Current Issues in Agricultural Law and Taxation

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I. POSSIBLE "SUNSET" OF THE TAX CUTS AND JOBS ACT

A. Sunsetting Income Tax Provisions

1. Individual rates increase.

2. Standard deduction cut in half.

3. SALT limitation removed.

4. Itemized deductions return.

5. Mortgage interest deduction restored to prior level.

6. Child tax credit reduced.

7. Personal exemptions return.

8. Individual AMT will apply to many more taxpayers.

9. QBI deduction eliminated (but corporate tax rate at 21 percent remains).

10. Bonus depreciation will continue phase-down

B. **Transfer Tax Provisions.** The tax reform bill ("RRA 2017") enacted in December of 2017 retained the basic provisions of the American Taxpayer Relief Act ("ATRA 2013") which has been in place since January 1, 2013, but increased the federal

estate tax, gift tax and GST tax exemption equivalents. The change to the exemption equivalent provisions sunsets on December 31, 2025. After that time, the exemptions will revert to the inflation-adjusted amounts put in place under ATRA 2013. ATRA 2013 does NOT include a sunset provision, so the basic provisions of ATRA 2013 remain in effect until further action by Congress.

RRA 2017 retains the inflation adjustments to the applicable exclusion amounts under current law, but for taxable years after December 31, 2017, the adjustments are made based on the somewhat less generous Chained Consumer Price Index for All Urban Consumers (C-CPI-U). The C-CPI-U differs from the Consumer Price Index for All Urban Customers (CPI-U) because it attempts to account for individuals' ability to alter consumption patterns in response to price changes. The changes to inflation indexing do not sunset after 2025.

1. **Exemptions & Rates.** The applicable exemption equivalents and rates, as well as the present interest annual exclusion are as follows:

    a. For Decedents dying in 2024, the estate tax exemption equivalent is $13,610,000 and the applicable tax rate on amounts over the exemption is 40%.

    b. For gifts completed in 2024, the lifetime gift tax exemption amount is $13,610,000 with a tax of 40% on gifts in excess of the exemption amount. For years after 2024, the exemption equivalent is indexed to inflation.

    c. For 2024, the GST exemption is $13,610,000 and is indexed to inflation in future years.

    d. For 2024, the present interest annual exclusion maximum that can be used to offset taxable gifts is $18,000. The maximum exclusion for gifts to a noncitizen spouse is $185,000 in 2024.

    e. The amount for determining the 2% portion of I.R.C. §6166 estate tax deferral is $1,850,000 for 2024.

    f. The maximum reduction in value via an I.R.C. §2032A election is $1,390,000 for deaths in 2024.

2. **Basis**. RRA 2017 retains a full step-up in basis for assets included in the Decedent's gross estate that do not constitute income in respect of a decedent. For estates below the applicable exemption, this provides an incentive to retain assets in the estate until death to obtain the step-up for beneficiaries. This is particularly true for assets likely to be sold upon death.

3. **Portability**. RRA 2017 retains the portability rules. A spouse may, under certain circumstances, use the unused estate tax exemption equivalent of his or her deceased spouse. Portability operates as follows:

   a. When the first spouse dies, an election is made by filing a federal estate tax return (Form 706) to establish the amount of the unused portion of the deceased spouse's exemption equivalent.

      NOTE: To make the election, a return is required to be filed even if the deceased spouse's Estate would not otherwise be required to file a federal estate tax return (because it is under the then current exemption equivalent). There is a schedule on the return to calculate the amount of exemption available to the surviving spouse. There is a box to check if the estate decides not to elect portability. On a return filed only for portability purposes, the portability regulations provide that good faith estimated values may be used for property qualifying for the marital or charitable deduction. The estimated values are then plugged into a range of dollar values and included on the return. To establish basis for purposes of a future sale of the assets, it may still be necessary to have evidence of actual value.

   b. When the surviving spouse dies, the Estate of the surviving spouse is entitled to an exemption equal to the surviving spouse's remaining exemption plus the unused exemption amount from the first spouse. In addition, the surviving spouse can use the deceased spouse's "excess exemption" to fund lifetime gifts. The unused exemption amount is a fixed number and is NOT adjusted annually for inflation.

   c. The exemption is only portable between a Decedent and his or her "last deceased spouse" who died after December 31, 2010. A surviving spouse who remarries may lose the opportunity to use the unused credit of the first spouse if his or her second spouse also predeceases.

   d. Portability does not apply to the exemption for generation skipping transfer tax.

C. **Clawback Regulations**. Treas. Reg. § 20.2010-1, 20.2010-2, 20.2010-3. RRA 2017 amended IRC § 2010(g) to direct Treasury to prescribe the regulations necessary to implement the purposes of the section with respect to differences between the estate and gift tax exclusion amount in effect at date of death and at the time gifts are made by the Decedent.

In November 2019, the Service issued final regulations. Under the final regulations, the Estate of a Decedent who passes away after 2025 is entitled to claim the greater of the then current estate tax exemption equivalent or the amount of the exemption equivalent used in connection with gifts made prior to 2026. The regulations include the following example: A, an individual who never married, made gifts of $9 million, all of which were sheltered from gift tax by the cumulative total of $11.8 million in basic exclusion amount allowable on the dates of the gifts. A dies after 2025 and the basic exclusion amount on A's date of death is $6.8 million. Because the total of the amounts allowable as a credit in computing the gift tax payable on A's post-1976 gifts (based on the $9 million basic exclusion amount used to determine those credits) exceeds the credit based on the $6.8 million basic exclusion amount applicable on the decedent's date of death, under paragraph (c)(1) of this section, the credit to be applied for purposes of computing the estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credits allowable in computing the gift tax payable on the post-1976 gifts made by

The examples also clarify that a deceased spouse's unused exemption claimed with regard to a spouse who dies before 2026 is not reduced as a result of the sunsetting of the law. On April 26, 2022, the Service released additional proposed regulations dealing with clawback issues. The new proposed rules seek to clarify whether gifts made during life but treated as transfers at death should benefit from the anti clawback rule. Examples of these types of transactions are transfers to a grantor retained annuity trust or a qualified personal residence trust where the retained interest causes estate inclusion upon the death of the grantor. The proposed regulations generally provide that the anti-clawback protections will NOT apply to these transfers. Examples of completed transfers that may nonetheless be included in the gross estate are transfers included under Sections 2035 (certain gifts within 3 years of death), 2036 (retained interests), 2037 (certain transfers at death), 2038 (revocable transfers), 2042 (certain life insurance proceeds), 2701 (freeze partnerships), and 2702 (GRATs, GRUTs, GRITs, and QPRTs).

D. **New Procedure/Fee for Estate Tax Closing Letter**. T.D. 9957. In final regulations released on September 28, 2021, the Service established a new $67 user fee for authorized persons who wish to request the issuance of IRS Letter 627 (estate closing letter). The Service issues estate tax closing letters upon request of an authorized person only after an estate tax return has been accepted by the Service as filed, after an adjustment to which the estate has agreed, or after an adjustment in the deceased spousal unused exclusion (DSUE) amount. In view of the resource constraints and purpose of issuing estate tax closing letters as a convenience to authorized persons, the Service has identified the provision of estate tax closing letters as an appropriate service for a user fee to recover the costs that the government incurs in providing such letters. The procedure for requesting the estate tax closing letter and paying the user fee utilizes https://www.pay.gov.

E. **Basis Consistency & Reporting Rules**. The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 included provisions enacting a basis consistency rule. Under the rule, which is effective for property with respect to which an estate tax return is filed after July 31, 2015, the basis of property for income tax reporting purposes cannot exceed the final value determined for federal estate tax purposes or, if there was no final determination, the value listed on the statement provided by the Estate under new Section 1035(a). Under this section, the executor of an estate for which a federal estate tax return is filed must provide to the Service and to the person receiving the property a statement identifying the value of each interest in property reported on the return and such other information the Service may require. The required form for the statement is IRS Form 8971 and is generally due to be delivered within 30 days after the filing of the estate tax return. The temporary and proposed rules were issued on March 2, 2016. Final regulations at Treas. Reg. §1.6035-2 providing additional guidance were issued on December 1, 2016. The notice requirement does NOT apply to returns filed solely for portability purposes.

> **NOTE:** In February 2021, the Service requested comments on the Form 8971 with a deadline of April 19, 2021. ACTEC and others submitted comments requesting a number of clarifications. So far, no changes have occurred, and no additional guidance has been issued.

F. **IRS Updates and Extends Simplified Procedure to Extend Time to Elect Portability**.
Rev. Proc. 2022-32, 2022-30 IRB 101

The Service has extended the time period for using the simplified method to obtain an extension to elect portability on an estate tax return. Under the revenue procedure, a personal representative must file a complete and properly prepared federal estate tax return (Form 706) by the *fifth anniversary* of the decedent's death. The executor must state at the top of the form that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER §2010(c)(5)(A)." This relief is available only if: (a) the decedent was survived by a spouse; (b) the decedent died after December 31, 2010; (c) the decedent was a citizen or resident of the United States on the date of death; (d) the executor is not otherwise required to file an estate tax return because the gross estate is less than the filing threshold under §6018(a); and (e) the executor did not file a timely estate tax return. This procedure cannot be used for estates above the filing threshold, even if no tax is due because of the marital or charitable deduction. A return filed in accordance with this procedure is deemed to be timely filed for purposes of electing portability, and the Decedent's unused exemption amount is available to the surviving spouse with respect to all transfers made after the date of death, even if they were made before the return was filed under this procedure. Even beyond the deadlines set forth in the revenue procedure, it is possible to obtain an extension, but a private letter ruling is required, and the Service has been fairly liberal in

granting such requests. In PLR 202046006, for instance, the Service allowed a late filing to make a portability election when the estate tax return was not timely filed, and a portability election was not made "for various reasons" which were not described in any detail in the letter ruling. *See also* PLR 202216008, PLR 202133002. Rev. Proc. 2022-32 is effective July 8, 2022.

II. FOREIGN OWNERSHIP of AGRICULTURAL LAND

BACKGROUND

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 did not want disloyal subjects owning or acquiring an interest in land. The common law rule existed in England until it was abolished by statute in 1870. However, by that time, the notion of limiting alien ownership of agricultural land was well imbedded in United States jurisprudence. 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.

AGRICULTUAL FOREIGN INVESTMENT DISCLOSURE ACT

In 1978, the Congress enacted the Agricultural Foreign Investment Disclosure Act (AFIDA).[1] 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.

AFIDA requires reports in four situations: (1) when a foreign person "acquires or transfers any interest, other than a security" in agricultural land; (2) when any interest in agricultural land, except a security interest, is held by any foreign person on the day before the effective date of the Act; (3) when a nonforeign owner of agricultural land subsequently becomes a foreign person; and (4) when nonagricultural land owned by a foreign person subsequently becomes agricultural land.

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[1] 7 U.S.C. 3501 *et seq*.

Note: Under the Act, a foreign person is an individual who is not a U.S. citizen. An entity also satisfies the definition if it is created or organized under the laws of a foreign government or has its principal place of business outside of the U.S. or is headquartered in another country. There are also many companies that are incorporated in the U.S. but are owned by foreign persons. These can also be a "foreign person" if a "significant interest or substantial control is indirectly held by foreign persons, corporations or governments." This definition is important not only for the information reporting requirement of the federal law, but also because many USDA programs bar participation by or funding of "foreign persons."

AFIDA defines "agricultural land" as "any land located in one or more states and used for agricultural, forestry, or timber production purposes...".[2] The regulations define agricultural land as "land in the United States which is currently used for, or if idle and its last use within the past five years was for, agricultural, forestry, or timber production, except land not exceeding one acre from which the agricultural, forestry, or timber products are less than $1,000 in annual gross sales value and such products are produced for the personal or household use of the person or persons holding an interest in such land."[3] In 1980, the Secretary proposed a change in this definition to increase the acreage amount to ten acres, while preserving the gross sales test. However, the proposed change has not yet become effective.

The reporting provisions of the AFIDA require the disclosure of considerable information regarding both the land and the reporting party. The information must be reported on Form FSA-153 and includes: (1) the legal name and address of the foreign person; (2) the citizenship of the foreign person, if an individual; (3) if the foreign person is not an individual or government, the nature of the legal entity holding the interest, the country in which the foreign person is created or organized, and the principal place of business; (4) the type of interest in agricultural land that the person acquired or transferred; (5) the legal description and acreage of the agricultural land; (6) the purchase price paid, or other consideration given, for such interest; (7) if a foreign person transfers an interest, the legal name and address of the person to whom the interest is transferred; (8) the agricultural purposes for which the agricultural land is being used and for which the foreign person intends to use the agricultural property; and (9) such other information as the Secretary of Agriculture may require by regulation.[4]

STATE RESTRICTIONS

State statutes designed to restrict alien ownership of real property are generally of three types: (1) outright restrictions on the acquisition of certain types of property; (2) limitations on the total amount of land that can be acquired; and (3) limitations on the length of time property can be held. Acquisition restrictions are common in the agricultural context, with the restriction generally applying only to the acquisition of farmland, as defined by the law. Exceptions are common for

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[2] 7 U.S.C. § 3508(1).
[3] 44 Fed. Reg. 7117 (1979); 7 C.F.R. § 781.2(b).
[4] 7 U.S.C. § 3501(a)(9).

the acquisition of land for conversion to nonagricultural purposes, land acquired by devise or descent, and land acquired through collection of debts or enforcement of liens or mortgages. Acreage restrictions allow foreign investment but place a premium on having an effective method of discovering and preventing multiple acquisition by the same individuals through the use of various investment vehicles. Time restrictions generally do not apply to voluntary acquisition of the land by foreign investors but are associated with involuntary acquisitions. Some states require the disclosure of information concerning the land acquired and the investors.

Ownership of U.S. land, specifically agricultural lands, by foreign persons or entities has been an issue that traces to the origins of the United States. Today, approximately fourteen states specifically forbid or limit nonresident aliens, foreign businesses and corporations, and foreign governments from acquiring or owning an interest in agricultural land within their state. Although these states have instituted restrictions, each state has taken its own approach. In other words, a uniform approach to restricting foreign ownership has not been established because state laws vary widely.

Currently, the following states restrict (in one fashion or another) foreign ownership of agricultural land AL, AR, FL, HI, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NE, ND, OH, OK, PA, SC, SD, TN, UT, VA, and WI. About one-half of the states restrict agricultural land acquisition by aliens.

The states with the most restrictive laws are IA, KY, MN, MO, NE, ND, OK, SD and WI. The other 16 states have minor restrictions on foreign ownership of agricultural land.

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 slow "fly-over" of a Chinese spy balloon from Alaska to South Carolina, 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.

The following is a brief summary of the activity of some of the states through 2023:

COLORADO HB 23-1152 (proposed)

- Prohibits starting on January 1, 2024, a nonresident foreign citizen, entity, or government of the People's Republic of China, the Russian Federation or any country determined by the US secretary of state to be a state sponsor of terrorism from acquiring a controlling ownership share in ag land, mineral rights, or water rights in the state.

  - They specifically say what countries may not obtain land and only prohibit states that sponsor terrorism.
  - A covered foreign person means a citizen of a covered foreign country and not domiciled in the U.S.
- A covered foreign person who acquires a controlling ownership share in a property interest in the state prior to January 1, 2024, may continue to own the property interest but not acquire controlling ownership in any additional property interests.
- A covered foreign person must register with the secretary of state within 60 days of acquiring ownership in property interests.
- If the AG has reason to believe a covered foreign person has not complied the AG must commence a civil action against the covered person. If the court finds the covered foreign person has violated the prohibition the judgment will revert the property interest to the state.

FLORIDA S.B. 264 (enacted)

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 and 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.

- There are three separate restrictions under Florida's foreign ownership law.

  - Section 692.202 restricts a "foreign principal" from directly or indirectly owning, holding, or acquiring "by purchase, grant, devise, or descent agricultural land or any interest…in such land." Under Florida law, "agricultural land" is land that is used primarily for "agricultural purposes," which includes activities such as horticulture, forestry, aquaculture, the raising of livestock, poultry, dairy, and the production of "farm products" which includes "any plant,…animal or insect useful to humans…." *Fla. Stat. Ann. §§ 193.461(3)(b), (5); 823.14(3)(e).* While this

language does not expressly restrict foreign principals from leasing land, the provision contains "or any interest" language that might mean that leases of agricultural land by a "foreign principal" are also prohibited.

  - A "foreign principal" includes governments, government officials, and political parties and its members of a "foreign country of concern" ("FCOC"). The countries considered as a FCOC under the law include China, Russia, Iran, North Korea, Cuba, Venezuela's Nicolás Maduro regime, and Syria. A foreign principal can be business entities organized or have a principal place of business in a FCOC. Individuals who are "domiciled in" a FCOC and are not U.S. citizens or lawfully permitted to permanently reside in the U.S. are foreign principals under the law. Any "entity or subsidiary formed for the purpose of owning real property" is a foreign principal when a controlling interest in the entity or subsidiary is held by any individual or entity foreign principal. *Fla. Stat. Ann. § 692.201(5)(e).*

    Note: The provision does not define what constitutes a "controlling interest" and it is unclear what it means for an entity to form "for the purpose of owning real property." This provision could be construed as to only applying to entities that form *solely* to acquire an ownership interest in land, meaning entities formed to acquire land and other purposes may not fall within the definition of a foreign principal subject to the restriction.

- Under the law, a buyer of Florida agricultural land or an interest in that land must sign an affidavit claiming they are not a foreign principal, and their purchase of the land complies with state law. Not obtaining such an affidavit does not affect title to the property and the closing agent will not be subject to civil or criminal liability, "unless the closing agent has actual knowledge that the transaction will result in a violation" of the restriction.

- Agricultural land held in violation of § 692.202 is subject to forfeiture to the state. The law authorizes the Florida Department of Agriculture and Consumer Services ("FDACS") to initiate a civil action for the forfeiture of land held in violation of the restriction. If a court determines that agricultural land is held in violation of the law, "the court must enter a final judgment of forfeiture…." Section 692.202(6)(e) provides that FDACS "may sell" the land.

- Foreign principals that acquire an interest in agricultural land in violation of the restriction commit a second-degree misdemeanor, which is punishable up to 60 days imprisonment and/or a $500 fine. Property sellers that knowingly violate the restriction by selling agricultural land to a foreign principal also face up to 60 days in prison and/or a $500 fine.

- Exceptions to the restriction prescribed under § 692.202:

- Foreign principals with a "de minimis indirect interest." Foreign principals have a de minimis indirect interest when they (1) own less than 5% of registered equities (*i.e.*, stocks that are registered to the name of the exact stockholder) in a publicly traded company owning agricultural land, or (2) hold an interest in an entity that is owned or controlled by a U.S. company that is registered as an investment adviser with the U.S. Securities and Exchange Commission.

- Agricultural landholdings acquired by foreign principals before July 1, 2023. Ag land acquired after July 1, 2023, must be disclosed to the Florida Department of Agriculture and Consumer Services (FDACS) by January 1, 2024. Failure to register by that date can lead to a penalty of $1,000 each day the registration is late. The FDACS is authorized to place a lien against the land for any unpaid balance of a penalty.

- An interest in agricultural land obtained as a gift, through inheritance, or by enforcing a security interest against the land. Land acquired in this manner must be disposed of within three years of acquisition. Failure to do so can result in a misdemeanor and forfeiture of the land to the state.

- Individuals of a FCOC that have become lawful permanent residents of the U.S. The statute does not address whether a permanent U.S. resident that retains citizenship in a banned country remains "domiciled" in that barred country and subject to the statute.

On August 17, the court denied the plaintiffs' motion for an injunction. *Shen v. Simpson, 687 F. Supp. 3d 1219 (N.D. Fla. 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.

> **Note:** The 11th Circuit Court of Appeals granted the plaintiff's motion for preliminary injunction pending appeal. *Yifen Shen v. Comr., 23-12737, 2024 U.S. App. LEXIS 2346 (11th Cir. Feb. 1, 2024).*

IDAHO HB 173 (signed into law on April. 3, 2023)

This legislation restricts certain foreign purchases of farmland located within the state.

ILLINOIS HB 1267 (proposed)

- Introduced January 19, 2023
- To prohibit the purchase of public or private real estate by noncitizens
- Noncitizen includes an foreign government, entity, corporation, partnership, or other association created under the laws o fa foreign country and beneficially owned by national of that foreign country
- The commission on government forecasting and accountability shall submit to the general assembly a report that:
    - Details the history of purchases of public and private real estate owned by noncitizens.
    - The percentage of real estate owned by noncitizens.
    - Recommendations to make it easier for citizens and harder for noncitizens to purchase real estate including farmland.
- This section is repealed 5 years after the effective date.

ILLINOIS HB 2125 (proposed)

- Introduced February 3, 2023
- Except as otherwise provided, all noncitizens may hold real and personal property in the same manner as natural born U.S. citizen.

NEW JERSEY A5120 (proposed)

- A foreign government or person owning or holding interest in ag land shall sell or convey the ownership within 5 years of the effective date of the Act.
- Ag land acquired by a foreign government or person shall be sold or conveyed within two years after title to the land is transferred thereto. Upon such conveyance, a deed of easement shall be attached to the land requiring it to remain devoted to ag use.
- The land conveyed should not be conveyed to a foreign person or government.

NORTH DAKOTA SB 2371 (enacted)

- Introduced January 23, 2023
- This bill 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.
- Effective through July 31, 2025.

OKLAHOMA SB 212 (enacted)

- Introduced February 6, 2023
- No person who is not a US citizen shall acquire title to land either directly through a business entity or trust.
- These requirements shall not 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 AG 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.
- Creates a citizen land ownership unit to enforce the provisions of the act within the office of the attorney general.

OKLAHOMA SB 464 (proposed)

- Introduced February 6, 2023
- Any person who knowingly acquires title to land that violates the bill is, upon conviction, guilty of a felony.

TEXAS SB 711 (proposed)

- Prohibited foreign actor is an alien, business, government, or an agent from a country identified as a country that poses a risk to the national security of the U.S. in the most recent Annual Threat Assessment issued by the Director of National Intelligence.
- Prohibited foreign actors may not acquire title to real property without written notification to the seller.
- A buyer required to provide written notification shall do so as soon as possible but not later than 10 days before the closing of the property. The notification shall specifically identify:
    - Whether the buyer is an alien individual or business and
    - The buyer's country of citizenship or creation or organization
- Upon receipt of notification, seller may choose to proceed or revoke sale.
- Court shall dismiss any action brought against seller for revoking a sale.

CURRENT KANSAS RESTRICTION

The Kansas restriction, to the extent there is one, is contained in the Kansas Constitution and in the anti-corporate farming law. Section 17 of the Kansas Bill of Rights states as follows:

> "No distinction shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment or descent of property. The rights of aliens in reference to the purchase, enjoyment or descent of property may be regulated by law."

The Kansas Bill of Rights, as noted, gives the legislature the power to regulate foreign ownership of "property" – in terms of its, purchase, enjoyments or descent. One manner that the legislature has chosen to do that is by means of the anti-corporate farming law. Kan. Stat. Ann. §17-5904. This provision states that, "no corporation, trust, LLC, limited partnership or corporate partnership other than a family farm corporation … shall either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state. However, there are many situations to which the restriction does not apply (in addition to not applying to a family farm corporation). The full list of those exemptions are as follows:

1. A bona fide encumbrance taken for purposes of security;
2. Agricultural land when acquired as a gift by a bona fide educational, religious, or charitable nonprofit corporation;
3. Agricultural land acquired by a corporation or a LLC in such acreage as is necessary for the operation of a nonfarming business. The corporation shall not engage in the farming operation and shall not receive any financial benefit other than rent.;
4. Ag land acquired by a corporation or a LLC by process of law in the collection of debts, for the enforcement of a lien or claim;
5. A municipal corporation;
6. Ag land acquired by a trust company or bank in a fiduciary capacity or as a trustee for a nonprofit corporation;

7. Ag land owned or leased or held under a lease purchase agreement described in KSA 12-1741;
8. Ag land held or leased by a corporation or LLC for use as a feedlot, poultry confinement, or rabbit confinement facility;
9. Ag land held or leased by a corporation for the purpose of the production of timber, forest products, nursery products, or sod;
10. Ag land used for bona fide educational research or experimental farming;
11. Ag land used for the commercial production and conditioning of seed or the growing of alfalfa;
12. Ag land owned or leased by a corporate partnership or LLC partnership in which the partners associated are either natural persons, family farms, authorized farms, limited liability ag companies, family trusts, authorized trusts or testamentary trusts;
13. Any domestic or foreign corporation or LLC for coal mining purposes which engages in farming on land strip mined for coal;
14. Ag land owned or leased by a limited partnership prior to the effective date of the act;
15. Ag land held or leased by a corporation for use as a swine production facility which voted in favor of it or the county has permitted it;
16. Ag land held or leased by a corporation for use as a swine production facility in any county which has voted in favor of it or the county has permitted it;
17. Ag land held or leased by a corporation for use as a dairy production facility in any county which has voted in favor of it or county has permitted it;
18. Ag land held or leased by a corporation or a LLC used in a hydroponics setting.

The law was later amended to provide that production contracts "shall not be construed to mean the ownership, acquisition, obtainment, or lease either directly or indirectly on any ag land."

A violation of the anti-corporate farming law subjects the violator to a civil penalty of not more than $50,000 and the violator must divest itself of all land acquired in violation of the anti-corporate farming law. Violations may be pursued by either the state attorney general or by a county attorney.

Kan. Stat. Ann. §17-7505 contains a reporting requirement. It provides as follows:

a. Every foreign corporation doing business in this state shall make a written business entity information report to the secretary of state.
b. The report shall be made on a form prescribed by the secretary of state.
c. The report shall contain:
    a. The name and the state or country it is incorporated in
    b. The location of its principal office
    c. The names and addresses of the officers and board of directors
    d. The number of shares of capital stock issued
    e. The nature of the business
    f. If the corporation holds more than 50% equity in ownership in any other business registered with the secretary of state, the name and ID number of that other business

d. Corporations subject to the provisions of this section that holds ag land within this state shall show the following additional information
    a. The acreage and location of ag land this state owned or leased by or to the corporation
    b. The purposes of the ownership or lease
    c. The value of the ag and non-ag assets owned and controlled by the corporate within and without the state of Kansas and where situated
    d. The number of stockholders of the corporation
    e. The number of acres owned and leased by the corporation and to the corporation
    f. The number of acres of ag land held and reported in each category under paragraph 5
    g. Whether any of the ag land was acquired after July 1, 1981
e. The official title of the person signing the report shall be designated. This person is liable.
f. At the time of filing the report each corporation shall pay the secretary of state a fee of $80 and the amount specified in the rules and regulations of the secretary multiplied by the number of tax periods in the report.

2023 KANSAS PROPOSALS

1. House Bill 2397

Effective, July 1, 2023, no person who is owned by or controlled by or subject to the jurisdiction of a "foreign adversary" shall purchase, acquire by grant, devise or descent or otherwise obtain ownership of any interest in real property. This is defined as an individual or entity acting as an agent, representative or employee, or anyone acting at the order, request or under the direction or control of a foreign adversary or whose activities are directly or indirectly under the supervision, control, direction or are being financed or otherwise subsidized primarily by a foreign adversary. An exception exists for a person that has acquired dual citizenship with the U.S. and a foreign adversary.

"Foreign adversary" is defined by tying it to a federal regulation that provides a list set forth in 15 C.F. R Sec. 7.4 as that list exists on July 1, 2023. Currently on that list are: (1) the People's Republic of China, including the Hong Kong Special Administrative Region (China); (2) the Republic of Cuba (Cuba); (3) the Islamic Republic of Iran (Iran); (4) the Democratic People's Republic of Korea (North Korea); (5) the Russian Federation (Russia); and (6) Venezuelan politician Nicolás Maduro (Maduro Regime). The bill vests power in the Secretary of Agriculture to modify the list, but only if the federal government amends the list after July 1, 2023.

The provision does not apply to land acquired by the collection of debts, foreclosure pursuant to a forfeiture of a contract for deed, and any procedure for the enforcement of a lien or claim on the land.

Land subject to the provision, is to be sold or otherwise disposed of within two years after title is transferred, and a covered "person" who inherits real property on or after July 1, 2023, has 12

months to divest of property once the violation is known. Other subject land transaction may be forfeited.

The Kansas Attorney General has the power to enforce the provisions of the bill.

2. Senate Bill 100

Senate Bill 100 has also been proposed this session in the Kansas Senate. This bill seeks to restrict a "foreign national, foreign business entity, and foreign government" from acquiring, purchasing, or holding any interest in land within the state. A "foreign business entity" is defined by ownership. If the majority ownership is held by a foreign national (non-U.S. citizen) or foreign government (any non-U.S. nation); or foreign business entity. The provision is prospective only, and does not apply to any real property purchased or otherwise acquired before July 1, 2023. Also, the provisions of the bill do not apply to real estate located wholly in Johnson, Sedgwick, Shawnee or Wyandotte counties.

Enforcement rests with the Kansas Attorney General and a violation of the provisions of the bill is deemed to be a level 10 nonperson felony. The Attorney General may investigate any transaction believed to violate the bill. Further. The bill specifies that land held in violation of the restriction is subject to forfeiture, with the state then taking possession of the land.

GENERAL COMMENTS ON THE TWO KANSAS BILLS

A few points can be made about both HB 2397 and SB 100. The bills take different approaches to address the issue. The House Bill is more specifically tailored to restricting ownership by a "foreign adversary" as the federal government defines that term. The Senate Bill focuses on percentage ownership by a "foreign business entity" defined as ownership by persons that are not U.S. citizens as well as entities that are majority owned by non-U.S. citizens. The Senate Bill is not restricted to persons/entities that are foreign adversaries. Conversely, would the House Bill allow for ownership by non-listed persons or entities that still should not have ownership of the land used for U.S. food production?

Over the past 30 years, the Kansas legislature has encouraged the use of "renewable" forms of energy. Often, the companies heavily involved in such energy production are foreign-owned. While the House Bill would not impact current or future development of projects on agricultural land (because the companies involved are not presently on the "foreign adversary" list), the Senate Bill could present some issues by its percentage ownership requirements and defining "foreign" as non-U.S. citizen. These companies, however, typically don't have outright title ownership of the land involved but merely a leasehold interest. So where is the line to be drawn? Is a leasehold interest that could last 120 years the same as "ownership"? Again, that's a policy decision to be made by the legislature.

> **Note:** Neither bill passed the Kansas legislature during the 2023 legislative session. New proposals were brought forward in the 2024 session, but as of the present time, nothing has passed.

2024 DEVELOPMENTS

South Dakota (H.B. 1231) [enacted on March 4, 2024]

This provision restricts a "foreign person", "foreign entity", and "foreign government" from acquiring more than 160 acres of agricultural land within the state. There are exceptions or foreign investors when the land is received by gift or inheritance (must dispose of within three years). Also exempted are leases of ag land held by a foreign person, foreign entity or foreign government. When the law applies, there is a two-year timeframe to dispose of the disqualified interest.

Definitions:

"Foreign person" - a natural person who is not a United States citizen or a resident."

"Foreign government" - any government—or any state-controlled enterprise of a government—other than the U.S. government, its states, territories, or its federally recognized Indian tribes.

"Foreign entity" - any organization that (1) is registered outside of the U.S. or (2) contains more than a 10% ownership interest held by a foreign person and/or a foreign government.

"Prohibited entity" - a "foreign entity" from, foreign government from, or foreign person from" China, Cuba, Iran, North Korea, Russian, or Venezuela.

> **Note:** Unlike other foreign investors, prohibited entities may not own, lease or hold an easement in *any* agricultural land within the state, with limited exceptions.

Idaho (H.B. 496) [enacted on March 11, 2024]

Makes certain amendments to the provision enacted in 2023:

- Inclusion of forest land as a type of real property subject to the restriction, defined as private or public land "being held and used primarily for the continuous purpose of growing and harvesting trees of a marketable species."

- "Foreign government" definition amended to include federally recognized Indian tribes as a type of governing body that is not considered a "foreign government" subject to the restriction

Indiana (H.B. 1183) [enacted on March 15, 2024]

Amends certain provisions of the 2022 law. The law bars a "prohibited person" from purchasing, leasing, or otherwise acquiring any real property located within Indiana. The legislation defines

"prohibited person" as individuals who are citizens of and business entities headquartered in country identified as a "foreign adversary" by the U.S. Secretary of Commerce. While the legislation restricts prohibited persons from acquiring or leasing real property, including agricultural land, within the state, it also restricts these investors from acquiring or leasing any mineral, water, or riparian rights on any agricultural land.

Utah (H.B. 186) [enacted on March 13, 2023]; (H.B. 516) [enacted March 21, 2024]

Prohibits a "restricted foreign entity" from acquiring land, including private and public agricultural land and waters located within the state. A "restricted foreign entity" is a military company required to be identified by the U.S. Department of Defense under Section 1260H of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. Under Section 1260H, the Department of Defense is required to identify Chinese military companies operating directly or indirectly in the U.S.

H.B. 516 amends existing law by expanding the list of restricted foreign entities.

III. U.S. SUPREME COURT DEVELOPMENTS

A. Important "Takings" Case at the Supreme Court
DeVillier v. Texas, 63 F.4th 416 (5th Cir. 2023)

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

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

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

On further review, the U.S. Supreme Court reversed and vacated the Fifth Circuit's opinion. *601 U.S. 285 (2024).* The court held that the farmer should be allowed to pursue his claim via the statutory mechanism provided by Texas law.

B. Can a Tax Be Imposed Without a Taxable Event? - or What is a Taxable Event?

Moore v. United States, No. C19-1530-JCC, 2020 U.S. Dist. LEXIS 216771 (W.D. Wash. Nov. 19, 2020), aff'd 36 F.4th 930 (9th Cir. 2022), aff'd., 144 S. Ct. 1680 (U.S. 2024)

The petitioners owned 11 percent of the common shares of KisanKraft, a corporation located in India. KisanKraft is a controlled foreign corporation (CFC) - more than 50 percent owned by U.S. persons – that makes tools for sale to farmers in India. KisanKraft did not pay dividends and reinvested all of its earnings in its business.

Before the Tax Cuts and Jobs Act of 2017, CFCs were taxable only under subpart F of the Code, which generally permitted deferral of U.S. taxation of the active foreign business income of the company until that income was repatriated to the United States.

However, the TCJA changed the international tax system into a territorial approach that taxes income only based on domestic sourced profits. The TCJA imposes a current-year tax in 2017 based on the U.S. persons owning at least 10 percent of a CFC, which is based on the amount of the previously accumulated and untaxed income of the CFC. Section 965 imposes this tax, which ensures that the CFC's undistributed and untaxed earnings and profits from 1986 to 2017 are effectively taxed to their owners – the U.S. shareholders like the petitioners – in 2017. If the CFC repatriates those earnings in the future, they are excluded from gross income. It is estimated that the provision will generate $340 billion in revenue.

The MRT increased the petitioners' 2017 tax liability by approximately $15,000 because of their pro rata share of corporate retained earnings of $508,000 – on the ground that they had no realization event to make them taxable. They paid the tax and sued for a refund. They lost at both the trial court and the appellate court. The U.S. Supreme Court agreed to hear the case.

> **Note:** Based on the oral argument at the Supreme Court, it did not appear likely that there would be a "clean" win for either the taxpayers or the government. Also, could the case impact other provisions of the Code? What about Subchapters K and S? The OID rules? The mark-to-market rules? All of these rules seem to permit taxation without a realization event.
>
> **Update:** On June 20, 2024, the Supreme Court issued a narrow decision only applicable to pass-through entities which did not address the issue of whether realization is a constitutional requirement for an income tax. The Court determined that the MRT taxed income that had been realized by KissanKraft which was then attributed to the shareholders. The Court noted that Congress may either tax an entity or its shareholders/partners on undistributed income and whatever route the Congress chooses it's a tax on income. The Court held that *Eisner v. Macomber, 252 U.S. 189 (1920)* did not address the question of attribution and was inapplicable to the present case, but the majority never addressed the key question at issue – whether the 16th Amendment includes a realization requirement. The dissent (Justice Thomas, joined by Justice Gorsuch) pointed out the ridiculousness of the majority's reasoning, noting that the "text and history of the 16th Amendment make

it clear that it requires a distinction between 'income' and the 'source' from which that income is 'derived.' And, the only way to draw such a distinction is with a realization requirement." The dissent astutely pointed out that, "Even as the majority admits to reasoning from fiscal consequences, it apparently believes that a generous application of dicta will guard against unconstitutional taxes in the future. The majority's analysis begins with a list of nonexistent taxes that the Court does not today bless, including a wealth tax. And, it concludes by offering a narrow interpretation of its own holding, hinting at limiting doctrines, prejudicing future taxes, cataloguing the Government's concessions and reserving other questions 'for another day.' Sensing that upholding the MRT cedes additional ground to Congress, the majority arms itself with dicta to tell Congress 'no' in the future. But, if the Court is not willing to uphold limitations on the taxing power in expensive cases, cheap dicta will make no difference."

C. Determining the Existence of a "Water of the United States"
Sackett v. Environmental Protection Agency, 598 U.S. 651 (2023)

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. As part of its interstate commerce power, the Congress has long regulated the navigable waters of the United States. The improvement of navigable waters is the domain of the U.S. Army Corps of Engineers (COE) pursuant to the Rivers and Harbors Act of 1890 (and an 1899 amendment banning private deposits of refuse into navigable waters without a permit). In 1972, under the CWA Amendments of that year, used the concept of "navigable waters" to address water pollution. By attaching federal jurisdiction (vested in the Environmental Protection Agency (EPA)) over water pollution to the concept of navigation, that gave the federal government control upstream to cover not only waters that are navigable, but waters that can impact waters that are navigable. This meant that the concept of pollution was integrated with that of navigation into a single definition that barred the discharge of a "pollutant" (which includes cellar dust) into the navigable waters of the United States. The concept of preserving wetlands was not in mind when the Congress wrote the definition of "a discharge into a navigable water." Thus, the parameters of the definition became the task of the EPA and the COE. Originally, those parameters were narrow in scope. The COE regulatory position was that a discharge permit was require only if a discharge was into waters that were truly navigable, and that didn't include wetlands as well as shallow or isolated wetlands.

However, environmental activists sued, and many court opinions have been filed attempting to define the scope of the government's jurisdiction. Ultimately, the courts sided with the environmentalists and the COE and EPA changed their rules to give themselves jurisdiction over streams, mud flats, prairie potholes, or ponds, "the use, degradation, or destruction of which could affect interstate commerce." The regulatory reach became so broad that in 1985 the EPA's general counsel approved a regulatory guidance letter stating that a migrating bird flying across state lines that contemplated landing and did land in an isolated wetland was enough to confer

jurisdiction! While that interpretation was eventually negated by the courts, the matter led to several high-profile criminal cases leading to incarceration of individuals for polluting navigable waters as a result of depositing dirt on dry ground.

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.

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 was ultimately challenged in 15 cases filed in 11 federal district courts.

Another Revised 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).* The proposed rule was finalized effective March 20, 2023, with the EPA clearly wanting to restore "significant nexus" via "adjacency" test for jurisdiction. This represented a big change in the definition of "adjacency." It doesn't mean simply "abutting." Instead, "adjacent" includes a "significant nexus" and a "significant nexus" can be established by "shallow hydrologic subsurface connections" to the "waters of the United States. A "shallow subsurface connection," the Final

Rule states, may be found below the ordinary root zone (below 12 inches), where other wetland delineation factors may not be present. Frankly, that means farm field drain tile.

> **Note:** The "significant nexus" can be established via a connection to downstream waters by surface water, shallow subsurface water, and groundwater flows and through biological and chemical connections. The Final Rule states that adjacency can be supported by a "pipe, non-jurisdictional ditch… or some other factors that connects the wetland directly to the jurisdictional water." This appears to be the basis for overturning the NWPR. Consequently, the prairie pothole region is directly in the "bullseye" of the Final Rule.

Prior converted cropland. The agencies say the final rule increases "clarity" on which waters are not jurisdictional – including prior converted cropland. This doesn't make much sense. Supposedly, the agencies are "clarifying" that prior converted cropland, (which is not a water), is not a water, but it somehow could be a water if the agencies had not clarified it? In addition, the burden is placed on the landowner to prove that prior converted cropland is actually prior converted cropland and therefore not a water.

Ditches and drainage devices. The Final Rule is vague enough to give the government regulatory authority over non-navigable ponds, ditches, and potholes.

The *Sackett* Litigation

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 concluded 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). 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 agreed to hear the case and oral argument occurred in early October of 2022.

Supreme Court opinion. On May 25, 2023, the Court unanimously agreed that the Sackett's lot was *not* a wetland subject to the CWA. All of the Justices rejected the "significant nexus" test when determining EPA/COE regulatory authority over wetlands. The majority (Alito, Roberts, Thomas, Gorsuch and Barrett), then paired back the expansive EPA regulatory authority under the CWA. They replaced the "significant nexus" test with a new standard – the Scalia standard set forth in the plurality opinion of *Rapanos* in 2006. They said that the term "waters" in the statute refers only to geological features that are "streams, oceans, rivers and lakes" and to adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. For the EPA/Corps to successfully assert jurisdiction, it must: 1) establish that the adjacent water body is a relatively permanent body of water connected to interstate navigable water; and 2) that the wet area has a continuous surface connection with that water making it difficult to determine where the water ends, and the wetland begins. Justices Kavanaugh, Sotomayor, Kagan and Jackson disagreed on the basis that the majority's approach was too narrow.

As for the 2023 WOTUS rule, the Supreme Court said it was "inconsistent with the text and structure of the CWA" and that EPA has "no statutory basis to impose a significant nexus test." A redo is in order. With the opinion, the Court restored the original position of the EPA in the 1970s – the CWA only applies to waters traditionally recognized as navigable – those subject to the tide; used for transportation, and natural river meanders. Isolated wetlands were excluded where fill would not affect boats.

What about agency deference? Interestingly, there wasn't a single mention of deference by any of the Justices (other than Justice Kavanaugh's retort about the agencies being consistent about "adjacency"). The Court in essence said that the scope of an agency's authority is not the type of question that courts should defer to the agencies. This sets the Court up for another case (*Loper, Bright*) that is coming next term on the issue of *Chevron* deference.

Water quality. The Court's decision will *not likely* have any discernable effect on water quality. While the decision does set forth a narrower interpretation of "the waters of the United States" for purposes of the entire CWA, the matter of pollution control is a separate issue. As noted above, navigation and pollution control are two separate issues which the Court's opinion more clearly distinguishes. Any negative impact on water quality is minimized (if not negated) because of the Supreme Court's decision in a case from Hawaii in 2020. In that case, the Court held that a "pollutant" that reaches navigable waters after traveling through groundwater requires a federal permit if the discharge into the navigable water is the "functional equivalent' of a direct discharge from the actual point source into navigable waters. *Hawai'i Wildlife Fund, et al. v. County of Maui, 886 F.3d 737 (2018), vac'd and rem'd. by County of Maui v. Hawaii Wildlife Fund, et al., 140 S. Ct. 1462 (2020).* That is a broad interpretation of "discharge of pollutants" creating the distinct possibility that a contamination of federal jurisdictional waters could result

from activities on land that is not subject to the CWA under the *Sackett* Court's definition of a "wetland."

In addition, the Court's decision in *Sackett* applies only to the federal CWA. It has no application to existing state and local regulations. Indeed, many of those rules were already in place before the CWA amendments of 1972, and many of them are significant.

Implications for agriculture. The *Sackett* opinion has significant ramifications for agriculture. This really solidifies the National Water Protection Rule of 2019 as the correct approach. That rule limited federal jurisdiction to traditional navigable waters and their tributaries. Now streams and ditches and private waters that don't have a continuous surface connection to navigable waters won't be subject to the CWA. It will make it more difficult for the EPA or COE to assert regulatory control over private land under the CWA. This eliminates federal control under the CWA over private ponds, as well as ditches and streams where there is no continues flow into a WOTUS.

Also, farmers that are in the farm programs are subject to the Swampbuster rules. A "wetland" is defined differently under Swampbuster. There are two separate definitions. The one at issue in *Sackett* involves "waters of the United States" contained in 33 U.S.C. Sec. 1362(7) which a "navigable water" must be. To have jurisdiction over those waters the Court is saying that the government must 1) establish that an adjacent water body is a relatively permanent body of water connected to interstate navigable water; and 2) such area has a continuous surface connection with that water making it difficult to determine where the water ends, and the wetland begins.

Swampbuster involves the definition of a wetland contained in 16 U.S.C. 3801(27). So, there are two different definitions of a "wetland" - one for CWA purposes - which ties into the "navigable waters of the United States" definition, and the other one for Swampbuster. This all means that a farmer may not have a wetland that the EPA/COE can regulate under the CWA, but might have a wetland that can't be farmed without losing farm program benefits.

Conclusion

The *Sackett* decision is a victory for property rights without any likely discernable impact on water quality. Ironically, if not for the EPA's belligerence in insisting on its position against the Sacketts and forcing the couple into a lawsuit, the "significant nexus" test would remain. That test has now been unanimously rejected. For once agriculture says, "thanks, EPA"!

> **Note:** The first case to apply the *Sackett* test involved the plaintiff that owned real estate including two tracts of 20 acres that were primarily grass-covered and primarily dry. The tracts contained gravel logging and timber roads on two sides. The U.S. Army Corps of Engineers (COE) determined that the tracts contained "wetlands" subject to the discharge permit requirements of the Clean Water Act (CWA). The CWA claimed that federal jurisdiction existed because the roadside ditches connected to an unnamed non-relatively permanent water tributary, which connected to a creek several miles away and then ultimately to Colyell Bay 10 to

15 miles from the tracts. The trial court, in an opinion issued before the U.S. Supreme Court's decision in *Sackett v. United States Environmental Protection Agency, 598 U.S. 651 (2023)* which changed the legal test for determining COE jurisdiction over wetlands under the CWA, ruled for the COE. On appeal, the appellate court applied the Supreme Court's test in Sackett without deferring to the COE's interpretation, determining that the facts demonstrated "simply no connection whatsoever" between the plaintiff's tracts and a connection to a water of the United States. The appellate court also refused to remand the matter back to the COE because it viewed the facts as indicating no other possible conclusion that that the plaintiff's tracts were not jurisdictional wetlands. There was no continuous surface connection between the plaintiff's tracts and traditional interstate navigable water (the *Sackett* test). *Lewis v. United States, 88 F.4th 1073 (5th Cir. 2023).*

D. "Chevron Doctrine" Repealed
Loper Bright Enterprises, et al. v. Raimondo, No. 22-451, 2024 U.S. LEXIS 2882 (U.S. Sup. Ct. Jun. 28, 2024)

Under the *Chevron Doctrine* (which stemmed from a 1984 U.S. Supreme Court case), courts are to defer to administrative agency interpretations of a statute where the intent of the Congress was ambiguous and where the interpretation is reasonable or permissible. If the agency's interpretation of a statute was not arbitrary, capricious or manifestly contrary to the statute, the agency's interpretation would be upheld. The present case involved a challenge of the National Marine Fisheries Service rule requiring the herring industry to pay for costs of carrying observers on board vessels to record fish catch data and monitor for overfishing. The Court said that the *Chevron Doctrine's* presumption was misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Court reasoned that its 1984 decision was inconsistent with the Administrative Procedure Act which directs courts to decide legal questions and, as a result, agency interpretations of statutes are not entitled to deference. Justice Thomas, in a concurring opinion, pointed out that Chevron was inconsistent with the three-part system of government. However, when an agency's statutory interpretation falls within the agency's purview (known as *Skidmore* deference) courts can consider that interpretation.

Practice Pointers:

- The Court's decision may likely have an impact on the administrative agency rulemaking process. Agencies will no longer go into court with a "leg up" on the defendant.
- Federal agencies may issue fewer regulations and take a more modest position with regulations that are issued.
- "Forum shopping" could become more prevalent. Judges have their own biases – some are pro-government and others are not.
- Practitioners with clients having labor or employment law disputes with federal agencies will be benefited by the Court's decision because those regulatory agency decisions will be easier to challenge.

- The U.S. Tax Court in recent years has been more strictly applying the requirements of the Administrative Procedure Act to the IRS. So, the Tax Court may have already reached the point that the Supreme Court reached with this decision.

  Note: Sitting behind *Loper Bright Enterprises* is *Foster v. United States Department of Agriculture, 68 F.4th 372 (8th Cir. 2023). Foster* involves a constitutional challenge to the government's position concerning the "Grassley Amendment" to the Swampbuster program. On August 10, 2023, a petition for certiorari in *Foster* was filed with the U.S. Supreme Court. After the Court's decision in *Chevron*, the Court designated *Foster* for rehearing with the Eighth Circuit.

E. Equity Theft
Tyler v. Hennepin County, 598 U.S. 631 (2023)

Equity that a homeowner has in their home/farm is the difference between the value of the home or farm and the remaining mortgage balance. It's a primary source of wealth for many owners. Indeed, the largest asset value for a farm or ranch family is in the equity wrapped up in the land. In the non-farm sector, primary residences account for 26 percent of the average household's assets. Certainly, the government has the constitutional power to tax property and seize property to pay delinquent taxes on that property. But is it constitutional for the government to retain the proceeds of the sale of forfeited property after the tax debt has been paid? That was a question presented to the U.S. Supreme Court in 2023.

In this case, Hennepin County. Minnesota followed the statutory forfeiture procedure, and the homeowner didn't redeem her condominium within the allotted timeframe. The state ultimately sold the property and bagged the proceeds – including the homeowner's equity in the property.

She sued, claiming that the county violated the Constitution's Takings Clause (federal and state) by failing to remit the equity she had in her home. She also claimed that the county's actions amounted to an unconstitutional excessive fine, violated her due process and constituted an unjust enrichment under state law. The trial court dismissed the case and the Eighth Circuit affirmed finding that she lacked any recognizable property interest in the surplus equity in her home. On further review, the U.S. Supreme Court unanimously reversed. The Court held that an unconstitutional taking had occurred.

All states have similar forfeiture procedures, but only about a dozen allow the state to keep any equity that the owner has built up over time. Now, those states will have to revise their statutory forfeiture procedures.

F. Traffic Impact Mitigation Fee and Government Extortion
Sheetz v. El Dorado County, 601 U.S. 267 (2024)

The plaintiff claimed that a local ordinance requiring all similarly situated developers pay a traffic impact mitigation fee posed the same threat of government extortion as those struck down in *Nollan v. California Coastal Commission, 483 U.S. 825 (1987), Dolan v. City of Tigard, 512 U.S. 374 (1995),* and *Koontz v. St. Johns River Water Management District, 570 U.S. 595 (2013).* Those

cases, taken together, hold that if the government requires a landowner to give up property in exchange for a land-use permit, the government must show that the condition is closely related and roughly proportional to the effects of the proposed land use. In this case, the plaintiff claimed that test meant that the county had to make a case-by-case determination that the $24,000 fee was necessary to offset the impact of congestion attributable to his building project - a manufactured home on a lot that he owns in California. He paid the fee, but then filed suit to challenge its constitutionality under the Fifth Amendment. The U.S. Supreme Court unanimously ruled in his favor. The Court determined that nothing in the Takings Clause indicates that it doesn't apply to fees imposed by state legislatures.

G. Quiet Title Act is not Jurisdictional – Implications for Property Rights.

Wilkins v. United States, 143 S. Ct. 870 (2023)

Farmers and ranchers can sometimes find themselves in various legal battles with the Federal Government. That's particularly true in the U.S. West as it was in this case. Here, the plaintiffs live along a dirt road in western Montana that provides access to a National Forest from a public highway. The prior owners of the land granted the federal government an easement in 1962 across the land by means of a road to provide government timber contractors access to the forest from the highway. The deeds and an accompanying letter said the purpose of the road was for timber harvest.

For about 45 years, the government's use of the easement didn't interfere with the landowners' property. Then in 2006, the government posted a sign saying the road provided public access through private land.

The landowners sued in 2018 under the Quiet Title Act. 28 U.S.C. 2409a. The Quiet Title Act allows a private landowner to sue the federal government for intrusion of the landowner's private property if the lawsuit is brought within 12 years of the claim incurring – when the government expanded the scope of the easement. In this case, the landowner's sued just outside that 12-year window and the government claimed that, as a result, the court lacked jurisdiction to hear the case.

The trial court agreed and dismissed the case. On appeal the U.S. Court of Appeals for the Ninth Circuit agreed. Both of those lower courts held that the Quiet Title Act's 12-year filing provision was jurisdictional and, as a result, the statute of limitations had run.

The U.S. Supreme Court reversed, holding that the Quiet Title Act's provision at issue (28 U.S.C. 2409a(g)) was a non-jurisdictional claims-processing rule that required certain claims-processing steps to be taken at certain times that must be completed before a lawsuit can be filed. The Court, citing its decision in a tax case from North Dakota in 2022 said that a procedural requirement is only to be construed as jurisdictional when the Congress has clearly stated so in the statute at issue. *Boechler v. Comr., 596 U.S. 199 (2022).* Here, the Court determined that 28 U.S.C. §2409a(g) lacked such a clear congressional statement, and that nothing in the statute's text or context gave the Court any reason to depart from the general rule of a time bar being non-jurisdictional. Indeed, the Court held that the Quiet Title Act's jurisdictional grant was in a separate section well separated

from subsection 2409a(g) and that there was nothing there that conditioned the jurisdictional grant on the limitations period in subsection 2409a(g).

> **Note:** Three dissenting Justices (including the Chief Justice) maintained that the general rule of a time bar being non-jurisdictional did not apply in this case because subsection 2409(a) is a condition on a waiver of sovereign immunity to be interpreted as a jurisdictional bar (time bar) to bringing a lawsuit.
>
> The Court's decision means that the two landowners will get their chance in court to establish that the U.S Forest Service changed the terms of its easement to take some of their private property rights. But there might also be broader implications that ultimately flow from the Court's decision.

Clearly, property rights are a fundamental constitutional right. Not so for the doctrine of sovereign immunity which isn't found in the Constitution. The Quiet Title Act is a tool for private property owners to seek redress for the government's illegal appropriation of private property. This is particularly important in the U.S. West. There the federal government owns a high percentage of land that either surrounds or even cuts through private property. Numerous federal agencies engage in activities that impact private property rights. Often it may be very difficult to determine when an intrusion occurs for purposes of a jurisdictional requirement under the Quiet Title Act.

H. States' Water Compact Must Include Federal Government.
Texas v. New Mexico, 144 S. Ct. 1756 (2024)

Colorado, New Mexico, and Texas signed the Rio Grande Compact in 1938, and Congress approved it in 1939. The Compact equitably apportions the waters of the Rio Grande Basin. Under the Compact, Colorado committed to deliver a certain amount of water to the New Mexico state line. A minimum quality standard was also established. In 2014, Texas sued New Mexico for allowing the Rio Grande's water reserves to be channeled away for its use which deprived Texas of its equal share in the river's resources. In 2018, the Supreme Court said the federal government should be a party to the case because of its treaty obligation to deliver a quantity of Rio Grande River water to Mexico and because the water is delivered via a federal reclamation project administered by the Department of the Interior which, in turn, has an obligation to Indian tribes what also have an interest in the water. To resolve the dispute, Texas and New Mexico entered a proposed consent decree. The federal government objected that the settlement was inconsistent with the original compact and undermined the Compact's plain language, which the states cannot do without congressional approval. The court agreed, sending the case back to a Special Master on the basis that Article I, Section 10, Clause 3 which states: "No State shall, without the Consent of Congress,… enter into any Agreement or Compact with another State"…. Thus, when the federal government has an interest in a water agreement among states, it must be a party to the agreement.

I. Fair Credit Reporting Act Waives Sovereign Immunity

United States Department of Agriculture Rural Development Housing Service v. Kirtz, 601 U.S. 42 (2024)

The defendant received a loan from the plaintiff, a division of the U.S. Department of Agriculture, which was repaid in full by mid-2018. However, the USDA repeatedly informed a consumer credit reporting company that the defendant's account was past due. As a result, the defendant's credit score was damaged and his ability to secure future loans at affordable rates was threatened. The defendant notified the company of the error and the company, in turn, notified the USDA. However, the USDA did not correct its records and the defendant sued for either a negligent or willful violation on the Fair Credit Reporting Act (FCRA). The USDA moved to dismiss the case based on sovereign immunity. The trial court dismissed the case, the appellate court reversed on the basis that the Congress had amended the FCRA to authorize suits for damages against "any person" who violates the FCRA, and that "person" includes any governmental agency. The Supreme Court agreed to hear the case to clear up contrary conclusions reached by the Third, Seventh and D.C. Circuits (holding that the FCRA authorizes suits against government agencies) and the Fourth and Ninth Circuits (holding that the FCRA bars consumer suits against federal agencies).

The Supreme Court noted that the U.S. is generally immune from suits seeking money damages unless the Congress waived that immunity by making a clear legislative statement. Here, the Court unanimously determined that the FCRA clearly waived sovereign immunity by applying its provisions to persons who furnish information to consumer reporting agencies, and that no separate provision addressing sovereign immunity was required. The Court also noted that its holding would not make the States susceptible to consumer suits for money damages because the FCRA was enacted pursuant to the Commerce Clause and, as such, does not give the Congress the power to abrogate state sovereign immunity.

J. Redemption Agreements and Corporate Value

Connelly v. United States, No. 4:19-cv-01410-SRC, 2021 U.S. Dist. LEXIS 179745 (E.D. Mo. Sept. 21, 2021), aff'd., 70 F.4th 412 (8th Cir. Jun. 2, 2023), aff'd., 144 S. Ct. 1406 (2024)

The Decedent was the president and CEO and majority shareholder in a closely held business owned with the Decedent's brother. The business owned life insurance on each brother's life. When the Decedent died, the business received $3.5 million in life insurance proceeds. Upon the Decedent's death, a stockholder agreement gave the surviving brother the first option to purchase the shares, which he did not exercise. Upon the brother's failure to exercise the option, the Company and the Decedent's estate entered into an agreement whereby the estate received $3 million, and the Decedent's son received a three-year option to buy company stock from the surviving brother. The Service argued that the agreement was not a bona fide agreement but rather a device to transfer wealth within the family. It valued the business at $6.86 million for estate tax purposes after including the value of the life insurance.

The District Court agreed with the Service and denied the Estate's claim for a refund of estate tax paid. In *Blount*, the 11th Circuit determined that the redemption obligation of the business offset

the value of the life insurance proceeds so that there was no increase in value. The Missouri District Court rejected this argument and found it was appropriate to include the life insurance proceeds in the overall value. The overall approach did not pass muster as a bona fide agreement to redeem the stock for fair value.

On further review the trial court's decision was affirmed.

On June 6, 2024, the U.S. Supreme Court unanimously affirmed. The court determined that the life-insurance proceeds payable to the corporation were an asset that increased the corporation's farm market value that weren't offset by the corporation's contractual obligation to redeem the decedent's shares. The Court reasoned that the redemption agreement had not effect on any shareholder's economic interest and, as a result, no hypothetical buyer of the decedent's shares would have treated the corporation's obligation to redeem the shares at fair market value as a factor that reduced the value of those shares. The Court stated in a footnote that it was not holding that a redemption agreement could *never* decrease a corporation's value, noting that it could, for example, require a corporation to liquidate operating assets to pay for the shares which would decrease future earning capacity.

III. MISCELLANEOUS AG LAW DEVELOPMENTS

A. Corps of Engineers Mismanages Water Levels in Missouri River

Ideker Farms, Inc. et al. v. United States, 71 F. 4th 964 (Fed. Cir. 2023), aff'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 affirmed 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 from Northeast Kansas to Southeast South Dakota. The case stemmed from changes in the COE's manual for managing waters levels in the river.

In 2014, almost 400 farmers along the Missouri River 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 their 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. 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.

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.

B. Court Vacates Registrations of Three Dicamba Products
Center for Biological Diversity v. United States Environmental Protection Agency, No. CV-20-00555-TUC-DCB, 2024 U.S. Dist. LEXIS 20307 (D. Ariz. Feb. 6, 2024)

Farmers have used Dicamba for decades on broadleaf plants and, more recently, have used it to control weeds that have become glyphosate-tolerant. However, until 2016 the use of Dicamba was used only as a pre-emergent herbicide. It was then that the Environmental Protection Agency (EPA) registered certain low-volatility forms of Dicamba that had a low likelihood of drift problems for over-the-top usage on growing soybean and cotton crops resulting from Dicamba-resistant seeds. The EPA was sued on the basis that the registration process violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as well as the Endangered Species Act

(ESA). The case became moot by the expiration of the registration, but when the EPA again registered Dicamba for over-the-top use in 2018, a new case was filed. In 2020, the U.S. Court of Appeals for the Ninth Circuit vacated the registrations for XtendiMax, Engenia and FeXapan. *National Family Farm Coalition v. United States Environmental Protection Agency, 960 F.3d 1120 (9th Cir. 2020).* The court determined that the EPA had failed to follow the procedural rules of the Administrative Procedure Act, the FIFRA and the ESA. Those statutes require the EPA to provide public notice and a chance for the public to make comments and attend a hearing on the registration issue. The court also said that the EPA failed to assess risks and costs for non-users of over-the-top Dicamba.

The EPA again issued another registration for over-the-top Dicamba use for the 2020 and 2021 growing seasons and made further amendments in 2022 and 2023 along with approval for new uses.

2024 Court Decision

On February 6, 2024, a federal district court vacated the registrations of three Dicamba products (XtendiMax, Engenia, and Tavium) that EPA had approved for over-the-top applications. *Center for Biological Diversity v. United States Environmental Protection Agency, No. CV-20-00555-TUC-DCB, 2024 U.S. Dist. LEXIS 20307 (D. Ariz. Feb. 6, 2024).* The decision came at a time when many soybean and cotton farmers have already purchased seed and chemicals and will soon be planting the 2024 crop. The court said the EPA didn't follow the notice and comment provisions of the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) when it issued the registrations and also violated the Administrative Procedure Act (APA) (and the Endangered Species Act) by not allowing public input on whether over-the-top Dicamba has unreasonable adverse effects on the environment.

The ruling canceled any benefits of planting Dicamba seeds, with the concern that there might not be enough supply of other traits to replace the Dicamba market share. The immediate impact of the ruling was that it could force farmers to plant Dicamba trait soybeans or cotton without the correct chemical to utilize the gene, resulting in the likely use of alternatives. Those alternatives could, in turn, magnify the known issues of the Dicamba chemical problems.

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

EPA Reaction

On February 14, the EPA issued an order to allow existing stocks of XtendiMax, Engenia, and Tavium to be applied directly onto crops so long as the pesticides were "labeled, packaged, and released for shipment" before the court's decision. The order will allow these products purchased before February 6 to be used this growing season. The EPA order also provides instructions for how to dispose of unwanted or unused dicamba products.

The Future

What does the future hold for over-the-top Dicamba? Of course, the EPA could appeal the court's decision, but any appeal would be to the Ninth Circuit. Going back to the same court on the same shortcomings as in the 2020 decision probably wouldn't end well for the EPA. Perhaps a better idea is for the EPA to re-register over-the-top use of Dicamba by actually following the law's requirements for providing public notice and comment and giving the public the opportunity to attend a hearing on the registration.

C. Court Addresses How State Can Manage Interrelated Surace and Groundwater Rights

Sullivan v. Lincoln County Water District, 542 P.3d 411 (Nev. 2024)

In this case, the court addressed how the State of Nevada can manage interrelated surface and groundwater rights. In Nevada, pre-1913 water rights can't be impaired by later-granted permits. The case involved applications for groundwater permits to supply an urban development. The state denied hundreds of new groundwater permits because they interfered with vested surface water rights. While state law didn't explicitly give the State Engineer the authority to conjunctively manage groundwater and surface water, the Court said there was implicit authority to take extraordinary action to protect vested water rights. The Court also broadly construed the term "basin" to protect those rights. Ultimately the Court sent the case back to the trial court to determine if there is substantial evidence to support the State Engineer's actions.

The Court's decision is important for agriculture in Nevada where water is limited – the State Engineer was granted the right to administer groundwater and surface water rights together without explicit statutory authority. The Court's decision also means that groundwater rights granted after pre-1913 vested surface water rights that impair those rights may now be revoked.

D. Animal Ag Facilities and Free Speech

Animal Legal Defense Fund v. Reynolds, 89 F.4th 1071 (8th Cir. 2024)

In response to attempts to shut down animal confinement operations by activist groups, legislatures in several states have enacted laws designed to protect these businesses by limiting access. A common approach is for the law to criminalize the use of deception to access a confined livestock facility or meatpacking plant with the intent to cause physical harm, economic harm or some other type of injury to the business. But the laws have generally been struck down on free speech and

equal protection grounds. Is there a way for states to provide legal protection to confinement livestock facilities?

What can these facilities do to protect themselves? I wrote about this issue last spring and since that time the U.S. Court of Appeals for the Eighth Circuit has issued a significant opinion. That makes an update in order.

Laws designed to protect confined animal livestock facilities from those intended to do them harm – it's the topic of today's post.

General Statutory Construct

The basic idea of state legislatures that have attempted to provide a level of protection to livestock facilities is to bar access to an animal production facility under false pretenses. At their core, the laws attempt to prohibit a person having the intent to harm a livestock production facility from gaining access to the facility (such as via employment) to then commit illegal acts on the premises. *See, e.g., Iowa Code §717A.3A.* Laws that bar lying and trespass coupled with the intent to do physical harm to an animal production facility should not be constitutionally deficient. Laws that go beyond those confines may be.

The Iowa provisions. Iowa legislation is a common example of how states have attempted to address the issue. The Iowa legislature has made two attempts at crafting a state law that would withstand a constitutional challenge. The initial version, enacted in 2012, criminalized "agricultural production facility fraud" if a person willfully obtained access to such a facility by false pretenses (the "access" provision) or made a false statement or representation as part of an application or agreement to be employed at the facility (the "employment" provision). The law also required the person to know that the statement was false when made and that it was made with an intent to commit a knowingly unauthorized act. *Iowa Code §717A.3A.* This initial statutory version was challenged, and the employment provision was deemed unconstitutional.

The Iowa legislature then modified the law with a second version that described an agricultural production facility trespass as occurring when a person uses deception "on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to [the facility], with the intent to cause physical or economic harm or other injury to the [facility's] operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer [the "access" provision]." *Iowa Code §717.3B.* The revised law also criminalizes the use of deception "on a matter that would reasonably result in a denial of an opportunity to be employed at [a facility] that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the [facility's] operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer [the "employment" provision].

Note: In other words, the Iowa provisions criminalize the use of lies to either gain access or employment at an ag production facility where the use is coupled with the intent to do harm.

Recent Court Opinions

North Carolina. In 2017, a challenge to the North Carolina statutory provision was dismissed for lack of standing. *People for the Ethical Treatment of Animals v. Stein, 259 F. Supp. 3d 369 (M.D. N.C. 2017).* The plaintiffs, numerous animal rights activist groups, brought a pre-enforcement challenge to the North Carolina Property Protection Act. They claimed that the law unconstitutionally stifled their ability to investigate North Carolina employers for illegal or unethical conduct and restricted the flow of information those investigations provide. As noted, the court dismissed the case for lack of standing. On appeal, however, the appellate court reversed. *PETA, Inc. v. Stein, 737 Fed. Appx. 122 (4th Cir. 2018).* The appellate court determined that the plaintiffs had standing to challenge the law through its "chilling effect" on their First Amendment rights to investigate and publicize actions on private property. They also alleged a reasonable fear that the law would be enforced against them.

On the merits, the trial court then held that the challenged provisions of the law were unconstitutional under the First Amendment as a violation of the plaintiffs' free speech rights. There was a direct implication of speech, the court reasoned, because recordings and image capture constituted speech and the Act was unconstitutional under intermediate scrutiny. *People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547 (M.D. N.C. 2020).*

On further review, the appellate court affirmed in part and reversed in part. People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc., 60 F.4th 815 (4th Cir. 2023). The appellate court determined that the First Amendment protects the right to surreptitiously record in an "employer's nonpublic areas as part of newsgathering" and that, therefore, the Act was unconstitutional when it was applied to bar the undercover activities that the plaintiff wanted to conduct on private property.

Note: The Attorney General of North Carolina sought the U.S. Supreme Court's review, but the Court declined review. *North Carolina. Farm Bureau Federation, Inc. v. People for the Ethical Treatment of Animals, Inc., 144 S. Ct. 325 (2023).*

Utah. The Utah law was also deemed unconstitutional. *Animal Legal Defense Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017).* At issue was Utah Code §76-6-112 which criminalizes the entering of a private agricultural livestock facility under false pretenses or via trespass to photograph, audiotape or videotape practices inside the facility. While the state claimed that lying, which the statute regulates, is not protected free speech, the court determined that only lying that causes "legally cognizable harm" falls outside First Amendment protection. The state also argued that the act of recording is not speech that is protected by the First Amendment. However, the court determined that the act of recording is protectable First Amendment speech. The court also concluded that the fact that the speech occurred on a private agricultural facility did not render it outside First Amendment protection. The court determined that both the lying and the recording

provisions of the Act were content-based provisions subject to strict scrutiny. To survive strict scrutiny the state had to demonstrate that the restriction furthered a compelling state interest. The court determined that "the state has provided no evidence that animal and employee safety were the actual reasons for enacting the Act, nor that animal and employee safety are endangered by those targeted by the Act, nor that the Act would actually do anything to remedy those dangers to the extent that they exist." For those reasons, the court determined that the Act was unconstitutional.

A Wyoming law experienced a similar fate. In 2015, two new Wyoming laws went into effect that imposed civil and criminal liability upon any person who "[c]rosses private land to access adjacent or proximate land where he collects resource data." Wyo. Stat. §§6-3-414(c); 40-27-101(c). The appellate court, reversing the trial court, determined that because of the broad definitions provided in the statutes, the phrase "collects resource data" included numerous activities on public lands (such as writing notes on habitat conditions, photographing wildlife, or taking water samples), so long as an individual also records the location from which the data was collected. Accordingly, the court held that the statutes regulated protected speech in spite of the fact that they also governed access to private property. While trespassing is not protected by the First Amendment, the court determined that the statutes targeted the "creation" of speech by penalizing the collection of resource data.

> **Note:** The appellate court remanded the case to the trial court for a determination of the appropriate level of scrutiny and whether the statutes survived review. Ultimately, the trial court granted the plaintiffs' motion for summary judgment, finding that the statutes were content based and, as such failed to withstand constitutional strict scrutiny review on the basis that the laws were not narrowly tailored. *Western Watersheds Project v. Michael, 353 F. Supp. 3d 1176 (D. Wyo. 2018).*

Ninth Circuit. In early 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit issued a detailed opinion involving the Idaho statutory provision. *Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).* The Ninth Circuit's opinion provides a roadmap for state lawmakers to follow to provide at least a minimal level of protection to animal production facilities from those that would intend to do them economic harm. According to the Ninth Circuit, state legislation can bar entry to a facility by force, threat or trespass. Likewise, the acquisition of economic data by misrepresentation can be prohibited. Similarly, criminalizing the obtaining of employment by false pretenses coupled with the intent to cause harm to the animal production facility is not constitutionally deficient. However, provisions that criminalize audiovisual recordings are suspect.

The Iowa experience. In 2021, the U.S. Court of Appeals for the Eighth Circuit construed the 2012 version of the Iowa law and upheld the portion of it providing for criminal penalties for gaining access to a covered facility by false pretenses. *Animal Legal Defense Fund v. Reynolds, 8 F.4th 781 (8th Cir. 2021).* This is the first time that any federal circuit court of appeals has upheld a provision that makes illegal the gaining of access to a covered facility by lying.

Conversely, the court held that the employment provision of the law (knowingly making a false statement to obtain employment) violated the First Amendment because the law was not limited to false claims that were made to gain an offer of employment. Instead, the provision provided for prosecution of persons who made false statements that were incapable of influencing an offer of employment. A prohibition on immaterial falsehoods was not necessary to protect the State's interest – such as false exaggerations made to impress the job interviewer. The court determined that barring only false statements that were material to a hiring decision was a less restrictive means to achieve the State's interest.

> **Note.** The day before the Eighth Circuit issued its opinion concerning the Iowa law, it determined that plaintiffs challenging a comparable Arkansas law had standing the bring the case. *Animal Legal Defense Fund v. Vaught, 8 F.4th 714 (8th Cir. 2021).* The court later denied a petition for rehearing. *Animal Legal Defense Fund v. Vaught, No. 20-1538, 2021 U.S. App. LEXIS 27712 (8th Cir. Sept. 15, 2021).*

In late 2019, the plaintiffs in the Iowa case filed suit to enjoin the second version of the Iowa law – Iowa Code §717A.3B. The trial court agreed and preliminary enjoined the revised law. The plaintiffs then filed a motion for summary judgment in early 2020 and the state filed a cross motion for summary judgment, and the case was continued while the appellate court was considering the case involving the initial version of the Iowa law. As noted above, the appellate court ultimately upheld the access provision but not the employment provision. The trial court, in the current case upheld the plaintiffs' motion for summary judgment, finding that the revised statutory language had been slightly modified, but was substantially similar to the initial version. As such, the trial court determined that the revised statute discriminated based on content and viewpoint and was unconstitutional under a strict scrutiny analysis. *Animal Legal Defense Fund v. Reynolds, No. 4:19-cv-00124-SMR-HCA, 2022 U.S. Dist. LEXIS 48142 (S.D. Iowa Mar. 14, 2022).*

Iowa also has another law that bears on the issue. Iowa Code § 727.8A makes it a crime for "a person committing a trespass as defined in section 716.7 to knowingly place or use a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property."

Iowa Code §716.7 defines a trespass as follows:

> 2. a. "Trespass" shall mean one or more of the following acts:
>
> (1) Entering upon or in property without the express permission of the owner, lessee, or person in lawful possession with the intent to commit a public offense, to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate,….
>
> (2) Entering or remaining upon or in property without justification after being notified or requested to abstain from entering or to remove or vacate therefrom by the owner, lessee, or person in lawful possession, or the agent or employee of the

owner, lessee, or person in lawful possession, or by any peace officer, magistrate, or public employee whose duty it is to supervise the use or maintenance of the property. A person has been notified or requested to abstain from entering or remaining upon or in property within the meaning of this subparagraph (2) if any of the following is applicable:

(a) The person has been notified to abstain from entering or remaining upon or in property personally, either orally or in writing, including by a valid court order under chapter 236.

(b) A printed or written notice forbidding such entry has been conspicuously posted or exhibited at the main entrance to the property or the forbidden part of the property.

(3) Entering upon or in property for the purpose or with the effect of unduly interfering with the lawful use of the property by others.

(4) Being upon or in property and wrongfully using, removing therefrom, altering, damaging, harassing, or placing thereon or therein anything animate or inanimate, without the implied or actual permission of the owner, lessee, or person in lawful possession.

Note: An initial conviction for violation of Iowa Code § 727.8A is an aggravated misdemeanor and a second conviction is a class "D" felony.

In *Animal Legal Defense Fund, et al. v. Reynolds, et al., 630 F. Supp.3d 1105 (S.D. Iowa. 2022),* the plaintiffs (animal rights activist groups) claimed the statute violated their First Amendment rights by hindering them from gaining access to farms and dairies under false pretenses of seeking a job to be able to take pictures and/or videos without the property owner's consent. The defendants asserted that the case should be dismissed for lack of standing and lack of ripeness.

The trial court (the same Obama-appointed judge that ruled earlier in 2022 on another variant of the Iowa laws) held that the plaintiffs had standing because their organizational objectives would be hindered, and that an arrest is not required before a criminal statute can be challenged. The trial court noted that the statute prohibited video recordings (which the court asserted was protected "speech") while trespassing which the plaintiffs considered important to broadcasting their negative messages about animal agriculture to the public. More specifically, the court determined that the statute singled out conduct (that the plaintiffs contemplated) by expanding the penalty for conduct already prohibited by law and was not limited to specific uses of a camera. Accordingly, the court determined that the statute was an unconstitutional restriction on the free speech rights of trespassers apparently on the basis that regulating free speech on private property would create a "slippery slope" for not allowing people to record politicians or express views about the Government. In addition, any recording, production, editing, and publication of the videos is protected speech. The court granted summary judgment to the plaintiffs.

The trial court's view, made it practically impossible for farmers to protect their farming operations from those intending to inflict harm via protected "speech." Is the trial court saying that there is a constitutional right to trespass? If so, that is flatly contrary to the U.S. Supreme Court opinion of *Cedar Point Nursery, et al. v. Hassid, et al., 141 S. Ct. 2063 (2021).*

> **Note:** Interestingly (and hypocritically) the Iowa federal district court's website contains the following information: "To be admitted into the courthouse, you must present a government issued photo identification. Please be aware the following items are NOT allowed in the courthouse: cell phones, cameras, other electronic devices (including Apple watches), recording devices,…".

> **Note:** Iowa Code §716.7A, the Food Operation Trespass Law, remains in effect. That law, effective on June 20, 2020, treats as an aggravated misdemeanor a first offense of entering or remaining on the property of a food operation without the consent of a person who has real or apparent authority to allow the person to enter or remain on the property. A subsequent offense is a Class D felony. This statutory provision was upheld as constitutional by an Iowa county district court judge in early 2022.

In early 2024, the U.S. Court of Appeals for the Eighth Circuit reversed. *Animal Legal Defense Fund v. Reynolds, 89 F.4th 1071 (8th Cir. 2024).* The appellate court concluded that while false or deceptive speech is not per se unprotected, Iowa had the constitutional right to bar intentionally false speech that is used to cause a legal harm to someone else or their business. The Iowa law, the appellate court concluded, focused on the intent to inflict a legally recognizable harm rather than on the content of what was being said. Accordingly, both the trespass and employment provisions of the law constitutionally barred false statements that result in a harm the law would recognize. It was the law's reference to the content of the speech (i.e., false statements) that made the law constitutional. The intent requirement did not distinguish among speakers based on their viewpoints. The appellate court succinctly stated that the Iowa law filtered out trespassers who are "relatively innocuous," and focuses the criminal law on conduct that inflicts greater harms on victims and society. Thus, the Iowa law was not a viewpoint-based restriction on speech, but was a permissible restriction on intentionally false speech undertaken to accomplish a legally cognizable harm.

Kansas and the Tenth Circuit. In *Animal Legal Defense Fund, et al. v. Kelly, 9 F.4th 1219 (10th Cir. 2021), pet. for cert. filed, (U.S. Sup. Ct. Nov. 17, 2021),* the court construed the Kansas provision that makes it a crime to take pictures or record videos at a covered facility "without the effective consent of the owner and with the intent to damage the enterprise." The plaintiffs claimed that the law violated their First Amendment free speech rights. The State claimed that what was being barred was conduct rather than speech and that, therefore, the First Amendment didn't apply. But, the court tied conduct together with speech to find a constitutional violation – it was necessary to lie to gain access to a covered facility and consent to film activities. As such, the law regulated protected speech (lying with intent to cause harm to a business) and was unconstitutional. The court determined that the State failed to prove that the law narrowly tailored to a compelling state interest in suppressing the "speech" involved. The dissent pointed out (correctly and consistently

with the Eighth Circuit) that "lies uttered to obtain consent to enter the premises of an agricultural facility are not protected speech." The First Amendment does not protect a fraudulently obtained consent to enter someone else's property.

> **Note:** On April 25, 2022, the U.S. Supreme Court declined to hear the case. *Kelly v. Animal Legal Defense Fund, cert. den., 142 S. Ct. 2647 (2022).*

As a result of the Eighth Circuit's opinion in *Reynolds* in early 2024, legislation was introduced into the Kansas Senate that would amend the Farm Animal and Field Crop Act and Research Facilities Protection Act. Among other things, the legislation would criminalize the making of false statements on an employment application to gain access to an animal facility. The legislation stalled in the Senate. Identical legislation was introduced into the Kansas House. Ultimately, Senate Sub. for HB 2047 passed and was signed into law. The legislation becomes effective on July 1, 2024. The legislation does the following:

- Bars a person from entering or remaining on or in any animal facility or field crop production area without the owner's consent. Included in the prohibition is the flying an aircraft within the airspace directly above a covered facility at an altitude that is deemed unsafe as defined in 14 C.F.R. §91.119(c).
- Bars a person from knowingly making false statements on an employment application to gain access to a covered facility or field.
- Sets criminal penalties

A Different Approach?

The appellate courts generally holding (except for the Eighth Circuit) that the right to free speech protects false factual statements that inflict real harm and serve no legitimate interest runs contrary to an established line of U.S. Supreme Court precedent, at least until the Court's decision in *United States v. Alvarez, 567 U.S. 709 (2012). See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); Brown v. Hartlage, 456 U.S. 45 (1982); Herbert v. Lando, 441 U.S. 153 (1979); Garrison v. Louisiana, 379 U.S. 64 (1964).* The current split between the Eighth, Ninth and Tenth Circuits on the constitutionality of the Iowa, Idaho and Kansas laws with respect to the issue of gaining access to a covered facility by lying could warrant a Supreme Court review.

Indiana trespass law. Short of a Supreme Court review of a state statute is there another approach that a state might take to provide protection for agricultural livestock facilities? The state of Indiana's approach might be the answer. In 2014, the Indiana legislature passed, and the Governor signed into law the "Indiana Trespass Law." *Ind. Code 35-43-2-2.* Under the statute, "trespass" is defined as being on a property after being denied entry by the property owner, court order or by a posted sign (or purple paint). If the trespass involves a dwelling (including an ag operation), the landowner need not deny entry for a trespass to be established. The law also sets various thresholds for criminal violations.

Note: The Iowa Food Operation Trespass Law appears to be similar to the Indiana law.

The Indiana law appears to base property entry on the legal property interest of that of a license. A license is a term that covers a wide range of permissive land uses which, unless permitted, would be trespasses. For example, a hunter who is on the premises with permission is a licensee. The hunter has a license for the limited purpose of hunting only. If the hunter were to videotape any activity on the premises, that would constitute a trespass as exceeding the scope of the license. An unlawful entry. This would be the same result for a farm employee. Video recording would be outside the scope of employment. By focusing on the property interest of a license and that of a trespass for unauthorized entry, a claim of a possible free speech violation is eliminated.

Hiring Practices

Considering activists that wish to harm animal agriculture, ag animal facilities should utilize common sense steps to minimize potential problems. Of course, not mistreating animals should always be the standard. Proper hiring practices are also very important. A well drafted employment agreement should be used for workers hired to work in an ag animal facility to help screen potential hires. The agreement should specify in detail the job requirements and what is not permitted to occur on the premises and inside buildings. The agreement should give the employer the right to search every employee for devices that could be used to record activities on the farm and in farm buildings. Also, employee training should be provided and documented. Also, it's critical that employee conduct be closely monitored to ensure that employees are acting within the scope of their employment and that animals are being treated appropriately.

Conclusion

It's unfortunate that groups exist dedicated to damage and/or eliminate certain aspects of animal agriculture, and that they will use lies and deception to become employed and gain access. It's even more frustrating that many of the courts are willing to use the First Amendment as a shield to protect those intending to commit criminal activities to harm animal agriculture. But, until state laws are drafted in a way that will be found constitutional, the only recourse for livestock operations is to adopt hiring and business practices that will minimize potential harm.

The Eighth Circuit's decision in *Reynolds* is refreshing and led to the revised statue in Kansas. It is an important decision for agriculture in general and the confinement livestock industry in particular. For example, in the Iowa situation, approximately one-third of the nation's hog production occurs in Iowa.

E. Massachusetts Animal Cruelty Act Upheld
Triumph Foods, LLC v. Campbell, No. 23-11671-WGY, 2024 U.S. Dist. LEXIS 128483 (D. Mass. Jul. 22, 2024)

In 2016, Massachusetts 77 percent of Massachusetts voters approved the Prevention of Farm Animal Cruelty Act via ballot initiative. The Act's purpose is to "prevent animal cruelty by

phasing out extreme methods of farm animal confinement, which also threaten the health and safety of Massachusetts consumers, increase the risk of foodborne illness, and have negative fiscal impacts on the Commonwealth of Massachusetts." The Act makes it unlawful for a farm owner or operator in Massachusetts to knowingly cause any covered animal to be confined in a cruel manner and defines "cruel manner" as confining a "breeding pig in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs or turning around freely." The Act also makes it unlawful to knowingly sell meat from an animal that was confined in a cruel manner. Violations are punishable by a civil fine of up to $1,000 and the state Attorney General may seek injunctive relief to prevent any future violations of the Act. The plaintiff, a processor and producer of pork products located in St. Joseph, MO, sells pork products into Massachusetts and has made efforts to adjust its business model and structure in order to comply with the Act, but at additional cost. The plaintiff sued to stop enforcement of the Act, claiming that the Federal Meat Inspection Act (FMIA) preempts the Act's enforcement. The federal trial court disagreed, concluding that the Act did no more than ban the sale of non-compliant pork meat and didn't regulate how the plaintiff operates its facility. The plaintiff claimed that the FMIA preempted the Act because it created additional and different requirements on how pigs are to be handled than did the FMIA. The trial court noted that the Act merely required the plaintiff to identify if the meat originated from a legally compliant pig and did not require a processor to segregate noncompliant pork from compliant pork. The trial court noted that the Food Safety and Inspection Service already requires the plaintiff to identify where its pork meat came from. In addition, the trial court concluded that the Act did not override USDA's inspection and approval of pork for sale because the Act has no effect on health and safety but has as its purpose the prevention of cruelty to animals.

Note: An appeal was filed in the case on August 19, 2024.

F. Cranberry Bogs and the Clean Water Act
Courte Oreilles Lakes Association, Inc. v. Zawistowski, No. 3:24-cv-00128 (W.D. Wis. filed Feb. 28, 2024)

The Clean Water Act regulates the discharge of pollutants from a fixed point into a water of the United States. Not regulated is water runoff from irrigation activities on farms. Historically, the EPA has interpreted this exemption to include runoff from irrigated dryland crops, rice farming and cranberry bogs. This means a Clean Water Act permit is not required for these activities.

But a recent case has been filed against a Wisconsin cranberry farm claiming that the discharges involved should not be exempt under the irrigation return flow provision. The claim is that a channel and ditch are point sources of phosphorous and sediment discharges into the nearby lake when the bogs are drained. Phosphorous and sediment are pollutants under the Clean Water Act, and the claim is that the water in the bogs is not used for irrigation, but to aid in the overall growing process and protect the cranberries from freezes and harvesting.

The case is in its early stages, but a ruling against the farm could have a big impact on the cranberry and rice industries nationwide.

G. PFAS and Rural Landowners

A PFAS is a widely used, long lasting chemical having components that break down slowly over time. It is found in water, air and soil all over the globe. Some studies have shown that exposure to PFAS may be linked to harmful health effects in humans and animals.

The biggest potential problem for agriculture involving PFAS will likely be biosolids – the solid matter remaining at the end of a wastewater treatment process. Biosolids are often land applied and there are benefits to doing so. It recycles nutrients and fertilizers and creates cost savings on chemicals and fertilizers for farmers. The uptake of PFAS by plants varies depending on PFAS concentration in soil and water, type of soil, amount of precipitation or irrigation, and the type of plant.

The EPA treats PFAS as a hazardous substance under the Comprehensive Environmental Response Liability Act – that's the Superfund law, and it can be a major concern for all rural landowners.

In 2022, a Michigan cattle farm received biosolids from a municipal wastewater treatment plant and now can't market beef products. But some states have acted. Maine has banned land application of biosolids and set up a fund for impacted farmers.

H. Property Rights and the Administrative State
White House Executive Order 14008 (Jan. 27, 2021)

A 2012 Earth Summit established a goal of setting aside 50 percent of the world's land and water for conservation by 2050. In late January 2021, the President issued an Executive Order establishing a goal of putting 30 percent of U.S. land and water under permanent government control by 2030. That's in addition to the 36 percent of U.S. land that is already owned or controlled by federal and state governments. At the same time, the Interior Department issued an order removing state and local control over federal land acquisitions.

The authority often cited for private land acquisition is the Antiquities Act of 1906. But lawsuits have been filed challenging government control of private land that would curtail mining, ranching and other activities, and one State, Utah, passed a law allowing it to overrule some federal directives.

In general, courts defer to executive branch and administrative agency efforts to withdraw land and natural resources from private use, but a pending U.S. Supreme Court case (as referenced above) could result in limits to that deferential standard.

I. Enforceability of Water Rights in the West

Klamath Irrigation District v. United States Bureau of Reclamation, 48 F.4th 934 (9th Cir. 2022), cert. den., 144 S. Ct. 342 (2023)

Since the early 1970s, Oregon worked toward finalizing a comprehensive stream adjudication process to accurately determine all state and federal water rights in the Upper Klamath Basin. But doing so was met with challenges brought by the federal government and Indian tribes that contested Oregon's authority to adjudicate its rights. The Ninth Circuit dismissed these challenges in *United States v. State of Oregon, 44 F3d 758, 762 (9th Cir 1994),* ruling that the McCarran Amendment (43 U.S.C. §666) waives the United States' sovereign immunity, allowing the State of Oregon to adjudicate all state and federal water rights, including those of tribes, in Oregon's Klamath Basin.

In 2013, the State of Oregon issued an adjudication order, firmly establishing all state and federal water rights in the Klamath Basin. The adjudication notably confirmed that farmers and ranchers, rather than the federal government, retain the rightful water rights to utilize stored water in Upper Klamath Lake. Yet, since the adjudication order was issued, the federal government diverted stored water in Upper Klamath Lake for non-irrigation purposes, thereby landowners in the Klamath Irrigation District (District) of its property and adjudicated water rights. The District sued to protect its rights, but did not contest the water rights of any Indian tribes. However, certain tribes chose to intervene in the case, alleging potential indirect impacts on their interests and sought dismissal of the District's case against the federal government. The tribal claims were predicated on the assertion that their sovereign immunity prevented the District from including them as parties. The trial court concurred with the Tribe's argument, resulting in the dismissal of District's case and with no ability to enforce its water rights.

The Ninth Circuit affirmed, and the U.S. Supreme Court declined to hear the case. The U.S. Supreme Court also declined to hear a second, related case in early 2024.

On February 1, 2024, the Interior Department entered into a Memorandum of Understanding between the Klamath Waters Users Association and the Tribes that will guide future negotiations over the Klamath River Waterway.

Four dams on the Klamath River are in the process of being removed.

J. Expansion of Salmon Populations as a Ruse to Remove Dams?

In early 2024, the U.S. House Subcommittee on Energy, Climate, and Grid Security held a hearing focusing on the Administration's efforts to boost salmon populations by removing dams on the Snake River.

Note: There also is a movement to remove dams on a nationwide basis. A total of 2,119 dams have been removed in the U.S. since 1912.

K. Bureau of Land Management (BLM) Conservation Rule
"Conservation and Landscape Health," 88 Fed. Reg. 19583 (Apr. 3, 2023)

The BLM has produced a draft rule on conservation and landscape health that proposes to make conservation one of the multiple uses BLM manages for under the Federal Land and Policy Management Act (FLPMA), without Congressional authorization.

The FLPMA requires BLM to manage federal lands for "multiple use and sustained yield" of resources and defines major uses of the public land as mineral exploration and production, livestock grazing, rights-of-way, fish and wildlife development, recreation and timber. In managing lands for conservation as a multiple use, BLM proposed to expand the FLPMA and prioritize conservation on par with developing other natural resources, thus bypassing FLPMA's mandate to manage the public lands "in a manner which recognizes our Nation's need for domestic sources of mineral, food, timber and fiber."

L. BLM "Conservation and Landscape Health Rule".
89 Fed. Reg. 40308 (May 9, 2024)

The BLM published a new "Public Lands Rule" in the Federal Register on May 9, 2024. Since then, multiple lawsuits have been filed challenging the rule. In *Alaska v. Haaland, No. 3:24-cv-00161 (D. Alaska, filed Jul. 24, 2024),* the State of Alaska claims that the "vast majority" of the rule was not authorized by the Federal Land Policy Management Act and other federal and state laws and violated the "major questions doctrine" and failed to comply with the National Environmental Policy Act (NEPA). In *American Farm Bureau Federation v. United States Department of the Interior, No. 2:24-cv- 00136 (D. Wyo., filed July 12, 2024),* an additional claim is made that the Congressional Review Act bars the rule and that supposed "climate change" as a basis for the rule does not excuse unlawful rulemaking. In *Utah v. Haaland, No. 2:24-cv- 00438, (D. Utah, filed Jun. 18, 2024),* the states of Utah and Wyoming challenged the rule based on the BLM's reliance on a categorical exclusion for NEPA compliance.

M. Agricultural Labor – Bargaining Rights.
State of Kansas, et al. v. United States Department of Labor, et al., No. 2:24-cv-00076 (S.D. Ga. Aug. 26, 2024)

A federal court has denied the U.S. Department of Labor's (DOL) request for reconsideration of preliminary injunction that has blocked the DOL's rule that was finalized in April and is purportedly aimed at improving pay and conditions for foreign farmworkers. The rule is blocked from being implemented in the 17 states that challenged the rule (GA, KS, AR, FL, ID, IN, IA, LA, MO, MT, NE, ND, OK, SC, TN, TX and VA). The rule also will not apply to a berry farm in southeast GA and the members of the GA. The court determined that the states were likely to

succeed on their claims that the DOL rule violates the National Labor Relations Act as well as a ban on granting collective bargaining rights to agricultural workers.

N. Farm Bill; "Climate Smart Agriculture" and "Clean" Fuel Credit; FSA and Machinery Sales

[Slides only]

IV. TAXATION

A. International Tax – What is a "Realization" Event?
Moore, et ux. v. United States, 144 S. Ct. 1680 (2024)

The petitioners owned 11 percent of the common shares of KisanKraft, a corporation located in India. KisanKraft is a controlled foreign corporation (CFC) - more than 50 percent owned by U.S. persons – that makes tools for sale to farmers in India. KisanKraft did not pay dividends and reinvested all of its earnings in its business. Before the Tax Cuts and Jobs Act of 2017, CFCs were taxable only under subpart F of the Code, which generally permitted deferral of U.S. taxation of the active foreign business income of the company until that income was repatriated to the United States.

However, the TCJA changed the international tax system into a territorial approach that taxes income only based on domestic sourced profits. The TCJA imposes a current-year tax in 2017 (known as a "mandatory repatriation tax" or MRT) under I.R.C. §965 on U.S. persons owning at least 10 percent of a CFC. The MRT is based on the amount of the previously accumulated and untaxed income of the CFC. The MRT ensures that the CFC's undistributed and untaxed earnings and profits from 1986 to 2017 are effectively taxed to their owners – the U.S. shareholders like the petitioners – in 2017. If the CFC repatriates those earnings in the future, they are excluded from the taxpayer's gross income.

The MRT increased the petitioners' 2017 tax liability by approximately $15,000 because of their pro rata share of corporate retained earnings of $508,000. They paid the tax and sued for a refund on the basis that there had been no tax realization event. They lost at both the trial court and the appellate court.

The Supreme Court issued a narrow decision only applicable to pass-through entities which did not address the issue of whether realization is a constitutional requirement for an income tax. The Court determined that the MRT taxed income that had been realized by KissanKraft which was then attributed to the shareholders. The Court noted that Congress may either tax an entity or its shareholders/partners on undistributed income and whatever route the Congress chooses it's a tax on income. The Court held that *Eisner v. Macomber, 252 U.S. 189 (1920)* did not address the question of attribution and was inapplicable to the present case, but the majority never addressed the key question at issue – whether the 16th Amendment includes a realization requirement. The dissent (Justice Thomas, joined by Justice Gorsuch) pointed out the ridiculousness of the majority's reasoning, noting that the "text and history of the 16th Amendment make it clear that it

requires a distinction between 'income' and the 'source' from which that income is 'derived.' And, the only way to draw such a distinction is with a realization requirement." The dissent astutely pointed out that, "Even as the majority admits to reasoning from fiscal consequences, it apparently believes that a generous application of dicta will guard against unconstitutional taxes in the future. The majority's analysis begins with a list of nonexistent taxes that the Court does not today bless, including a wealth tax. And, it concludes by offering a narrow interpretation of its own holding, hinting at limiting doctrines, prejudicing future taxes, cataloguing the Government's concessions and reserving other questions 'for another day.' Sensing that upholding the MRT cedes additional ground to Congress, the majority arms itself with dicta to tell Congress 'no' in the future. But, if the Court is not willing to uphold limitations on the taxing power in expensive cases, cheap dicta will make no difference."

B. "Functional Analysis" Test Determines S.E. Tax Status of "Limited Partner"
Soroban Capital Partners LP v. Comr., 161 T.C. No. 12 (2023)

A question in self-employment tax planning is whether an LLC member is a limited partner. In 1997 the IRS/Treasury issued a proposed regulation establishing a fact-based analysis to determine limited partner status. For businesses other than those providing professional services, characterization of an LLC member's interest is determinative of whether the member has self-employment tax liability on amounts distributed to the member (other than guaranteed payments).

Here, the Tax Court confirmed *that state law classifications of a partner's interest are not conclusive on the self-employment tax issue.* However, the petitioner excluded distributions of ordinary income to its limited partners from its computation of net earnings from self-employment. Its basis for doing so was that the limited partners' interest conformed to state law. The IRS disagreed asserting that wasn't enough and that the functions and roles of the limited partners also had to be analyzed for self-employment tax purposes. The Tax Court agreed with the IRS.

The Tax Court noted that it had applied a "functional analysis" test in *Renkemeyer, Campbell & Weaver, LLP, 136 T.C 137 (2011),* but that this was the first time the Tax Court was asked to determine the self-employment tax status of limited partner in a state law limited partnership (having passed on the issue in a 2020 case).

The Tax Court determined that the functional analysis test applied based largely on statutory construction of I.R.C. §1402(a)(13) which excludes from self-employment tax "the distributive share of any item of income or loss of a limited partner, as such." The Court concluded that the "as such" language meant that there wasn't a blanket exclusion for a limited partner. Instead, the statute only applies to a limited partner that is acting as a limited partner. If a limited partner is anything more than merely an investor, self-employment tax applies to the partner's distributive share.

The Tax Court held that a functional inquiry into the roles and activities of the petitioner's individual partners under I.R.C. §1402(a)(13) "involves factual determinations that are necessary to determine Soroban's aggregate amount of net earnings from self-employment." Accordingly, the Tax Court denied the petitioner's motion for summary judgment and set forth the rule going

forward in evaluating the application of self-employment tax for limited partners in professional service businesses.

Practice Pointers:

- The proper structuring of the entity matters as does the drafting of the LLC operating agreement and the conduct of the members.
- The manager-managed LLC provides a better result than that of a member-managed LLC for LLCs that are not service partnerships. For those that are, the S corporation is the business form to use to achieve a better tax result.

C. Beneficial Ownership Information (BOI) Provisions Ruled Unconstitutional
National Small Business United v. Yellen, No. 5:22-cv-1448-LCB, 2024 U.S. Dist. LEXIS 36205 (N.D. Ala. Mar. 1, 2024)

The plaintiff, an organization with over 65,000 members, filed a constitutional challenge against the Beneficial Ownership Information Reporting requirements of the Corporate Transparency Act (CTA) that requires certain businesses to report particular ownership information to the federal government as a means of combating money laundering. The plaintiff claimed that the CTA exceeded the Constitution's limits on the power of the Congress to legislate and was not sufficiently connected to any specifically enumerated power that would make it either a necessary or proper means of achieving a policy goal of the Congress. The court rejected the government's defense of the CTA that it was constitutional under the plenary power of the Congress to conduct foreign affairs as well as under the Commerce Clause and the Congress' taxing power. The court disagreed on all claims noting that the Supreme Court had ruled in 2011 that the foreign affairs power did not extend to the CTA because the CTA regulated only internal transactions. Indeed, the court noted that informational reporting such as the BOI reporting, has historically been a matter reserved for the States. The court also determined that the provision violated the Fourth Amendment.

On the Commerce Clause claim, the court noted that, "[t]he plain text of the CTA does not regulate the channels and instrumentalities of commerce, let alone commercial or economic activity." It was not sufficient to trigger federal regulatory authority via the Commerce Clause that a business that is registered with a State then uses the channels of commerce for its business activity, even if the business activity substantially affects interstate and foreign commerce. The Congress has the power to regulate business activity but cannot require additional reporting information of a business that is already registered to do business with a State. The court noted that the Congress could have created a reporting rule that was constitutional by simply triggering the reporting requirement once a business engages in commercial business activity and pointed out that FinCEN's customer due diligence rule from 2016 provides "nearly identical information" in a constitutional manner.

The government's taxing power argument also failed, the court determined, because the civil penalties for noncompliance with the rules were not a tax – they were fixed amounts with no income thresholds and did not vary.

D. Special Use Valuation Interest Rates
Rev. Rul. 2024-16

The IRS has issued the average annual effective interest rates on new loans under the Farm Credit System for 2024. The rates are used for the rent capitalization formula contained in I.R.C. §2032A(e)(7)(A)(ii) in determining the special use valuation of real property used as a farm for which an election is made under I.R.C. §2032A. The rates by Farm Credit Bank District are as follows:

- AgFirst (DE, DC, FL, GA, MD, NC, PA, SC, VA, WV) – 5.78%
- AgriBank (AR, IL, IN, IA, KY, MI, MN, MO, NE, ND, OH, SD, TN, WI, WY) – 5.27%
- CoBank (AK, AZ, CA, CO, CT, HI, ID, KS, ME, MA, MT, NH, NJ, NM, NY, NV, OK, OR, RI, UT, VT, WA) – 5.30%
- Texas (AL, LA, MS, TX) – 5.70%