

## Contracts, Estate Planning and Wetlands

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### Overview

Digital contracts are becoming more common for farmers and ranchers. That means there are some unique legal issues that might arise. The first part of today's article takes a brief look at what those might be.

An estate planning tool in light of the uncertainty of whether the Trump tax cuts (Tax Cuts and Jobs Act (TCJA)) is a spousal lifetime access trust (SLAT). I provide a very brief explanation of what a SLAT is.

A new court decision from a federal court in Idaho provides insight as to how the Sackett test concerning the definition of a wetland under the Clean Water Act is to be applied. The case involved an Idaho farming operation. I survey the court's decision.

Digital contracts, SLATs and wetlands – the topics of today's blog

### Digital Contract Basics

There are certain core elements to every contract – offer, acceptance and consideration. And, in general, there must be a meeting of the minds as to the essence of the contract. A question is how those elements are satisfied in the context of digital contracts. For starters, any offer should include definite terms. Vague terms will be interpreted according to the parties' past course of dealing, if any, or be construed against the drafter, or be filled in based on law and precedent. Make sure you know what you are signing, whether paper or digital

In addition, an acceptance must mirror the offer. Any change in the terms means “no deal” until the original offeror accepts the new terms. So, be careful with a digital contract where you “click to accept” the contract's terms. Make sure you know what you're accepting.

Another requirement is consideration – an amount of payment. But with a digital contract what about a free trial use period? For example, could you sue a free online service provider when the product doesn't work as promised? Doubtful because of no consideration.

And make sure to read a digital contract – it's easy for the offer, acceptance and consideration to get buried in the fine print. A “meeting of the minds” is essential.



## Spousal Lifetime Access Trusts

Future tax policy is uncertain right now and a big concern for some farmers and ranchers is what the federal estate tax exemption will be after 2025. If the exemption level drops, one strategy that might be effective to lessen a future estate tax burden is a spousal lifetime access trust, or SLAT.

A SLAT is an irrevocable trust designed to provide income to a beneficiary spouse while removing the trust's assets from the grantor spouse's taxable estate. As an irrevocable trust, it can't be modified or revoked, and the assets can't be returned to the donor spouse. The trustee must ensure that the trust assets are used according to the trust's terms, and that the beneficiary spouse gets the income from the trust for life.

When the beneficiary spouse dies, the remaining trust assets pass to designated beneficiaries free of estate tax.

The technique could work well now while the estate tax exemption is high - allowing a significant amount of asset value to be transferred to the trust and offset by the exclusion. The value would also not be included in the beneficiary spouse's estate.

If a SLAT can be funded with assets that will appreciate, the tax benefits can be maximized. One downside, however, is that the ultimate beneficiaries won't get a step-up in basis at the time of the beneficiary spouse's death.

## Waters of the United States

The U.S. Supreme's Court's decision in the *Sackett* case in May of 2023 changed the way a "wetland" is defined for purposes of the federal government's jurisdiction under the Clean Water Act (CWA). The most recent lower court decision involving the new definition as applied to a farmer involves a case out of Idaho.

In *United States v. Ace Black Ranches, LLP, No. 1:24-cv-00113- DCN, 2024 U.S. Dist. LEXIS 156797 (D. Idaho Aug. 29, 2024)*, the Environmental Protection Agency (EPA) claimed that the defendant discharged "pollutants" into a navigable water of the United States (a river that passes through the defendant's ranch) and associated wetlands without a Clean Water Act discharge permit. The EPA and the U.S. Army Corps of Engineers (COE) notified the defendant that it was going to start investigating potential CWA violations. The defendant withdrew its initial consent to the investigation and filed a complaint and motion for preliminary injunction. The case was dismissed. The EPA then obtained an administrative warrant and inspected the ranch in 2021 and 2023. The EPA then sued, claiming that the ranch had violated the CWA by illegally discharging pollutants by constructing multiple road crossings in the Bruneau River (a navigable water) and associated wetlands which impeded the flow of water and polluted the river. The EPA also claimed that the defendant "disturbed the riverbed" by mining sand and gravel from the river, and that the defendant's construction of a center pivot irrigation system cleared and leveled "nearly all of the Ranch's wetlands." The EPA sought a permanent injunction that would bar the ranch from further discharges and would require the ranch to restore the impacted parts of the river.



The ranch moved for dismissal for failure to state a claim. The court granted the defendant's motion and dismissed the case. The court determined that the EPA failed to sufficiently specify in its complaint that the wetlands at issue had a continuous surface connection with the Bruneau River to be considered indistinguishable from it (the requirement needed to satisfy the "adjacency test" established in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023)). It was not enough for the EPA to assert that it could clear up any confusion during discovery. The court noted that the EPA had to put forth sufficient allegations at the pleading stage to entitle it to discovery. As such, the EPA failed to state a claim upon which relief could be granted. However, the court gave the EPA an opportunity to amend its complaint within 30 days of the court's order.

Til next time...

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