Property Rights Edition - Irrigation Return Flows; PFAS; and the Quiet Title Act

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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.

PFAS and Rural Landowners

A PFAS is a widely used, long lasting chemical having components that break down slowly over time that have been used since the 1940s. It is found in water, air and soil all over the globe and are used for many commercial and industrial products. Some studies have shown that exposure to PFAS may be linked to harmful health effects in humans and animals. PFAS are a group of more than 15,000 chemicals that are associated with various cancers and other health problems.

Note: Presently, there is no known method for cleaning up PFAS contamination.

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.

Note: 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. Indeed, in 2019, PFAS were discovered on farms in Maine and New Mexico resulting in the disposal of most of the livestock on the farms.

In 2022, a Michigan 400-acre cattle farm (a Century Farm) was forced to shut down due to high levels of PFAS in the beef products from his cattle and in the soil at his farm. The farm received biosolids from a municipal wastewater treatment plant to fertilize his crops which he later harvested and fed to his cattle. Biosolids are a cost-effective fertilizer and are EPA-approved. Unfortunately, the biosolids before they were sold to the cattle farm and, as a result of the PFAS investigation at the farm, beef products from the farm can no longer be marketed. Normal screening is for pathogens and heavy metals (e.g., lead, arsenic and mercury), but most states don't test biosolids for PFAS. However, Michigan does conduct extensive PFAS investigations that includes testing municipal water systems and watersheds that have suspected contamination.

The farm has sued an auto parts supplier (filed Aug 12, 2023, in Livingston County, MI) for the release of PFAS (hexavalent chromium) into the wastewater system that allegedly contaminated the biosolids. The lawsuit seeks tens of millions of dollars in punitive damages to help cover the cost of remediating the farm's soil and groundwater.

Note: The State of Kansas does not currently test for PFAS in wastewater. Sampling has occurred of a select number of mechanical wastewater plants for PFAS in the plants' effluent since 2022, but the Kansas Department of Health and Environment has not sampled biosolids from those facilities.

In early 2024, several Texas farmers filed suit against a major biosolid provider for manufacturing and distributing contaminated biosolid-based fertilizer that was applied to the plaintiffs' farm fields resulting in damage to the land and personal health problems. *Farmer, et al. v. Synagro Technologies, Inc., No. C-03-CV-24-000598 (filed, Feb. 27, 2024, Baltimore Co. Maryland).* The claim is that the defendant either knew or should have known that it was putting a contaminated (defective) product in commerce. The plaintiffs' claims are couched in strict liability product defect, negligence and private nuisance.

Some states have taken preemptive action. For example, Maine has banned land application of biosolids and set up a fund for impacted farmers. Other states are looking into providing compensation for disaffected farmers.

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 activity that impacts 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.

Wilkins could turn out to be a key case in the battle of property rights versus the federal government.