

More “Stuff” in the Ag Law and Tax World

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
September 2024

Agricultural Law and Taxation Blog, by Roger McEowen: <https://lawprofessors.typepad.com/agriculturallaw/>
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Overview

Agricultural law and taxation is very dynamic. It deals with real issues facing farmers and ranchers and isn't just legal theory that one sits around and contemplates – it's reality.

With today's article, I look at a few more common issues facing farmers, ranchers and rural landowners in general.

SAF fuel, R&D credit, drones and cleaning fencerows – these are the topics of today's post.

Sustainable Aviation Fuel

The USDA's "Climate Smart Agriculture (CSA) Program" establishes practices for cultivating corn and soybeans for use as sustainable aviation feedstocks. A clean fuel tax credit is available for those that sell or use sustainable aviation fuel or SAF, and farmers are being incentivized to adopt "sustainable" farming practices to grow crops used to produce the fuel. The credit applies for each gallon of SAF produced. The purported idea is to reduce greenhouse gas emissions.

USDA received millions of dollars under the Green New Deal (a.k.a. the "Inflation Reduction Act of 2022) and then established the idea of CSA farming practices. A tax credit was also created for 2023 and 2024 (I.R.C. §40B) for the production of "clean" fuel. The whole deal is "hooked" together via contracts between USDA and major national commodity groups who, in turn, enter into agreements with third parties to certify that a farmer (who is also a contracting party) is growing corn and soybeans in an approved manner. Essentially, a corn or soybean farmer must use no-till and cover crops.

An ethanol plant receiving the crops grown in the government-approved manner can reduce its carbon score perhaps enough that the SAF produced will qualify the plant for a credit (switching to I.R.C. §45Z after 2024) for 2025 and 2026.

But there's no way to "identity preserve" corn and make sure that's the only corn that goes into the SAF. Another problem is that powering airplanes with crops is inefficient and unsustainable. Some studies indicate that it takes 1.7 gallons of corn ethanol to produce a gallon of SAF. To reach the U.S. goal of 35 billion gallons of ethanol-based SAF, 114 million acres of corn will be needed. Another "laugh" in all of this is that the government, in putting together the model to measure the reduction in a plant's carbon score as a result of the way crops are produced, didn't account for the fuel used in producing the crops.



Oh, in one of the producer contracts I reviewed recently for farmer, the following provision was included:

“Lifecycle Emissions Reductions. The [national commodity organization] Partnership for Climate-Smart Commodities will compensate Producer for practices believed to contribute to lifecycle GHG emissions reductions. *This compensation is in no way based on real or perceived soil carbon sequestration.*” [emphasis added].

Carbon reduction... yeah... I am thinking the point of all of this is something other than reducing carbon. Be careful of any crop production contracts that you sign.

Research and Development Credit

A business can potentially be eligible for a tax credit for qualified expenses associated with research and development (R&D). Over the years, Congress has expanded the availability of the credit, and many farmers may now qualify to take it. But the provision is quite detailed and there are some unscrupulous promoters.

The R&D tax credit might apply if your farming operation has qualifying research expenses. The credit could be about 10 to 15 percent which can reduce payroll tax or your overall tax burden. But there’s a four-part test you must satisfy. The research must create a new or improved product or process to increase performance, function, reliability or quality. The research must also involve experimentation and minimize uncertainty about the development of a product or process. Finally, the research must rely on hard sciences such as engineering, chemistry or biology.

Can it work for you? Possibly. The IRS says your entire farm is not a research lab. But expenses associated with a test plot might work. That’s a point some promoters don’t clearly make. Indeed, last year the IRS criminal investigation division examined an R&D promoter that was aggressively targeting farmers.

Also, you probably should incur at least \$100,000 of qualified expenses to make it worthwhile for tax purposes.

Drones, Privacy and the U.S. Supreme Court

The use of drones in agriculture is increasing. Some of the uses of drones include scouting crops and monitoring livestock. But drones can also be used for questionable purposes. Soon the U.S. Supreme Court will consider whether to hear a case involving the Texas drone law.

All states have drone laws outlining the permissible and impermissible use of drones. The Texas law, like many other states, has surveillance provisions and no-fly provisions. The law says that a drone can’t be used to capture an image of an individual or privately owned real property with the intent to conduct surveillance. Newsgathering is not an exempted use. And, the law’s no-fly provision makes it unlawful to fly a drone over certain structures including a confined animal feeding operation.

Two media organizations challenged the law as unconstitutional on free speech grounds and the trial court agreed. But the appellate court reversed. Now the U.S. Supreme Court is going to consider



whether to take the case at a conference on September 30. The case is an important one for agriculture, particularly because of the vulnerability of farming and ranching operations and agribusinesses that have property in the open to being surveilled by the government., as well as organizations that want to do them harm. That last point is particularly true with respect to confinement animal operations.

The case is *National Press Photographers Association v. McCraw*, 90 F.4th 770 (5th Cir. 2024), *pet. for cert. filed*, No. 23, 1105 (Apr. 9, 2024).

Issues when Cleaning Out a Fencerow

Cleaning up fencerows seems to be an ongoing project. But the cleanup process can generate legal issues that you might not have thought about. For example, what should you do if there's a tree in the fence line? In that situation, each adjacent owner has an ownership interest in the tree. It's considered to be jointly owned, and you could be liable for damages if you cut it down and your neighbor objects. But, if only the branches or roots of a tree extend past the property line and onto an adjoining neighbor's property, the branches and roots don't give the neighbor an ownership interest in the tree. In that situation, you can trim the branches that hang over onto your property. That's an important point, for example, if you are dealing with a thorn tree that can puncture tires.

Always make sure to trim branches, bushes and vines on a property line with care. Keep the neighbor's rights in mind when doing the cleanup work. Maintaining good communication is always beneficial when property line work is involved. Also, if a neighbor's tree falls onto your property, it's your responsibility to clean up the mess – but you can keep the resulting firewood. The converse is also true. And, it's not a trespass to be on your neighbor's side of the fence when doing fence maintenance, such as cleaning out a fence row.

Conclusion

That's another "snippet" of various legal and tax issues. More next time.

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