Top Ag Law and Tax Developments of 2022 – Numbers 6 and 5

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Overview

Today's article is another installment on what I believe to be the Top 10 developments in agricultural law and agricultural taxation of 2022. Today, I look at developments number six and five.

No. 6 – Caselaw and Legislative Developments on "Ag Gag" Provisions

2022 saw further developments in the courts and in state legislatures involving legislative attempts 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.

In *Animal Legal Defense Fund, et al. v. Reynolds, et al., No. 4:21-cv-00231-SMR-HCA (S.D. Iowa. Sept. 26, 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 Court (the same 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 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.

According to the court's view, it seems practically impossible for farmers to protect their farming operations from those who intend to inflict harm via protected "speech." Is the court saying that there

is a constitutional right to trespass? If so, that is flatly contrary to the recent U.S. Supreme Court opinion of *Cedar Point Nursery, et al. v. Hassid, et al., No. 20-107, 2021 U.S. LEXIS 3394 (U.S. Sup. Ct. Jun. 23, 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.

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).*

No. 5 – WOTUS Final Rule

On December 30, 2022, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COA). On December 30, 2022, the agencies announced the final "Revised Definition of 'Waters of the United States'" rule which will become effective on March 20, 2023. It represents a "change of mind" of the agencies from the positions that they held concerning a water of the United States (WOTUS) and wetlands from just over three years ago. The bottom line is that the new interpretation is extremely unfriendly to agriculture, particularly to farmland owners in the prairie pothole region of the upper Midwest.

As promised, the Final Rule uses a definition that was in place before 2015 (for purposes of the Clean Water Act) for traditional navigable waters, territorial seas, interstate waters, and upstream water resources that "significantly" affect those waters.

Note: Two joint memos were published with the final rule to set forth the delineation of the implementation of roles and responsibilities between the agencies. One is a joint coordination memo to "ensure accuracy and consistency of jurisdictional determinations under the final rule." The other is a memo with the USDA to provide "clarity on the agencies' programs under the Clean Water act and the Food Security Act (Swampbuster)."

Adjacency. The EPA wants to restore the "significant nexus" via "adjacency." This is 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.

Specifically, the Final Rule sets forth two kinds of adjacency: 1) the traditional "relatively permanent" standard; and 2) the "significant nexus" standard. The EPA and the COE say the agencies will not assume that all wetlands in a specific geographic area are similarly situated and can be assessed together on a watershed basis in a significant nexus analysis. But it is clear from the Final Rule that the agencies intend to expand jurisdiction over isolated prairie pothole wetlands using the "significant nexus" standard.

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 U.S. Supreme Court. A case is presently pending before the U.S. Supreme Court involving the definition of a WOTUS. In *Sackett v. Environmental Protection Agency, 8 F.4th 1075 (9th Cir. 2021), cert, granted, 142 S. Ct. 896 (2022).* The issue in the case is whether the U.S. Circuit Court of Appeals for the Ninth Circuit used the proper test for determining whether wetlands are "waters of the United States" under the CWA. Oral argument occurred in early October of 2022. The Court's opinion is anticipated sometime before mid-March of 2023, but the issuance of the Final Rule may cause that to be delayed. In any event, the Supreme Court will have the final say on what a WOTUS rather than the COE or the EPA.

Conclusion

Next time I will look at developments four and three.