The Top Ten: Part 1

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Overview

With today's article I start my annual trek through what I believe to be the "Top 10" ag law and tax developments of the previous year. It's always difficult to determine the ten "big ones." I start with a much larger list and slowly pair it down. Some significant ones always get left on the cutting room floor. But, what I am looking for are those developments that I think will have the biggest impact on the agricultural production sector as a whole.

With that in mind, the following is what I see as developments Nos. 10-8 in agricultural law and taxation for 2024.

10. States' Water Compact Must Include Federal Government. 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. At the time of the Compact's approval in 1939, there wasn't as much groundwater pumping as there is now. Beginning in the 1950s groundwater pumping increased. Because of the interconnectedness of groundwater and surface water, the increase in groundwater pumping decreased the amount of surface water in the Rio Grande Basin that flowed to Texas. 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 that introduced some additional metrics to account for changed circumstances in the Basin since 1939. 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. That's a key point. The Supreme Court did not rule that the Constitution requires the

Congress to be involved in every state water law Compact, just that the facts of this case involved Congressional involvement. The case was sent back to the special master assigned to the matter (basically a person (in this instance a senior appellate judge from the U.S. Court of Appeals for the Eighth Circuit) who acts as a one-person jury. *Texas v. New Mexico, 602 U.S. 943 (2024).*

9. Public Lands Rule. The Bureau of Land Management (BLM) published a new "Public Lands Rule" in the Federal Register on May 9, 2024. *89 Fed. Reg. 40308.* The Rule is part of the Biden/Harris administration's effort to conserve at least 30 percent of U.S. lands and waters by 2030 and is projected to apply to approximately 245 million acres of public lands – about one tenth of the U.S. land area Since then, multiple lawsuits were 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. Later in 2024, the American Farm Bureau Federation and 10 other groups filed an action in federal court challenging the validity of the Rule. Bureaus of Land Management's (BLM) Public Lands Rule (Rule). The Rule, published at *89 Fed. Reg. 40308 (May 9, 2024),* prioritizes land conservation via restoration and mitigation by restricting grazing on public lands. The Rule is being challenged as exceeding the BLM's authority under the Federal Land Policy and Management Act in that the Rule sets aside land for conservation which is a power the Congress has reserved for itself and is vague in when land can or will be set aside for mitigation or restoration. The case is *American Farm Bureau Federation, et al. v. U.S. Department of the Interior, et al. No. 2:24-cv-00136 (D. Wyo. filed Jul. 12, 2024).*

Note: Grazing issues will continue to be big in 2025. Will a change in Administration mitigate these disputes on federal rangeland? Only time will tell.

8. Takings" Cases at the U.S. Supreme Court. In 2024, the U.S. Supreme Court decided two cases involving "takings" under the Fifth Amendment where the implications of the Court's decisions will be important to agriculture.

In the first case, the family involved in *Devillier* 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. The family sued the State of Texas to get paid for the Taking.

Note: Constitutional rights don't usually come with a built-in cause of action that allows for private enforcement in courts – in other words, "self-executing." They're generally invoked defensively under some other source of law or offensively under an independent cause of action.

The family claimed that the Takings Clause is an exception based on its express language – "nor shall private property be taken for public use, without just compensation." The case was removed to federal court and the family won at the trial court. However, the appellate court dismissed the case on the basis that the Congress hadn't passed a law saying a private citizen could sue the state for a constitutional taking. In other words, the federal appellate court determined that the Fifth Amendment's Takings Clause isn't "self-executing."

The U.S. Supreme Court agreed to hear the case with the question being what the procedural vehicle is that a property owner uses to vindicate their right to compensation against a state. The U.S. Supreme Court unanimously reversed the lower court, although it did not hold that the Fifth Amendment is "self-executing." Texas does provide an inverse condemnation cause of action under state law to recover lost value by a Taking. The Supreme Court noted that Texas had assured the Court that it would not oppose the complaint being amended so that the case could be pursued in federal court based on Texas state law. *Devillier v. Texas, 144 S. Ct. 938 (2024).*

In the second case, a landowner sought to build a modest residential home and 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 landowner 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. *Sheetz v. El Dorado County, 144 S. Ct. 893 (2024).*

Conclusion

Property rights were at issue in each of these developments. Next time I continue the journey through the list as I count down to the top development of 2024.