Top Ten Developments in Agricultural Law and Taxation in 2023-Part 1

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Overview

With my two prior blog articles I started looking at some of the most significant developments in agricultural law and taxation during 2023. With today's article I begin the look at what I view as the ten most significant developments in 2023. These make my Top Ten list because of their significance on a national level to farmers, ranchers, rural landowners and agribusiness in general.

Developments ten through eight of 2023 – that's the topic of today's post.

10. Entire Commercial Wind Development Ordered Removed

United States v. Osage Wind, LLC, No. 4:14-cv-00704-CG-JFJ,

2023 U.S. Dist. LEXIS 226386 (N.D. Okla. Dec. 20, 2023)

In late 2023, a federal court ordered the removal of an entire commercial wind energy development (150-megawatt) in Oklahoma and set a trial for damages. The litigation had been ongoing since 2011 and was the longest-running legal battle concerning wind energy in U.S. history. The ruling follows a 2017 lower court decision concluding that construction of the development constituted "mining" and required a mining lease from a tribal mineral council which the developers failed to acquire. *United States v. Osage Wind, LLC, 871 F.3d 1078 (10th Cir. 2017).* The court's ruling granted the United States, the Osage Nation and the Osage Minerals Council permanent injunctive relief via "ejectment of the wind turbine farm for continuing trespass."

The wind energy development includes 84 towers spread across 8,400 acres of the Tallgrass Prairie involving leased surface rights, underground lines, overhead transmission lines, meteorological towers and access roads. Removal costs are estimated at $300 million. In 2017, the U.S. Circuit Court of Appeals for the Tenth Circuit held that the wind energy company's extraction, sorting, crushing and use of minerals as part of its excavation work constituted mineral development that required a federally approved lease. The company never received one. The Osage Nation owns the rights to the subsurface minerals that it purchased from the Cherokee Nation in the late 1800s pursuant to the Osage Allotment Act of 1906. The mineral rights include oil, natural gas and the rocks that were mined and crushed in the process of developing the project.

In its decision to order removal of the towers, the court weighed several factors but ultimately concluded that the public interest in private entities abiding by the law and respecting government

sovereignty and the decision of courts was paramount. The court pointed out that the defendant's continued refusal to obtain a lease constituted interference with the sovereignty of the Osage Nation and "is sufficient to constitute irreparable injury."

Note: The lengthy litigation resulting in the court's decision is representative of the increasing opposition in rural areas to wind energy production grounded in damage to the viewshed, landscape and wildlife. During 2023, including the court's opinion in this case, there were 51 restrictions or rejections of wind energy projects and 68 rejections of solar energy projects. See, Renewable Rejection Database, https://robertbryce.com/renewable-rejection-database/

9. Reporting Foreign Income

Bittner v. United States, 598 U.S. 85 (2023)

The Bank Secrecy Act of 1970 requires U.S. financial institutions to assist U.S. government agencies in detecting and preventing money laundering by, among other things, maintaining records of cash purchases of negotiable instruments, filing currency transaction reports for cash transactions exceeding $10,000 in a single business day, and reporting suspicious activities that might denote money laundering, tax evasion and other crimes. The law also requires a U.S. citizen or resident with foreign accounts exceeding $10,000 to report those account to the IRS by filing FinCEN Form 114 (FBAR) by the due date for the federal tax return. The failure to disclose foreign accounts properly or in a timely manner can result in substantial penalties.

In this case, the plaintiff was a dual citizen of Romania and the United States. He emigrated to the United States in 1982, became a U.S. citizen, and lived in the United States until 1990 when he moved back to Romania. He had various Romania investments amounting to over $70 million. He had 272 foreign accounts with high balances exceeding $10,000. He was not aware of the FBAR filing requirement for his non-U.S. accounts until May of 2012. The initial FBARs that he filed did not accurately report all of his accounts. In 2013, amended FBARs were filed properly reporting all of his foreign accounts. The IRS audited and, in 2017, computed the plaintiff's civil penalties at $2,720,000 for a non-willful violation of failing to timely disclose his 272 foreign account for five years 2007-2011.

The plaintiff denied liability based on a reasonable cause exception. He also claimed that the penalty under Section 5321 of the Bank Secrecy Act applied based on the failure to file an *annual* FBAR reporting the foreign accounts, and that the penalty was not to be computed on a *per account* basis.

The trial court denied the plaintiff's reasonable cause defense and held him liable for violations of the Bank Secrecy Act. The trial court determined that the penalty should be computed on a per form basis and not on a per account basis. Thus, the trial court computed the penalty at $50,000 ($10,000 per year for five years). On appeal, the appellate court affirmed on the plaintiff's liability (i.e., rejected the reasonable cause defense), but determined that the penalty was much higher because it was to be computed on a per account basis.

On further review, the U.S. Supreme Court (in a 5-4 decision) determined that the penalty was to be computed on a *per form* basis and not a *per account* basis. The Court's holding effectively reduced the

plaintiff's potential penalty from $2.72 million to $50,000. The majority relied on the text, IRS guidance, as well as the drafting history of this penalty provision in the Bank Secrecy Act. The Court did not address the question of where the line is to be drawn between willful and non-willful conduct for FBAR purposes.

Note: The Supreme Court's decision was a major taxpayer victory. However, the point remains that foreign bank accounts with a balance of at least $10,000 at any point during the year must be reported. This is an important point for U.S. citizen farmers and ranchers with farming interests in other countries.

8. New Corporate Reporting Requirements

Corporate Transparency Act (CTA), P.L. 116-283

Overview. The Corporate Transparency Act (CTA), P.L. 116-283, enacted on January 1, 2021 (as the result of a veto override), as part of the National Defense Authorization Act, was passed to enhance transparency in entity structures and ownership to combat money laundering, tax fraud and other illicit activities. In short, it's an anti-money laundering initiative designed to catch those that are using shell corporations to avoid tax. It is designed to capture more information about the ownership of specific entities operating in or accessing the U.S. market. The effective date of the CTA is January 1, 2024.

Who needs to report? The CTA breaks down the reporting requirement of "beneficial ownership information" between "domestic reporting companies" and "foreign reporting companies." A domestic reporting company is a corporation, limited liability company (LLC), limited liability partnership (LLP) or any other entity that is created by filing of a document with a Secretary of State or any similar office under the law of a state or Indian Tribe. A foreign reporting company is a corporation, LLC or other foreign entity that is formed under the law of a foreign country that is registered to do business in any state or tribal jurisdiction by the filing of a document with a Secretary of State or any similar office.

Note: Sole proprietorships that don't use a single-member LLC are not considered to be a reporting company.

Reporting companies typically include LLPs, LLLPs, business trusts, and most limited partnerships and other entities are generally created by a filing with a Secretary of State or similar office.

Exemptions. Exemptions from the reporting requirement apply for securities issuers, domestic governmental authorities, insurance companies, credit unions, accounting firms, tax-exempt entities, public utility companies, banks, and other entities that don't fall into specified categories. In total there are 23 exemptions including an exemption for businesses with 20 or more full-time U.S. employees, report at least $5 million on the latest filed tax return and have a physical presence in the U.S. But, for example, otherwise exempt businesses (including farms and ranches) that have other businesses such as an equipment or land LLC or any other related entity will have to file a report detailing the required beneficial ownership information. Having one large entity won't exempt the other entities.

What is a "Beneficial Owner"? A beneficial owner can fall into one of two categories defined as any individual who, directly or indirectly, either:

- Exercises substantial control over a reporting company, or
- Owns or controls at least 25 percent of the ownership interests of a reporting company

Note: Beneficial ownership is categorized as those with ownership interests reflected through capital and profit interests in the company.

What must a beneficial owner do? Beneficial owners must report to the Financial Crimes Enforcement Network (FinCEN). FinCEN is a bureau of the U.S. Department of the Treasury that collects and analyzes information about financial transactions to combat domestic and international money laundering, terrorist financing and other international crimes. Beneficial owners must report their name, date of birth, current residential or business street address, and unique identifier number from a recognized issuing jurisdiction and a photo of that document. Company applicants can only be the individual who directly files the document that creates the entity, or the document that first registers the entity to do business in the U.S. A company applicant may also be the individual who is primarily responsible for directing or controlling the filing of the relevant document by someone else. This last point makes it critical for professional advisors to carefully define the scope ot engagement for advisory services with clients.

Note: If an individual files their information directly with FinCEN, they may be issued a "FinCEN Identifier" directly, which can be provided on a BOI report instead of the required information.

Filing deadlines. Reporting companies created or registered in 2024 have 90 days from being registered with the state to file initial reports disclosing the persons that own or control the business. *NPRM (RIN 1506-AB62) (Sept 28, 2023).* If a business was created or registered to do business before 2024, the business has until January 1 of 2025 to file the initial report. Businesses formed after 2024 must file within 30 days of formation. Reports must be updated within 30 days of a change to the beneficial ownership of the business, or 30 days from when the beneficial owner becomes aware of or has reason to know of inaccurate information that was previously filed.

Note: FinCEN estimates about 32.6 million BOI reports will be filed in 2024, and about 14.5 million such reports will be filed annually in 2025 and beyond. The total five-year average of expected BOI update reports is almost 12.9 million.

Penalties. The penalty for not filing is steep and can carry the possibility of imprisonment. Specifically, noncompliance can result in escalating fines ranging from $500 per day up to $10,000 total and prison time of up to two years.

State issues. A state is required to notify filers upon initial formation/registration of the requirement to provide beneficial ownership information to the FinCEN. In addition, states must provide filers with the appropriate reporting company Form.

How to report. Businesses required to file a report are to do so electronically using FinCEN's filing system obtaining on its BOI e-filing website which is accessible at https://boiefiling.fincen.gov.

Note: On December 22, 2023, FinCEN published a rule that governing access to and protection of beneficial ownership information. Beneficial ownership information reported to FinCEN is to be stored in a secure, non-public database using rigorous information security methods and controls typically used in the Federal government to protect non-classified yet sensitive information systems at the highest security level. FinCEN states that it will work closely with those authorized to access beneficial ownership information to ensure that they understand their roles and responsibilities in using the reported information only for authorized purposes and handling in a way that protects its security and confidentiality.

Conclusion

I will continue the trek through the "Top Ten" of 2023 in the next post.