

Ag Law Update (& Two Pet Peeves)

*Online Master Marketer
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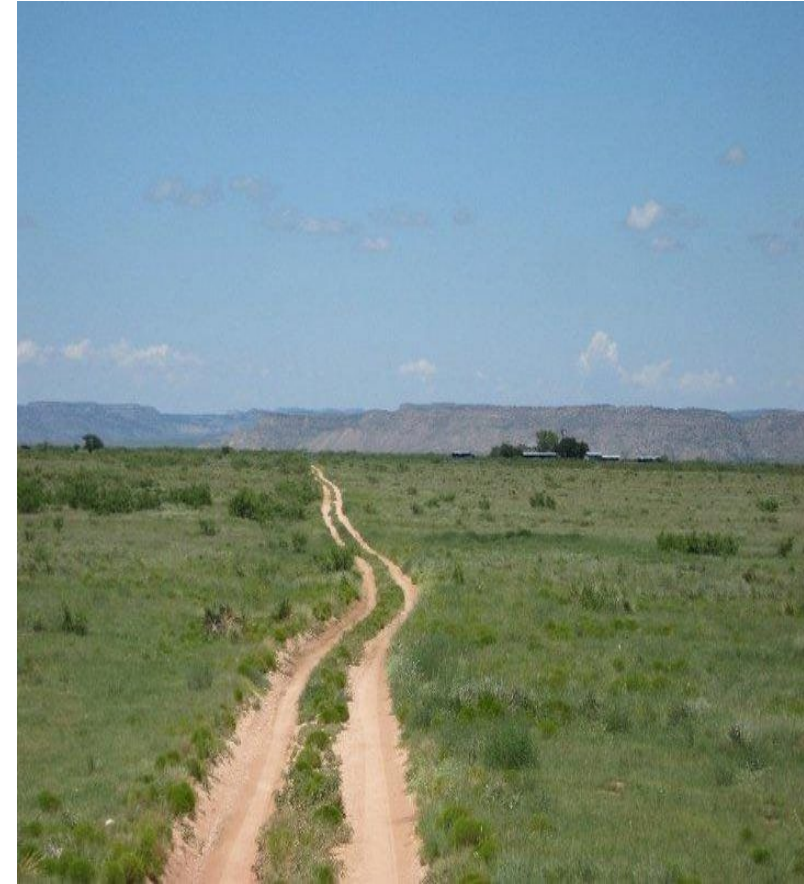
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Roadmap

- Agricultural Law Resources
- Carbon Contracts
- WOTUS Debacle
- SCOTUS Docket
- Foreign Ag Land Ownership Laws
- Honorable Mentions
- Two Pet Peeves



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Click for a hub of Extension resources related to the current COVID-19 situation. **COVID-19 Resources**

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Category Archives: Estate Planning

January 29, 2021 Weekly Round Up
Posted on [January 29, 2021](#) by [tiffany.dewell](#)

Happy Friday! It's been a busy week here as I have been working with several of my colleagues in the Texas A&M Agricultural Economics Department on a series of educational videos on the legal and economic issues related to hemp production. If this is a topic of interest to you, be sure you subscribe to this blog as we will be releasing our videos and written materials within the next month! Here are some of the ag law stories in the news over the past couple of weeks...

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January 15, 2021 Weekly Round Up
Posted on [January 15, 2021](#) by [tiffany.dewell](#)

Happy 2021, friends! We hope you all had a happy, healthy holiday and we are excited to be back for our first Weekly Round Up of the year. Here are some of the major agricultural law stories in the news over the past couple of weeks. * Lawsuit filed seeking to overturn recent dicamba registration. On December 22, several environmental groups filed suit against the US Environmental Protection Agency challenging the recent approval of the use of over-the-top dicamba products through 2025. Specifically, the lawsuit claims that the...

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Carbon Contracts



What Are We Even Talking About?



UNITED AIRLINES
A STAR ALLIANCE MEMBER

100% green
Carbon neutral by 2050.



Key Considerations

- READ THE CONTRACT!
- Payment structure (practice or outcome)?
- Potential for sequestration in your area?
- Know you can almost never “just walk away.”
- What other uses allowed?
- Breadth of stacking prohibition?
- Right to assign?
- Data must be provided?



WOTUS Debacle



Waters of the United States

- Clean Water Act gives EPA & US COE federal jurisdiction over “waters of the United States”
- But...didn't define that term
- 50 years of confusion
 - *Rapanos* 4-1-4 decision
 - Scalia Plurality: Relatively permanent body of water; wetland must abut
 - Kennedy Concurring: “Significant nexus”
- 2015 Obama WOTUS definition
 - Significant nexus
- 2020 Trump definition
 - Relatively permanent bodies of water



Biden Rule

- Announced December 30; effective March 20.
- Significantly affect or relatively permanent.
- Jurisdictional:
 - Traditional navigable waters (are, were, could be used in ISC)
 - Impoundments of waters otherwise classified as WOTUS
 - Tributaries of TNW or impoundments that are either relatively permanent or alone or with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of a TNW.
 - Wetlands adjacent to TNW, relatively permanent or significantly affect...
 - Interstate lakes, ponds, streams, wetlands not included above that are relatively permanent and share a surface connection with a TNW, impoundment or tributary or significantly affects...

Biden Rule (cont.)

- Definitions
 - Adjacent: bordering, contiguous, neighboring including wetlands separated by man made dikes/barrier, natural river berms, beach dunes & the like.
 - Significantly affect: a material influence on the chemical, physical, or biological integrity of” traditional navigable waters.
 - Factors to consider: contribution of flow; trapping, transformation, filtering, and transport of materials such as nutrients or sediment; retention and attenuation of floodwaters and runoff; modulation of temperature in traditional navigable waters; and provision of habitat and food resources for aquatic species located in traditional navigable waters. The factors to be considered include: the distance from a traditional navigable water; hydrologic factors such as the frequency, duration, magnitude, timing, and rate of hydrologic connections; the size, density, or number of waters that are similarly situated; landscape and geomorphology; and climate variables such as temperature, rainfall, and snowpack
- Exceptions
 - Prior converted cropland
 - Ditches that do not carry relatively permanent flow
 - Artificially irrigated areas would revert to dry land if irrigation stopped.
 - NOT included: groundwater

But wait...there's more.

- Lawsuits have already been filed against Biden rule.
 - In S.D. Texas by AFBF by number of ag, trade, building groups
 - In S.D. Texas by State, TCEQ, RRC, TDA, GLO, DOT
- *Sackett v. EPA* pending at US Supreme Court



SCOTUS Docket



WOTUS

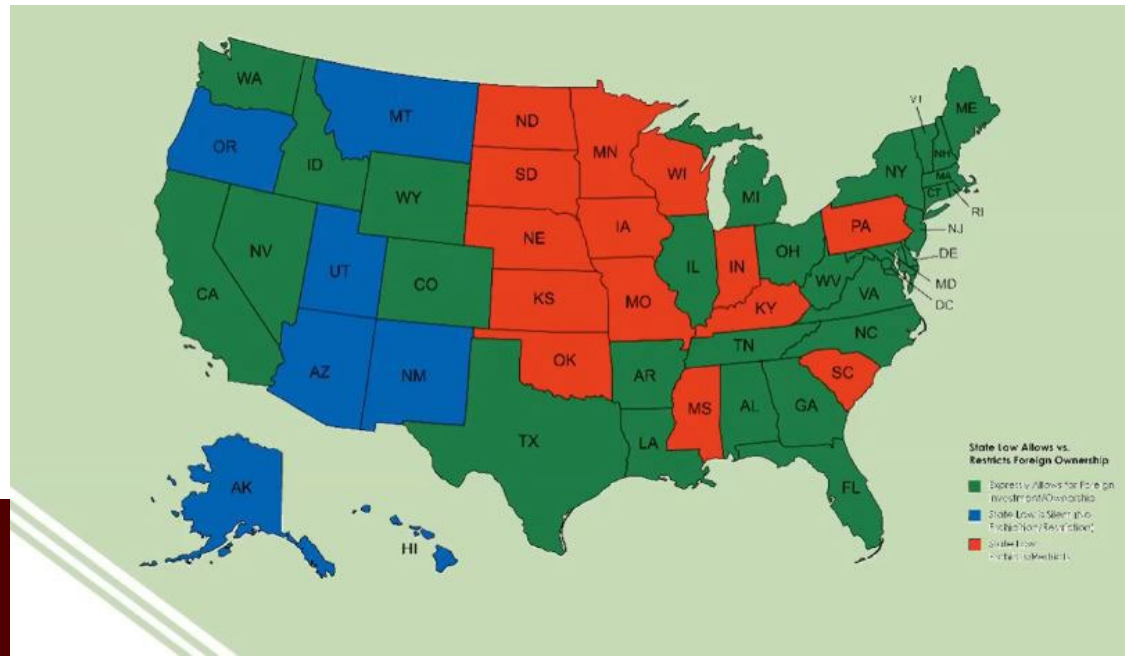
- *Sackett v. EPA*
- Sacketts buy residential lot next to lake in Idaho. EPA says can't place fill on lot because property is a wetland and jurisdictional WOTUS. They say it isn't a WOTUS.
- US Court of Appeals for the Ninth Circuit applies Kennedy's "significant nexus test" and finds the property is a WOTUS because it is across the road from a lake (adjacent), shallow surface water connection to the lake.
- SCOTUS grants cert on question of whether 9th Circuit correctly applied the WOTUS test.
- Oral argument held on October 3.
- Court looks very different now than in *Rapanos*...

Proposition 12

- *National Pork Producers v. Ross*
- Prop 12 makes it illegal to sell pork in California unless the pig from which it comes was born to a sow housed with 24-square feet of space & in conditions that let her turn around freely and not touch the pen.
- Lawsuit by NPPC & AFBF claim this violates the dormant commerce clause:
 - Impermissibly extraterritorial
 - Fails test balancing significant burden on interstate commerce v. importance of the law.
- Trial court and US Court of Appeals for the Ninth Circuit dismissed.
- SCOTUS heard oral argument October 11.

Foreign Ag Land Ownership Laws

- Laws prohibiting ownership/leasing of land/ag land by certain foreign individuals/companies.
- No federal law—but Ag Foreign Investment Disclosure Act does require reporting to USDA.
- 14 states have; currently pending in 18 states, including Texas.



Foreign Ag Land Ownership Laws

- Common features in state laws
 - Where: All land, ag land, land near military bases
 - What: Some ownership, some leasing
 - Who: Foreign governments, foreign companies, foreign individuals; some only to certain countries (China, Iran, Russia, North Korea)
 - Exceptions
 - Acreage limit
 - Inheritance
 - Grandfather clause
 - Security interest

Bills Currently Proposed in Texas

- **SB147: Prohibit individuals, foreign businesses (if HQ or held/owned by govts or majority individuals from), and government entities from China, NK, Iran, Russia from investing/acquiring real property.**
- **SB552: Prohibit individual or business entity from entering into agreement related to ag land with individuals from China, NK, Iran, Russia or other country deemed by governor as a threat to CI or ag land or with a company if the company would have access to/control of ag land and the company is HQ or majority owned by citizens of those countries.**
- **HB1075: Prohibits foreign government & entities controlled/owned by citizens thereof from purchasing/acquiring/leasing ag land. Would not renew interest terminates after 9/1/23.**

Honorable Mentions

- *National Press Photographers Assn v. McCraw*
 - Texas drone law prohibited using a drone to capture image of individual or privately owned property with the intent to “conduct surveillance” with a number of exceptions; unlawful to fly drones over certain facilities with exceptions for commercial purposes.
 - Court says violates First Amendment.
- *Hlavinka v. HSC Pipeline*
 - Condemnation case; property with 25 pipeline easements.
 - TXSC allows testimony from landowner about prior arms-length pipeline sales in determining value.
 - Even one non-affiliated contract may be sufficient for ED power.
- *Pape Partners v. DRR Family Properties*
 - Who should determine ownership of surface water rights?
 - TXSC says courts, not the TCEQ.

Two Pet Peeves



Two Important Pet Peeves

- Get your farm/ranch leases in writing and (tenants!) record them in the deed records at the courthouse!
- If you are relying on a kind neighbor, a handshake, “we’ve always gone across there” to access property, get that written into an easement form and recorded in the deed records!



Thank you!

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