Agricultural Law Update

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Inside This Issue

A WORD FROM THE EDITORS

FEATURE ARTICLES: TOPICS FROM THE 2021 AALA SYMPOSIUM

Solar Development on Agricultural Lands: Five Questions Every Landowner (and Their Attorney) Should Ask, Brianna J. Schroeder, Paul Goeringer, and Shannon L. Ferrell 2

Updates to the Agricultural Law Updates

Agricultural Finance, Jeffrey A. Peterson 4
Food Law, Susan Schneider 6
Environmental Law, Anthony Schutz 8
Tax Law, Kristine Tidgren 8
Land Use and Resource Law, Jesse Richardson 10

A Word from the Editorial Committee

This issue of the Ag Law Update highlights the annual conference from November. The feature article builds upon one of the favorite sessions at the conference- solar leases. The remaining articles provide mid-year updates to the ever-popular Ag Law Updates presented at the annual conference. Thanks to all of the authors of the articles for taking time out from their busy schedules to contribute to this issue. If anyone has suggestions for themes for future issues or wants to volunteer to contribute an article, please let one of the editors know.

AALA Update Editorial Committee
Peggy Kirk Hall, The Ohio State University, aglaw@osu.edu

Jesse Richardson, West Virginia University College of Law, jesse.richardson@mail.wvu.edu

Jackie Schweichler, Penn State Law, jks251@psu.edu

Solar Development on Agricultural Lands: Five Questions Every Landowner (and Their Attorney) Should Ask

Brianna J. Schroeder, Paul Goeringer, and Shannon L. Ferrell

Brianna Schroeder is a partner at Janzen Schroeder Ag Law LLC., Paul Goeringer is a Senior Faculty Specialist and Extension Legal Specialist, Department of Agricultural and Resource Economics, University of Maryland, and Shannon L. Ferrell is an Associate Professor in the Oklahoma State University Department of Agricultural Economics, where he specializes in Agricultural Law.

Electrical generation using solar energy captured by photovoltaic (PV) modules has grown at an astonishing pace over the past decade and will continue to grow even more quickly. Over the next two years, 60 percent of new installed electrical generating capacity – 51 gigawatts (GW) – will be from solar power and battery storage projects[1], adding to the current 75.6 gigawatts of solar capacity installed in the United States.[2] Solar power has the potential to reduce our country's demand on fossil fuels, but the primary factor driving the remarkable growth of solar PV is the drastic reduction in costs. Solar module prices dropped 85 percent in the past decade[3] giving solar generation a subsidy-free levelized cost of energy (LCOE) of $31.31/MWh, making it cheaper than even wind or natural gas generation.[4]

While solar PV development can and does take place on rooftops, open-field development will likely dominate near-term installations. Frequently, these projects take place on agricultural lands, meaning developers must sign contracts with property owners to gain access to the large stretches of open land necessary to develop large solar farms. Usually, the process begins with a solar company contacting a prospective landowner. After initial conversations about the acres involved and specific land details, the company will likely present the landowner with an agreement. Whether termed a lease, easement, contract, or other agreement, the gist is often the same: the landowner gives the solar company permission to construct and operate a solar farm on her land. Developers may contact numerous landowners simultaneously to sign similar deals, with the goal to create a large contiguous tract with access to substations and the power grid.

While the specific details differ from lease to lease, company to company, or even project to project, similar issues often arise. Thus, landowners and their attorneys need to turn their attention to five overarching questions.

Question 1: How will solar development affect other land uses on and near the property?

With the possible exception of the economic implications of the project, resolving land use issues may be the central issue in any solar project. Accurately and completely describing the subject property is vital. It is likely the solar farm will not occupy 100% of the land at issue, due to ingress/egress access roads, shadowy areas, soil types, and other property details. Measured land occupation rates for some solar projects approach 45 percent as compared to rates of less than 3 percent for wind.

Naturally, agricultural landowners have wondered about the ability to continue production on lands committed to solar projects. While some developers remain adamant that operation of the solar equipment is the sole permissible use of the leased ground, some have begun exploring the field of agrovoltaics, or the simultaneous use of land for solar power production and agriculture. The benefits are obvious: reduced maintenance costs, support for bio-diversification, ability to maintain crop or livestock production, soil nutrient management, and perhaps even greater reduction of greenhouse gasses. For example, sheep might graze on the grasses and weeds, decreasing the need for mowing or spraying. Another approach would be to plant shade-tolerant plants around and under the panels. Projects in Germany and the Netherlands have focused on wheat, potatoes, celery, blueberries, red currants, raspberries, strawberries, and blackberries. Some places are requiring solar farms to be pollinator-friendly, with bees and native flowers. Modification of traits in traditional row crops might allow them to thrive around and under solar panels by either raising the panels or breeding the plants to be shorter. In dry areas, solar farms can

1 S. Ray, "Solar power and batteries account for 60% of planned new U.S. electric generation capacity," Energy Information Administration (EIA) Today in Energy Update, March 7, 2022. https://www.eia.gov/todayinenergy/detail.php?id=51518. EIA notes "The remaining 34 GW of planned capacity additions over the next two years will largely come from natural gas (16 GW) and wind (15 GW). The amount of planned wind capacity dropped by nearly half from the previous two years, which had 29 GW of new wind capacity come online." It is likely a significant portion of this capacity shifted from wind to solar / battery installations.
2 EIA Electric Power Annual, "Existing Net Summer Capacity of Other Renewable Sources by Producer Type, 2010 through 2020," https://www.eia.gov/electricity/annual/html/epa_04_02_b.html
3 D. Feldman, et al., "U.S. Solar Photovoltaic System and Energy Storage Cost Benchmark: Q1, 2020." National Renewable Energy Laboratory report, https://www.nrel.gov/docs/fy21osti/77324.pdf.
4 EIA, Annual Energy Outlook 2021.

reduce crop water usage. However, much work remains in agronomics, animal sciences, economics, and in the law to make such arrangements a "win-win" for landowner and developer.

Entities beyond the landowner and solar developer influence land use choices. To begin construction of a solar farm, the project will likely require a local permit. This may be as simple as a building permit if solar is a land use allowed "by right" in the relevant zoning district. It may require a special exception or extensive development plan. The local land use board may hold public hearing(s). Local control over where these solar projects go can create issues at times within states where counties have much more control over zoning and planning. A good current example comes from Maryland. A recent decision in LeGore Bridge Solar tries to answer the question of what consideration the state's Public Service Commission (PSC) must give to a county's comprehensive plan.[5]

In March 2017, PSC staff recommended granting the LeGore project a CPCN. Later that month, Frederick County introduced a bill creating zoning requirements for solar facilities that had not obtained a CPCN; it was only after a subsequent LeGore CPCN hearing that the bill was passed with an effective date of July 2017. In October 2017, a new Maryland state law took effect, functionally requiring PSC to give due consideration to Frederick county's comprehensive plans and zoning ordinances.[6] Two days later, the Public Utility Law judge issued a proposed order approving LeGore's CPCN. The PSC affirmed that proposed order in March 2018. On appeal, the central issue was whether the PSC gave due consideration to the new county zoning standards for utility-scale solar developments before issuing the CPCN for LeGore's project. While the PSC does have some discretion to preempt the county's requirements when looking at the county zoning requirements' impacts on the proposed project, it must first give due consideration to those zoning requirements and the comprehensive plan. The PSC argued the county had until after the record closed to intervene in the proceedings. The court held PSC needed to go back and give due consideration to the zoning changes on LeGore's proposed project and court remanded the proceeding back to the PSC, allowing PSC to determine what weight to give the county zoning changes and fix the issues related to vested rights in the record.

5 Frederick Cty. v. Legore Bridge Solar Ctr., LLC, No. 1249, 2020 WL 6892007 (Md. Ct. Spec. App. Nov. 24, 2020).

6 UTILITY REGULATION—CONSIDERATION OF CLIMATE AND LABOR, 2021 Maryland Laws Ch. 615 (S.B. 83)

The conflicts between county zoning and planning authority and the state's authority to approve power projects will continue to be one with which states may struggle. Those struggles obviously impact developers and landowners as well.

Question 2: How long will the agreement last?

The length of these contracts is important—most start with 20 or 25 years of operation, plus automatic extensions. Landowners and their attorneys must pay close attention to renewal provisions. As with the other key terms, the important thing here is that the parties understand the agreement and have a true "meeting of the minds" regarding what will be done in 20, 25, or even 50 years when the lease terminates. The importance of reducing all agreed terms between the landowner and the developer to writing cannot be overstated when the people signing the lease today are unlikely to be the stakeholders by its end – those stakeholders may be a child, grandchild, heir, or purchaser. The solar company may exist in a different corporate form or be purchased by another entity who assumes all the contractual responsibilities. To keep the commercial terms of a lease economically equitable over the entire term of a half-century agreement, the parties may consider payment escalator clauses, inflation adjustments, and/or market adjustment/price parity mechanisms.

Question 3: What are the landowner's obligations under the agreement?

Like many contracts, these solar agreements will likely contain indemnity provisions to protect the parties from lawsuits caused by the other's negligence. How does the agreement handle environmental suits or claims based on the mere construction or operation of the solar farm? Who bears the risk if the assessed value of the underlying land increases due to the solar project, thus increasing the property taxes owed? Other terms typically include: insurance requirements for both landowner and developer, maintenance responsibilities, mortgage details (including the potential subordination of the landowner's lenders in some cases), default, force majeure, and termination, just to name a few. Landowners may not focus on any of these terms because their attention will likely be on the rent, payment escalator clauses, and any one-time or bonus payments, but the devil can be in the details.

Question 4: How will the landowner be compensated?

In some ways, compensation plans for solar development of agricultural land may be similar to those used in wind development, with per-foot payments for road and utility easements, per-acre payments for substations and maintenance facilities, and agreed terms for assessing and compensating crop damage. In the authors' experience, however, the payment for the actual location and operation of the generation assets may be significantly different for wind and solar. Where most wind projects may pay a per-turbine installation fee, a guaranteed annual minimum payment, and then a royalty payment (frequently

starting at 4 percent of gross revenues from the sale of power), the trend in solar development appears to be a fixed per-acre payment. These per-acre payments also appear to vary widely from region to region. Landowners report that some projects in the southern Great Plains have paid $300 to $500 per acre, while those in the Corn Belt have reported prices near or even exceeding $1000. While these prices significantly exceed cash rental rates, some landowners have negotiated payment rates as a function of cash rental rates for the land – in some cases using a fourfold or fivefold cash rent multiplier function. The price of the underlying land may influence these regional differences, and some solar developers have shown much greater interest in the outright purchase of the underlying land than their wind developing counterparts.

Question 5: What will happen when the project ceases operations?

One of the most important pieces of a solar agreement is the removal bond coupled with the decommissioning plan. The bond ensures there are funds available to pay for the removal of the solar equipment at the end of the lease if something were to happen to the solar company. Currently, states differ widely in the solar decommissioning requirements and the availability of state programs to enforce decommissioning or to handle the task if the developer fails. The decommissioning plan (also called a removal or restoration plan) provides the details for equipment removal, grade and drainage restoration, reestablishment of vegetative cover, and other post-project land conditioning. Given the dramatic increase in battery storage installations, the landowner may desire a soil and water-sampling program to monitor for the release of any electrolytes, heavy metals, or other materials.

The need for rapid deployment of zero-carbon energy sources coupled with drastic and continuing reductions in costs will drive large demand for agricultural land for solar PV development. This development may present an important economic opportunity for landowners, but entry into any such agreement requires counsel from an attorney well versed in both the solar energy industry and in agriculture. Evaluation of land impacts, agreement duration, landowner obligations, payment terms, and decommissioning represent vital inquiries in forging an agreement truly beneficial to both landowner and developer.

Agricultural Finance Update

Jeffrey A. Peterson

Jeff is a partner with Lathrop GPM in Saint Cloud, Minnesota, where he focuses on commercial transactions, creditor's rights, bankruptcy and agricultural and food law.

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1. Texas court misanalysed the priority rights of secured creditor that holds proceeds from the sale of crops in the deposit account of the debtor. Hartwell Farms, LLC ("Old Debtor") was owned and controlled by its principal Waymon Scott Hartwell ("Principal"). The Old Debtor was indebted to Fannin Bank ("Secured Creditor A") and the debt was secured by a security interest in the personal property of the Old Debtor including its crops. Secured Creditor A was the beneficiary of UCC-1s filed in 2011 and 2014. The Old Debtor was also indebted to American Bank ("Secured Creditor B") and the debt was secured by a security interest in the personal property of the Old Debtor. Secured Creditor B files a UCC-1 in 2014. The Old Debtor sold its wheat crop in the name of the Principal, the Principal then deposited the wheat check into the Old Debtor's deposit account with Secured Creditor B, and then Old Debtor issued a check to Secured Creditor B in the amount of $272,855 to pay off Secured Creditor B. The Principal was unable to obtain crop financing for the Old Debtor so the Principal formed HHH Farms, LLC ("New Debtor"). The New Debtor then became indebted to Secured Creditor B and the debt was secured by a security interest in the personal property of the New Debtor including its crops. The Old Debtor defaulted on the debt to Secured Creditor A and Secured Creditor A commenced a legal action against the Old Debtor, the New Debtor, the Principal and Secured Creditor B. The Old Debtor subsequently filed a Chapter 11 bankruptcy. Secured Creditor A asserted that the Principal created the New Debtor with the intent of defrauding Secured Creditor A and conversion against Secured Creditor B on the basis that Secured Creditor A had a first and priority lien in the 2013 wheat crop used to pay off Secured Creditor B. On appeal, the Texas Court of Appeals held that Secured Creditor A retained a security interest in the funds deposited in the deposit account with Secured Creditor B and that the application of those funds against the debt owed to Secured Creditor B constituted conversion. ***HHH Farms, L.L.C., Hartwell Farms, LLC and Waymon Scott Hartwell, v. Fannin Bank,* 2022 WL 175967 (TX App. 2022).**

Comments. Absent collusion, the deposit of the wheat proceeds in the deposit account maintained by Secured Creditor B would sever the priority lien of Secured Creditor A under UCC 9-332(b).

2. Secured creditor's notice to refuse Minnesota agricultural lien only requires substantial compliance. Ivan and Pamela Kohout ("Debtors") were indebted to Roundbank ("Secured Creditor") and the debt was secured by a security interest in the personal property of the Debtors including its crops. The Secured Creditor properly filed a UCC-1 to perfect its security interest. Farmers Mill & Elevator Inc. ("Crop Input Supplier") supplied the Debtors with crop inputs on credit. Minn. Stat. §514.964 allows a crop input supplier to a priority lien if the crop input supplier gives a written notice or "lien-notification statement" to the secured creditor and the secured creditor fails to respond in writing within ten (10) days. Minn. Stat. §514.964 requires the written response also be sent to the farmer requesting the crop input financing. On March 29, 2018, the Crop Input Supplier mailed the lien-notification statement to the Secured Creditor. On April 2, 2018, the Secured Creditor responded in writing. The Crop Input Supplier argued that the Secured Creditor notice was ineffective because Minn. Stat. §514.964 requires strict compliance and the Secured Creditor failed to strictly comply with the statute because: 1) the Secured Creditor failed to include certain required language in its written response to the Crop Input Supplier; and 2) the Secured Creditor failed to provide a copy of the written response to the Debtors within the required ten (10) day response window. The Secured Creditor gave written notice to the Debtors twenty-four (24) days after its initial written response to the Crop Input Supplier. The Minnesota Court of Appeals affirmed the trial court and held that: 1) the Secured Creditor written response that "[t]oday [the Secured Creditor] received a Lien Notification Statement from your firm claiming a lien for [the Crop Input Supplier] against [the Debtors]. [The Secured Creditor] rejects the lien claim and asserts it[s] rights to the collateral and proceeds thereof" was sufficient notice under Minn. Stat. 514.964 to refuse the request of the Crop Input Supplier to have a priority lien; and 2) the 10 day window to respond deadline is only required as to the crop input supplier and not the farmer. ***Farmers Mill & Elevator, Inc. v. Kohout,*** **2021 WL 2070534 (Minn. App. 2021).**

Comment. This is an interesting unpublished decision because the Minnesota Court of Appeals, in Minnwest Bank, M.V. v. Arends, 802 NW2d 412 (Minn. App. 2011), held that the crop input supplier must strictly comply with the notice requirements under Minn. Stat. §514.964. The Court in Farmers Mill did not reference Minnwest Bank.

3. Continued uncertainty as to whether principal of produce seller is fiduciary for purposes of bankruptcy discharge. Cesar Sanchez ("Debtor") owned and operated Sanchez Bros. Produce, LLC t/a Sanchez Bros. Wholesale Corporation (the "Company"). On behalf of the Company, the Debtor purchased and resold produce supplied by Royal Garden Produce, LLC ("Produce Seller"). After the Company failed to pay several invoices for produce shipments, the Produce Seller commenced a legal action against the Company and the Debtor asserting trust claims under the Perishable and Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a-t. The Debtor filed a Chapter 7 bankruptcy petition. The Produce Seller commenced an adversary action in the bankruptcy case to find the debt owed by the Debtor non-dischargeable under 11 U.S.C. §523(a)(4) asserting that a PACA trust establishes fiduciary duties for purposes of 523(a)(4). The court held in favor of the Produce Seller on the basis that PACA trusts meet the requirements of an express trust in that a PACA trust defines the trust res, provides protection and ownership in the beneficiary. ***Royal Garden Produce, LLC, v. Cesar Sanchez (In re Cesar)*****, 2021 WL 5893993 (Banr. N.D. Ill 2021).**

Comment. This remains a divided issue. Royal Garden Produce, LLC adopts the minority view, as well as the following courts. Melon Acres, Inc. v. Villa (In re Villa), 625 B.R. 111 (Bankr. N.D. Fla. 2021); Lundgren, 503 B.R. at 717; E. Armata, Inc. v. Parra (In re Parra), 412 B.R. 99 (Bankr. E.D.N.Y 2009); A.J. Rinella & Co. v. Bartlett (In re Bartlett), 397 B.R. 610 (Bankr. D. Mass. 2008). The majority view is supported by KGB Int'l, Inc. v. Watford (In re Watford), 374 B.R. 184, 190 (Bankr. M.D.N.C. 2007); holding that the principal does not have separate fiduciary duties and an existence prior to and without reference to the act creating the debt.

4. Satisfaction of secured creditor claim at Chapter 12 plan confirmation through expected post-confirmation payments to debtor fails to qualify as confirmable "dirt-for-debt" Chapter 12 plan. NRS Properties, LLC (the "Debtor") was engaged in farming and ranching operations. The Debtor was indebted to MM Opportunity Fund, LLC (the "Secured Creditor") and the debt was secured by certain cropland. The Secured Creditor was owed $1,872,572. The Chapter 12 plan proposed to transfer 1,640 acres of the unirrigated cropland to the Secured Creditor (the "Surrendered Cropland") while the Debtor would retain 1,395 acres of other mortgaged unirrigated cropland (the "Retained Cropland") – which is commonly known as a "dirt-for-debt" Chapter 12 plan. The Debtor valued the Surrendered Cropland at $1,600,000. The Chapter 12 plan proposed to pay the balance owed to the Secured Creditor through the payment of $1,165,553.59 owed by another party to the Debtor. The Secured Creditor

objected and the court agreed that the value of the Surrendered Cropland was only $1,361,250 and, therefore, the Chapter 12 plan failed to comply with 11 U.S.C. 1225(a)(5). The Chapter 12 plan was also internally inconsistent and unclear as to the payment of $1,165,553.59 owed by another party to the Debtor and the obligation of the Debtor to use these funds. See In re Miceli, 587 B.R. 492, 503 (Bankr. N.D. Ill. 2018) (denying confirmation of plan because, among other reasons, "the plan is confusing and ambiguous"); In re Woods, 406 B.R. 293, 298 (Bankr. N.D. Ohio 2009) ("Language in a plan, purporting to impair a creditor's claim, must be stated in clear and unambiguous terms."). ***See In re NRS Properties, LLC,* 634 B.R. 395 (Bankr. D. Colorado 2021).**

Food Law Update
Susan Schneider

Susan Schneider teaches at the Arkansas School of Law and serves as the Director of the law school's signature advanced degree program, the LL.M. Program in Agricultural & Food Law.

There have been numerous food law initiatives and events since the AALA annual symposium last November. This short article highlights the most significant. Links are provided to additional information.

Baby Formula Recall

On February 17, Abbott Nutrition issued a voluntary recall of millions of containers of baby formula due to concerns that it could be contaminated with Cronobacter. FDA Investigation of Cronobacter Infections: Powdered Infant Formula (February 2022), FDA Announcement. Three brand names are involved, including the major brand, Similac. The Minnesota Department of Health was first to report an infant illness to Abbott, FDA, and CDC in September 2021, and U.S. Senators have demanded additional information as to why this recall took so long to occur. Four babies have been hospitalized, with two deaths linked. Many mothers are reporting additional illnesses that have not yet been confirmed. The recalled formula is distributed worldwide. For a list of countries affected, see, Many Countries Received Recalled Infant Formula Linked To Outbreak, Food Safety News (Feb. 19, 2022). Helena Botemiller Evich has been leading coverage of this with multiple articles and a podcast on Politico. See, e.g., The FDA's 4-Month Recall Gap, Politico Dispatch (Feb. 24, 2022). The USDA has granted additional flexibilities to the Women, Infants, and Children (WIC) Program.

PFAS Found to Contaminate Soil and Water

PFAS, better known as "forever chemicals" have been in the news, with the EPA, Congress and many state legislatures considering action. The connection to food and agriculture was highlighted when farmers in Maine found PFAS in their soil and well water in January, forcing their farm to shut down. Farm groups in Maine are lobbying their state legislatures to become the first state to enact statutory limits on PFAS in land-applied biosolids (municipal and industrial waste applied as fertilizer). See, Ban PFAS Fertilizer Spread on Land, Maine Farmers Ask Lawmakers, Bloomberg News (Feb. 23, 2022) (included with this article is a video explaining what PFAS are and where their come from as well as a chart detailing state actions pending and passed to date).

Child Nutrition and School Meals

The USDA issued "transitional standards" for school meals that will apply to 2022-23 and 2023-24 school years to assist schools as they move away from the meal pattern flexibilities during the pandemic. The new final rule, Child Nutrition Programs: Transitional Standards for Milk, Whole Grains, and Sodium, is published at 87 Fed. Reg. 6984 (Feb. 7, 2022). The new rule allows flavored low-fat (1%) milk, requires 80% whole grains, and established sodium targets. The USDA states that a proposed rule will be issued in the Fall 2022 for long term standards.

The omnibus spending bill that passed through Congress on March 10 did not include an extension of the pandemic waivers that gave school districts flexibility in preparing and distributing food to students. Many school districts were counting on an extension, citing their continued struggles with supply chain disruptions, inflation, labor shortages, and students struggling to get back on track. See, School Officials Struggle With How To Feed Students As Omnibus Bill Skips Meal Waivers, PBS NewsHour (Mar. 10, 2022).

Obesity Reports: Public Health and Economic Concerns

The COVID-19 pandemic has exacerbated the U.S. obesity epidemic, with 16 states now reporting that 35% or more residents are classified as obese. Since the pandemic began, 42% of American adults reported gaining an undesirable amount of weight, with an average weight gain of 29 pounds.

See, State of Obesity 2021: Better Policies for a Healthier America, Trust for America's Health (2021) (calling for government policies to improve American health). New research indicates a possible correlation between obesity and ultra-processed foods. See, references in the article: Americans are Addicted to 'Ultra-Processed Foods, and It's Killing Us, Newsweek (Dec. 8, 2021).

Cell-cultured Proteins

Singapore became the first country to approve the retail sale of cell-cultured protein product. More Cell Cultured Chicken Products Approved for Sale in Singapore (Dec. 16, 2021). The USDA FSIS and FDA continue to cooperate on the US approval process. The comment period for the Advanced Notice of Proposed Rulemaking, 86 Fed. Reg. 49,491 (Sept. 3, 2021) closed in Dec. 2021, and USDA FSIS is currently evaluating the comments received.

Food Containing Chlorpyrifos Residues

On February 25, 2022, the EPA denied objections, requests for hearing, and requests for a stay of their final rule revoking all food tolerances for chlorpyrifos, an organophosphate used in agriculture. Two of its common trade names are Lorsban and Dursban. Under the new final rule, the tolerance for chlorpyrifos residue in food products expired on February 28, 2022. EPA will proceed with cancelling all registered food uses for chlorpyrifos, either through voluntary withdrawal or a notice of cancellation.

Under the Food, Drug, and Cosmetic Act, pesticide residues on food products are deemed unsafe unless a tolerance has been established and either the residue is within the limits of that tolerance, or an exemption has been issued. 21 U.S.C. § 408. The food is considered to be adulterated. 21 U.S.C. § 402. However, a "channels of trade provision" provides an exception when the pesticide was applied lawfully, before a tolerance was revoked, and the tolerance limit is met. The FDA issued a Guidance for Industry that explains this and its enforcement discretion. Questions and Answers Regarding Channels of Trade Policy for Human Food Commodities with Chlorpyrifos Residues: Guidance for Industry (Feb. 2022).

These actions come after years of controversy over concerns that chlorpyrifos caused neurological damage in children and recent litigation that successfully challenged EPA's actions. See Chlorpyrifos, EPA Action on the Federal Food, Drug, and Cosmetic Act (FFDCA) Petition and Litigation, EPA webpage; Chlorpyrifos, What you Need to Know, Earthjustice webpage.

Standards of Identity

Although the FDA has yet to take any action regarding the use of dairy-related terms on non-dairy products, it did make headlines for revoking the standard of identity for "French Dressing." 87 Fed. Reg. 2038 (Jan. 13, 2022). The "headlines" were mostly tongue-in-cheek. The FDA was responding to a petition that was filed in 1998 by the Association of Dressings and Sauces.

Related: A federal district judge in Virginia ruled that the term "gruyere" can be used on cheese produced in the U.S., calling the term generic to cheese producers. Gruyere cheese producers in Switzerland and France have indicated that they will appeal the decision. Swiss guidelines provide that gruyère must be made in the region surrounding Gruyères, Switzerland, where the cheese has been produced since the 12th century. Is Gruyère Still Gruyère if It Doesn't Come From Gruyères?, NY Times (Jan.14, 2022).

Avian Influenza

The USDA and poultry producers are continuing to monitor the spread of highly pathogenic avian influenza (HPAI) in the U.S. Since January 2022, it has been confirmed in backyard and commercial flocks in Indiana, Kentucky, Virginia, New York, Maine, Delaware, Michigan, Connecticut, Iowa, Missouri, Maryland, and South Dakota. The USDA APHIS reports that the HPAI detections in birds do not present an immediate public health concern and that no human cases of these avian influenza viruses have been detected in the United States. Consult the USDA APHIS website for updated information: 2022 Detections of Highly Pathogenic Avian Influenza.

Environmental Law Update
Anthony Schutz

Anthony is Associate Professor of Law and Associate Dean for Faculty at the Nebraska College of Law, where he teaches Agricultural Law, Environmental Law, Water Law, Land Use Regulation, State and Local Government Law and Contracts

The 2021 symposium update can be found at this link. This interim update provides a few developments since then.

The United States Supreme Court granted certiorari in Sackett v. U.S. EPA, 8 F.4th 1075 (9th Cir. 2021) (docket here), limited to the following question: "Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." The Ninth Circuit applied Justice Kennedy's significant nexus test. The case will be interesting, in part, because the makeup of the Court has changed significantly since Rapanos v. United States, 547 U.S. 715 (2006), when a fractured Court left the scope of the term murky. Justice Kennedy, there, was the fifth vote for concluding that the agencies needed to use a more exacting standard than they had used, and his version of the standard was markedly different than that used by four other Justices. It was at least clear, however, that satisfying either the four-Justice standard or Kennedy would have satisfied the remaining members of the Court. Today, counting votes is much more difficult.

Even after this case is decided, significant questions will remain about the role of an agency interpreting the statutory language differently. The agencies charged with administering the CWA published a proposed rulemaking on December 7, 2021, proposing a rule that is similar to the standards the agencies adopted in 2015, but with a more 1986-era approach to the definition's structure. The Federal Register release can be accessed here. If the rulemaking ultimately creates a different standard, the CWA may be a vehicle for evaluating the scope of deference that the Court gives agency interpretations of statutes they are charged with administering.

A variety of other developments remain afoot in the broad realm of environmental law. Tiffany Lashmet (Texas Ag Law Blog) and Bridgit Rollins (National Ag Law Center, Ag & Food Law Update) have great coverage of regulatory and litigation developments concerning pesticides, where there has been significant activity on glyphosate, dicamba drift liability, treated seed, and chlorpyrifos tolerances. More broadly, the next update will likely cover the progression of efforts to revise regulations under the ESA and NEPA, which were dramatically changed in the last administration.

Tax Law Update
Kristine Tidgren

Kristine is the Dolezal Adjunct Assistant Professor in the Agricultural Education & Studies Department and the Director for the Center for Agricultural Law and Taxation at Iowa State University

Like 2020 before it, 2021 was no ordinary tax year. With high crop yields and robust commodity prices, many farmers closed 2021 with more income than they expected. Likewise, input costs for 2022 have reached record highs. During the past two years, Congress responded to the COVID-19 pandemic by allocating trillions of dollars to programs designed to assist families and businesses. Specific COVID-19 legislation included the following:

- Families First Coronavirus Response Act (FFCRA) (March 2020) - $225 billion
- CARES Act (March 2020) - $2.2 trillion
- PPP Enhancement Act (April 2020) - $483 billion
- Consolidated Appropriations Act, 2021 (CAA) (December 2020) - $920 billion
- American Rescue Plan Act (ARPA) (March 2021) - $1.9 trillion

Significant COVID Benefits in 2021

While the FFCRA, the CARES Act, and the PPP Enhancement Act distributed benefits in 2020, the CAA and ARPA authorized new benefits for 2021. Many of these benefits affected farmers' 2021 income tax returns. Congress has not authorized these benefits to continue into 2022.

Economic Impact Payments / Recovery Rebate Credits

Modeled after two rounds of economic impact payments reported on 2020 returns, ARPA authorized "2021 rebate" payments to eligible individuals, in the amount of $1,400 per person ($2,800 in the case of a joint return), plus $1,400 per dependent. "Dependents" for the

2021 rebate payments included any legal dependent and not just children under the age of 17.

As with the two prior rounds of economic impact payments (also called "stimulus payments"), the payments were an advance of a refundable credit allowed to eligible individuals on their tax return, but this time for tax year 2021. As compared to the first two rounds of economic impact payments, eligibility for the 2021 recovery rebate phased out more rapidly, with ineligibility reached at a lower income level. Married individuals with $160,000 or more in modified adjusted gross income and single individuals with $80,000 or more in income were not eligible for the advance payments or the associated credits.

Expanded / Advanced Child Tax Credit

ARPA also authorized a special monthly payment for most families with young children, from July through December of 2021. These novel payments were partial advances of the child tax credit, which Congress expanded significantly for 2021 only. Since 2018, the child tax credit has been a $2,000 offset against tax liability for each child under the age of 17. The credit phased out when a married couple reached $400,000 of income. Before 2021, taxpayers claimed the credit on their tax return. Only $1,400 of the credit was refundable, meaning that no one could receive a refund for more than $1,400 of the credit amount that exceeded tax liability. Before 2021, parents were also required to have earned income to receive the child tax credit.

For 2021 only, ARPA significantly changed the rules. First, the child tax credit was $3,000 per child, for those ages six through 17 (17 year olds were included in 2021 only) and $3,600 for children under six for taxpayers meeting certain income requirements. The entire credit was refundable, meaning that a taxpayer could receive a $3,000 refund, even if they had no income tax liability. Finally, Congress removed the earned income requirement for 2021. In other words, an individual with a qualifying child could file a return to receive the "child tax credit" in 2021, even if they had no earned income. The enhanced $3,000 credit began to phase out where income exceeded $150,000 for those who were married filing joint and where income exceeded $75,000 for singles. The $2,000 credit continued, however, until taxpayers reached income levels of $400,000 for MFJ and $200,000 for other taxpayers. It then phased out entirely for taxpayers with income above those levels.

IRS began making advance child tax credit monthly payments July 15, with additional deposits made each month through the end of the year. The advance payments comprised a 50 percent advance on the expected 2021 child tax credit, generally calculated by IRS based upon 2020 tax return information (if that return was on file). Recipients of the advance credit claimed the balance of the credit (if any) when they filed their 2021 tax return.

Paycheck Protection Program

Perhaps generating more attention and questions than any other COVID-19 relief provision in early 2021, the Paycheck Protection Program or PPP provided $525 billion in 100 percent federally guaranteed loans to small businesses, including the self-employed, in 2020. The CAA allocated an additional $284 billion to a reauthorized and revised PPP in 2021. This program allowed first draw loans to those borrowers who did not receive a loan in 2020, second draw loans to borrowers who could demonstrate a 25 percent or greater reduction in gross receipts for any quarter in 2020, as compared to the same quarter in 2019, and first draw loan increases to select borrowers, most notably some self-employed farmers.

With the CAA, Congress explicitly confirmed that forgiven PPP loans are not income to the taxpayer and "no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied by reason of a forgiven PPP loan's exclusion from gross income." In other words, the receipt of a PPP loan in 2021 (or 2020) does not affect an individual's tax liability.

Employee Retention Credit

Many farmers with employees were also eligible for a generous employee retention credit in 2021. Generally, an employer who can show a greater than 20 percent decline in gross receipts in any of the first three quarters of 2021, as compared to the same quarter in 2019, were eligible for up to a $7,000 payroll tax credit per employee for each quarter of eligibility. Farmers generally claim this credit on the Form 943, which was due January 31, 2022, but they may also claim the credit on a later-filed amended return.

Sick and Family Leave Credits

The CAA and ARPA also extended the availability of sick and family leave credits to employers. Self-employed farmers with no employees were eligible for a tax credit if they could document that they were unable to work because of certain COVID-19-related reasons. Specifically, ARPA provided self-

employed taxpayers a potential family leave credit for a maximum of 60 days, and a potential sick leave credit of 10 days for 2021. The credit was only available for absences between the dates of January 1, 2021, and September 30, 2021. Based upon average daily self-employment income, the credit was available if the self-employed person could not work because they were sick. A lower credit was available if the self-employed person could not work because they were taking care of a family member who was sick with COVID-19 or unable to attend school or daycare because of COVID-19. Credits were also available for COVID vaccinations occurring between April 1, 2021, and September 30, 2021.

Self-employed farmers claimed their family and sick leave credits on Form 7202. Those claiming the credit must maintain documentation.

CFAP Payments

USDA created the Coronavirus Food Assistance Program ("CFAP"), with funding from Congress, to compensate farmers for losses associated with COVID-19. The agency made two rounds of CFAP payments in 2020. Many farmers received additional CFAP payments in 2021.

Farmers must include CFAP payments in gross income (subject to self-employment tax) for the year in which they receive the payments. They report the payments on lines 4a and 4b of IRS Form 1040, Schedule F.

New Tax Law in 2022?

In addition to COVID relief, potential tax changes dominated most 2021 tax discussions. Proposals such as the American Families Plan sought to significantly increase the capital gains tax rate and require recognition of capital gain at death or at gift. A later House of Representatives proposal sought to increase the capital gains tax rate and cut the estate and gift tax exemption in half in 2022. On November 19, 2021, the Build Back Better Act passed the House of Representatives. It did not come up for a vote in the Senate. As passed by the House, the Build Back Better Act did not include earlier proposals seeking to reshape the capital gains tax or lower the estate and gift tax exemption. The estimated $1.75 trillion bill proposed extending the enhanced child tax credit through 2022 and raising the SALT deduction limit from $10,000 to $80,000, along with implementing a number of other social spending measures. The BBB would have paid for the social spending primarily through surtaxes on multi-millionaires and a new minimum tax on corporations with more than $1 billion in profit.

Senator Manchin from West Virginia voiced his opposition to the BBB, urging that he was concerned about the BBB's possible contribution to inflation. He also stated that the asserted price tag of $1.75 trillion was not accurate. He argued, for example, that those supporting its passage would want to extend the enhanced child tax credit beyond the one-year period proposed in the text. Extending the child tax credit enhancement alone for 10 years would cost an estimated $1.6 trillion. It does not appear in the early second quarter of 2022 that significant tax law will pass during this election year.

Land Use and Resource Law Update

Jesse Richardson

Jesse is a Professor with the West Virginia University College of Law and the Lead Land Use Attorney at WVU's Land Use and Sustainable Development Law Clinic, where he focuses his research and teaching in land use law and water law.

Since the AALA Conference in Salt Lake City there have been several significant land use and resource law court decisions. This article summarizes several of the most important cases.

Water Law

***Mississippi v. Tennessee*, 142 S.Ct. 31 (2021).**

In this case the Court, for the first time, considered an interstate dispute over groundwater. The Court first found that equitable apportionment of the Middle Claiborne Aquifer would be "sufficiently similar" to equitable apportionment of surface waters to warrant the same treatment, for three reasons. One, equitable apportionment only applies to transboundary resources and this aquifer is multistate in nature. Two, water in the aquifer flows naturally between the states. Finally, Tennessee's pumping affects the portion of the aquifer below Mississippi as the cone of depression extends into Mississippi.

The Court rejected Mississippi's contention that the groundwater beneath the state belongs exclusively to that state. Although states control the lands, including beds of streams, within their state, that control does not extend to "flowing interstate waters." States that share interstate waters must respect each other's interests in that water.

The ruling means that where three requirements are met: (1) the aquifer is interstate, (2) waters in the aquifer flow naturally between the states and,

(3) the actions of one state affects the portion of the aquifer below another state, equitable apportionment will apply to groundwater.

Right to Farm

***Rural Empowerment Association for Community Help v. State of North Carolina*, 2021-NCCOA-693 (N.C. Ct. App. 2021).**

The North Carolina Court of Appeals affirmed the Superior Court's dismissal of an action challenging recent amendments to the North Carolina Right to Farm Act, added in response to the Murphy Brown cases. Community and environmental organizations brought action against State, the President Pro Tempore of the North Carolina Senate, and Speaker of the North Carolina House of Representatives, challenging the constitutionality of amendments to the Right to Farm Act that defined and limited nuisance claims against agricultural and forestry operations. A farm advocacy organization intervened. A three-judge panel of the Superior Court, Wake County, dismissed the action for failure to state a claim upon which relief can be granted. Community and environmental organizations appealed.

The Court of Appeals held that:

- amendments did not facially violate the Law of the Land Clause of the state Constitution;
- amendments did not facially violate the prospective fundamental right to enjoy property;
- amendments were general laws, and thus were permissible under section of state constitution that prohibited local, private, or special laws relating to health, sanitation, or abatement of nuisances; and
- amendments did not deprive a prospective plaintiff of state constitutional right to a jury trial.

Affirmed.

Renewable Energy

***Summit Farm Solar, LLC v. Planning Board for the Town of Braintree*, 2022 WL 522438 (Mass. Land Ct. 2022).**

The court started its opinion in this case as follows:

> Notwithstanding the inoffensiveness of ground-mounted solar arrays in terms of traditional impact issues such as noise, traffic, shadow and odor that arise when new commercial or industrial facilities are proposed, the proliferation of solar energy facilities has raised concerns among some neighbors to such facilities and municipalities because of the large amount of real estate they often occupy and because of their visibility. Commercial solar energy facilities generate no noise, no odor, and virtually no additional traffic, and cast no long shadows, but a moderately sized facility will take up as much as ten or even twenty-five acres of land that otherwise might be devoted to farming or open space. This has led to disputes like the one presently before the court, in which the planning board of the rural town of New Braintree ("Planning Board") denied a special permit for a solar array proposed for about eight acres of a forty-three-acre farm located near prominent roadways and intersections in the center of this bucolic town and near its town hall. The special permit provision of the New Braintree Zoning Bylaw pertaining to solar energy facilities is predicated on minimization of their visibility, and the Planning Board denied the present proposal, twice, because of its conviction that the visual impact of the proposed facility had not been rendered sufficiently negligible.

Summit Farms Solar, at *1.

The court found that the Planning Board violated the exemptive provisions of Massachusetts law by its denial of the special use permit for the solar energy facility and otherwise exceeded its authority in denying the permit. Massachusetts law provides that zoning ordinances may not "prohibit or unreasonably regulate" solar energy systems "except where necessary to protect the public health safety and welfare." Mass. G.L. c. 40A Section 3. The zoning ordinance provided that view impact is a basis for denial only with respect to solar facilities. Other uses are left unregulated as to view impact. The regulation here is therefore unreasonable (the court conducted an exhaustive analysis of these provisions, on first impression). Finally, the court found that no rational view of the facts support denial of the permit. The judgment of the Planning Board was annulled and the court ordered approval of the site plan and issuance of the special permit.

***Pegasus Wind, LLC v. Tuscola County*, 2022 WL 572498 (Ct. App. Mich. 2022).**

Tuscola Area Airport Zoning Board of Appeals (AZBA) denied eight variance requests of Pegasus to add wind turbines. The Circuit Court affirmed. On appeal, the Court of Appeals of Michigan reversed in part and remanded.

This case has an extensive procedural and factual history. The court delved deeply into variance law and the different standards applied to variances. In particular, the court discussed in great detail the differences between the "practical difficulty" and "unnecessary hardship" standards. The court found that the AZBA erred in finding that the practical difficulty must be unique or inherent in the land, a requirement that only applies to unnecessary hardship. This finding tainted the remainder of the findings of the AZBA.

In addition, the AZBA erred in looking to uses of the property to the owner, which included agriculture, and not to looking to the uses of the land available to Pegasus. Pegasus could only place turbines on the property under its lease agreements with the owner. Therefore, the lease agreements are rendered valueless. [Note by author: This holding seems odd. Landowners can lease themselves into a variance if this holding is true.] The court applied similar reasoning to find that the hardship was not self-created. The finding by the AZBA that the wind turbines would threaten public safety was also rejected by the court. A dissenting opinion would have granted substantial deference to the findings of the AZBA.

Regulatory Takings

***Campo v. United States*, 2021 WL 6102151 (Ct. Fed. Cl. 2021).**

Oyster farmers filed complaint alleging that United States' opening of spillway, which increased mortality rate of oyster reefs, deprived them of their use, occupancy and enjoyment of their personal property, resulting in permanent taking of their property for public use, without payment of just compensation. United States filed motion to dismiss in part.

The Court of Federal Claims denied the motion and held that Louisiana statutes establish that oyster lessees could have compensable property rights in oysters. Farmers here had compensable property rights in oysters and, thus, could assert claim that opening of spillway constituted a taking. However, farmers had no independent cause of action for damages arising from dredging operations.

What is agriculture?

***Settimi v. Irby,* 2022 WL 292317 (Supreme Ct. W.Va. 2022).**

In this case the question was whether property described as a mini-distillery and agritourism business qualified for farm use assessment for real property taxes. West Virginia law requires that at least 50% of total annual gross sales must be from agricultural products.

Property here showed average income of around $2,000 per year from sale of distilled spirits and an average of over $6,000 per year from short-term rentals. The trial court concluded that even if "sales of distilled spirits could be counted as sales of agricultural products, the distilled spirits sales would represent barely one-third of the annual gross income derived from the surface use of the property." The West Virginia Supreme Court affirmed the circuit court's order granting the Tax Commissioner's motion for summary judgment and upholding the Commissioner's ruling that the property did not qualify for farm use valuation.Since the AALA Conference in Salt Lake City there have been several significant land use and resource law court decisions. This article summarizes several of the most important cases.

Agricultural Law Update

The official newsletter of the American Agricultural Law Association

Agricultural Law Update Committee
Peggy Hall, Jesse Richardson,
and Jackie Schweichler

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Peggy Kirk Hall
e-mail: hall.673@osu.edu
Jesse Richardson
email: jesse.richardson@mail.wvu.edu
Jackie Schweichler
email: jks251@psu.edu

For AALA membership information, contact:
Brad Parker, CAE
Executive Director
American Agricultural Law Association
825 S. Kansas Ave., Suite 500
Topeka, KS 66612
email: brad@aglaw-assn.org

AALA on the web:
www.aglaw-assn.org