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Agricultural Finance & Credit Update

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Topics

- Case Law Update
- Livestock Dealer Trust
- Interest in Crop Insurance

Case Law Update

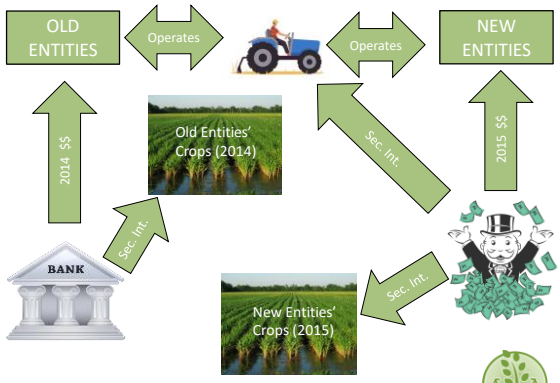
Principles of Equity

Facts: Debtor farms under three entities (Old Entities). The Bank provides the Old Entities financing for the 2014 crop season, perfecting these interests. After the reason, Old Entities default on the loans. Following year, the Bank will not provide loans to the Old Entities because of the substantial carryover. Meanwhile, the Debtor creates three new entities (New Entities).

Debtor turns to Ag Lender for loans. The Lender requests subordination from the Bank, but declines. Afterwards, the Lender urges the Bank to agree to subordination, warning the Bank the Debtor will use other means to obtain loans. Again, the Bank declines.

After the second refusal, the Debtor requests loans from the Lender under the New Entities, and the Lender provides the loans, perfecting against the New Entities' crops and the Debtor, individually. Again, the Debtor defaults.

***AgriFund, LLC v. Regions Bank*, 2020 Ark. 246, 602 S.W.3d 726 (2020)**



***AgriFund, LLC v. Regions Bank*, 2020 Ark. 246, 602 S.W.3d 726 (2020)**

Case Law Update

Issue: What is the order of priority? The Lender and the Bank both claim first priority to the 2015 crop proceeds.

Lender's Argument: Has priority to 2015 because the court must pierce the corporate veil of the New Entities; once pierced, must hold Debtor liable for the loans individually, and because the Lender holds the only lien against the Debtor individually, Lender has priority.

Bank's Argument: New Entities are Debtor's alter egos; Lender abused corporate structure to obtain priority in 2015 crops.

Analysis: It would be inequitable to give Lender priority because: (1) the Lender did not suffer injury from Debtor's abuse of the corporate structure (i.e., using the New Entities); and (2) Debtor and Lender abused the corporate structure to gain priority stake over lien held by Bank.

Holding: Because New Entities are alter egos of Old Entities, Bank has priority to the 2015 crop proceeds.

***AgriFund, LLC v. Regions Bank*, 2020 Ark. 246, 602 S.W.3d 726 (2020)**

Case Law Update

Priority Dispute in Crops: Security Interest vs. Landlord's Lien

Facts: Landlord leased farmland to Tenant. Tenant then borrowed money from Bank, granting bank an interest in crops grown upon the leased land, which Bank perfected. Tenant defaulted on lease, and Landlord regained possession of the land. Landlord sent notice to Bank, informing it of Tenant's default and Landlord's possession of the land. After, Landlord harvested the already planted crops, and sold them at market. Bank filed suit against Landlord for wrongfully converting the crops because Bank had priority to the collateralized crops.

Issue: Does a creditor's security interest in crops have priority over a statutory landlord's lien in the same crops?

***Bank of Kremlin v. ARA, L.P.*, 2020 OK CIV APP 30, 469 P.3d 724**

Case Law Update

Landlord's Argument: Landlord has priority because they hold a statutory landlord's lien, which is not governed by UCC Article 9 priority rules, rather state's real property laws dictate order of priority for landlord's liens; because real property laws provide priority to landlord's lien over other interests, Landlord has priority to crops.

Bank's Argument: Bank asserts landlord's lien is subject to Article 9 priority rules because it is an "agricultural lien" under the scope of the UCC; Article 9 contains specific rule to determine priority in crops; state enacted UCC provision which supersedes any inconsistent statutes with Article 9 priority in crop rule.

Analysis: Because landlord's lien is within definition of "agricultural lien" under the UCC, Article 9 rules apply and preempt real property laws of the state.

Holding: Bank has priority and Landlord's harvest/sale is conversion.

***Bank of Kremlin v. ARA, L.P.*, 2020 OK CIV APP 30, 469 P.3d 724**

Case Law Update

No Collateral Investigation, No Future Advances Clause

Facts: Debtor borrows money from Creditor who takes interest in Debtor's 2013 tobacco crop. Debtor then executes security agreement with Warehouse, providing it an interest in 100 acres of tobacco and insurance proceeds from the crop. Warehouse perfects this interest by filing financing statement. After, Creditor perfects its interest. Months later, Creditor informs Warehouse of its interest in Debtor's 2013 crop, requesting Warehouse include Creditor as payee on any proceeds from the crop. However, Creditor never receives a payment for the sale of the crop. Creditor files suit against Warehouse alleging conversion of the proceeds of the sale of the Debtor's 2013 tobacco crop.

Issue: Does the lack of a future advances clause in a security agreement entitle a junior creditor (Creditor) to the crop proceeds?

***Versailles Farm, Home & Garden, LLC v. Haynes*, 2021 WL 519722 (Ky. Ct. App. Feb. 12, 2021)**

Case Law Update

Creditor's Argument: Warehouse has first priority to crop proceeds, but not all of the earnings because the Debtor-Warehouse security agreement only secures the proceeds from 100 acres of the tobacco and did not contain a future advances clause; by neglecting to include future advances clause, Creditor has priority to crop proceeds once Warehouse's loan is satisfied.

Warehouse's Argument: UCC does not require inclusion of future advances clause to secure future advances. Because Warehouse perfected by filing, this filing provides notice to Creditor of its interest, and it became Creditor's duty to investigate state of collateral under the Debtor-Warehouse security agreement.

Analysis: Creditor did not attempt to obtain the Debtor-Warehouse agreement, and did not rely on the absence of a future advances clause when providing its loan to Debtor.

Holding: Creditor's inaction impaired it from enforcing interest.

***Versailles Farm, Home & Garden, LLC v. Haynes*, 2021 WL 519722 (Ky. Ct. App. Feb. 12, 2021)**

Federal Livestock Dealer Trust

Background

- Consolidated Appropriations Act ("CAA") contained $900 billion in stimulus relief, $13 billion which was allocated to agricultural sector
- Most CAA agricultural provisions offered financial assistance to producers through USDA-led programs, but some measures designed to protect and benefit certain groups in the agricultural industry
- CAA established a statutory federal livestock dealer trust to benefit unpaid sellers of livestock
  - SALE Act of 2018 was introduced to establish a livestock dealer trust, but went no further in the legislative process
  - 2018 Farm Bill instructed USDA to conduct study on feasibility of a trust
  - Congress introduced the SALE Act of 2020 to amend the Packers and Stockyards Act ("PSA") to create a livestock dealer trust
  - SALE Act of 2020 was included in the CAA, and the trust was established with the enactment of the CAA

Federal Livestock Dealer Trust

Overview

- Congressional Goal: To ensure livestock sellers are repaid for the livestock they sold to a livestock dealer
- The statutory trust accomplishes this goal by requiring livestock dealers to retain certain assets in trust for the benefit of unpaid livestock sellers
  - I.e., if the dealer fails to pay the seller for livestock, the seller will be able to receive payment through the trust assets
- Protects unpaid cash sellers of livestock (not creditors)—including:
  - Livestock producers
  - Auction markets
  - Livestock dealers selling to another livestock dealer
- Dealers whose average annual purchases of livestock exceed $100,000 are subject to the statutory trust
- *Livestock* includes "cattle, sheep, swine, horses, mules, or goats—whether live or dead" (7 U.S.C.A. § 182(4))

Federal Livestock Dealer Trust

Operation of the Dealer Trust

- When is a dealer's trust created?
  - When the dealer does not pay for livestock they "purchase" from a seller
  - Dealer must maintain a trust with certain assets until they satisfy the unpaid purchase of livestock
- Trust assets include livestock, inventories of, or account receivables or proceeds from, livestock purchased by the dealer
- The trust is a "floating trust," so all trust assets are commingled
  - All assets are subject to claims from every unpaid seller, up to the amount owed

Federal Livestock Dealer Trust

Priority Rules for Trust Assets

- Statutory provisions of the trust determine order of priority in assets
- The trust guarantees repayment by providing unpaid sellers first priority to trust assets over dealer's secured creditors
  - Sellers who deliver livestock to a dealer without payment become beneficiaries of the trust, and have a greater claim to trust assets until paid in full
- Priority to trust assets may become an issue when a dealer files for bankruptcy
  - Trust assets are not included in the dealer's bankruptcy estate—important for two reasons:
    1. Automatic stay does not touch trust assets, meaning unpaid sellers can still use collection efforts to receive funds to satisfy the dealer's debt
    2. Unpaid sellers will receive payment from trust assets before any creditors who claim an interest in the same assets
- Transfer of livestock subject to dealer trust is not "for value" if transfer is in accordance with a creditor's security agreement (i.e., not accepting good title)
- Payment from dealer to unpaid seller is most likely not recoverable as a preference item

Interest in Federal Crop Insurance Proceeds

Overview

- UCC Article 9 usually governs secured transactions and security interests
- Federal law replaces Article 9 depending on the type of property used as collateral for a loan
- Federal Crop Insurance Act ("FCIA") created federal crop insurance program
  - FCIA governs all aspects of the crop insurance program, including indemnity payments
  - Established Federal Crop Insurance Corporation ("FCIC"), which implements regulation to carry out the provisions of FCIA
- The FCIA and its regulations contain provisions which have a preemptive effect on certain Article 9 rules
  - FCIA replaces Article 9 rules when a creditor has a security interest in a producer-debtor's crop insurance proceeds
    - However, FCIA's preemption of Article 9 does have a backstop

Interest in Federal Crop Insurance Proceeds

Preemptive Provisions

- "Claims for indemnities…shall not be liable to attachment, levy, garnishment, or any other legal process before payment to the insured…." (7 U.S.C. § 1509).
- Public and private entities are prohibited from undertaking certain actions that affect FCIA insurance agreements, including the imposition or enforcement of "liens, garnishments, or other similar actions against proceeds obtained, or payments issued in accordance with the [FCIA]…." (7 C.F.R. § 400.352(b)).
- A regulation entitled "Creditors" specifies that "an interest of a person in an insured crop existing by virtue of a lien…shall not entitle the holder of the interest to any benefit under the contract." (7 C.F.R. § 457.5).

Interest in Federal Crop Insurance Proceeds

Assignment of Indemnity

- The regulations offer creditors a specific method for receiving an interest in a debtor's crop insurance proceeds
- Under FCIA's regulations, producers are permitted to assign their right to an indemnity payment to another individual or entity
- To assign, the requirements under the regulations must be satisfied:
  1. May only assign to creditors the producer owes a financial debt;
  2. May only assign the indemnity for the current crop year;
  3. Must execute an "Assignment of Indemnity" form provided by insurer; and
  4. Insurer or FCIC must approve form in writing. (7 C.F.R. § 457.8).

Interest in Federal Crop Insurance Proceeds

Interpreting Preemptive Provisions

- Analyzing the regulations "could lead one to the conclusion that the only way to obtain a [security interest] on the proceeds of a crop insurance policy is by an assignment secured in the manner described in the policy." (*In re Rees*, 216 B.R. 551, 554 (1998)).
- Reading the regulations in this manner conflicts with the FCIA's preemption provision.
  - Under the FCIA, a producer's insurance proceeds are not subject to a state law security interest "before payment to the insured...." (7 U.S.C. § 1509).

Interest in Federal Crop Insurance Proceeds

Hypothetical: In re Piper

Hometown Bank provides Piper Producer a loan and takes a security interest in Piper's 2021 crop year insurance proceeds. Hometown Bank correctly attaches and perfects its security interest in accordance with the applicable Article 9 laws of the state. Later that year, half of Piper's crops are destroyed by flooding, which is covered under her crop insurance policy. She files a claim with her insurance provider, and this claim is approved. Weeks later, Piper receives a $70,000 insurance payment. Instead of using the funds to satisfy her loan with Hometown Bank, Piper purchases farming equipment and satisfies loans with her other creditors (who did not have an assignment or security interest in her crop insurance proceeds). Unfortunately, Piper faces financial struggles and files for bankruptcy. In the bankruptcy proceeding, Hometown Bank attempts to enforce its security interest against Piper to recover the $70,000 insurance proceeds. However, Piper claims the bank does not have an enforceable interest in the proceeds because the FCIA preempts state law, and she did not assign indemnity rights to Hometown Bank in accordance with 7 C.F.R. § 457.8.

Interest in Federal Crop Insurance Proceeds

Hypothetical: In re Piper, cont.

- **Hometown Bank's Argument:** The FCIA preempts Article 9 security interests only before the debtor receives insurance proceeds.
- **Piper's Argument:** The FCIA and its regulations require an creditors to obtain an assignment to have an enforceable interest in crop insurance proceeds.
- **Court's Interpretation:** Congress clearly mandated that claims for insurance proceeds are not subject to a security interest "before payment to the insured…." (7 U.S.C. § 1509). If Congress wanted the FCIA to completely preempt Article 9, it would have included "before or after payment to the insured" within the statutory provision. Hence, Congress clearly intended the FCIA to preempt Article 9 only before the producer receives an insurance payment.
- **Holding:** Piper has received insurance proceeds, which means FCIA's preemptive effect is exhausted and Article 9 applies. Because Hometown Bank holds a perfected Article 9 security interest in the proceeds, it may enforce its interest to recover the funds and satisfy Piper's loan debt.

Interest in Federal Crop Insurance Proceeds

Seeking Assignments: Three Advantages

- Assignments likely reduce risk and provide a superior interest
- Three main reasons why lenders may seek an assignment:
  1. Claims on Insurance Policy
     - Lenders can make a claim for indemnity under the insurance policy
  2. Collecting Insurance Proceeds
     - Lenders receive direct payment from insurance provider
  3. Priority
     - Lender-assignees hold an interest before producer receives payment

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Environmental Law Update

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Overview

- Pesticides
- Swampbuster
- The Biden Administration

2020 Dicamba Label

- Approved in October 2020 for the 2021 – 2026 growing seasons (5 year registration)
- Includes XentiMax (Bayer), Engenia (BASF), and Tavium (Syngenta)
- Added restrictions to address volatility:
  - Tank mixed pH-buffering agent required before application
  - Downwind butter of 240 ft, 310 ft in areas where endangered species are located
  - Application cutoff dates of June 30 for soybeans and July 30 for cotton
  - Simplified label and use directions
- Footnote limiting state use of FIFRA 24(c) labels to restrict pesticide use

Current Dicamba Lawsuits

- ***Center for Biological Diversity v. EPA*, No. 4:20-cv-00555 (D. Ariz.)**
  - Challenging the 2020 registration for violating FIFRA and the ESA
  - Argument: New registration fails the same FIFRA requirement that a pesticide may not cause "unreasonable adverse effects" to the environment
    - In other words: 2020 registration should not have been granted
- ***American Soybean Association v. EPA*, No. 1:20-cv-03190 (D. D.C.)**
  - Argument: EPA exceeded its statutory duties under FIFRA and the ESA by imposing the cutoff dates, and the buffers for endangered species
    - In other words: 2020 registration is unlawfully restrictive
  - Asking court to uphold the label but remove the cutoff dates and buffers

Consolidated Petitions for Review

- Two petitions for review of the 2020 label have been consolidated together into the D.C. Circuit Court of Appeals:
  - ***National Family Farm Coalition v. EPA*, No. 21-1043 (D.C. Cir.)**
  - ***American Soybean Association v. EPA*, No. 21-1441 (D.C. Cir.)**
- NFFC lawsuit was originally filed in the Ninth Circuit
  - Argues that EPA failed to fulfill its duties under FIFRA and the ESA
  - EPA failed to support its conclusion of "no unreasonable adverse affects"
  - Failed to ensure that endangered species and critical habitat would not be put in jeopardy
- ASA argues that the 2020 label violates FIFRA and the ESA by exceeding statutory authority
  - Cutoff dates are too restrictive
  - Buffer requirements are too large

Where These Lawsuits Are Currently At

- CBD case in Arizona district court:
  - Stayed in Feb. for 60 days, resumed in April
  - Bayer, BASF, & Syngenta have intervened
  - Waiting on response to complaint from EPA
- ASA case in D.C. district court:
  - Stayed in Feb. for 60 days, resumed in April
  - Bayer, BASF, & Syngenta have intervened
  - Waiting on response from EPA
- Consolidated petitions for review in D.C. appellate court:
  - EPA filed motion to dismiss for lack of jurisdiction
    - Claiming that FIFRA only allows appellate review for orders issued after "public hearing"
  - Enviro plaintiffs asked court to reject motion to dismiss and for case to be transferred back to the Ninth Circuit
  - Waiting on response from court

Dicamba in Arkansas: Before the Supreme Court

- Arkansas Supreme Court issued a decision on May 6, finding that the makeup of the State Plant Board was unconstitutional
  - Allowing interest groups to appoint 9 of the 18 Plant Board members violated the Arkansas Constitution by delegating legislative power
  - Sent back to lower court with instructions to remove unconstitutionally appointed members
  - Unclear when this will happen – new law restructuring Plant Board expected to take affect sometime in the summer
- Lead to additional lawsuits challenging Plant Board actions

Dicamba in Arkansas: 2021 Rule

- State Plant Board has adopted a new dicamba use rule, effective May 3
  - Cutoff date for over the top application on soybeans and cotton set for June 30
  - Half mile buffer requirement for certified organic crops and commercially grown specialty crops
  - Quarter mile buffer requirement for all applications
- TRO issued on May 21 in ***Hooks v. Arkansas State Plant Board*, No. 60CV-21-2843** will prevent May 3 rule from going into effect
  - Filed after Ark. Supreme Court decision challenging May 3 rule as unconstitutional
  - Dicamba rules that existed prior to May 3 are now in effect, including a cut-off date of May 25

Recent OIG Report on 2018 Dicamba Label

- Concluded that EPA's 2018 decision to extend registration for registered dicamba products did not follow typical operating procedures
  - EPA did not conduct "required internal peer review" of scientific documents created to support the registration decision
- Senior members of Office of Chemical Safety and Pollution Prevention were more involved in the registration decision than was typical
  - Lead to senior-level changes to scientific documents
- Resulted in Ninth Circuit decision vacating the 2018 label
- Does not suggest any concerns over the 2020 label

Glyphosate

- Ninth Circuit published a decision upholding the $25 million award in ***Hardeman v. Monsanto Co.*, No. 19-16636 (9th Cir. 2021)**
  - Concluded that the plaintiff's failure to warn claims were not preempted by FIFRA
  - Found that the district court had properly applied the *Daubert* standard to properly admit the plaintiff's expert testimony
  - Similar cases in the same jurisdiction may rely on the court's conclusions going forward
- Settlement of other glyphosate cases is on-going
  - $2 billion settlement in progress in California district court – Judge Vince Chhabria must approve for settlement to be finalized
  - Intended for people who have been exposed to Roundup but who have not filed lawsuits
  - Separate from the $11 billion earmarked to settle existing lawsuits

Ninth Circuit Chlorpyrifos Decision

- Court ordered EPA to revoke or modify all pesticide residue tolerances for chlorpyrifos in ***League of United Latin Am. Citizens v. Regan*, No. 19-71979 (9th Cir. 2021)**
- Plaintiffs petitioned EPA to review the pesticide tolerances in 2007 – EPA denied the review request in 2017, prompting this lawsuit
- Basis:
  - Under the FFDCA, EPA must set limits on the amount of pesticide residue that may legally be allowed on food
    - EPA "may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food on if [EPA] determines that the tolerance is safe." 21 U.S.C. § 346a(b)(2)(A)(i).
  - If EPA finds that a pesticide tolerance is no longer safe, it must modify or rescind the tolerance
- Ruling: 2007 petition had enough information to show that chlorpyrifos tolerances were unsafe, and the petition to review them should have been granted

Consequences?

- EPA also ordered to modify or cancel FIFRA registrations for food use registrations of chlorpyrifos accordingly
- A pesticide will be registered under FIFRA if EPA determines it will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D).
- "Unreasonable adverse effects on the environment" = "a human dietary risk from residues that result from a use of a pesticide in or on any food[.]" 7 U.S.C. § 136(bb).
- If chlorpyrifos tolerances are rescinded, could FIFRA registration be cancelled?
- Could challenging pesticide tolerances be an avenue for future plaintiffs?

Additional Chlorpyrifos Lawsuits

- Two lawsuits filed in California state court in late 2020 challenge Corteva over harm allegedly caused by chlorpyrifos exposure:
  - ***Avila v. Corteva Inc.*, No. 20C-0311 (Cal. Super. Ct., October 27, 2020)**
  - ***Calderon de Cerda v. Corteva Inc.*, No. 20C-0250 (Cal. Super. Ct., September 16, 2020)**
- Plaintiffs bring claims of negligence, failure to warn, and design defect
- Both plaintiffs have asked for a jury trial

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Swampbuster 2020 Regulations

- Final regulations published in Federal Register August 28, 2020
- Codified an interim final rule published in December, 2018
- Goal of new regs is to clarify process by which highly erodible lands and wetlands are identified, and help farmers better understand what actions result in ineligibility

Regulatory Changes to Swampbuster

- Added definitions for: "best drained condition," "normal climatic conditions," "playa," "pocosin," "pothole," & "wetland hydrology"
- Revised definition of "wetland determination" with respect to farmed wetland, farmed wetland pasture, and prior-converted cropland
- Confirmed that wetland determinations made between Nov. 28, 1990 and July 3, 1996 are certified wetland determinations
- Requires a particular level of legibility for maps used for wetland determinations that result in ineligibility for benefits

Regulatory Changes to Swampbuster: Clarifications

- Wetland determination process involves three steps
- Wetland hydrology consists of saturation by water during growing season sufficient to support hydrophytic vegetation
- Wetland hydrology will be determined according to best drained condition when the wetland is affected by drainage manipulations that occurred prior to December 23, 1985
- Wetland hydrology determinations will be made according to the current methodology used by NRCS at the time of the determination
- Wetland determinations are done on a field or sub-field basis

Foster v. Vilsack

- Plaintiffs in ***Foster v. Vilsack*, No. 21-4081 (D. S.D.)** filed a lawsuit on May 5 alleging that NRCS improperly denied two petitions to review a wetland certification, and that Swampbuster is unconstitutional
- Concerns a 0.8 acre area of land certified as a wetland in 2011
- Plaintiffs allege that the area is an artificial wetland created as a result of nearby development activity and should not be regulated under Swampbuster
  - According to plaintiffs the area is a "muddy puddle" created by additional snow melt from an "adjacently developed" tree belt planted by the plaintiffs' father in the 1930s

Foster v. Vilsack: Arguments

- Plaintiffs make several arguments, including:
  1. Swampbuster violates the Commerce Clause and the 10th Amendment
  2. Swampbuster's "Review Regulation" is not in effect under the Congressional Review Act and therefore may not be used to regulate the plaintiffs
  3. Review Regulation violates Swampbuster and the Due Process Clause
  4. NRCS unlawfully withheld agency action by denying plaintiffs' 2017 and 2020 requests for review
  5. The 2011 Wetland Certification is no longer valid due to plaintiffs' submission of the 2017 and 2020 requests for review

Foster v. Vilsack: Swampbuster Violates Commerce Clause & 10th Amendment

- Commerce Clause grants Congress the power "to regulate commerce with foreign nations, and among the several states"
- Plaintiffs argue that Swampbuster does not regulate any part of foreign or interstate commerce and is therefore unconstitutional
- **Note**: in ***U.S. v. Dierckman*, No. 98-4131 (7th Cir. 200)** the 7th Circuit concluded that Swampbuster was valid exercise of Congress's spending power
- Under 10th Amendment, all powers not delegated to Congress are left to the States
- Plaintiffs argue this includes ability to regulate land and water use

Foster v. Vilsack: "Review Regulation" & the CRA

- Swampbuster "Review Regulation" states:
  "A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6).
- NRCS denied plaintiffs' 2017 and 2020 requests for review based on the Review Regulation
- The CRA requires federal agencies to report their rulemaking activities to Congress – an agency must submit a rule to Congress before it can take affect
- Plaintiffs argue that the Review Regulation was never submitted to Congress and therefore cannot be enforced

Foster v. Vilsack: "Review Regulation" & Due Process

- Text of Swampbuster states that a final wetland certification will be valid so long as the area is used for agriculture or until the person affected by the certification requests review. 16 U.S.C. § 3822(a)(4).
- Plaintiffs allege Review Regulation violates plain text of Swampbuster
- Also claim that Review Regulation violates Due Process Clause by "creating an adjudicatory decision-making process which is rigged against the requestor"
  - NRCS will only grant review if the area has experienced a change or if NRCS agrees there was an error in the certification process

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Executive Order & "Freeze Memo"

- President Biden issued Executive Order 13990 on Jan. 20
- Directs federal agencies to review all regulations passed between Jan. 20, 2017 and Jan. 20, 2021
  - Also issued non-exclusive list of regulations to be reviewed, including 2020 NEPA regs, 2019 & 2020 ESA regs, and 2020 WOTUS rule
- Biden administration issued "freeze memo" that barred all Trump-era rules that had not taken legal effect on Jan. 20 from taking effect for an additional 60 days

What's Happened So Far

- FWS is taking steps to revoke Migratory Bird Treaty Act rules finalized on Jan. 7
- The Jan. 7 rules limited the scope of the MBTA to exclude incidental take of migratory birds
- FWS published a proposed rule to revoke the Jan. 7 rule, effectively restoring the MBTA to where it was before that rule was finalized
  - Incidental take of migratory birds would once again violate the MBTA

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  - EPA did not conduct "required internal peer review" of scientific documents created to support the registration decision
- Senior members of Office of Chemical Safety and Pollution Prevention were more involved in the registration decision than was typical
  - Lead to senior-level changes to scientific documents
- Resulted in Ninth Circuit decision vacating the 2018 label
- Does not suggest any concerns over the 2020 label

Glyphosate

- Ninth Circuit published a decision upholding the $25 million award in ***Hardeman v. Monsanto Co.*, No. 19-16636 (9th Cir. 2021)**
  - Concluded that the plaintiff's failure to warn claims were not preempted by FIFRA
  - Found that the district court had properly applied the *Daubert* standard to properly admit the plaintiff's expert testimony
  - Similar cases in the same jurisdiction may rely on the court's conclusions going forward
- Settlement of other glyphosate cases is on-going
  - $2 billion settlement in progress in California district court – Judge Vince Chhabria must approve for settlement to be finalized
  - Intended for people who have been exposed to Roundup but who have not filed lawsuits
  - Separate from the $11 billion earmarked to settle existing lawsuits

Ninth Circuit Chlorpyrifos Decision

- Court ordered EPA to revoke or modify all pesticide residue tolerances for chlorpyrifos in ***League of United Latin Am. Citizens v. Regan*, No. 19-71979 (9th Cir. 2021)**
- Plaintiffs petitioned EPA to review the pesticide tolerances in 2007 – EPA denied the review request in 2017, prompting this lawsuit
- Basis:
  - Under the FFDCA, EPA must set limits on the amount of pesticide residue that may legally be allowed on food
    - EPA "may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food on if [EPA] determines that the tolerance is safe." 21 U.S.C. § 346a(b)(2)(A)(i).
  - If EPA finds that a pesticide tolerance is no longer safe, it must modify or rescind the tolerance
- Ruling: 2007 petition had enough information to show that chlorpyrifos tolerances were unsafe, and the petition to review them should have been granted

Consequences?

- EPA also ordered to modify or cancel FIFRA registrations for food use registrations of chlorpyrifos accordingly
- A pesticide will be registered under FIFRA if EPA determines it will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D).
- "Unreasonable adverse effects on the environment" = "a human dietary risk from residues that result from a use of a pesticide in or on any food[.]" 7 U.S.C. § 136(bb).
- If chlorpyrifos tolerances are rescinded, could FIFRA registration be cancelled?
- Could challenging pesticide tolerances be an avenue for future plaintiffs?

Additional Chlorpyrifos Lawsuits

- Two lawsuits filed in California state court in late 2020 challenge Corteva over harm allegedly caused by chlorpyrifos exposure:
  - ***Avila v. Corteva Inc.*, No. 20C-0311 (Cal. Super. Ct., October 27, 2020)**
  - ***Calderon de Cerda v. Corteva Inc.*, No. 20C-0250 (Cal. Super. Ct., September 16, 2020)**
- Plaintiffs bring claims of negligence, failure to warn, and design defect
- Both plaintiffs have asked for a jury trial

Overview

- Pesticides
- Swampbuster
- The Biden Administration

Swampbuster 2020 Regulations

- Final regulations published in Federal Register August 28, 2020
- Codified an interim final rule published in December, 2018
- Goal of new regs is to clarify process by which highly erodible lands and wetlands are identified, and help farmers better understand what actions result in ineligibility

Regulatory Changes to Swampbuster

- Added definitions for: "best drained condition," "normal climatic conditions," "playa," "pocosin," "pothole," & "wetland hydrology"
- Revised definition of "wetland determination" with respect to farmed wetland, farmed wetland pasture, and prior-converted cropland
- Confirmed that wetland determinations made between Nov. 28, 1990 and July 3, 1996 are certified wetland determinations
- Requires a particular level of legibility for maps used for wetland determinations that result in ineligibility for benefits

Regulatory Changes to Swampbuster: Clarifications

- Wetland determination process involves three steps
- Wetland hydrology consists of saturation by water during growing season sufficient to support hydrophytic vegetation
- Wetland hydrology will be determined according to best drained condition when the wetland is affected by drainage manipulations that occurred prior to December 23, 1985
- Wetland hydrology determinations will be made according to the current methodology used by NRCS at the time of the determination
- Wetland determinations are done on a field or sub-field basis

Foster v. Vilsack

- Plaintiffs in ***Foster v. Vilsack*, No. 21-4081 (D. S.D.)** filed a lawsuit on May 5 alleging that NRCS improperly denied two petitions to review a wetland certification, and that Swampbuster is unconstitutional
- Concerns a 0.8 acre area of land certified as a wetland in 2011
- Plaintiffs allege that the area is an artificial wetland created as a result of nearby development activity and should not be regulated under Swampbuster
  - According to plaintiffs the area is a "muddy puddle" created by additional snow melt from an "adjacently developed" tree belt planted by the plaintiffs' father in the 1930s

Foster v. Vilsack: Arguments

- Plaintiffs make several arguments, including:
  1. Swampbuster violates the Commerce Clause and the 10th Amendment
  2. Swampbuster's "Review Regulation" is not in effect under the Congressional Review Act and therefore may not be used to regulate the plaintiffs
  3. Review Regulation violates Swampbuster and the Due Process Clause
  4. NRCS unlawfully withheld agency action by denying plaintiffs' 2017 and 2020 requests for review
  5. The 2011 Wetland Certification is no longer valid due to plaintiffs' submission of the 2017 and 2020 requests for review

Foster v. Vilsack: Swampbuster Violates Commerce Clause & 10th Amendment

- Commerce Clause grants Congress the power "to regulate commerce with foreign nations, and among the several states"
- Plaintiffs argue that Swampbuster does not regulate any part of foreign or interstate commerce and is therefore unconstitutional
- **Note**: in ***U.S. v. Dierckman*, No. 98-4131 (7th Cir. 200)** the 7th Circuit concluded that Swampbuster was valid exercise of Congress's spending power
- Under 10th Amendment, all powers not delegated to Congress are left to the States
- Plaintiffs argue this includes ability to regulate land and water use

Foster v. Vilsack: "Review Regulation" & the CRA

- Swampbuster "Review Regulation" states:
  "A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6).
- NRCS denied plaintiffs' 2017 and 2020 requests for review based on the Review Regulation
- The CRA requires federal agencies to report their rulemaking activities to Congress – an agency must submit a rule to Congress before it can take affect
- Plaintiffs argue that the Review Regulation was never submitted to Congress and therefore cannot be enforced

Foster v. Vilsack: "Review Regulation" & Due Process

- Text of Swampbuster states that a final wetland certification will be valid so long as the area is used for agriculture or until the person affected by the certification requests review. 16 U.S.C. § 3822(a)(4).
- Plaintiffs allege Review Regulation violates plain text of Swampbuster
- Also claim that Review Regulation violates Due Process Clause by "creating an adjudicatory decision-making process which is rigged against the requestor"
  - NRCS will only grant review if the area has experienced a change or if NRCS agrees there was an error in the certification process

Overview

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Executive Order & "Freeze Memo"

- President Biden issued Executive Order 13990 on Jan. 20
- Directs federal agencies to review all regulations passed between Jan. 20, 2017 and Jan. 20, 2021
  - Also issued non-exclusive list of regulations to be reviewed, including 2020 NEPA regs, 2019 & 2020 ESA regs, and 2020 WOTUS rule
- Biden administration issued "freeze memo" that barred all Trump-era rules that had not taken legal effect on Jan. 20 from taking effect for an additional 60 days

What's Happened So Far

- FWS is taking steps to revoke Migratory Bird Treaty Act rules finalized on Jan. 7
- The Jan. 7 rules limited the scope of the MBTA to exclude incidental take of migratory birds
- FWS published a proposed rule to revoke the Jan. 7 rule, effectively restoring the MBTA to where it was before that rule was finalized
  - Incidental take of migratory birds would once again violate the MBTA

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Agricultural Law Update

Harrison Pittman

Foreign Ownership of Agricultural Land

- Considerable state-level legislative activity this past year
  - Arkansas, Tennessee, and Missouri are key examples
  - Likely to arise again
- Missouri is a continuation of changes made to accommodate acquisition of Smithfield Foods
- Arkansas largely copied Missouri, at least initially

Tennessee Proposed Law

- Would have stated that "a nonresident alien, foreign business, or foreign government, or an agent, trustee, or fiduciary thereof, shall not purchase or otherwise acquire agricultural land in this state."
  - Would have taken effect July 1, 2021 but would have grandfathered in land
  - Grandfathered land transferred after July 1, 2021 would have required affected "persons" to divest property within two years of acquisition
- Required registration after July 1, 2021 with TN Secretary of State
  - If not farmed for 5 years, could lead to court order to divest

Foreign Ownership of Agricultural Land

- Very complicated area
- One size does not fit all
- USDA data available
- Many states have reporting statutes

Federal and State Checkoff Programs

- Ongoing First Amendment litigation and issues
  - 9th Circuit (*R-CALF*)
  - D.C. District Court (Beef/Soybean Checkoff specific)
  - *Janus v. AFSCME*
- Could emerge (again) in Farm Bill process