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The nation's leading source of agricultural and food law research and information



Agricultural, Food & Environmental Law Update




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About The Center


- Since 1987, the National Agricultural Law Center is the nation's leading source for agricultural and food law research and information.
 - The Center is a unit of the University of Arkansas System Division of Agriculture
 - In close partnership with the USDA Agricultural Research Service, National Agricultural Library
- Objective, non-partisan research and information regarding laws and regulations affecting agriculture

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Outline:

- Carbon Contracts
- Pesticides
- Animal Ag: Antitrust & Slaughter
- Foreign Ownership of Ag Land



Carbon Markets: Where are We?

- Still in the very early days.
 - Contracts are difficult to obtain and typically contain confidentiality clauses.
- Likely to be variation in the amount of carbon that particular types of soil can capture
 - Could mean substantial differences in the ability of farmers to capture payments in some parts of the country...
 - Estimates for payments may not meet farmer's expectations if the company does not have good data in a particular area
- Perception: Substantial (voluntary) demand at present



Length of Contracts

- Contract duration?
 - From one year to much longer
- Questions to consider:

? Does the farmer own the land OR have a lease agreement that covers a long period of time?

? If it is a lease agreement – do you expect the tenant to keep leasing the land?

? Are there other potential tenants in the area that can (successfully) farm and abide by the carbon contract?



What Practices are Covered?

- Different companies use (and value) different practices.

- Common practices:
 - Cover crops
 - No-till or minimal till
 - Buffer strips along streams (think EQIP)
 - Crop rotational practices
 - Rotational grazing practices
 - Digesters at CAFOS
 - Planting of trees/foregoing logging operations



•**Cover crops and no-till seem to be popular practices



Calculating Payments

- Different companies may use different methodologies...
 - \$15-\$20 per ton is what we are seeing presently, but some are as low as \$3 per acre
 - Many contracts do not specify how the payment is calculated
- What about earlier adopters?
 - Some contracts exclude acreages already using these practices
- Practical difficulties to consider:
 - What if not as much carbon is sequestered as expected?
 - What about a change of ownership?



Additional Contract Issues

- “No Double Dipping” clauses...i.e. you can’t sell the same benefits twice!
 - Consider: federal or state cost share programs like EQIP
- Confidentiality clauses
- Access to the property clauses
- Additional terms?
 - Some seem to reference a website with additional/changeable terms
- Penalty clauses
- Definitions – critical!
 - Some contracts just cover carbon while others include “environmental benefits” such as water quality credits




Final Thoughts

- Read all definitions carefully...
 - Also consider what words/phrases are not defined
- Lots of variability among contracts that we have heard about
- Relatively young industry...many agreements are about “pilot programs”
- Measuring and verification of carbon sequestered can be tricky
- Producers may be caught between the government and private sector
- Experience with wind leases may offer some lessons to consider
 - Ex: statutory requirements to record contract with deed, for example




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FIFRA Preemption

- State authority under FIFRA:
 - (a) A state may regulate the sale or use of any federal registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
 - (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
 - 7 U.S.C. § 136v.
- Supreme Court in *Bates v. Dow Agrosciences* established preemption test:
 - “For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement ‘for labeling or packaging’[.] Second, it must impose a labeling or packaging requirement that is ‘in addition to or different from those required under this subchapter.’”
 - This can include common law requirements that affect labeling or packaging of pesticides



FIFRA Misbranding & Failure to Warn

- Misbranded:
 - A pesticide is misbranded if [...] the labeling accompanying it does not contain directions for use which [...] are adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F).
- Unlawful acts:
 - It shall be unlawful for any person in any State to distribute or sell to any person [...] any pesticide which is adulterated or misbranded. 7 U.S.C. § 136j(a)(1)(E).
- Failure to warn claims:
 - The defendant did not warn of a particular risk that was known or knowable in light of the generally recognized and best knowledge available at the time of manufacture or distribution.
 - *Anderson v. Owens Corning Fiberglas Corp.* 53 Cal.3d 987 (1991).
 - *Note:* Elements of failure to warn can vary across states, but are largely similar




The Two Main Arguments

FIFRA Preempts Failure to Warn Claims





State law failure to warn claims would require a new warning to be added to the glyphosate label that is *different from or in addition to* the federally registered label. Preemption under 7 U.S.C. § 136v.


FIFRA misbranding requirement is broader than state law failure to warn claims, so preemption does not occur. No preemption if FIFRA requirements are parallel to state law requirements.

FIFRA Does NOT Preempt Failure to Warn Claims




Recent Legal Decisions Involving FIFRA Preemption

<p>Ruling: Claims ARE NOT Preempted</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;">  <p><i>Hardeman v. Monsanto Co.</i>, No. 19-16636 (9th Cir. May 14, 2021) • Bayer has appealed decision to Supreme Court</p> </div> <div style="width: 45%;">  <p><i>Carson v. Monsanto Co.</i>, 508 F.Supp.3d 1369 (S.D. Ga. Dec. 21, 2020) • On appeal to 11th Circuit</p> </div> </div>	<p>Ruling: Claims ARE Preempted</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;">  <p><i>Pilliod v. Monsanto Co.</i>, No. A158228 (Cal. Ct. App. Aug. 9, 2021)</p> </div> <div style="width: 45%;">  <p><i>Stephens v. Monsanto Co.</i>, CTVSB2104801 (Cal. Super. Ct. July 19, 2021) • Pre-trial decision; trial currently ongoing</p> </div> </div>
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Court Orders Chlorpyrifos Tolerances Revoked

- *League of United Latin Am. Citizens v. Regan*, No. 19-71979 (9th Cir. 2021)
- Plaintiffs filed a petition with EPA in 2007 seeking revocation of chlorpyrifos tolerances due to newly available scientific evidence showing current chlorpyrifos tolerance levels caused neurodevelopmental effects in children
 - EPA did not issue final decision on petition until 2017 when the Agency denied the petitioner's request
 - This decision prompted lawsuit challenging the denial
- Ninth Circuit agreed with plaintiffs, finding that that the FFDCA requires EPA to review a pesticide tolerance once the Agency comes aware of "genuine questions" of the tolerance's safety
- Emphasis on term *safe* in the FFDCA



FIFRA & the FFDCA

- Section 408 of the FFDCA allows EPA to set tolerances for pesticide residues on food
 - "Tolerance" refers to the maximum level of pesticide residues legally allowed in or on raw agricultural commodities and processed foods
 - In general, any pesticide residue in or on a food shall be deemed unsafe unless "a tolerance for such pesticide chemical residue in or on such food is in effect[.]" 21 U.S.C. § 346a(a)(1)(A).
 - EPA "may establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if [EPA] determines that the tolerance is safe." 21 U.S.C. § 346a(b)(2)(A)(i).
- For a pesticide to be legally used in the U.S., it must be registered under FIFRA
 - To register a pesticide, EPA must conclude that it will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5).
 - "Unreasonable adverse effects" means "(1) any unreasonable risk to man or the environment [...] or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with" the FFDCA. 7 U.S.C. § 136(bb).



Practical Results

EPA issued a final rule revoking chlorpyrifos tolerances in August 2021

- Rule became effective October 29, 2021; tolerances will formally expire February 28, 2022
- Food commodities containing traces of chlorpyrifos will be considered adulterated after that date

EPA will issue accompanying Notice of Intent to Cancel under FIFRA to cancel all registered food uses of chlorpyrifos

- Notice has not been issued yet

Appears to be the first time a pesticide has had food uses cancelled following a court order to revoke tolerances

- Possibility of similar cases in the future

Paraquat Lawsuits

- Emerging group of lawsuits with plaintiffs alleging paraquat exposure caused them to develop Parkinson's disease
- Plaintiffs bringing similar claims as plaintiffs in glyphosate suits
 - Design defect, failure to warn, negligence, public nuisance, breach of implied warranty
- Earliest paraquat lawsuit filed in Illinois state court as *Hoffman v. Syngenta*, No. 17-L-517 (Ill. Cir. Ct. 2021)
 - Trial was scheduled to start June 1, 2021, but has been delayed
- Dozens of other paraquat cases filed in federal district courts have been consolidated into an MDL as *In re: Paraquat Products Liability Litigation*, No. 3:21-md-03004 (S.D. Ill. 2021)
 - Jury trial date set for November 15, 2022



Key Takeaways

- Preemption issue ramping up
 - Decision from Supreme Court could impact future lawsuits
- Revocation of pesticide tolerances opens new door to label cancellation
- Pesticide lawsuits continue gaining steam
 - Glyphosate suits continue
 - Paraquat lawsuits following similar patterns

Roundup Warning
 Lawsuits targeting Monsanto-produced Roundup continue to flood courts across the U.S. The parent company, Bayer, has said three pay made in Roundup litigation. Over \$7 billion dollars in damages have been awarded. Roundup is still widely available, which means the...



PHOTO COURTESY OF BAYER/AMERICA'S PEOPLE AFFECTED BY ROUNDUP MAY BE ENTITLED TO CASH SETTLEMENTS



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Oversight of Slaughter and Processing

- USDA/FSIS
- Requirements:
 - Sanitation
 - Recordkeeping
 - Continuous inspection
- Paid by federal funds
- Interstate/international sale of products

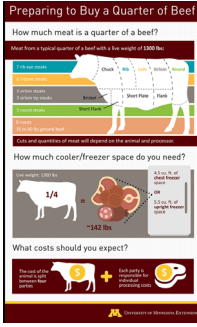


- State inspection programs (MPI)
- Must enter into cooperative agreement with FSIS/reviewed annually for compliance
- Requirements must be "at least equal to"
- Paid by state, federal cost-share
- Intrastate sale of products




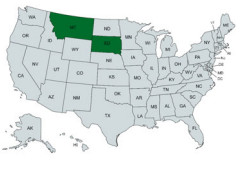
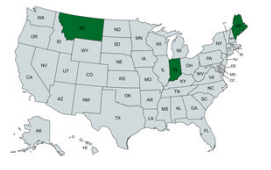
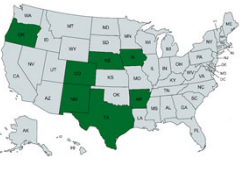
<p>Federal-State Cooperative Inspection Program</p> <ul style="list-style-type: none"> • AKA “Talmadge-Aiken” or “cross-utilization agreement” plants • Under federal inspection, but operating with state inspection personnel. <ul style="list-style-type: none"> • Federal inspection requirements • Inspectors employed by/paid by state, 100% federal reimbursement • Additional cooperative agreement required • Interstate/international commerce 	<p>Cooperative Interstate Shipment</p> <ul style="list-style-type: none"> • Eligibility: Small plants in MPI states that meet FSIS inspection standards <ul style="list-style-type: none"> • “Same as” federal inspection reqs • State inspectors/state funds, 60% federal reimbursement • Additional cooperative agreement required • Interstate/international commerce 
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Custom Slaughter:



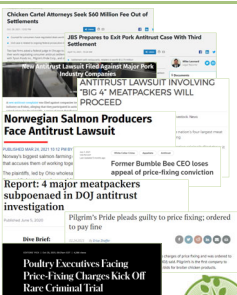
- Continuous inspection not required, lower building/sanitation/recordkeeping requirements
- Meat can be used by owner/members of their household
 - May not be sold or donated
- Performed by a custom exempt facility acting on behalf of the owner of the animal
- In practice:
 - Producer sells the animal or portions of the animal to consumer(s) while it is still alive
 - Ex: 1/4 steer, 1/2 pig
 - After animal is completely sold, the producer acts as an agent to arrange transportation to the custom exempt facility
 - Each individual consumer/owner is responsible for choosing how their portion of the animal should be processed
 - Consumer/owner is responsible for costs to:
 - Producer (for the animal)
 - Custom exempt facility (for processing)

2021 State Proposals:

 <p>MPI</p>	 <p>Interstate Cooperative Meatpacking Compact</p>
 <p>Permit Custom Exempt Sales</p>	 <p>“Animal Share”</p>

Anticompetitive Behavior

- Major Antitrust Statutes
 - Sherman Antitrust Act of 1890
 - Clayton Act
 - Packers and Stockyards Act
- Types of cases
 - Private party
 - Individual and class action
 - Damages:
 - Sherman/Clayton Act- treble damages, costs incurred plus attorney's fees
 - PSA- full damages, but not treble
 - Administrative
 - Damages: Fines/injunction
 - Criminal
 - Damages: jail/fines



Burden of Proof/Types of Violations

- "Per se"
 - Sufficient to show that action falls within a prohibited category (ex: horizontal agreements to fix prices; horizontal market allocation agreements; bid rigging among competitors)
- "Quick look"
 - Appear on their face to be very clearly anticompetitive in nature and likely effect, but not part of prohibited category
- "Rule of Reason"
 - Consider whether a particular restraint of trade is unlawful as unreasonably interfering with competition, or is instead the result of a reasonable business justification
 - Prove harm to the competitive balance of the industry as a whole
- *** *Reoccurring questions about what definition should be applied to PSA definition of "competitive injury"*.
 - USDA has, at several points in time, argued that a lower standard of competitive injury to the individual should be applied.
 - Instead, case law evolved to use the anti-trust definition/rule of reason test for the term, with eight federal circuit courts concurring in that interpretation.
 - Current USDA definition, per [USDA PSA FAQ \(Aug 2021\)](#)
 - "...a violation of section 202(a) or (b) of the P&S Act may be established without proving an industry-wide injury to competition..."



SB: Meat Packing Special Investigator Act HR: Meat and Poultry Special Investigator Act

- Sponsors:
 - S. 2021: Sen. Jon Tester (D-MT)
 - As of 11/11/21: 6 cosponsors, referred to ag committee
 - H.R. 2522: Rep. Alligall Spanberger (D-VA)
 - As of 11/11/21: 1 cosponsor, referred to subcommittee on livestock/forestry ag
- In short:
 - Creates an office within the Packers and Stockyards Division to "investigate and prosecute" PSA violations
 - Including subpoena power
 - Work with other agencies to coordinate actions with respect to competition, trade practices, national security and critical infrastructure
 - Bring civil or administrative actions authorized under PSA
 - Criminal actions (presumably) reserved for DoJ
- Specific language:
 - **"SEC. 416. OFFICE OF THE SPECIAL INVESTIGATOR FOR COMPETITION MATTERS.**
 - "(a) ESTABLISHMENT.—There is established within the Packers and Stockyards Division of the Department of Agriculture an office, to be known as the Office of the Special Investigator for Competition Matters" (referred to in this section as the "Office").
 - "(b) SPECIAL INVESTIGATOR FOR COMPETITION MATTERS.—The Office shall be headed by the Special Investigator for Competition Matters (referred to in this section as the "Special Investigator"), who shall be appointed by the Secretary.
 - "(c) DUTIES.—The Special Investigator shall:—
 - "(1) use all available tools, including subpoenas, to investigate and prosecute violations of this Act;
 - "(2) serve as a Department of Agriculture liaison to, and act in consultation with, the Department of Justice and the Federal Trade Commission with respect to competition and trade practices in the food and agricultural sector;
 - "(3) act in consultation with the Department of Homeland Security with respect to national security and critical infrastructure security in the food and agricultural sector; and
 - "(4) maintain a staff of attorneys and other professionals with appropriate expertise.
 - "(d) PROSECUTORIAL AUTHORITY.—Notwithstanding title 28, United States Code, the Special Investigator shall have the authority to bring any civil or administrative action authorized under this Act."



Focus by Biden Administration

- White House:
 - [Executive Order on Promoting Competition in the American Economy](#) (7/9/21)
 - Create "White House Competition Council"
 - Briefing paper: [Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families](#) (9/8/21)
- DOJ:
 - Active investigations into multiple companies/industries
 - May 2021: Grand jury indictment of Claxton Poultry Farms for participating in a nationwide conspiracy to fix prices and rig bids for broiler chicken products.
 - July 2021: Grand jury indictment of Koch Foods and four Pilgrim's Pride executives in same conspiracy
 - Currently ongoing criminal trial of four Pilgrim's Pride executives charged with price fixing
- USDA:
 - [Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences under the Packers and Stockyards Act](#) (August 2021)
 - Re-re-issue GIPSA rules (early 2022?)
 - Strengthen USDA's enforcement of unfair and deceptive practices and undue preferences
 - Poultry grower tournament system
 - Easier for USDA to bring enforcement actions under the Act
 - Change one law definition of "competitive injury"
 - Individually harmed v. harm to competitiveness of the industry as a whole



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Foreign Ownership of Ag Land

- *Foreign Ownership of Ag Land: Legal Background and Update* (NALC webinar, available at <https://bit.ly/3mivh3y>)
- Key federal statute: Agricultural Foreign Investment Disclosure Act (AFIDA)
- States' laws are definitely not a one-size-fits-all matter
- Renewed interest across the country, which is likely to increase over next year
- Recent federal proposals



Historical Context: On The Eve of AFIDA

May 1978

25 states had laws that to some degree restricted aliens from acquiring agricultural land

June 1978


“There is virtually unanimous agreement among people at all levels of government and in the private sector that, currently, there is no reliable data on the amount of U.S. farmland owned by nonresident aliens or on recent trends in such ownership. Such information would be very helpful to the Congress if it wishes to formulate and implement a national policy on nonresident aliens owning farmland in the United States. Clearly, efforts need to be started now to produce useful and meaningful information.”

Comptroller General Report (CED-78-132)

October 1978

Agricultural Foreign Investment Disclosure Act (AFIDA) was enacted

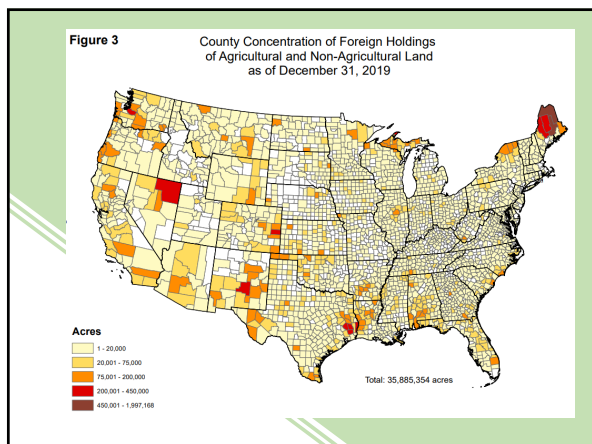
*The information (or lack thereof) we have today derives from AFIDA.



Where are we “Today”?

- Latest official data via AFIDA is through December 31, 2019
- All 50 states and Puerto Rico report having some level foreign investment/ownership
 - Concentrated in the Southern and Western United States
 - Texas has largest amount of acreage (4.4 million), followed by Maine (3.3 million acres) and Alabama (1.8 million acres)
 - 49% forest land, 25% cropland, 24% for pasture/other ag land
- 40%+ of increase from 2018 to 2019 is attributed to Texas, Oklahoma, and Colorado
- Foreign individuals/entities reported holding an interest in about **35.2 million acres** of U.S. agricultural land
 - 2.7% of all privately held **agricultural land** in the U.S.
 - 1.5% of all land in the U.S.
- Take special note of Maine – accounts for about 10% of all reported U.S. ag land
 - Followed by Hawaii (9.2%), Washington (6.9%), Alabama (6.1%), and Florida (5.8%)



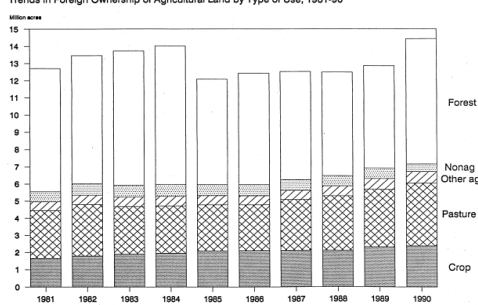


Snapshot of 2021: Country of Origin

- Canadian investors own largest amount of acreage (ag and non-ag)
 - 10,519,444 acres (primarily forest land)
 - 29%
- Netherlands (14%), Italy (7%), Germany (6%), and United Kingdom (6%)
 - Combined, 11.7 million acres
 - 33%
- The remaining 13.6 million acres (38%) are spread across about 100 other countries
- Chinese investors own 191,652 acres, representing 0.05% of total foreign ownership
- Note that "ownership" includes long-term leases



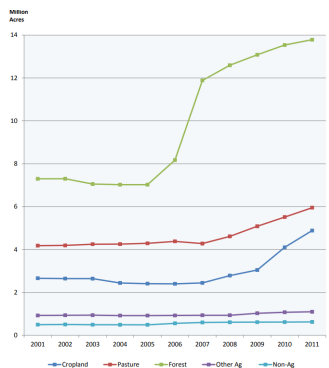
Figure 3
Trends in Foreign Ownership of Agricultural Land by Type of Use, 1981-90



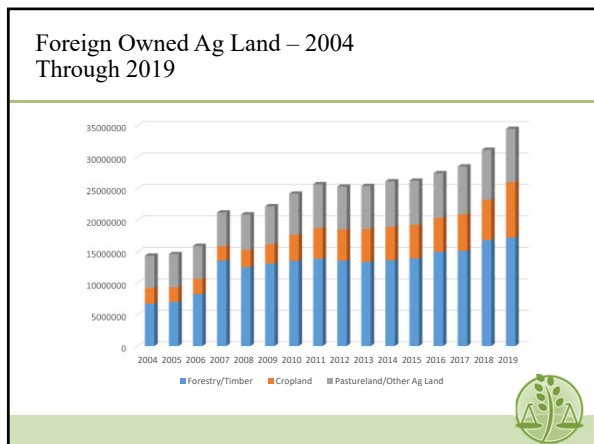
Cropland rose from 1.7 million acres in 1981 to 2.4 million acres in 1990; pasture, from 2.9 to 3.7 million acres; and other agriculture, from 0.5 to 0.7 million acres.

Source: USDA FSA, Foreign Ownership of U.S. Agricultural Land Through December 31, 1990

Trends in Foreign Holdings of Agricultural Land 2001 - 2011

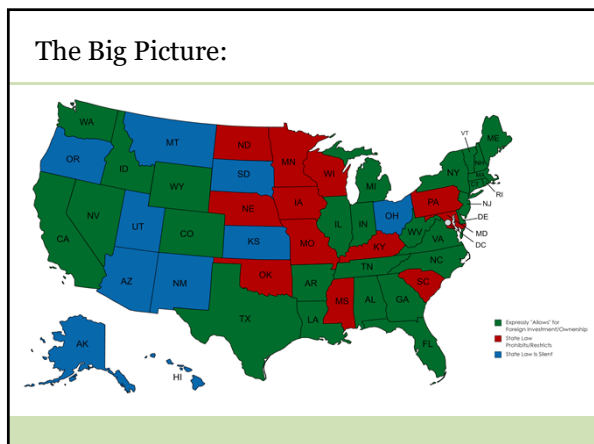


Source: USDA FSA Foreign Ownership of U.S. Agricultural Land Report (2011)



Snapshot of States' Laws

- There is no state with an absolute prohibition on foreign ownership
 - This statement contradicts many publications/articles
- 13* states have some level of foreign ownership restriction
 - This statement contradicts many publications/articles
- 12 states have some type of reporting and/or registration requirement for ag land
 - This does not account for laws requiring any corporation to obtain license or register
- 28* states expressly allow for foreign ownership
 - 9 states are currently silent on the issue (reporting and prohibition/restriction)
- Several states have prohibitions specific only to public/state land
 - Not addressed in this presentation



Foreign Ownership of Ag Land as of December 31, 2019

- Iowa
 - 386,597
 - 1.2% (only state that had decrease from 2018)
- Kentucky
 - 78,561
 - 0.4%
- Minnesota
 - 520,741
 - 1.9%
- Mississippi
 - 720,412
 - 2.7%
- Missouri
 - 345,658
 - 1.0%
- Nebraska
 - 317,613
 - 1.1%
- North Dakota
 - 302,715
 - 0.8%
- Oklahoma
 - 1,145,797
 - 3.0%
- Pennsylvania
 - 331,215
 - 1.0%
- South Carolina
 - 481,475
 - 3.1%
- South Dakota
 - 208,691
 - 0.8%
- Wisconsin
 - 476,241
 - 1.8%

Total Acres:
5,613,426;
16% of foreign
owned ag land



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