



The Feed

Recent Developments in Ag Law & Policy

The Feed highlights recent legal developments affecting agriculture, with issues released twice a month.

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Colorado River. On June 22, the United States Supreme Court issued its ruling in *Arizona v. Navajo Nation*, No. 21-1484 (2023), a lawsuit concerning the role of the federal government in helping the Navajo Nation secure water rights to the Colorado River. Specifically, the Court was asked to consider whether the 1868 treaty that established the Navajo Reservation created implied water rights for the tribe. In a 5-4 decision authored by Justice Kavanaugh, the Court held that because the treaty did not contain language imposing a duty on the federal government to help the tribe secure water rights, that no such responsibility existed. To read the Court's decision, click **here**.

The Supreme Court's decision comes at a time when access to Colorado River water is a pressing issue for those states that rely on the river, following several years of intense drought and reservoir decline. Currently, the Bureau of Reclamation ("Reclamation") is in the process of developing new operating guidelines and protection measures for the Colorado River as the current set of policies will expire in 2026. The current policies, adopted in 2007, outline when Reclamation should reduce the annual

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amount of water available for consumptive use from Lake Mead, when a water surplus may be declared, how to coordinate management between Lakes Powell and Mead, and provide details for water storage and delivery. Reclamation is currently seeking public comment on post-2026 operating guidelines. To find out more about submitting a comment, click [here](#).

Foreign Ownership of Ag Land: Federal Legislation. On June 20, Senators Joni Ernst (R-IA) and Debbie Stabenow (D-MI) introduced the Foreign Agricultural Restrictions to Maintain Local Agriculture and National Defense (“FARMLAND”) Act (**S. 2060**) which seeks to amend AFIDA and CFIUS. Specifically, this measure seeks to require USDA to conduct investigations into efforts to steal agricultural knowledge and technology and to disrupt the U.S. agricultural base. Further, the legislation seeks to require CFIUS to review foreign entities’ land purchases or leases exceeding \$5 million or 320 acres of land over the past 3 years. The FARMLAND Act would also restrict certain foreign persons from participating in farm programs administered by FSA. For more information on foreign ownership of farmland, read NALC’s “Foreign Ownership of Agricultural Land: FAQs & Resource Library” available [here](#).

Prop 12. On June 15, a group of eleven Republican Senators introduced **S. 2019** to the United States Senate. The bill proposes to prevent states and other local jurisdictions from interfering with the production and distribution of agricultural products in interstate commerce. The proposal is a response to California’s Prop 12, a voter-approved referendum that bans the sale of pork and other animal products in California if certain animal housing requirements are not met. The Supreme Court upheld Prop 12 earlier this year.

Following the Supreme Court’s decision to uphold Prop 12, California has turned its attention to enforcement. The State of California announced earlier this month that it would be giving retailers until the end of the year to clear out their supplies of pork that do not comply with Prop 12. Specifically, California will give retailers until the end of 2023 to sell, transfer, export, or donate any noncompliant pork products in their possession as of July 1, 2023. The announcement is available [here](#). To learn more about the Supreme Court’s decision on Prop 12, click [here](#) to read NALC article “What’s Cooking with Prop 12?: SCOTUS Decision.”

WOTUS. The Environmental Protection Agency (“EPA”) **has announced** that it will be revising its regulatory definition of the key Clean Water Act term “waters of the United States” (aka “WOTUS”) following the Supreme Court ruling in *Sackett v. EPA*. Prior to the Court’s decision, which was issued in May, EPA had released a final rule to redefine WOTUS in late 2022. That rule went into effect in March, and has been enjoined in 27 states. EPA says that it expects a new final rule to bring the definition of WOTUS in line with the Supreme Court’s recent ruling to be issued by September 1. To learn more about the *Sackett* decision, click [here](#) to read NALC article “WOTUS Update: U.S. Supreme Court Revisits Wetlands Jurisdiction Under the CWA.”

Endangered Species Act. On June 22, the Fish and Wildlife Service (“FWS”) issued three proposed rules aimed at rolling back regulatory changes made to the Endangered Species Act (“ESA”) during the Trump Administration. One of the proposed rules would **reinstate the Blanket 4(d) rule** which automatically grants all species listed as “threatened” under the ESA the same protections as those species listed as “endangered.” The other two proposals are aimed at making changes to the **interagency ESA consultation process**, and the **criteria used to list species**. All of the proposed rules are open for comment until August 21. To learn more about the ESA and its recent regulatory changes, click [here](#) to read “The National Agricultural Law Center’s Endangered Species Manual: A Practical Guide to the ESA for Agricultural Producers.”

Monarch Butterfly. FWS has published a notice in the Federal Register reaffirming its conclusion that the monarch butterfly is considered threatened enough to warrant official listing under the ESA. In the notice, FWS notes that habitat loss, herbicide use, logging of overwintering sites, drought, and climate change have all contributed to the decline in monarch populations. However, while the monarch butterfly will remain a candidate species for listing, FWS has decided not to list it at this time, finding that other species continue to have a higher listing priority. To read the notice, click [here](#).

Pesticides: Mitigation Measures. EPA has released a draft white paper that proposes several mitigation measures for 27 federally threatened or endangered species that are particularly vulnerable to pesticide exposure. The proposal is part of EPA's new policy for conducting required ESA consultation when making pesticide-related decisions. The proposed mitigation measures are geographically-specific, and include proposals to reduce both spray drift and run-off. The white paper will be available for public comment through August 6. Click [here](#) to read the white paper and find out how to submit a comment.

Plant-Incorporated Protectants Regulation. EPA has issued a new rule to regulate plant-incorporated protectants, known as PIPs, under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). PIPs refers to those plant varieties that have been created via genetic engineering to give those plants pesticidal traits. Under EPA's new rule, PIPs will be exempt from FIFRA regulation when the genetic modification to the plants could have been made through conventional breeding methods, and would pose no greater risk than PIPs already approved by EPA. However, the exemption only applies to those PIPs which were created by reducing or eliminating the activity of a gene. To view a draft of the final rule, click [here](#).

PFAS. The State of Maine has recently enacted a law that requires the state to offer to purchase farms that have been contaminated with perfluoroalkyl and polyfluoroalkyl substances, also known as PFAS. **LD 289** directs the state to determine the value of contaminated agricultural land as if it were not contaminated, with a set minimum per acre price of \$20,000.

Biofuels. On June 21, EPA announced a final rule to establish biofuel volume requirements and percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for 2023, 2024, and 2025. The rule establishes a total blending of 20.94 billion gallons for 2023, 21.54 billion gallons for 2024, and 22.33 billion gallons for 2025. Click [here](#) to read the final rule.

Cell-Cultured Meat. The USDA's Food Safety and Inspection Service ("FSIS") has issued "grants of inspection" to two companies that produce cell-cultured meats. The grants represent the final stage in the regulatory process for cell-cultured meat, and allow the companies to start producing chicken for human consumption. UPSIDE Foods and GOOD Meat are the first two companies to receive FSIS grants of inspection for cell-cultured meat products. To learn more about the regulatory process for cell-cultured meats, click [here](#).

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