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- by Roger A. McEowen*

We begin 2014 with our annual look at the most significant agricultural law and taxation developments of the previous year. Legal and tax issues continue to be at the forefront of developments that are shaping the present and future of American agriculture, and it is very likely that the involvement of the legal system in agriculture will continue to grow. The following is my list of what I view as the top ten agricultural law developments of 2013 based on their impact (or potential impact) on U.S. agricultural producers and the sector as a whole.

1. **U.S. Tax Court says non-farmer's Conservation Reserve Program (CRP) income is subject to self-employment tax.** Since the late 1980s, the IRS and the courts have issued various rulings, advices, notices and opinions concerning the issue of whether CRP payments are subject to self-employment tax. Until 2003, the IRS always took the position that a taxpayer had to be materially participating in a farming operation for CRP payments to be subject to self-employment tax. The courts agreed. But, in 2003, the IRS took the position in a Chief Counsel Advice that the mere signing of a CRP contract resulted in the signing taxpayer being engaged in the trade or business of farming with the result that the CRP payments were subject to self-employment tax. With a June 18, 2013 opinion, the U.S. Tax Court agreed. The implications of the court's decision could be far reaching by subjecting mere passive investors in farmland and non-farming heirs to self-employment tax on CRP rental income.

The facts of the case are fairly straightforward. The petitioner was a non-farmer who lived in Texas and worked for the University of Texas. In 1994, he inherited farmland in South Dakota and bought other farmland from his family members. He never personally farmed the land, but rented it out. In 1997, he put the bulk of the property in the CRP while continuing to rent-out the non-CRP land. He hired a local farmer to maintain the CRP land consistent with the CRP contract (e.g., plant a cover

crop and maintain weed control). In 2003, the petitioner moved to Minnesota, but still never personally engaged in farming activities. Consequently, the petitioner reported his CRP income on Schedule E where it was not subject to self-employment tax.

The Tax Court, in breaking with its own past precedent, ruled in favor of the IRS. The court determined that the petitioner was in the business of participating in the CRP with the intent to make a profit. The court skipped entirely over the material participation requirement and determined the existence of a trade or business on either the petitioner's personal involvement with the CRP contract or through the local farmer that he hired to maintain the land. The court cited the Sixth Circuit's decision in a 2000 case as controlling even though the taxpayer in that case was an *active* farmer and the petitioner in this case was a mere investor who had never been engaged in farming. Thus, the Sixth Circuit case was factually distinguishable. However, the Tax Court stated that the petitioner was in the business of maintaining "an environmentally friendly farming operation." In addition, the Tax Court noted that a statutory change made by the 2008 Farm Bill was narrow in its application and showed a congressional intent not to exclude CRP payments from self-employment in their entirety. While, as the Tax Court ruled, CRP payments may not constitute "rents from real estate" such that they are exempt from self-employment tax under the exception of I.R.C. §1402(a)(1), that determination has no bearing on the issue of whether the taxpayer is engaged in a trade or business as required by I.R.C. §1402(a). That question can only be answered by examining the facts pertinent to a particular taxpayer. Mere signing of a CRP contract and satisfying the contract terms via an agent is insufficient to answer that question.

The Tax Court's decision is the first court opinion holding that a non-farmer's CRP income is subject

to self-employment tax simply by virtue of signing a CRP contract. As a result of the Tax Court's decision, it is hard to imagine any situation where CRP rental income will *not* be subject to self-employment tax – especially in the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). The case is presently on appeal to the United States Court of Appeals for the Eighth Circuit. *Morehouse v. Comr.*, 140 T.C. No. 16 (2013).

- 2. The 3.8 percent tax on passive income sources via I.R.C. §1411.** This tax became effective for tax years beginning after 2012 and is one of the new taxes contained in Obamacare. Individuals, estates and trusts are potentially subject to the tax. The tax has application to many taxpayers that have passive sources of income, including gains from the sale of certain capital assets and some farmland sales. The tax applies to the lesser of the taxpayer's net investment income (NII) for the year or the amount of modified adjusted gross income (MAGI) in excess of a threshold amount (\$250,000 for married persons filing jointly; \$125,000 for married persons filing separately; and \$200,000 for everyone else – these are the 2013 thresholds which are adjusted for inflation in future years). For trusts, the threshold was \$11,950 for 2013. Passive sources of income include interest, dividends, royalties, rents, income derived from a passive activity and net gains attributable to the disposition of non-business property. Final regulations published in late 2013 provided some relief with respect to self-rentals (when the taxpayer rents property that he owns to an entity that he also is an owner of) and the grouping and regrouping of activities, and also provide a safe harbor for real estate professionals. The final regulations also provide some needed guidance on the application of the tax to net losses, and are generally more favorable than the proposed rules that had been issued earlier. The same can be said for self-charged interest.

As for trusts, the IRS position is that only the trustee can satisfy the material participation test on behalf of the trust so that the trust income would not be subject to the additional 3.8 percent tax. That will be a nearly impossible task. The one court that has considered that issue has rejected the IRS position as defying common sense, and said that the trust's employees and agents along with the trustee can satisfy the material participation test. Presently, a case is pending with the U.S. Tax Court on the issue of just who can satisfy the material participation test on behalf of a trust for purposes of the passive loss rules (the tests that are used for the new passive tax under I.R.C. §1411). The outcome of that case will be very important. In any event, a combined tax rate of 43.4 percent beginning at \$12,150 of trust income

(for 2014) is a heavy burden and will present some tough issues for trust fiduciaries. *New I.R.C. §1411 and the regulations thereunder.*

- 3. Clean Water Act (CWA) developments.** Two cases decided in 2013 have important implications for agriculture. In the first case, the exemption from the CWA National Pollutant Discharge Elimination System (NPDES) permit requirement for ag stormwater was upheld. The case involved a West Virginia confinement poultry operation where the EPA was claiming a federal permit was necessary for discharges of chicken dander when mixed with rainwater.

In a case involving a West Virginia poultry CAFO, the EPA had issued an order that the CAFO obtain an NPDES permit for stormwater discharges on the basis that a regulable discharge occurred when dust, feathers and dander were released through ventilation fans and then came into contact with precipitation. The plaintiff's CAFO consisted of eight poultry confinement houses equipped with ventilation fans, litter storage shed, compost shed and feed storage bins. The entire poultry growing operation, manure and litter storage were under a single roof. The resulting dust particles and feather discharges, the EPA claimed, were not within the agricultural stormwater discharge exemption because the exemption only applied to land application areas where crops are grown. The CAFO was threatened with significant fines - \$37,500 for each occurrence and separate fines of \$37,500 per day for failure to apply for a NPDES permit. The plaintiff challenged the EPA's position in court. In response, the EPA withdrew its order and motioned to dismiss the case. The court refused the EPA's motion, thereby forcing the EPA to defend its position in court. The court noted that the EPA had not changed its regulatory position against other farmers, and that proceeding on the merits would benefit all parties by clarifying extent of CWA discharge permit liability and whether an NPDES permit is required for ordinary precipitation contacting typical farmyard by-products of animal and poultry agricultural production. Various environmental activist groups were also allowed to intervene on the EPA's behalf, except that the Chesapeake Bay Foundation attempt to intervene was ruled untimely because its motion was filed after the plaintiff filed its motion for summary judgment. *Alt, et al. v. United States Environmental Protection Agency*, No. 2:12-CV-42, 2013 U.S. Dist. LEXIS 65093 (W.D. W. Va. Apr. 22, 2013).

At the trial on the merits, the court noted that the ag stormwater exemption was added to the CWA in 1987 but was not defined. The court believed that evidenced a congressional intent that the phrase

should be given its ordinary meaning. Based on that rationale, the court stated that it was common sense that the plaintiff's operation was "agricultural" and that the runoff triggered by rainwater was "stormwater." The court did not accept EPA's position that the exemption for ag stormwater discharges didn't exist until EPA developed its regulation in 2003. The court also noted that a prior court had determined that the EPA's 2003 rule *expanded* the definition of exempt "agricultural stormwater discharge" to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices. That conclusively indicated, the court noted, that the exemption had always been in place and applied to situations where land application practices were not involved. The court also rejected the EPA's arguments that stormwater from a CAFO's production area is not entitled to the exemption and that the plaintiff's discharge is industrial rather than agricultural. *Alt, et al. v. United States Environmental Protection Agency, et al., No. 2:12-CV-42, 2013 U.S. Dist. LEXIS 152263 (N.D. W.V. Oct. 23, 2013).*

In a California case, the plaintiffs brought a citizen suit action under the CWA claiming that the defendant's (U.S. Bureau of Reclamation) Grasslands Bypass Project in California's San Joaquin Valley illegally discharged polluted water (water containing naturally-occurring selenium from soil) into navigable waters of the United States via subsurface tile system under farmland without an NPDES permit. The plaintiff directly challenged the exemption of tile drainage systems from CWA regulation via "return flows from irrigated water" on the basis that groundwater discharged from drainage tile systems is separate from any irrigation occurring on farms and is, therefore, not exempt. The court initially refused to grant the defendant's motion to dismiss. Ultimately, however, the court dismissed the case and specifically noted that the parties agreed that the only reason the project existed was to enable the growing of irrigated crops and that, therefore, any contaminated water that is drained off would occur only due to irrigated agricultural activities. The court noted that the wording of the exemption including the phrase "return flows" narrows the type of water permissibly discharged from irrigated agriculture and covers discharges from irrigated agriculture that don't contain additional discharges unrelated to crop production. On that point, the court held that the plaintiffs failed to plead sufficient facts to support claim the some discharges were unrelated to crop production. So, farm tile drains are not subject to the CWA's NPDAES permit requirement. However, the court did grant leave to the plaintiffs for them to file an amended complaint. The plaintiffs have filed an

amended complaint alleging that a large portion of the tile drain outflows came from non-agricultural sources. *Pacific Coast Federation of Fishermen's Associations, et al. v. Glaser, et al., No. CIV S-2:11-2980-KJM-CKD, 2013 U.S. Dist. LEXIS 132240 (E.D. Cal. Sept. 16, 2013).*

4. **Unconstitutional "takings" cases and implications for property rights.** In 2013, several important property rights cases involving unconstitutional takings under the Fifth Amendment were decided. In June, the U.S. Supreme Court held that the Government cannot condition the issuance of a land-use permit on the landowner giving up a portion of his property unless there is a connection and "rough proportionality" between the condition and the effects of the proposed land use. The Court said there is no distinction between conditions precedent and conditions subsequent, and that the requirements of "nexus" and "rough proportionality" apply even though none of the landowner's property is actually taken. That means that monetary exactions without a physical taking of property are subject to takings scrutiny. In the case, the landowner claimed that an unconstitutional taking of his property occurred when the state of Florida conditioned his receipt of a permit for commercial development on the landowner's payment for improvements to a parcel of land that the government owned miles from his property. The landowner refused to accept the permit with the condition attached. The Florida Supreme Court held that no taking had occurred, but the U.S. Supreme Court reversed, citing two prior U.S. Supreme Court decisions. *Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013).*

Another case that ultimately spilled over into 2013 further defined the scope of taking jurisprudence. In this case, the United States Army Corps of Engineers deviated from its operating plan for a dam that resulted in increased downstream flooding of a wildlife management area that the plaintiff owned. The flooding was only temporary and was not "inevitably recurring." The trial court determined that the Corp's action constituted the taking of a temporary flowage easement over the plaintiff's property and awarded damages of \$5,778,758. On appeal, the Federal Circuit reversed. But, on further review by the U.S. Supreme Court, the Court agreed with the trial court and held that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." On remand, the Court of Appeals for the Federal Circuit affirmed the trial court's ruling, determining that the government's action had given rise to a temporary taking, compensable under the Fifth Amendment. The flooding was foreseeable and a sufficiently severe invasion to constitute a taking.

Arkansas Game & Fish Commission v. United States, 2009-5121, 2010-5029, 2013 U.S. App. LEXIS 24006 (Fed. Cir. Dec. 3, 2013), on rem. from, 133 S. Ct. 511 (2012).

Railroad lines that have been converted from railroad use to recreational trails have also created takings issues over the years. Takings claims that arise from the conversion of a railroad line to a trail are analyzed under a three-part test: (1) a determination of the type of property interest that the railroad owned (e.g., an easement or a fee simple interest); (2) if the property interest was an easement, a determination of whether the terms of the easement limited use only for railroad purposes or whether the terms allow for future use as a public recreational trail and (3) if the railroad acquired a “broad enough” easement under applicable state law, a determination of whether the easements terminated before the alleged taking with the result that the property owners at the time held fee simple ownership interests unencumbered by the easements.

In 2013, the United States Court of Federal Claims held that the Federal Government was liable for an unconstitutional taking under the Fifth Amendment to the extent that the railroads involved in the case had been granted easements and the government converted the rail line to trail usage under the National Trail Systems Act. However, where the deeds in issue transferred a fee interest in the rail line to the railroad rather than an easement, the court dismissed the takings claims because the fee owners of the adjacent lands could not prove that they held sufficient property interests to establish a takings claim. *Burgess, et al. v. United States*, 109 Fed. Cl. 223 (2013).

At the state level, the Texas Supreme Court, in 2012, held that landownership in Texas includes interests in in-place groundwater. Accordingly, such groundwater cannot be taken for public use without adequate compensation under the Texas Constitution. The farmers in the case sought a permit to pump underground water for crop irrigation purposes. The permit was granted, but was limited in amount based on historical use. The court said limiting the amount of water that could be pumped to historical use was not in accordance with state law and remanded the case for a determination of whether a taking had occurred. In 2013, the Texas Court of Appeals held that a taking had occurred to the extent the permit limited pumping of in-place groundwater to an amount for the farmers’ crop irrigation purposes. *The Edwards Aquifer Authority, et al. v. Bragg*, No. 04-11-00018-CV, 2013 Tex. App. LEXIS 13854 (Tex. Ct. App. Nov. 13, 2013).

5. **Legal issues surrounding patented seeds.** The Plant Variety Protection Act of 1970 (PVPA) grants “copyright-like” protection to developers of novel varieties of sexually reproducible plants. In a 2013 decision, a federal district court held that infringement under Section 2541(a)(3) of the PVPA could be proven via sexual multiplication. The plaintiffs in the case argued that the defendants’ contracting with farmers to grow the peanuts at issue in the case and receiving a crop from farmers constituted sexual multiplication that violated the PVPA based on a 1995 U.S. Supreme Court opinion. But, the court disagreed, and noted that the defendants did not plant and harvest seeds themselves, but contracted the process of sexually multiplying the seeds. Such conduct was not a “step in marketing” as required for patent infringement. Under the facts of the case, the defendants did not sell or intend to sell seeds and did not propagate a new crop in violation of Section 2541(a)(5) of the PVPA. *Florida Foundation Seed Producers, Inc. v. Georgia Farms Services, LLC, et al.*, No. 1:10-CV-125 (WLS), 2013 U.S. Dist. LEXIS 136963 (M.D. Ga. Sept. 25, 2013).

While the PVPA, as enacted, protected sexually reproducible plants, the U.S. Supreme Court held in 1980 that living things such as genetically engineered microorganisms could be patented under general patent law so long as they satisfied the statutory criteria. The Court’s language was sufficiently broad to suggest that even plants that could be protected under the PPA or the PVPA could be the object of a general utility patent. Indeed, in 2001, the Court specifically held that newly developed plant breeds fall within the terms and scope of general utility patent law, and that neither the Plant Patent Act nor the PVPA limits the scope of coverage of the general utility patent law. The Court noted that the Congress has not given any indication of narrowing the scope of the general utility patent law’s application to plants since the U.S. Supreme Court’s 1980 decision. The Court also held that something that can be protected under the PVPA may also qualify for patent protection as a utility patent under the general patent laws. Accordingly, with the development of techniques for genetic engineering, many other new varieties of agricultural plants may be patented rather than being protected by the PVPA. A patent would essentially give the developers an exclusive monopoly over their varieties for a period of 20 years without the problem of the “farmer exemption.”

Even though general patent protection is possible, the strict requirements of the patent law must be satisfied. Thus, an item must be shown to be “novel,” “nonobvious,” and must be shown to have “utility” to society. However, even if a patent is

granted, the patent only allows the holder to exclude others from making, selling or using the invention. In addition, patented seed that has been lawfully purchased can be resold before planting without violating the PVPA. Similarly, where the patented variety is planted and then harvested, the offspring of the patented variety could certainly be sold as a crop without violating the statute.

The U.S. Supreme Court decided another high stakes seed patent case in 2013. In the case, the defendant purchased Roundup Ready soybeans and executed Monsanto's technology agreement. The defendant also purchased commodity soybean seed from a local grain elevator for late season planting or "second-crop" planting with the purpose of avoiding the higher price for Roundup Ready seed and with the knowledge that the commercial seed had a high probability of containing the Roundup Ready trait. The basic legal question that the Court faced was whether Monsanto could control what users do with the patented seeds. Can a farmer who buys patented Roundup Ready seed use newly grown seed for subsequent plantings? Of course, Monsanto didn't think so, instead wanting farmers to buy seeds from them every year. At its core, the case involved the patent exhaustion doctrine which holds that a patent holder's rights in a patented object are essentially exhausted when the object is sold. Thus a buyer could use or resell the purchased "copy" of the patented object. The Court held that the patent exhaustion doctrine was only applicable to the item sold and that the buyer can't make "copies" of the patented item. Planting and harvesting commercial seed constituted "copying" of patented technology, according to the Court. The Court reasoned that establishing a "per se" rule exhausting all patent claims on first sale would not foster the development and sale of patented products and would erode the incentive that patent law provides to develop new technology and products. The patent at issue was protected as a general utility patent rather than under the Plant Patent Act or the Plant Variety Protection Act. The Court rejected the plaintiff's argument that he didn't copy the seeds because it was the seeds themselves that reproduced (i.e., copied themselves). So, the patented seeds that are purchased can be planted, but a farmer cannot plant newly grown seeds from the initially purchased seeds for future growing seasons. *Bowman v. Monsanto Co., et al.*, 133 S. Ct. 1761 (2013), *aff'g., sub nom., Monsanto Company and Monsanto Technology, LLC v. Bowman*, 657 F.3d 1341 (Fed. Cir. 2011).

6. **Special use valuation, income tax basis and the "duty of consistency."** I.R.C. §2032A allows the executor of a decedent's estate to list the value of the decedent's farmland on the decedent's estate tax

return at its agricultural use value rather than its fair market value. The executor must make an election to be able to do this, and can select the farmland that is subject to the election. Numerous requirements must be satisfied by the decedent before death for the decedent's estate to make the election, and the farmland and farm personal property must make up a sufficient amount of the total value of the property in the estate. In addition, the heirs who inherit the land must continue to farm the land for 10 years after the decedent's death. If the elected land is not farmed for 10 years, the tax benefits to the estate of having made the election are forfeited and interest is tacked-on. In addition, the estate's executor must file an agreement signed by each person who has an interest in the elected property. In this consent agreement, the heirs consent to the election, agree to personal liability for any additional taxes imposed as result of sale of elected property or cessation of qualified use within that 10-year post-death "recapture" period and consent to the collection of the recapture tax from the property subject to the election. In addition, the heirs receive as their income tax basis in the elected land the special use value of the property as reported in the decedent's estate. That's different that the general rule that persons that inherit property get an income tax basis in the inherited property equal to its value reported for estate tax purposes. In 1954, IRS said that a taxpayer can challenge the reported value of property for estate tax purposes if the taxpayer has clear and convincing evidence that the reported value was wrong, unless the taxpayer is barred by previous conduct. *Rev. Rul. 54-97, 1954-1 C.B. 113*. However, since that time, the courts have utilized a "duty of consistency" that prevents a taxpayer from making an inconsistent representation after the expiration of the statute of limitations that IRS had relied on if the outcome of the taxpayer's position would not be in the favor of the IRS.

In a 2013 U.S. Tax Court case, the petitioners were two children of a 1994 decedent and were beneficiaries of a residuary testamentary trust that received most of decedent's estate, including a 13/16 interest in a 2,345-acre cattle ranch. Their step-mother was the executor. The fair market value of the ranch was determined to be \$1,963,000 at the time of the decedent's death, but was reported on the decedent's estate tax return at less than \$100,000 in accordance with I.R.C. §2032A. That dramatically reduced value was incorrect because it far exceeded that total value reduction that was possible under the I.R.C. §2032A rules. But, IRS allowed it as the result of a trade-off for higher estate tax values on other non-elected parcels. The petitioners signed a consent agreement (one via guardian ad litem). Years later, the trust sold an easement on the ranch for \$910,000 that restricted development on the

property. The gain on sale of the easement was reported with reference to the I.R.C. §2032A value and K-1s were issued showing that the proceeds had been distributed to the beneficiaries. The beneficiaries did not report the gain as reflected on the K-1s, asserting that the ranch was mistakenly undervalued (by someone other than themselves) on the estate tax return and, thus, the gain reportable should be reduced by using a fair market value income tax basis. The court determined, however, that I.R.C. §2032A value pegs the income tax basis in accordance with I.R.C. §1014(a)(3).

Importantly, the court determined that the heirs (who were not the estate's executor) as being bound by a "duty of consistency" to use as their income tax basis, the value of the property as reported on the decedent's estate tax return. The court noted that the IRS had relied on the values as stated on the estate tax return, and that the petitioners were trying to change that representation to the detriment of the IRS after the statute of limitations with respect to the estate tax return had expired. As such, *Rev. Rul. 54-97* did not apply. The court also noted the "unequivocal" language of I.R.C. §1014(a)(3) which states that the basis of property acquired from a decedent as "in the case of an election under section 2032A, its value determined under such section."

Clearly, the caselaw supports the notion that the "duty of consistency" establishes basis in an heir's hands as the estate tax value of the inherited property if the heir was also a fiduciary of the estate. But, the court expanded the application of the doctrine to non-fiduciary heirs by citing three cases, all of which applied the doctrine to an heir that was also a fiduciary of the estate. Another problem with the court's opinion is that the audit of the estate went, as the court described it, "back and forth." Estate tax audits are often characterized by negotiations, and it is possible in this case that the special use value for the ranch property was allowed to be lower than what was allowed by statute as a trade-off for higher values on other non-elected property in the decedent's estate. The result was that the estate's executor and the IRS negotiated estate tax values on elected and non-elected land that were not representative of actual fair market value of the non-elected property or a special use value for the elected land that was within the statutory limitation. Binding the non-fiduciary heirs (such as the petitioners in this case) to the outcome of negotiations between the executor and the IRS seems to not be fair, but apparently the signed consent agreement trumps that concern. *Van Alen v. Comr., T.C. Memo. 2013-235*.

7. **"Climate change" litigation.** In 2013, more "climate change" litigation was before the federal

courts. Continuing the trend, all of the federal district courts that have considered the issue have held that "climate change" lawsuits involve nonjusticiable political questions that are not suitable for court resolution. In what is probably the lead case on the matter, the court held that the plaintiff class, residents and owners of lands and property along the Mississippi Gulf coast, had standing to assert public and private nuisance, trespass and negligence claims against the defendants for emission of greenhouse gases that allegedly contributed to "global warming" which, the claim asserted, caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property along with public property.

In reversing the trial court, the United States Court of Appeals for the Fifth Circuit held that the plaintiffs' claims were not non-justiciable political questions. However, the plaintiff's unjust enrichment, fraudulent misrepresentation and civil conspiracy claims were dismissed for lack of standing. The trial court could have dismissed the case due to the plaintiffs' inability to establish proximate causation, but the trial court had dismissed the case without relying on that ground so the appellate court did not address the issue. The court remanded the case to the trial court to determine if the plaintiffs could establish a causal connection. But, before the case was remanded, the court granted the plaintiffs' petition for a review by the full court and vacated the three-judge panel's decision. Later, the court dismissed the appeal. Thus, the district court's opinion holding that property owners did not have standing to sue for "climate change" and that "climate change" is a political question and that property owners cannot seek state-law tort damages for industrial emissions of carbon dioxide is controlling law in the Fifth Circuit. In 2012, the plaintiffs' claims were completely dismissed, and that decision was affirmed on appeal in 2013. *Comer, et al. v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), aff'd., No. 12-60291, 2013 U.S. App. LEXIS 9705 (5th Cir. May 14, 2013)*.

In another 2013 case, a collection of youth plaintiffs sued the federal government and the oil industry claiming that the government had failed to protect the atmosphere from irreversible damage from man-made effects. The essence of the plaintiffs' legal claim was rooted in the public trust doctrine, which imposes a fiduciary obligation on the government to protect the nation's natural resources such as air and water. The plaintiffs wanted the government to conduct a detailed accounting of carbon emissions in the U.S., followed by the development and implementation of a national Climate Recovery

Plan. But, the court dismissed the case in 2012 on the grounds that the federal government has no constitutional obligation to protect the atmosphere. In 2013, the court refused to reconsider its 2012 decision. The court based its decision heavily on a 2012 U.S. Supreme Court decision wherein the Court noted that the U.S. Constitution does not control state public trust law. The Court stated that the public trust doctrine is essentially the domain of the states and, as a result, a state would have standing to litigate “climate change” as a public nuisance. The federal government has no public trust obligation. As such, the court in the present case determined that the plaintiffs had not asserted any constitutional claim in its complaint. *Loorz, et al. v. Perciaspepe*, No. 11-cv-2235, 2013 U.S. Dist. LEXIS 72301 (D. D.C. May 22, 2013).

8. **No free pass for “biogenic” carbon dioxide emissions.** The ethanol industry has been politically favored for many years. An additional bit of favoritism was provided by the Obama Administration in 2011 when the Environmental Protection Agency (EPA) amended its regulatory definition of “greenhouse gases” to exclude biogenic carbon dioxide from carbon emissions requirements (the exemption is from the Prevention of Significant Deterioration permitting requirement). Under the revised rule, the normal preconstruction review and permitting for greenhouse gases emitted from an ethanol plant (and other plants that derive energy from biological sources such as paper and lumber manufacturers) is waived for three years. But, in 2013 the U.S. District Court for the District of Columbia invalidated the EPA’s amended rule. The court held that there was a complete lack of a statutory basis for exempting biogenic carbon dioxide from the carbon emissions requirements. The court also opined that the EPA was “necessarily making it up as it goes along” with respect to greenhouse gas emissions. *Center for Biological Diversity, et al. v. Environmental Protection Agency, et al.*, No. 11-1101, 2013 U.S. App. LEXIS 14108 (D.C. Cir. Jul. 12, 2013).

9. **The importance of hiring a lawyer with a background in agricultural legal issues.** This case is somewhat unique to be part of our “Top Ten” list. Normally to make the list, the development is a case, regulation or ruling with significant implications for producers, landowners or agribusinesses because of the rule of law or impact of the regulation at issue. This case however, is important because of its importance in pointing out how critical it can be to hire lawyers trained in agricultural legal issues.

In this case, 6,682 acres of rangeland in Southwest Kansas were sold at auction in 27 separate tracts via an out-of-state auction company. The sale brochure

delivered to the plaintiff (a New York investment firm) said that the defendant sellers would convey certain mineral rights along with the real estate. The plaintiff relied on the representations in the brochure and paid \$8.9 million for the land and mineral rights advertised in the brochure, and the purchase agreement was executed the same day. Indeed, the sale brochure contained a grid listing the percentage of mineral rights that the “Don Renick Family” owned and promised to convey for each of the 27 tracts included in the sale. The purchase agreement contained an integration clause stating that final bids were subject to the sellers' acceptance or rejection, and that the sellers warranted that they were selling 100 percent of their ownership in the mineral rights being sold. The real estate was sold “as is” and the transaction closed. Two years later, the plaintiff discovered it had not acquired the mineral rights that the plaintiff thought that it had acquired. The seller suddenly became interested in those rights when oil deposits were discovered beneath the surface of the rangeland. However, the mineral rights were actually owned by a separate branch of the seller’s family that had transferred them to an LLC which then leased them to a local lease acquisition company in return for bonus lease payments and future royalty payments. The buyer’s attorneys, a big city firm, did not conduct a mineral title search when, under state (Kansas) law a separate mineral title search is necessary to properly determine ownership of minerals.

The plaintiff sued for breach of warranty based on the deed as well as breach of seisin (a warranty that the grantor owns the estate that the deed says it is conveying to the grantee), breach of the purchase agreement, breach of the auction sale agreement, fraud, reformation of the purchase agreement and specific performance. The defendant moved to dismiss the claim based on breach of the auction sale agreement, and the court granted the motion because the purchase agreement's integration clause was clear and unambiguous and barred a separate contract action based on any earlier oral or written assurances that were not incorporated into the purchase agreement. In addition, neither any alleged oral agreement or the auction brochure were incorporated into the purchase agreement. The auction brochure stated that the purchase agreement controlled the terms of the sale. The court held, however, that the plaintiff could pursue a contract remedy for breach of the purchase agreement. On the fraud claim, the court determined that the sellers held themselves out as owning mineral rights that they promised to convey. The plaintiff had claimed that the family of sellers represented the actual part of the family that held the mineral rights, but they actually did not. Instead, it was the non-contracting members of the family that held the mineral rights.

The court denied the defendant's motion to dismiss the plaintiff's claim of fraud in inducement. The court also denied the defendant's motion for judgment on the pleadings with respect to reformation and specific performance of the purchase agreement. The case was scheduled to proceed to trial in Wichita, Kansas.

In any event, it is very unlikely that this case would have ever occurred had the buyer's attorneys conducted a mineral title search before the sale proceeded to closing. The status of mineral rights ownership (or gas and oil drilling rights) is not commonly apparent on deeds and other documents in the recent transaction history. For example, a deed will likely make no mention of oil and gas rights that were conveyed by a previous owner. Instead, the ownership chain to the oil and gas rights would run in a separate deed chain specifically referencing those rights and would not be part of the land deed documents. Similarly, if oil rights remained with the surface rights to the property, those rights would not commonly be referenced on the land deed. That is why it is critical to conduct a separate mineral title search. Clearly, the potential value of oil, gas, and mineral rights make the difficulty of mineral title searches worthwhile. *613 Agro Holdings, LLC v. Renick, No. 12-2425-JAR-KMH, 2013 U.S. Dist. LEXIS 35917 (D. Kan. Mar. 15, 2013).*

10. **Iowa legislature wipes out Iowa Supreme Court opinion on state recreational use statute.** The Iowa recreational use statute provides an incentive for landowners to open up their property to entrants for recreational purposes by removing the common-law duties that landowners owe to lawful property entrants. Recreational users are generally treated as adult trespassers – the landowner only owes recreational entrants a duty to refrain from willfully or wantonly injuring them. However, an opinion of the Iowa Court of Appeals was affirmed and expanded by the Iowa Supreme Court in early 2013 with the result that the Court invalidated the statute in its present form. The Court's opinion created a firestorm amongst Iowa landowners, hunters, outdoor enthusiasts and other interested parties and resulted in legislation unanimously passing both bodies of the Iowa legislature that had the effect of vacating (rendering null and void) the Court's opinion.

The facts of the case are straightforward. The plaintiff was a chaperone for her daughter's kindergarten class field trip to the defendants' dairy farm. The kindergarten teacher had been invited to bring her class to the farm on an annual basis for 25 years. During this visit, the group was guided by the defendants to different activities, such as horseback

riding, calf feeding, tractor viewing, and playing in the hayloft. The plaintiff was in the hayloft with the children when the hay bale on which she was standing gave way and she fell down a chute to the floor six feet below. As a result, she broke her wrist and ankle. The plaintiff sued the defendants, alleging that they breached their duty to maintain the premises in a safe manner. She later amended her petition to allege that "as tour guides" upon whom the plaintiff "relied," the defendants "failed to exercise reasonable care in the conduct of the tour when they directed the [p]laintiff and her daughter into the hay loft where the dangerous condition existed."

The Court reviewed five fact-specific tests that have been used by *other* states to limit the scope of liability protections in those states' recreational use statutes. The majority opinion appeared to adopt *all* of the tests. Each test must be satisfied and each one represents a new requirement that must be satisfied before the liability protections of the Iowa recreational use statute apply. None of these requirements have ever been previously required under the Iowa statute. The five requirements the court created are as follows: (1) the land must be held open to the general public; (2) the activities must occur outdoors; (3) the injury must be sustained while the plaintiff is directly participating in a covered activity; (4) the plaintiff must not be invited to the property; and (5) the landowner must not be functioning in the role of a tour guide. Because these factors were not satisfied, the Court said the statute did not apply and the landowner was liable for the chaperone's injury. A dissenting opinion was filed in the case.

In the late-night hours May 16, the Iowa legislature unanimously passed a bill to address the liability concerns raised by the case. The bill expresses that the statute should be interpreted liberally and broadly in favor of landholders to accomplish the purposes of the statute. The bill makes clear that the land holder does not have to open the land to the general public. It adds "educational activities" to the scope of recreational use activities. The bill also expressly states that persons accompanying others engaging in the recreational activities are included under the statute (i.e. chaperones). The bill eliminates the causation requirement enunciated by the Iowa Supreme Court in the case that injuries must be directly sustained in the course of a specific recreational activity and includes protection for a person's entire presence on the land to participate in the activities. The bill eliminates any duty of care created solely by reason of guiding, directing, supervising, or participating in the activities ("tour guide" liability). The bill retains exceptions for statutory liability protection if injuries are sustained

from the land holder's willful or malicious failure to guard or warn against a dangerous condition or if the land holder charges a fee for the use of the land.

The legislature's action represents how the people, through their elected representatives, can eliminate a court's opinion when that opinion is viewed to be a radical departure from settled law. *Sallee v. Stewart*, 827 N.W.2d 128 (Iowa 2013) and HF 649, Iowa Legislature, 2013 General Assembly.

* Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa, and Director of the ISU Center for Agricultural Law and Taxation. Member of the Iowa and Kansas Bar Associations and licensed to practice in Nebraska.