Agricultural Law Decisions Update

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I. Agricultural Land Uses

A. Aana v. Pioneer Hi-Bred International, Inc., *2014 WL 4956489 (D. Haw. Sept. 30, 2014) (unreported)*

THIS CASE TESTS A STATE'S RIGHT TO FARM LAWS. Defendant leased land for purposes of conducting "open air testing of genetically modified crops as a part of Pioneer's Waimea Research Center." Plaintiff neighbors brought a nuisance complaint against the lessee and the property owner. Defendants moved to dismiss citing, among other things, Hawaii's right to farm laws. Plaintiffs claimed the right to farm laws only applied to protect existing agricultural operations in proximity to which residential objectors later move. Plaintiffs claimed the right to farm laws had no applicability when a new agricultural operator moves into an existing community. Plaintiffs cited legislative history to support their view that the state's right to farm law had been designed to mirror the "coming to the nuisance doctrine." The court disagreed:

> This court therefore rejects Plaintiffs' argument that the protections of the Farm Act only apply to farming operations that pre-existed the nearby non-agricultural land user who alleges that the farming operation is causing a nuisance. Although Plaintiffs argue that committee reports regarding the adoption of, and amendments to, the Farm Act support their position, this court has concluded that the plain language of [the right to farm law] is unambiguous. Thus, this court's sole duty is to give effect to the plain meaning of the statute. Courts only "resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law" when the statute is ambiguous. (citations omitted).

B. Balady Farms LLC v. Paradise Township Hearing Board*, 148 A3d 496 (Pa. Commw. Ct. 2016)*

Balady Farms is composed of 23 acres in the Paradise Township's Rural Conservation (RC) district. "Agriculture" is a use permitted by right in the

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RC district. Baladay historically maintained various farm uses on the property including two-story poultry barns in which "at any one time, there were approximately 28,000 chickens (7,000 chickens on each poultry barn floor.)" The chickens had been processed (i.e., slaughtered) for consumption off-site for many years. However, Balady decided to begin processing (slaughtering) the chickens raised on the farm, on-site as follows:

> [Balady] proposed to convert and use the interior of one of the existing storage buildings (approximately 3,200 square feet) to process the chickens raised on the Property. The proposed facility would be fitted with state-of-the-art processing equipment housed entirely within the building. Chicken processing would take place approximately two times per week between 9:00 a.m. and 3:00 p.m. and would meet United States Department of Agriculture (USDA) standards. Balady Farms would hire up to six full-time employees due to its increased operation. Processing by-products and waste would be stored in refrigerated containers, and then regularly removed and transported off-site for recycling by Valley Proteins, Inc.

Id. at 498.

At issue is whether such use was within the definition of "agriculture." It was undisputed that the local code did not specifically prohibit the proposed operation. The local code defined the term "agriculture" to mean:

> [a]n enterprise that is actively engaged in the commercial production and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and/or livestock and livestock products. The term includes an enterprise that implements changes in production practices and procedures or types of crops, livestock, livestock products or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry. . . .

In turn, the Township's code defined "livestock" to include poultry.

After a public hearing, the Township determined that the proposed processing facility was not within the definition of "agriculture." Instead, the Township decided the proposal was a prohibited "commercial" or "intensive agriculture" operation[1]:

> Accordingly, the Board must decide first whether the commercial processing of chickens, *i.e,* slaughtering, cutting, and cleaning, constitutes the production and preparation for market of livestock and livestock products, and second, that even if the processing was production and preparation, whether such activities are those which are consistent with the procedures that are normally engaged in by farmers in [the] Township.
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> . . . .
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> In the Board's opinion, "processing" livestock and livestock products is not "preparation and production for market" of livestock and livestock products. To the con-

1. For example, a proposed "swine nursery" was deemed to be included within the definition of "intensive agriculture" in *Berner v. Montour Township Zoning Hearing Board*, 2016 WL 464225 (Pa. Commw. Ct. Feb. 8, 2016) (unreported).

> trary, the preparation and production of livestock and livestock products deals more with getting the livestock and livestock products ready to be transferred to a processing facility.
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> An important example came from the comments of Mr. Craumer, a Township farmer. Mr. Craumer raises cattle and ships them to a processing facility to be processed for consumption by the end consumer. Accordingly, the "preparation and production" is the raising, breeding, and keeping of the cattle, then sending them off to be processed for consumption. To allow [Balady Farms] to process the chickens as [it] proposes would open up the flood gates, whereby any farmer raising any livestock would now be entitled to process that livestock for consumption. Regardless of the state and federal requirements for such an operation, such operation is beyond the definition of "agriculture" as set forth in the Ordinance.

The trial court agreed with the Township. On appeal, the appellate court reversed. The Pennsylvania appellate court applied the familiar statutory interpretation methodology and determined that under the dictionary definition of key terms, the operation fell within the definition of "agriculture." The appellate court determined it was improper for the local zoning board to insert the requirement that the particular operation was typical of other farms in the area.

C. Cotton Tree Service, Inc. v. Zoning Board of Appeals of Westhampton*, 55 N.E.3d 434 (Mass. App. Ct. Aug. 5, 2016) (unpublished)*

The zoning board entered an enforcement order prohibiting commercial wood chipping and wood storage on property zoned for agricultural use. The definition of "agriculture" included "growing or harvesting of forest products." The property owner appealed and the appellate court held for the local zoning board.

The disputed use was described as follows:

> David Cotton has developed a process of grinding and chipping of stumps, trees and wood waste into shreds that can be composted and turned into a usable and valuable agricultural and horticultural commodity. This product can be used for landscaping, but also enriches the soil to allow the composted mulch to enhance plant growth and not simply be used to control weeds and be a landscape cover. David Cotton's primary business at the subject site is to create and generate this valuable agricultural product.

On appeal, the court framed the issue as follows:

> "whether Cotton's composting activity was protected by considering the composting of mulch to be the primary agricultural activity." We also agree that the fact Cotton carries on this activity for commercial purposes is irrelevant to the analysis.

The court determined that "while mulch produced on the property may be a 'valuable agricultural product,'" the production process of making mulch from damaged trees and stumps brought to the property

from elsewhere in connection with the defendant's tree service business is not properly characterized as the "growing or harvesting of forest products."

D. In the Matter of Conditional Use Permit No. 13-08, *855 N.W.2d 836 (S.D. 2014)*

Eastern Farmer's Cooperative (EFC) applied for a Conditional Use Permit (CUP) for an agronomy facility on approximately 60 acres of land. The proposed facility would store, distribute, and sell a variety of farm products, including anhydrous ammonia. The subject land, as well as the neighboring land at issue in this case, is zoned A-1 Agricultural. Area residents, fearing the storage of chemicals near their residences, opposed the application. Prior to the hearing before the Board of Commissioners, one of the commissioners called an existing agronomy facility to request a tour, which was allowed. The other facility gave the decision-maker a tour of its operation.

It was disputed whether the commissioner knew that the facility he toured was owned by the applicant for the proposed facility. During the hearing on the proposed facility, the commissioner who toured the other facility disclosed he had done so and reported being impressed by the safety measures in place. The Board of Commissioners approved the application. The neighbors appealed. The trial court found the tour to be an ex parte communication and disqualified the commissioner who toured the facility, but decided that the remaining commissioners were not influenced by that ex parte contact and were enough in number to support the approval. The South Dakota appellate court affirmed.

E. Syngenta Seeds, Inc., v. County of Kauai, *842 F.3d 669 (9th Cir. 2016)*

This is a GMO case. Kauai County adopted an ordinance that regulated the plaintiff's genetically engineered plant seed by regulating pesticides. Kauai adopted its ordinance because:

> This case arises primarily from concern about Plaintiffs' use of insecticides, herbicides, and fungicides (collectively pesticides) in their farming operations on Kauai. They use both general use pesticides (GUPs), which under federal and state law may be applied by anyone in accordance with label instructions, and restricted use pesticides (RUPs), which may only be applied by applicators certified by the State or persons under their direct supervision. . . . Pesticides are useful for controlling pests and thus increasing crop yields, but their application can have detrimental effects on humans and the environment. For example, with respect to human health impacts, some studies have found that long-term exposure to some pesticides may increase the risks of diseases, including cancer, autism, Parkinson's disease, and childhood leukemia. With respect to environmental impacts, studies have found

> that some pesticides can harm insects and native plants, alter soil ecology, and increase the number and prevalence of herbicide-resistant pests.
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> Kauai residents have reported experiencing medical symptoms due to contact with pesticides applied on Plaintiffs' farms. Additionally, a University of Hawaii study detected pesticides in indoor and outdoor air samples collected at a Kauai middle school, albeit at concentrations "well below health concern exposure limits or applicable screening levels."

The Kauai ordinance imposed notification requirements and requirements to post warning signs, including:

> The "Good Neighbor" provision requires CAEs to send weekly "Good Neighbor Courtesy Notices" to interested beekeepers and people who own or occupy property within 1,500 feet of the property where the pesticide will be applied. The notices must address the pesticide to be used, its active ingredient, and the date, time, and field number of its use. . . . Following the application of RUPs, the Ordinance also requires CAEs to submit to Kauai's Office of Economic Development and post online weekly "public disclosure reports" "compiling the actual application of all pesticides during the prior week.". . . These reports must detail the date and time of application, the field number and total acreage to which the pesticide was applied, the pesticide's trade name, EPA registration number, and active ingredient, the gallons or pounds of the pesticide used, and the temperature, wind direction, and wind speed at the time of application.

The ordinance also required buffer zones between certain sensitive uses, such as schools and certain natural features, such as waterways.

Plaintiffs sued Kauai County arguing the disputed ordinance was preempted under "field preemption" principles by state law, which established a comprehensive scheme for regulating pesticides. Kauai County argued there was no preemption because the disputed ordinance was within its delegated statutory authority: "the power to enact ordinances deemed necessary to protect health, life, and property . . . on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute . . . disclos[ing] an express or implied intent that the statute shall be exclusive or uniform throughout the State." *Syngenta Seeds*, 842 F.3d at 674.

There was no express preemption against local authority. The question was whether field preemption was implied. The critical issue was whether the state legislature had evinced an intent to have exclusive authority over pesticide regulation. The court concluded that the state regulatory system over pesticides was comprehensive and did not leave room for local regulation. The court found that the legislature had evidenced such an intention. The court pointed out that the state specified where pesticides may be applied, thus preempting Kauai County's buffer requirements. The court found that the Department of Agriculture had reporting requirements, preempting the dis-

puted ordinance's reporting provisions. Finally, the court determined that the state had enacted notification and warning requirements and that those state law provisions preempted the disputed ordinance requirements for notice and reporting. The court found that the state scheme for regulating pesticides preempted the disputed Kauai ordinance. (Similar holding in *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016), except in *Atay* there was a federal preemption claim, that the court denied—finding no federal preemption—but that preemption applied under state law as above described.)

F. Victor Township Drainage Dist. 1 v. Lundeen Family Partnership*, 19 N.E.3d 652 (Ill. App. Ct. 2014)*

Defendants have a farming operation on their property. They had severe flooding issues, which adversely affected their ability to farm. The property is not in plaintiff's drainage district but drained into plaintiff's watershed. Property owners installed drain tile on their property and connected it to plaintiff's drainage district ditch facilities without permission. The trial court found against the farmer holding, among other things:

> The trial court addressed the good-husbandry rule. The trial court found that the good-husbandry rule was not applicable, because the subject property was not dominant to, or even within, the plaintiff's drainage district and the drain tile work did not follow the general course of natural drainage. Additionally, the trial court determined that the increased water flow went beyond any reasonable use. The trial court found the evidence undisputed that the drain tile work would increase the amount of water entering the drainage ditch. The trial court found that the plaintiff spent large sums of money maintaining its ditch and that the increased water flow would increase flooding, crop destruction, and erosion. The trial court also noted that the defendants had not proven that the development of the dominant estate outweighed the harm to the servient land, because there was no evidence of whether and to what extent the drain tile work improved their ability to farm the subject property.

The appellate court decided the trial court had applied the correct analysis and embellished on the "good-husbandry" rule:

> In regulating the natural flow of surface water between adjacent landowners, Illinois recognizes the "civil law rule," which is reflected [state statute that] (land may be drained in the general course of natural drainage). Under that rule, the owner of a dominant (higher) parcel of land is given an easement in a servient (lower) parcel to allow surface water to naturally flow from the dominant land to the servient land. The owner of the servient estate is not obligated to receive surface water in different quantities or at different times than would come to his land ordinarily.
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> The good-husbandry rule is an exception to the civil law rule of surface-water drainage. The good-husbandry rule permits the owner of dominant agricultural land to alter the flow of water upon a servient estate if this is required for proper husbandry of the dominant parcel. However, no rule of law permits a dominant owner to unreasonably increase the flow of water upon a servient estate. The question which

> must be confronted is whether the increased flow of surface waters from the land of the defendants to that of the plaintiff . . . was beyond a range consistent with the policy of reasonableness of use which led initially to the good- husbandry exception. (Citations omitted).
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> In the present case, the trial court found that the subject property was not dominant to the plaintiff's drainage district and that the drain tile installation did not divert the water toward a natural course of drainage. Accordingly, the trial court found that the civil law rule and the good-husbandry exception were not applicable to the present circumstances. The trial court went on to find that, even if the subject property was dominant to the plaintiff's drainage district, the drain tile installation exceeded what was reasonable, because the plaintiff's drainage district already flooded every few years, the plaintiff spent large sums maintaining its district, and the drain tile installation would result in increased flooding, crop destruction, and soil erosion. (Citations omitted.)

The appellate court affirmed the trial court. The farmer was required to remove the disputed drainage tile.

II. Agriculture Related Cases to Watch

A. *Monsanto—Regulation of Glyphosate Under California's Prop 65*[2]

On January 20, 2016, Monsanto filed a petition for a writ of mandate and complaint for preliminary and permanent injunctive and declaratory relief against the California Office of Environmental Health Hazard Assessment (OEHHA). The OEHHA gave notice that it planned to list the herbicide glyphosate as a chemical "known to cause cancer," requiring new regulations and requirements under California's Safe Drinking Water and Toxic Enforcement Act of 1986, known as Prop 65. Monsanto argued that in the 40 years that Roundup had been on the market there was no evidence of it causing cancer or reproductive toxicity. OEHHA cited a study done by the International Agency for Research on Cancer (IARC), which states glyphosate is a "probable carcinogen," as the basis for adding glyphosate to the carcinogenic list. In the petition, Monsanto alleges that IARC is the only agency to reach such conclusions, and that its conclusions are not credible because the IARC lacks appropriate regulatory oversight. Monsanto alleges that studies performed by more credible scientific bodies, including the EPA and the World Health Organization, have enough weight to undermine the OEHHA's conclusion to list glyphosate. The significance of this lawsuit is that it raises issues over how scientific assessments can be used as a

2. http://news.monsanto.com/news/monsanto-takes-legal-action-prevent-flawed-listing-glyphosate-under-californias-prop-65.

basis for legal and governmental actions. As of July 29, 2016, Monsanto and OEHHA have entered into an agreement to the effect that the listing of glyphosate will be postponed until a decision on the merits or after 45 days' notice to Monsanto:[3]

> 6. Monsanto and OEHHA have entered into a stipulation providing that if OEHHA issues a decision to list glyphosate, the actual listing will not take place until after a final ruling by the court on the merits of Monsanto's Petition and Complaint unless OEHHA gives Monsanto 45 days' advance notice. The stipulation further provides that in the event Monsanto files a motion for preliminary injunction or similar relief in response to OEHHA's notice, the listing will not take place until the court issues its ruling on the motion for preliminary injunction or similar relief. In the event OEHHA provides 45 days' notice of its intent to list glyphosate before the hearing on the motions for judgment on the pleadings, the parties will meet and confer on whether a modification to the briefing schedule set forth above is warranted.

B. *Agriculture v. Smelt:* Stewart and Jasper Orchards, Arroyo Farms LLC v. Jewel, *747 F.3d 581 (9th Cir. 2014),* cert. denied*, 135 S. Ct. 948 (Jan. 12, 2015)*

While this particular litigation is mostly over, the issue involving the tension between species listed under the Endangered Species Act and the needs of agriculture for the habitat upon which endangered species depend is not. This was litigation about a federal Fish and Wildlife Service's biological opinion to protect the Delta Smelt, a 3-inch indicator species on the endangered species list, by limiting water appropriations to farmers, regardless of the devastating human and economic consequences of doing so. As a result, California water agencies reported imposing the most drastic cuts ever to California water appropriation. The cut backs in water to central California farmers resulted in some farmers getting only 10 percent of their allocated water. In 2014, the Ninth Circuit Court of Appeals ruled that it would defer to the Fish and Wildlife Service and affirmed that the agency has no obligation to consider economic impacts in selecting among its "reasonable and prudent alternatives." The Ninth Circuit's decision was appealed to the Supreme Court to answer essentially the question whether *Tennessee Valley Authority v. Hill* (which stopped a federal dam project on ESA grounds) still requires federal agencies to protect species and their habitat "whatever the cost." The Supreme Court denied review.

3. CONFIDENTIAL, 16CECG00183, Order filed (Cal. Super. Ct. July 29, 2016), *available at* https://www.docketalarm.com/cases/California_State_Fresno_County_Superior_Court/16CECG00 183/CONFIDENTIAL/07-29-16-Order_filed/1/).

C. *Federal Deregulation of GMO Crops–First Grass Seed*[4]

Based on an EPA environmental impact statement, on January 17, 2017, the U.S. Department of Agriculture deregulated a genetically modified Bentgrass seed developed for golf courses that is resistant to the herbicide Roundup. Deregulation enables the seed to be sold commercially. Federal regulators determined that the seed was "unlikely to pose a plant pest risk to agricultural crops or other plants in the U.S." The Willamette Valley in Oregon is home to the billion dollar a year grass seed industry and has been referred to as the grass seed capital of the world. The altered seed travels with the wind and contaminates other seed stock and has raised concern about outcompeting native rangeland grasses and grasses in protected areas. While currently the seed has only taken root in the eastern parts of Oregon, there is significant concern over the introduction of the altered grass to the Willamette Valley and elsewhere. Foreign buyers are reluctant to buy GMO seed or potentially contaminated seed. An industry group has hired a well-respected environmental lawyer with the Center for Biological Diversity to look into legal options.

D. *Cow Flatulence Regulation (Dairy Methane Regulation California Bill 1383)*[5]

On September 19, 2016, California Governor Jerry Brown signed legislation that requires the state Department of Food and Agriculture to implement a comprehensive strategy to reduce methane emissions from manure management operations in dairy and livestock facilities. Livestock is responsible for 14.5 percent of human induced greenhouse gas emissions; beef and dairy are the two industries responsible for most of it. Dairy producers are concerned with the probable rise in costs associated with the changes required to minimize emissions, including the cost of food as well as the expense of installing methane digesters, which capture methane gas from manure in storage units and turn it into electricity. State officials have set aside $50 million to assist farmers in the transition. With 1,500 dairy farms in California

4. Jeff Manning, GMO grass that 'escaped' defies eradication, divides grass seed industry, Oregonian/Oregon Live, Jan. 8, 2017 (3 P.M.), http://www.oregonlive.com/business/index.ssf/2017/01/grass_seed_industry_fearful_ab.html; U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/sa_environmental_documents/sa_e nvironmental_impact_statements/cbg+eis.

5. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1383.

alone, farmers are worried that $50 million will not come close to the costs of implementing the bill.

"But Jerry Brown's new restrictions on cow flatulence isn't bad news for everyone . . . perhaps there is now hope for Argentina's cow fart backpack invented by the National Institute of Agricultural Technology."[6]

6. Tyler Durden, *Only in California–Governor Jerry Brown Signs Bill To Regulate Cow Flatulence*, ZEROHEDGE.COM, Sept. 20, 2016 (2:45 P.M.), http://www.zerohedge.com/news/2016-09-19/only-california-governor-jerry-brown-signs-bill-regulate-cow-flatulence.