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- Speaker Background
 - B.S. Agronomy
 - M.S. Plant Pathology & Crop Physiology
 - Concentration: Weed Science
 - J.D. (law degree)
 - Agricultural Law Association

Topics

- Migratory Bird Act
 - Agricultural Exception
 - Zone of Influence
 - Natural Disasters
- Landowner v. Operator Liability
- Off Target Complaints by Neighbors

Migratory Bird Conservation Act

Agricultural Exception to Baiting
- Zone of Influence

Natural Disasters

The Black Letter Law

- No person shall take migratory game birds by the aid of baiting, or on or over any baited area, where a person knows or reasonably should know that the area is or has been baited.

However, nothing in this paragraph prohibits (*the agricultural exception*). 50

C.F.R. §20.21(i)

What is Baiting?

- “Baiting means the direct or indirect placing, exposing, depositing, or scattering of salt, grain, or other feed that could serve as a lure or attraction for migratory game birds to, on, or over any areas where hunters are attempting to take them.” 50 C.F.R. §20.11(k)

What is a Baited Area?

- “Baited area means any area on which salt, grain, or other feed has been placed, exposed, deposited, or scattered, if that salt, grain, or other feed could serve as a lure or attraction for migratory game birds to, on, or over any areas where hunters are attempting to take them. Any such area will remain a baited area for ten days following removal of all such salt, grain, or other feed.” 50 C.F.R. §20.11(k)

Remember:

- No person shall take migratory game birds by the aid of baiting, or on or over any baited area, where a person knows or reasonably should know that the area is or has been baited.

However, nothing in this paragraph prohibits (*the agricultural exception*). 50

C.F.R. §20.21(i)

Agricultural Exception

- **Nothing prohibits** the taking of migratory game birds on or over land that is not otherwise baited areas, including:
 - “standing crops or flooded standing crops (including aquatics); standing, flooded, or manipulated natural vegetation; flooded harvested croplands; or lands or areas where seeds or grains have been scattered solely as the result of normal agricultural planting, harvesting, post-harvest manipulation or normal soil stabilization practice”

What is . . .

- Normal agricultural planting?
 - Wheat seeding in South Dakota
- Normal agricultural harvesting?
 - Not strip harvesting
- Normal post-harvest manipulation?
- Normal agricultural operation?
 - Is the primary purpose to attract wildlife?
- Normal soil stabilization practice?

Normal is . . .

- When the practice is conducted in accordance with official recommendations of State Extension Specialists of the Cooperative Extension Service.
 - This does limit innovation, even if minor

Official recommendations:

- must be for crop production
- can't be for attracting migratory birds
 - this includes harvest timing recommendations
- can be for “specialty crops”
- can be regional specific
 - aerial seeding

Zone of Influence

- If a location is classified as baited by an enforcement agent, the agent will also determine if the baited area effects a larger area and will classify such an area as falling within the “zone of influence”
- The investigating enforcement agent has sole discretion for this determination

Zone of Influence

- Natural disasters do not create an exception to this rule
 - partially harvested then flooded is baited
- No right to administrative hearing
- Lease agreements could be at issue
- Liability to neighbors could exist

Landowner v. Operator Liability

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Landowner v. Operator Liability

- Generally – if a tenant commits a tort through his operation of leased property, the tenant is solely liable
- However, recent LA Supreme Court decisions have held that if the tort resulted from “foreseeable” tenant use, the landowner may be held jointly and severally liable

Why is this important?

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Example 1

- Landlord has tenant farmer on ground used solely for sugarcane production
- Tenant farmer burns the cane as a harvest aid
- A neighboring property owner claims damage as the result of the cane burning
- Was the act of burning the cane “foreseeable” to the landlord?

Example 2

- Landlord has tenant farmer on ground traditionally used for grain production
- Tenant farmer hires aerial applicator for herbicide applications (wet field conditions)
- Aerial application results in drift/overspray to neighbor property owner/farmer
- Neighbor claims damages
- Was aerial application “foreseeable”

Take home message

- Written lease agreements can aid, and usually eliminate this concern
 - The lease should be written and have a full indemnification clause
- There are several cases in various trial courts that have not dismissed landlords from litigation after suit initiation; however, it will be a while before we know how the LA Supreme Court will handle agricultural cases

Off Target Complaints

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Off Target Claim Concerns

- Same allegations by the same allegeders
- Gets to be systematic
- Often by individuals that are familiar with agricultural claims
- Most national commercial applicators have discretion to pay claims up to a threshold amount, otherwise insurance companies send out an adjuster

The typical systematic pain

- They wait until they see an application
- Then they call the LDAF or the local LDAF inspector directly
- Will let the inspector write the standard report, which includes:
 - Chemicals applied, applicator name, application variables, applicator insurance certificate information, farmer/client identifiers

The typical systematic pain

- They will request a copy of the report
- Then research the anticipated symptoms
- They will document their alleged loses
- Then they contact the insurer/applicator
- They will have some knowledge about the settlement limits of the insurer/applicator

Remedies

- Few Exist
 - a fraud claim for multiple claims will not exist – because everyone has paid them
 - document all applications
 - especially the status of neighboring crops/fields
 - the best defense may be demonstrating the alleged damage could not have occurred
 - spring budding example

Questions / Comments

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