

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1084 (Hurtado)
Version: February 15, 2022
Hearing Date: April 5, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Property ownership: foreign governments

DIGEST

This bill prohibits foreign governments from newly acquiring an interest in agricultural land in California after January 1, 2023. The bill also requires foreign governments that own agricultural land in California to report specified information about their ownership to the California Department of Food and Agriculture (the Department).

EXECUTIVE SUMMARY

Government data appears to show small recent increases in foreign ownership of agricultural land in California. The author of this bill is concerned that this trend could eventually contribute to local food insecurity and might make it more difficult for local residents to be able to afford agricultural land for themselves.

In an effort to address these concerns, this bill would prohibit foreign governments from newly acquiring any agricultural land in California. At the same time, the bill seeks to enable the Department to begin tracking agricultural land ownership trends at the state level by requiring foreign governments currently owning agricultural land in California to report specified information about the size, nature, and use of those holdings. Going forward, the bill would obligate everyone newly purchasing agricultural land in California to file similar reports. In this way, the author hopes to begin to shed light on if and how foreign investment impacts various aspects of food production in California. In order to further these goals, the author proposes to offer amendments in Committee that would incorporate state-owned enterprises into the definition of foreign governments and take advantage of existing federal data collection about foreign ownership of agricultural land as a basis for establishing an official, annual assessment on the impact of foreign investment on California's food security.

The bill is author sponsored. There is no support or opposition on file. If the bill passes out of this Committee, it will next be heard before the Senate Agriculture Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes that noncitizens have the same property rights as citizens. (Cal. Const., art. I, § 20.)
- 2) Provides that any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State. (Civ. Code § 671.)
- 3) Establishes the U.S. Agricultural Foreign Investment Disclosure Act (the “Act”). (7 U.S.C. §§ 3501 – 3508.)
- 4) Defines “foreign person,” for purposes of the Act, to include foreign governments as well as specified foreign individuals and legal entities. (7 U.S.C. § 3508(3).)
- 5) Defines “agricultural land,” for purposes of the Act, to include any land used for agricultural, forestry, or timber production purposes as prescribed by USDA regulations. (7 U.S.C. 3508(1).)
- 6) Requires foreign persons, as part of the Act, to report information regarding current and future acquisitions of U.S. agricultural land, including the name of the owner, the total acreage, and the intended use of the land, among other specified things. (7 U.S.C. § 3501.)
- 7) Directs the U.S. Department of Agriculture (USDA) to transmit the reports generated pursuant to (6), above, to the corresponding State department of agriculture, or such other appropriate State agency as the Secretary considers advisable, at six month intervals. (7 U.S.C. § 3505.)
- 8) Provides that any report submitted to the Secretary under (6), above, shall be available for public inspection at the USDA in the District of Columbia not later than 10 days after the date on which such report is received. (7 U.S.C. 3506.)

This bill:

- 1) Defines “agricultural land” to mean:
 - a) land currently used for, or, if currently idle, land last used within the past five years, for farming, ranching, or timber production, except land not exceeding ten acres in the aggregate, if the annual gross receipts from the sale of the farm, ranch, or timber products produced thereon do not exceed \$1,000; or
 - b) land exceeding 10 acres in which 10 percent is stocked by trees of any size, including land that formerly had such tree cover and that will be naturally or artificially regenerated.

- 2) Defines “foreign government” to mean a government other than the government of the United States, its states, territories, or possessions.
- 3) Defines “interest” in land to mean any estate, remainder, or reversion, as specified, or portion thereof, or an option pursuant to which one party has a right to cause legal or equitable title to agricultural land to be transferred.
- 4) Prohibits a foreign government from newly purchasing, acquiring, or holding any interest in agricultural land in California beginning January 1, 2023, except where application of the prohibition would violate a treaty between the U.S. and another country.
- 5) Requires a purchaser of agricultural land in California, other than a security interest, to submit the following information to the California Department of Food and Agriculture within 90 days of the acquisition or transfer:
 - a) the legal name and the address of the new owner;
 - b) the citizenship of the new owner;
 - c) the nature of the legal entity holding the interest, if any, the country in which the legal entity is created or organized, and the principal place of business of the legal entity;
 - d) the type of interest in agricultural land which such foreign person acquired or transferred;
 - e) the legal description and acreage of such agricultural land;
 - f) the purchase price paid for, or any other consideration given for, such interest;
 - g) in any case in which such new owner transfers such interest, the legal name and the address of the person to whom such interest is transferred as well as, if the transferee is an individual, the citizenship of the transferee or, if the transferee is not an individual or a government, the nature of the legal entity holding the interest, the country in which the transferee is created or organized, and the principal place of business of the transferee;
 - h) the agricultural purposes for which the new owner intends, on the date on which such report is submitted, to use such agricultural land; and
 - i) any other information that the U.S. Secretary of Agriculture requires of foreign purchasers of agricultural land pursuant to the U.S. Agricultural Foreign Investment Disclosure Act.
- 6) Requires a foreign government that, as of December 31, 2022, holds an interest in agricultural land in California, other than a security interest, to submit the following information to the California Department of Food and Agriculture by June 30, 2023:
 - a) the legal name and the address of the foreign government;
 - b) the type of interest in agricultural land which is held by the foreign government;
 - c) the legal description and acreage of the agricultural land;

- d) the purchase price paid for, or any other consideration given for, the interest;
 - e) the agricultural purposes for which the foreign government is using the agricultural land on the date of the report and the use to which the foreign government intends, as of the time of the report, to use such agricultural land; and
 - f) any other information that the U.S. Secretary of Agriculture requires of foreign purchasers of agricultural land pursuant to the U.S. Agricultural Foreign Investment Disclosure Act.
- 7) Requires a foreign government that, on or after January 1, 2023, holds or acquires an interest, other than a security interest, in California land at a time when the land is not agricultural land, to submit the following information to the California Department of Food and Agriculture within 90 days if the land becomes agricultural land:
- a) the legal name and the address of the foreign government;
 - b) the type of interest in agricultural land which is held by the foreign government;
 - c) the legal description and acreage of the agricultural land;
 - d) the purchase price paid for, or any other consideration given for, the interest;
 - e) the agricultural purposes for which the foreign government is using the agricultural land on the date of the report and the use to which the foreign government intends, as of the time of the report, to use such agricultural land; and
 - f) any other information that the U.S. Secretary of Agriculture requires of foreign purchasers of agricultural land pursuant to the U.S. Agricultural Foreign Investment Disclosure Act.

COMMENTS

1. The problem the bill is intended to address

According to the author:

Foreign ownership of US agricultural land has steadily grown in prevalence over recent years. As our state continues its work towards more equitable food access, the need to address foreign ownership of agricultural land grows. Foreign owners of US agricultural land have less incentive to prioritize the needs of our own farmers, and at times this can hurt those who often rely most on the resources the land provides. The resulting consequences can lead to economic damage as money is taken away from local areas in favor of overseas investors and owners.

As evidence to back the concerns expressed above, the author provided the Committee with a California Research Bureau (CRB) report requested by the author. The report finds that:

Foreign-held land in California represents 2.7 percent of the state's total privately held agricultural land. This is close to the national average of 2.9 percent. The percentage of California agricultural land that is foreign held has increased steadily, yet is small compared with other states. Maine is the highest percentage of foreign-held agricultural land (19.5 percent), followed by Hawaii (9.2 percent) and Washington (7.1 percent).¹

The extent of this steady increase in foreign ownership of agricultural land in California should not be overstated. The CRB report includes a table showing that the proportion of California agricultural land that is foreign-owned increased by less than one-third of a single percentage point over the past decade. That represents only a small fraction of the total agricultural land in California. Still, the trend is toward slightly greater foreign ownership over California's agricultural land. This bill is intended to stop that trend before it reaches a point where it could potentially undermine the state's food security, as well as to establish a mechanism for documenting the extent of existing foreign government ownership of California agricultural lands.

2. The solution proposed by the bill in print

The bill in print proposes two related ideas meant to begin to redress the potential problem described in Comment 1, above.

a. Prohibition on future acquisition of California agricultural land by foreign governments

First, the bill would prohibit foreign governments from newly purchasing, acquiring, or holding agricultural land in California beginning on January 1, 2023. This prohibition would appear straightforward where the entity seeking to purchase, acquire, or hold the property is the foreign government itself. Across the globe, however, there are many countries in which the line between the private and public sector becomes blurry. This is particularly true of state-run economies such as that of China, but it is even true in many economies that are at least ostensibly market-based, including the U.S. In such situations, how would this bill apply?

The author indicates that the intent of the bill is to encompass not just foreign governments in and of themselves, but also businesses and legal entities that are so

¹ Memorandum from California Research Bureau to Ibarra Re: Request for Information: Foreign Farmland Ownership in California (Mar. 30, 2022). On file with the Committee.

substantially controlled by a foreign government that they effectively operate as an extension of that government. In order to more clearly and fully capture this intent, the author proposes to offer amendments in Committee that would broaden the definition of “foreign government” to include state-controlled enterprises where the government in question either owns more than 50 percent of the enterprise or where the government in question actually exercises control over the enterprise’s operations even though the government does not have a majority stake.

b. State data collection on the scope and nature of foreign government ownership of agricultural land in California

Second, in order to capture greater information about the extent of foreign government ownership of agricultural lands in California, the bill establishes new requirements for certain agricultural land owners to report information to the California Department of Food and Agriculture (CDFA). Specifically, all new purchasers of agricultural land in California would have to submit details about themselves and their planned use of the land. Foreign governments that already own agricultural land would have six months in which to report similar information. Finally, foreign governments that own non-agricultural which is then converted to agricultural use would have to report this information within 90 days of the conversion.

The author’s intent is to ensure that CDFA can track which foreign governments have investments in California agricultural land, how extensive those holdings are, and to what use they are being put. That information could then be used to identify any problematic patterns that could put the state’s food security in jeopardy.

As it turns out, however, CDFA may already have access not only to information about foreign government agricultural land holdings in California, but to broader detail regarding foreign ownership of California agricultural more generally. The U.S. Agricultural Foreign Investment Disclosure Act already requires foreign owners of agricultural land in the U.S. to register their holdings with the United States Department of Agriculture. (7 U.S.C. §§ 3501-3508.) The resulting information is publicly accessible to anyone within 10 days and the USDA is mandated to transmit the latest reports for each state to the corresponding state department of agriculture at six month intervals. (7 U.S.C. §§ 3505 and 3606.)

Rather than duplicate the information-gathering conducted by this federal program, therefore, the author proposes to offer amendments in Committee that would take maximum advantage of this existing information by directing CDFA to conduct yearly assessments of this data and issue a corresponding annual report. The amendments spell out key details that the report is to contain: the total amount of foreign-owned agricultural land, the leading countries that account for that ownership, trends in foreign agricultural land ownership in California over time, and information regarding the uses to which that land is being put. Because the underpinnings for food security

are not limited to property ownership, the author's proposed amendments also call upon the report to assess the extent and impact of foreign ownership over water rights, desalination plants, and energy facilities, as well. Finally, the amendments direct CDFR, where appropriate, to suggest policy responses that may become appropriate in the future.

3. Constitutional considerations

Though it probably stands on solid constitutional footing, it is worth noting that this bill brushes up against three constitutional doctrines: the foreign affairs doctrine, the dormant foreign commerce clause, and statutory preemption. All three are, in essence, related variations of the same question: can a state legislate in this area, or is it preempted from doing so by the federal government? U.S. Supreme Court precedent identifies three types of federal pre-emption: express, field, and conflict. Express pre-emption applies where Congress explicitly states that a federal statute is intended to pre-empt state legislation. Field pre-emption occurs when federal legislation is so pervasive in an area of law that Congress has left no room for the states to supplement it. Conflict pre-emption takes place when a state and federal statute are so at odds that it is impossible to comply with both at once. (Chemmerinsky, *Constitutional Law Principles and Policy*, Fifth Edition, p. 414.)

a. Foreign affairs doctrine analysis

The U.S. Constitution vests in the federal government the power to conduct the foreign affairs of the nation. As a result, "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy [...]" (*American Ins. Assn. v. Garamendi* (2003) 539 U.S. 396, 413.) It remains something of an open question whether field preemption generally prohibits states from conducting anything resembling foreign policy or if only conflict preemption applies and states are only preempted from enacting laws that conflict with foreign policy that the federal government has expressed through some act or agreement. (*Id.* at 419-20.) According to precedent in the Ninth Circuit Court of Appeals, however, state laws must clear both tests in order to be upheld. (*Movsesian v. Victoria Versicherung AG* (9th Cir. 2012) 670 F.3d 1067, 1071-1072.)

As there is no federal law that sets any limitations on foreign ownership of agricultural land, this bill does not appear to conflict with any expressed federal policy. Whether the bill could be said to intrude on the broader authority of the federal government to conduct foreign affairs is a harder question, but the bill can be distinguished from some other instances in which the courts found that a state statute preempted. Most notably, in *Zschernig v. Miller* (1968) 389 U.S. 429, the U.S. Supreme Court struck down an Oregon statute that denied foreigners the right to inherit land in Oregon if the foreigner's country of origin did not allow for the inheritance of private property. The *Zschernig* court ruled that, although probate laws are generally the province of state

law, the Oregon statute effectively expressed a policy view about how foreign countries should conduct their internal affairs and, accordingly, constituted an attempt to conduct the foreign affairs of the U.S. In the *Movsesian* Ninth Circuit case, similarly, the court focused on the fact that the state law at issue required the California Insurance Commissioner to make determination about whether foreign governments had engaged in persecution. This, the Ninth Circuit concluded, was more properly the role of the federal government. (*Movsesian, supra*, 670 F.3d at 1075-1076.) This bill, by contrast, treats all foreign governments equally and has an inward focus. Its purpose is not to change the policies of foreign governments, but to ensure domestic control over food security.

b. Dormant foreign commerce clause analysis

The U.S. Constitution vests in Congress the power to regulate commerce with foreign nations. (Art. I, § 8, cl. 3.) From this power, courts have inferred the existence of its corollary, known as the foreign dormant commerce clause, which restricts that power of states or municipalities to regulate foreign commerce, since it is “pre-eminently a matter of national concern.” (*Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434, 448.) To prevail on a foreign Commerce Clause claim, a plaintiff must allege that a state or local law contravenes “specific indications of congressional intent.” (*Barclays Bank PLC v. Franchise Tax Bd.* (1994) 512 U.S. 298, 324.)

As mentioned, there is no federal law setting limitations on foreign ownership of agricultural land in the U.S. Accordingly, this bill does not appear to conflict with any expressed federal policy and likely would be found not to violate the dormant foreign commerce clause.

c. Statutory preemption analysis

Finally, whenever federal and state laws conflict, the federal law governs. (U.S. Const., art. VI.) “Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” (*Gade v. National Solid Waste Management Association* (1992) 505 U.S. 88, 108.)

There is no federal law restricting foreign ownership of agricultural lands within the U.S., so there is no direct conflict between federal law and this bill. The only exception would be a treaty that governs reciprocal land ownership rights. The bill anticipates this possibility, however, and expressly declares that the bill’s prohibition on foreign ownership of California agricultural lands yields to any treaty to the contrary.

4. Cautionary lesson from California's past

Both the U.S. and the California constitutions demand equal protection under the law. (U.S. Const., art. XIV, Sec. 1.; Cal. Const., art. 1, Sec. 7(a).) The California Constitution is also definitive in its rule that, in California, "[n]oncitizens have the same property rights as citizens." (Cal. Const., art. 1, Sec. 20.)

To be crystal clear, as written and under the amendments proposed by the author, this bill does not discriminate against anyone on the basis race or national origin, nor does it deny noncitizens any property rights that are available to citizens. Its prohibitions on the future acquisition of agricultural land and its registration requirements are directed at foreign *governments* and their affiliated state-controlled enterprises only.

Nonetheless, California's shameful history in relation to restrictions on foreign ownership of agricultural land should serve as a cautionary lesson as this bill makes its way through the Legislature, assuming it passes out of this Committee. The Alien Land Law Act, approved by wide margins in this Legislature in 1913, prohibited "aliens ineligible for citizenship" from owning agricultural land or possessing long-term leases over it. (SB 5, Haney and Webb, Ch. 113, Stats. 1913.) In practice, the law was a thinly disguised tool for preventing Californians of Japanese origin from buying farmland, something that an increasing number of Japanese-Californians had been doing at the time in order to support their families and community.² Supporters of the Alien Land Act justified its racist and xenophobic effects, among other ways, on the proposition that non-citizens lacked affinity for the nation in the same way that citizens do and therefore could not be trusted to safeguard the food supply.³

Keeping this history in mind may help to ensure that this bill continues to focus on legitimate concerns about the influence of foreign government investment in California's agricultural systems, and avoids slipping into xenophobic tropes that presume foreign nationals are deserving of suspicion merely because they are foreign.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- expand the definition of foreign government to include state-controlled enterprises; and
- replace the land ownership reporting requirements in the bill with the establishment of an official, annual assessment of the impact of foreign investment on food production in California, using existing data sources.

² Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 19 B.C. Third World L.J. 37 (1998) at p. 45.

³ *Id.* at p. 47. See also, *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 735-736.

A mock-up of the amendments in context is attached to this analysis.

6. Arguments in support of the bill

According to the author:

SB 1084 is a crucial first step towards addressing this ever-growing issue. SB 1084 aligns state law with the US Agricultural Foreign Investment Disclosure Act, ensuring our state agencies can operate with the same information that federal agencies receive. California has just over 40 million acres of privately held agricultural land, with 2.7 percent of that land being held by foreign owners. Granting our state agencies more insight into this allows us to prioritize the stewardship of these lands while continuing to direct resources and spending towards local economies.

SUPPORT

None known

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

Amended Mock-up for 2021-2022 SB-1084 (Hurtado (S))

Mock-up based on Version Number 99 - Introduced 2/15/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 5 (commencing with Section 745) is added to Title 2 of Part 1 of Division 2 of the Civil Code, to read:

CHAPTER 5. Foreign Entities and Property Ownership

745. For purposes of this chapter, the following definitions apply:

(a) "Agricultural land" has the same meaning as defined in Section 3508 of Title 7 of the United States Code.

(b) "Controlling interest" means either of the following:

(1) Possession of 51 percent or more of the ownership interests in an entity.

(2) A percentage ownership interest in an entity of less than 51 percent, if the foreign government actually directs the business and affairs of the entity without the requirement or consent of any other party.

(c) "Foreign government" means a government other than the government of the United States, its states, territories, or possessions, and includes state-controlled enterprises.

(d) "Interest" means any estate, remainder, or reversion enumerated in Chapter 1 (commencing with Section 761) of Title 2 of Part 2, or portion of the estate, remainder, or reversion, or an option pursuant to which one party has a right to cause legal or equitable title to agricultural land to be transferred.

(e) "State-controlled enterprises" means business enterprises, however denominated, in which the government has a controlling interest.

746. (a) Notwithstanding any other law, on and after January 1, 2023, a foreign government shall not purchase, acquire, or hold any interest in agricultural land in the State of California.

(b) This section does not apply to any interest in agricultural land held by a foreign government before January 1, 2023.

(c) A transfer of an interest in land in violation of this section is void.

(d) This section shall not be applied in a manner inconsistent with any provision of any treaty between the United States and another country.

747. (a) Based the reports submitted to it pursuant to Section 3505 of Title 7 of the United States Code and such other information as the Department of Food and Agriculture, at its discretion, deems appropriate, the Department shall compile an annual report for each calendar year containing all of the following:

(1) The total amount of agricultural land that is under foreign ownership.

(2) The percentage change in foreign ownership of agricultural land in California, by year, over the past ten years.

(3) The top ten nationalities of the foreign owners of California agricultural land, by total acreage owned.

(4) The purpose to which foreign-owned agricultural land in California is being put to use currently. The Department shall also include any significant recent changes or trends in the use to which foreign-owned agricultural land in California is being put to use.

(5) Information regarding the extent of, and any recent changes in, foreign ownership of water rights in California, and any recent changes in foreign ownership of water rights in California.

(6) Information regarding the extent of, and any recent changes in, foreign ownership of water desalination facilities in California.

(7) Information regarding the extent of, and any recent changes in, foreign ownership of energy production, storage, or distribution facilities in California.

(8) The Department of Food and Agriculture's assessment of the impact of any recent changes in foreign ownership of California agricultural land, water rights, or water desalination facilities on Californian's food security.

(9) Any legislative, regulatory, or administrative policy changes the Department of Food and Agriculture recommends in light of the information in the report.

~~A purchaser of agricultural land, or interest in agricultural land, other than security interest, shall submit a report to the Department of Food and Agriculture no later than 90 days after the date of the acquisition or transfer. The report shall contain the same information that is required to be included in a report submitted to the United States Secretary of Agriculture pursuant to subsection (a) of Section 3501 of Title 7 of the United States Code.~~

(b)(1) The Department of Food and Agriculture shall publish the inaugural report described in subdivision (a) on its website by March 31, 2023. and on the 31st day of March of

(2) The Department of Food and Agriculture shall publish each subsequent report described in subdivision (a) on its website by the 31st day of March of each following year.

(3) If the report contains recommendations for legislative policy changes pursuant to paragraph (9) of subdivision (a), the Department of Food and Agriculture shall also deliver copies of those recommendations to the Governor's Office and the Assembly and Senate Committees on Agriculture. ~~A foreign government that holds an interest, other than a security interest, in agricultural land in this state on December 31, 2022, shall submit a report to the Department of Food and Agriculture no later than June 30, 2023. The report shall contain the same information that is required to be included in a report submitted to the United States Secretary of Agriculture pursuant to subsection (b) of Section 3501 of Title 7 of the United States Code.~~

~~(c) A foreign government that holds or acquires, on or after January 1, 2023, an interest, other than a security interest, in land at a time when the land is not agricultural land, and the land subsequently becomes agricultural land, shall submit a report to the Department of Food and Agriculture no later than 90 days after the date on which the land became agricultural land. The report shall contain the same information that is required to be included in a report submitted to the United States Secretary of Agriculture pursuant to subsection (b) of Section 3501 of Title 7 of the United States Code.~~