INSIDE

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IN FUTURE ISSUES

Seventh Circuit upholds "Swampbuster's" application to isolated, intrastate wetlands

The Seventh Circuit has upheld under the Spending Clause, U.S. Const., Art. 1, § 8, the application of the wetland conservation provisions of the Food Security Act, commonly known as the "Swampbuster" provisions, to isolated, intrastate wetlands. *United States v. Dierckman*, No. 98-4131, 2000 WL 15012 (7th Cir. Jan. 11, 2000). The court also upheld the imposition of Swampbuster sanctions on the lessee- "operator" of the farm even though the affected parcel's owner actually converted the wetland. In so doing, the Seventh Circuit affirmed a $92,703.00 judgment against the defendant. *United States v. Dierckman*, 41 F. Supp.2d 870 (S.D. Ind. 1998). The judgment amount represented the sum of the farm program payments that the defendant had received but was ineligible to receive because of the Swampbuster violation.

Defendant Dierckman farmed his land and land owned by his father. In 1991, Dierckman's father completed the conversion of a wetland on the land he owned after the USDA Soil Conservation Service had advised Dierckman that such actions would violate the Swampbuster provisions. Under Swampbuster as it was amended effective November 28, 1990, persons are ineligible for federal farm program payments and other USDA benefits if they convert a wetland so that crops could be grown on the land. Prior to this amendment, a Swampbuster violation occurred only if a conversion after December 23, 1985, was followed by crop production on the converted wetland. Under the amended statute, either action will constitute a violation. *See* 16 U.S.C. § 3821.

After unsuccessfully appealing the determination of his ineligibility for program benefits, Dierckman was sued for the amount of the farm program payments he had received after the conversion. Before both the district court and the Seventh Circuit, he argued that the wetland at issue was an isolated, intrastate wetland beyond the reach of Swampbuster by virtue of the limited reach of congressional authority under the Commerce Clause. Both courts disagreed.

As reasoned by the Seventh Circuit, compliance with the Swampbuster provisions was imposed by Congress on the recipients of USDA benefits as a condition of eligibility for these benefits. In turn, the congressional authority to provide these benefits and to impose conditions on their receipt was properly founded on the Spending Clause, not the Commerce Clause. Therefore, no connection between the affected wetland and interstate commerce

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Farmers misled by FSA appeal letter

A number of farmers appear to have been caught in a conflict between the Farm Service Agency (FSA) and the National Appeals Division (NAD), two agencies within the USDA. Unfortunately, it appears that the farmers were the ones injured by the agencies' disagreement, and although the agencies have now come to terms, no relief is apparently forthcoming from the USDA.

Whenever a farmer receives an "adverse decision" from the FSA, that farmer has specific administrative appeal rights. 7 U.S.C. § 6996; *see also* 7 U.S.C. § 6991 (definition of "adverse decision"). This appeal right allows the farmer to request an evidentiary hearing before a NAD hearing officer. 7 U.S.C. § 6996. In fact, in order for the farmer to be able to ever seek review of the adverse decision in court, the farmer *must* appeal to the NAD. Failure to exhaust this administrative appeal process renders the farmer unable to seek judicial review. 7 U.S.C. § 6912(e).

In addition to the right to appeal directly to NAD, the farmer has a right to seek informal review of the decision through the agency. 7 U.S.C. § 6995. This is the pre-NAD "in house" agency appeal process that typically involves asking FSA to reconsider the decision and/or asking a higher level within the FSA to review the decision. *Id., see also* 7 C.F.R. § 780.7. Similarly, the farmer has a right to request mediation. 7 U.S.C. § 6995. These rights are clearly in addition to the right to appeal to the NAD, and the exercise of either informal review or mediation rights does not, in and of itself, alter the farmer's basic right to a NAD hearing.

If neither informal review nor mediation is sought, the farmer has thirty days from notice

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was required. Moreover, in enacting Swampbuster, Congress clearly intended to cover wetlands without regard to their nexus to interstate commerce or to the definition of a "wetland" under the Clean Water Act, legislation which is grounded on the Commerce Clause.

Dierckman also claimed that he should not be penalized as the lessee for acts undertaken by his father, the wetland's owner. More specifically, he challenged the Swampbuster regulation, 7 C.F.R. § 12.4(e), that imposed liability on him as the farm's "operator" even though he had not converted the wetland. The Seventh Circuit, noting that the Swampbuster statute only renders the "person who converts the wetland" ineligible, reasoned that Dierckman's reading of the statute as limiting ineligibility to the actual converter was plausible, but not the only plausible interpretation. To the contrary, imposing liability on the "operator," defined in the Swampbuster regulations as the person in control of the farm, was also reasonable, notwithstanding its breadth relative to the statutory language. Applying the deference doctrine articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the court upheld the regulation's imposition of responsibility on the person who controlled the farm at the time of the conversion.

Dierckman also contended that he was only the "operator" of the farm's cropland, not its wetlands. It was his father, according to Dierckman, who was the "operator" of the wetlands. The Seventh Circuit rejected this claim, noting that on various forms he had submitted to the USDA, including Form AD-1026 relating to highly erodible land and wetlands, Dierckman listed himself as the farm's "operator." The court also dismissed Dierckman's claim that he was helpless in the face of his father's actions, noting that Dierckman continued to enroll the farm in farm programs while labeling himself as the farm's operator, failed to seek a reconstitution of the farm to put the wetland in a separate administrative unit, and produced little or no evidence that he tried to stop his father from converting the wetland.

Finally, the Seventh Circuit rejected Dierckman's substantive due process claim, concluding that both the Swampbuster statute and its implementing regulations have a rational basis. In this respect, the court opined: "The owner and the operator share control of the land, and, to the extent each is penalized for the conversion of wetlands, the purposes of Swampbuster will be furthered. Sanctions fall on owners and operators who could potentially benefit from agricultural conversion of their land, thus providing both with incentives to prevent conversion." *Dierckman*, 2000 WL 15012 at *10.

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Global treaty adopted on genetically modified organisms

Montreal, 29 January 2000—After five years of talks, ministers and senior officials from over 130 governments have finalized a legally binding agreement for protecting the environment from risks posed by the transboundary transport of living modified organisms (LMOs) created by modern biotechnology.

Under the Cartagena Protocol on Biosafety, governments will signal whether or not they are willing to accept imports of agricultural commodities that include LMOs by communicating their decision to the world community via an Internet-based Biosafety Clearning House. In addition, shipments of these commodities that may contain LMOs are to be clearly labeled.

Stricter Advanced Informed Agreement procedures will apply to seeds, live fish, and other LMOs that are to be intentionally introduced into the environment. In these cases, the exporter must provide detailed information to each importing country in advance of the first shipment, and the importer must then authorize the shipment. The aim is to ensure that recipient countries have both the opportunity and the capacity to assess risks involving the products of modern biotechnology.

"This agreement goes a long way towards meeting the environmental concerns of the international community," said Klaus Toepfer, Executive Director of the United Nations Environment Programme (UNEP), which administers the secretariat of the Convention on Biological Diversity, under whose auspices the talks took place.

One of the most contentious issues that negotiators had to resolve involved the relationship between the Protocol and other international agreements, notably those under the World Trade Organization. While environmental agreements are premised on the precautionary principle, decisions under trade law require "sufficient scientific evidence." Under the new agreement, the Protocol and the WTP are to be mutually supportive; at the same time, the Protocol is not to affect the rights and obligations of governments under any existing international agreements.

The meeting was attended by over 700 delegates from governments as well as from intergovernmental and non-governmental organizations. Over 40 ministers attended during the final two days. The agreed text of the Biosafety Protocol will be opened for signature at UNPE headquarters in Nairobi from 15-26 May, on the occasion of the Fifth Session of the Congress of the Parties to the Convention on Biological Diversity (COP5). The Protocol will then enter into force for its members after 50 countries have ratified it.

—Press Release, Convention on Biological Diversity, http://www.biodiv.org' reprinted with permission from February 2000 ISB News Report.

GM product labeling caters food for thought

For good reason, *Science* magazine has designated the debate over genetically modified (GM) foods as the "controversy of the year." Throughout the world, there have been numerous manifestations of the backlash against GM crops and food derived from GM crops. The European Union (EU), for example, has decided to suspend the introduction of new GM crops pending legislation, which may take three years to resolve. Meanwhile, Japan's health ministry recently announced that it would not approve any more GM

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FSA appeal letter/*Cont. from page 1*
of the adverse decision to file the appeal. 7 U.S.C. § 6996. The statute provides that [t]o be entitled to a hearing ... a participant shall request the hearing not later than 30 days after the date on which the participant first received notice of the adverse decision." 7 U.S.C. § 6996(b). If informal review to the agency is taken, the reviewing authority will issue a new decision, and the farmer then has thirty days to appeal that adverse decision. *See* 60 Fed. Reg. 67,298, 67,302 (Dec. 29, 1995) (prefatory comments to interim final rules to be codified at 7 C.F.R. pt. 11 and elsewhere). If the farmer requests mediation, however, the NAD and the FSA have disagreed about the time period in which the farmer must file the appeal.

The NAD has taken the position that in the event of mediation, the date of the original notice of the adverse decision starts the running of the 30 day period within which to file the NAD appeal. 7 C.F.R. § 11.5(c)(1). While mediation tolls the running of this period, at the conclusion of mediation, the farmer only has the balance of the 30 days within which to file the appeal with the NAD. *Id.* The NAD regulation expressly provides that "[i]f a participant [r]equests mediation or ADR prior to filing an appeal with NAD, the participant stops the running of the 30 day period during which a participant may appeal to NAD under § 11.6(b)(1), and will have the balance of days remaining in that period to appeal to NAD once mediation or ADR has concluded." 7 C.F.R. § 11.5(c)(1). Because the NAD is an agency within the office of the Secretary of Agriculture, this regulation was issued by the Office of the Secretary and throughout the prefatory comments to the regulation, it purports to represent the position of the USDA. 64 Fed. Reg. 33,367, 33367-72 (1999) (prefatory comments to final rules to be codified at 7 C.F.R. pt. 11). Moreover, the prefatory comments discuss the interpretation of the mediation time frame at some length and expressly reject alternative interpretations. *Id.* at 33,370.

Despite this, the FSA developed its own interpretation of the mediation process as it related to farmers' appeal rights. It interpreted the law as providing the farmer with a full thirty days after mediation within which to request an appeal. According to the FSA, a NAD appeal could be filed any time within 30 days after the conclusion of mediation, irrespective of the date that the farmer first received notice of the adverse decision. Despite the fact that this interpretation was in direct conflict with the regulations published by the Office of the Secretary of Agriculture, the FSA persisted in it interpretation. Moreover, the national FSA office issued this interpretation in the FSA Handbook that was sent out to all FSA state and county offices. FSA HANDBOOK, *Program Appeals, Mediation, and Litigation* (1-APP), 6-12, ¶ 97C (Aug. 15, 1997). According to this interpretation, at the conclusion of mediation, the mediator was supposed to issue a report that described the results of mediation and notified the parties that "the participant [farmer] has 30 calendar days from the date that the report is mailed or otherwise made available to the participant to exercise any further rights of administrative appeal." *Id.* Because mediators are not bound to follow FSA directives such as this, and because it was perceived to be inappropriate for them to provide this type of notice, in practice, FSA local offices took on this responsibility. These offices would typically send a letter to farmers at the conclusion of mediation, advising the farmer that he or she had 30 days from that date within which to request a NAD appeal.

In a number of cases, farmers, in reliance upon the advice given by the FSA, missed their 30 day deadline for filing their NAD appeal. In some cases, it has been reported that NAD hearing officers allowed the tardy appeal request and afforded the farmer the right to appeal. At some point, however, NAD hearing officers were directed to deny appeal requests that were filed after the initial 30 day period had run, regardless of advice given by the FSA. *See*, NAD APPEALS REFERENCE GUIDE, N-9 ("If the appellant has not met the deadline to file an appeal, you have no authority to hear the case.").

Informal, but irate, farmer complaints to the agency eventually resulted in the reversal of the FSA interpretation. FSA Notice APP-26 was issued on November 8, 1999 for distribution to all state offices and for these offices to relay to county offices. This notice re-interpreted the mediation/NAD appeal time frame to provide that "[i]f a participant requests mediation before filing an appeal with NAD, the participant stops the running of the 30-day period during which a participant may appeal to NAD. Once mediation is concluded, the participant has the balance of days remaining in the period to appeal to NAD." Notice APP-26, *Clarifying Appeal and Mediation Procedures*, USDA, Farm Service Agency (Nov. 8, 1999).

From the perspective of the national FSA office, this notice resolved the issue. Unfortunately, this perspective is not shared by farmers who have already lost their appeal rights in reliance upon the erroneous advice from FSA. These farmers were denied their NAD appeal and are therefore also denied an opportunity for judicial review. Moreover, it has been anecdotally reported that some local offices continued to send out the letter containing the misinterpretation for some time after the FSA Notice APP-26 was issued.

These farmers' situations could be easily remedied. In cases where the farmer relied upon the FSA letter and thus missed the appeal deadline, the FSA could review the farmer's case and issue a new adverse decision. The farmer would then have the right to appeal this decision. However, FSA officials in Washington have refused to do so.

Three aspects of this situation are particularly disturbing. First, it exemplifies a problem that exists within the USDA. The FSA and the NAD are two agencies within the same department, and the NAD is run directly out of the office of the Secretary of Agriculture. Despite this, there are a number of issues that arise, such as this issue, where the two agencies disagree. When this occurs, the farmer is likely to be caught in the middle.

For example, with regard to appeal notices, under the current division of labor between these two USDA agencies, the FSA is charged with providing farmers with notice of their appeal rights. Yet, it is the NAD that administers the appeal process. Despite the NAD's affiliation with the Office of the Secretary, it has been unwilling to take charge of the notice process. The prefatory comments to the NAD final rules states that, "[a]gency notices to participants of appeal rights are beyond the scope of this final rule." 64 Fed. Reg. 33, 367, 33,370 (1999) (prefatory comments to final rules to be codified at 7 C.F.R. pt. 11).

Moreover, it appears that disagreements between the agencies are not quickly resolved. The NAD expressed its interpretation of the mediation time frame in its interim final rule published in December of 1995. 60 Fed. Reg. 67,298, 67,302 (1995) (prefatory comments to interim final rules to be codified at 7 C.F.R. pt. 11 and elsewhere). It specifically discussed its interpretation in the prefatory comments to this rule, even providing an example of the time computation when mediation is at issue. *Id.* It again expressed its interpretation in the final rules issued in June of 1999 and again addressed the issue in its prefatory comments, expressly rejecting the position espoused by FSA. 64 Fed. Reg. 33,367, 33,370 (1999) (prefatory comments to final rules to be codified at 7 C.F.R. pt. 11). FSA did not "come around" to the NAD interpretation for almost two full years after the interim final rule was published, five months after the final rule confirmed the NAD interpretation. Presumably, all farmers who exercised their mediation rights in response to adverse decisions from the FSA were given erroneous advice for this entire period time.

Second, this issue reveals the inherent complexity of USDA programs. Although the NAD statute was intended to create a simple and straightforward appeal process that farmers could utilize without the assistance of an attorney, this problem illustrates the procedural dangers awaiting an ill-informed participant. For example, if a farmer files a NAD appeal first, and then seeks mediation, the appeal request is docketed and his or her rights are preserved. 7 C.F.R. § 11.5(c)(2). The NAD hearing may or may not be held within thirty days following mediation. Id. As described herein, if a farmer seeks informal review, the time period for requesting a NAD appeal is extended indefinitely, until a new decision is reached. 7 C.F.R. § 11.5(a). The farmer, presented with a number of options, is expected to know which to chose and when to make this choice.

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Status of regional dairy compacts

By Ken Bailey

Background on milk pricing

Milk pricing is exceedingly complicated because of our discriminatory pricing system. Under this system, milk is priced according to how it is used. A tanker of milk going to a manufacturing plant to produce cheese will be worth less under the federal order system than the exact same tanker going to a fluid bottling plant. Thus milk is allocated to the higher value uses (Class I for fluid purposes and Class II for soft manufactured purposes), and the rest is used for lower-value manufacturing purposes (Class III for hard cheese and butter, and Class IIIa for nonfat dry milk production). In theory, this system of discriminatory pricing results in a higher farm-gate milk price.

Under the old milk pricing system, prior to recent federal order reform, milk prices were driven primarily by the Basic Formula Price, or BFP. Each month, USDA would survey unregulated manufacturing plants in Minnesota and Wisconsin. Those plants would report what they paid for milk used to produce primarily cheese. Since it was unregulated milk, it represented a very small portion of the nation's milk supply. This survey information was used to compute the BFP. The BFP in turn was set equal to the Class III price, and was used in the computation of the Class I and II prices.

The problem with the old system was that the BFP was heavily influenced by cheese prices and had an enormous impact on U.S. milk prices. That small amount of milk in the Upper Midwest was effectively pricing milk in the rest of the country due to its inclusion in the formula prices for Class I and II.

That will change under the new federal order reforms that became effective January 2000. The 1996 Farm Bill required the Secretary of Agriculture to revamp milk pricing. The Secretary was given wide latitude in determining a new method for determining milk prices. This process has been called "federal order reform."

Under the new system, class prices are influenced by commodity prices for cheese, butter, nonfat dry milk, and whey. These commodity prices are used to compute component values for butterfat, protein, other solids, and nonfat solids. This new system, called multiple component pricing, reflects the value of components in manufactured dairy products. These component values are then used to compute class prices.

The classes have also been changed slightly under order reform. Class III use is solely for cheese production. Class IV, a new class, is now used to reflect milk used to produce both butter and nonfat dry milk.

The new order reform represents a major change in how milk is priced. The number of federal orders will be consolidated from 32 to 11. New formulas will drive class prices, and hence farm-gate milk prices. This will have two affects. First, milk pricing at the farm-level will be more transparent. Farmers will see a direct link between the now larger federal order their milk is sold into and their milk check. Second, milk prices will be more market oriented. Under the old system there was a two-month lag between changes in the BFP and Class I and II prices. Under the new system, when cheese prices change, for example, farmers will see it on their milk check the following month. There will no longer be a two-month lag in some class prices. Farmers will therefore receive clear and direct signals from the market place to either expand or contract milk production.

The New England Compact

The U.S. dairy industry has recently been split over milk pricing issues. Dairy farmers in the Upper Midwest want to deregulate the sixty-year-old system of federal milk pricing. At the same time, some farmers, primarily in the Northeast and South, want congressional authority to create regional pricing authorities that will enforce minimum price floors.

Milk prices in the U.S. are regulated by federal and state milk marketing orders. California, Virginia and Pennsylvania, for example, have state orders that coordinate prices with the nearby federal orders. These orders were created back in the early 1930s in order to stabilize volatile milk prices.

In 1996 when Congress asked the Secretary of Agriculture to revamp milk pricing, the idea was to modernize the current national system of milk pricing, make it more market oriented, and recognize the interstate nature of milk. When federal orders were first created, milk rarely moved more than 100 miles. Today, milk regularly moves 1000 miles, sometimes as much as 2000 miles. Milk produced in California does travel to Florida markets some months of the year. So, a modern system of milk pricing would do so within an interstate framework.

The 1996 Farm Bill also contained a little known provision called the Northeast Interstate Dairy Compact.[1] I call it the New England Compact since it refers to just six New England states. That provision in many ways represents the opposite of federal order reform since it is not market oriented and provides enhanced pricing authority for a select group of dairy farmers.

The creation of the New England Compact had the impact of creating a ground swell of popular support among many dairy farmers that supplied the fluid market. Farmers facing volatile milk prices and declining federal fluid milk prices saw the compact as a method of gaining more control over the marketplace. Farmers in the rest of the northeast (primarily in New York and Pennsylvania) wanted to join the New England Compact, and farmers in the South (from Virginia to Florida to Texas to Missouri) wanted to form a new Southern Dairy Compact. To do that, Southerners supported the extension and expansion of the New England Compact.

The stage was now set for tremendous strife and conflict. To the proponents of compacts, this policy would enhance and stabilize the fluid portion of farmers milk checks. And it would help stem the decline in the number of small farm families in many regions of the U.S. It would also provide greater regional pricing authority. Why depend on the federal government to set local or regional milk prices?

To opponents, primarily processors and farmers outside of compact regions, compacts represented depression-era economics that did not jibe with a modern U.S. economy now entering a new millennium. Besides, some thought, where would it end? Would all milk produced in the U.S. someday become involved in a regional dairy compact?

What is a dairy compact?

A dairy compact is simply an agreement among a group of states to regulate the price of milk used for fluid purposes. Compacts have not been involved in the regulation of manufacturing milk (i.e. milk used to make butter, nonfat dry milk, cheese, etc.) since manufactured dairy products like cheese trade on a national market. Fluid milk, since it is bulky and perishable, still trades primarily in regional markets. This, however, is changing rapidly as the fluid industry is becoming more consolidated, and as new technologies (i.e. reverse osmosis) allow milk to be concentrated at the farm level to make transportation to distant markets more economical.

Compacts create a regional pricing authority, called a Compact Commission, that fixes a minimum fluid milk price called the compact price. Any milk sold for fluid purposes in the New England Compact, for example, is subject to a minimum price floor of $16.94 per cwt. The federal minimum fluid price—the Class I price—is usually below this floor price and rises and falls each month with changing market conditions. The Compact Commission collects the compact premium each month—the difference between the compact price of $16.94 per cwt and the federal order Class I price—and distributes the proceeds back to farmers that participate in the Compact.

Compacts effectively disrupt the interstate nature of milk pricing since they create pricing authorities that set their own milk prices.

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They must derive their authority from the U.S. Congress since only Congress is authorized to create interstate compacts under the Compact Clause (Article 1, Section 10, Clause 3) of the U.S. Constitution. Interstate trade in goods and services has been the hallmark of U.S. commerce since the founding of the Union. Historically, compacts were created for interstate ambulance services, port authorities, nuclear waste disposal, etc. Until recently, they have not been created to price a commodity.

Most farmers in New England support the compact since it protects them from rapidly changing market conditions. For example, the Class I price of milk in New England fell from $19.86 per cwt in February 1999 to $12.79 per cwt in April 199, a drop of $6.57 per cwt. Part of that decline, however, was offset by the compact over-order premium.

Farmers in New England derive half of their income from fluid milk sales. So while the manufacturing portion is volatile with changing cheese prices, the other half was supported at $16.94 per cwt.

Economics of dairy compacts

The economic impact of interstate dairy compacts was first studied by the Office of Management and Budget,[2] and later by Bailey and Gamboa.[3] Both studies showed very similar results.

Dairy compacts do raise the farm price of milk. In the Bailey and Gamboa study, farm-gate milk prices in a proposed Southern Compact rose $1 per cwt, or over 6 percent with an effective $2 per cwt compact premium. A $1 compact would result in an increase of around $0.50 per cwt, or just over 3 percent. The cost of the compact would be borne by consumers and processors in the compact region. Retail milk prices rose $0.15 per gallon (5.1 percent) and per capita fluid milk consumption fell 3 pounds (1.6 percent).

One could argue that the economic impact of compacts on processors (via lower fluid milk sales) and consumers (via higher retail milk prices) is minimal when compared to the positive economic impact on compact farmers. Some would argue that compacts help support a local fluid milk industry. But the more contentious issue is that compacts also have an adverse economic impact on farmers outside the compact region.

When compact farmers receive a higher milk price, they expand production. Also, when consumers buy less milk, that adds to a greater supply of surplus milk. Surplus milk must be processed into storage dairy products such as butter, nonfat dry milk and cheese. Those additional products result in lower dairy commodity prices. That in turn lowers farm prices in non-compact regions such as the Upper Midwest and the West.

The Upper Midwest has been fighting dairy compacts primarily because about 85 percent of their milk is manufactured into dairy commodities, mainly cheese. Thus cheese prices have a direct impact on their milk check. The Bailey and Gamboa study showed that a Southern and Northern dairy compact would lower farm-gate milk prices in Wisconsin by about $0.21 per cwt. It would also lower farm milk income in that state by 64 million (2.3 percent) per year.

These economic implications explain part of the controversial nature of interstate dairy compacts. Processors are fighting the proliferation of regional dairy compacts through their trade association, the International Dairy Foods Association. Their members are concerned about lost sales and feel threatened by regional pricing authorities.

Thus the economics of dairy compacts are clear. They enhance farm-gate milk prices and result in more surplus milk, which has the effect of lowering dairy commodity prices. This negative impact of surplus milk could be avoided, however, by implementing a supply control program in the compact region. But that would adversely affect those farmers in the compact regions that are attempting to modernize their dairy farms via a major expansion.

Trends in the U.S. dairy industry

The compact debate takes place during a time of fundamental change in the U.S. dairy industry. Milk production is shifting dramatically across the U.S. The West—primarily California, Idaho, New Mexico, and Arizona—are expanding milk production rapidly, around 5-12 percent per year. They have adopted a large herd model (3,000 milking cows and up) that is focused on the dairy enterprise, produces a high quality product, and has a low unit cost of production. The Northeast is expanding milk production slowly, around 1-2 percent a year. In the Upper Midwest, milk production is either stable or declining. And milk production is declining everywhere else. That is primarily true in many Southern states like Texas, Missouri, Kentucky, Tennessee, and Louisiana.

Part of the problem is the economics of milk production. Not every dairy farmer has the same average milk production per cow. Even within a state, this number varies tremendously. The economics are clear—the more milk you produce from a given cow, the more revenue and the lower the unit cost. Economic studies suggest that both fixed and variable costs per cwt of milk produced fall with higher levels of milk production.

Again, not every state has the same level of milk production. In 1998, Washington ranked number one in average milk sales per cow at 21,476 pounds.[4] Other Western states such as Arizona, Colorado, New Mexico, Idaho and California all ranked in the top six high producing dairy states. But many southern states, such as Missouri, Alabama, Mississippi, Oklahoma, Arkansas, Kentucky, and Louisiana, ranked in the bottom ten milk producing states. Louisiana, ranked 50th in the nation for average milk sales per cow at 11,921 pounds, has spearheaded the organization for a new Southern Dairy Compact.[5] Clearly this figure reflects variances in competitiveness between states.

Another big trend in the U.S. dairy industry is that of small versus large operations. Typically, it is the larger dairy operations (3,000 cows and up) that are either new startups or expanding. They are increasingly competing in a national marketplace with more traditional dairy farms that are milking 50-100 dairy cows. Often the smaller dairy farms are very diverse in terms of numbers of enterprises, and many have a lower overall return on assets when compared to the newer operations.

Another dairy industry trend that should be considered is in the fluid milk market. Per capita consumption of milk has eroded over time. Fluid milk competes with other beverages such as soda, fruit juices, and mineral water. The dairy industry has not been effective in competing with these other beverages.

In a recent edition of Choices Magazine, writer Adelaja and Schilling note that nutraceutical products constitute the fastest growing segment of the U.S. food industry.[6] Consumers are now buying orange juice with twice the vitamin C and supplemented with calcium and vitamin E. That orange juice now comes in an attractive package with a thick easy-to-use handle and colorful graphics. The gallon of milk in the dairy case comes in a thin plastic bottle, has very poor labeling that does not capitalize on the fact that milk contains calcium, and may suffer from a poor image.

What does this have to do with dairy compacts? The future of the U.S. dairy industry is in getting more competitive with other beverages and selling more product.[17] This will not be accomplished if the industry decides to rely on new government pricing programs. These pricing programs, while well intentioned, can backfire if market opportunities are lost. In the case of expanding use of dairy compacts, it may be risky to charge consumers more for a product like milk without providing something in return. Consumers are used to a marketplace with stable to declining prices.

Conclusion

The question of what to do with dairy compacts has been settled, at least for now. President Clinton signed the Consolidated Appropriations Act of 2000 on November 29, 1999. The Act cleared the final hurdles for implementation of federal order reform. The New England Compact was to be terminated once federal order reform was implemented. Thus the budget bill also extended the deadline for the New England Compact for at least two more years. No mention was made of adding six other northeast states to the existing New England Compact, nor of a South-

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ern Dairy Compact.

Discussion of the future of dairy compacts will thus be timed with a new farm bill. That should allow a full discussion of the merits of regional dairy compacts. That discussion should take place with an understanding that no part of the country can be effectively isolated from the rest. Milk produced in one part of the country can have a direct impact on milk prices in the rest of the country. Thus the issue of how best to price milk will likely be discussed at the national level.

Dairy compacts are designed to assist farmers in a particular part of the country by stabilizing and enhancing a portion of their milk check. Many regions of the country, particularly in the Northeast and in the South, want a more active role in stemming the decline in the numbers of dairy farm families.

Dairy compacts attempt to limit direct market competition for a select group of dairy farmers. They attempt to circumvent the interstate nature of milk. Regional dairy compacts do raise the price of milk to farmers that ship milk into the compact region. But compacts also have other direct and indirect impacts on consumers, processors, and non-compact dairy farmers.

Dairy compacts also raise special challenges to members of Congress. Where does it all end? Compact prices may have to be raised over time as farm production costs rise. Dairy compacts may spread to other parts of the country, raising retail milk prices. And farmers that produce other commodities such as grain and hogs may ask for their own compacts. This occurs at a time when we will begin a new round of trade talks at the World Trade Organization. Thus to members of Congress, dairy compacts are becoming an ideological issue.

In conclusion, regional dairy compacts will likely provide some farmers a higher milk price, but it will have economic consequences for consumers, processors, and farmers in non-compact regions. In short, dairy compacts are very controversial!

[1] U.S. Senate, "Joint Resolution: To Grant Consent of Congress to the Northeast Interstate Dairy Comopacts," S.J. Res. 28, 104th Congress, 1st Session, March 2, 1995.

[2] Office of Management and Budget, *The Economic Effects of the Northeast Interstate Dairy Compact*, Washington, D.C., February 1998.

[3] Bailey, Ken and Jose Gamboa, *A Regional Economic Analysis of Dairy Compacts: Implications for Missouri Dairy Producers*, Report #CA-160, Commercial Agricultural Program, January 1999.

[4] Source: USDA, *Milk Production*, February 16, 1999.

[5] Louisiana Department of Agriculture & Forestry. Memorandum: Final Draft of the Southern Dairy Compact." Memorandum dated March 27, 1997.

[6] Adelaja, Adesoji and Brian Schilling, *Nutraceuticals: Blurring the Line Between Food and Drugs in the Twenty-first Century*, Choices, Fourth Quarter 1999, pps. 35-39.

[7] See Bailey, Ken, *Milk Marketing in the New Millennium; It Will be Different!,* Choices, Fourth Quarter 1999, pps. 61-63, for a more futuristic look at the dairy industry.

GM product labeling/Cont. from page 2
foods, pending the introduction of tighter regulations next April. Even Monsanto's caterer for the United Kingdom banned GM food from the staff cafeteria. In the United States, the summer and fall of 1999 saw an intensification of protests, including the damage of private and university research plots.

One position that various governments have adopted is that GM crops and food allowed in the market must be labeled as such. GM product labeling is required in Britain and Switzerland, and is under EU regulations, while Japan and South Korea plan to implement labeling requirements. At present, there is no mandatory requirement for labeling GM products in the US. This is a situation that activists are trying to change using a number of justifications, including the unsupported allegation that GM food is not safe. The issue of food safety falls within the purview of the Food and Drug Administration (FDA).

Labeling safety

Under the Federal Food, Drug, and Cosmetic Act, the FDA has the authority to ensure the safety and wholesomeness of most foods, except meat and poultry. In 1992, the FDA published a policy statement on the regulation of foods and animal feeds derived from new plant varieties developed by genetic engineering techniques. An evaluation of the safety and nutritional composition of food derived from GM plants relies upon information pertaining to the agronomic and quality attributes of the plant, genetic analysis of the modification and stabilitiy of expected genomic traits, evaluation of the safety (i.e., toxicity and allergenicity) of any newly introduced proteins, and chemical analysis of important toxicants and nutrients. The FDA requires pre-market approval for molecules (proteins, fatty acids, carbohydrates, etc.) produced by introduced genes, if these molecules differ substantially in structure and function from typical moleclues found in foods.

A basic principle in the 1992 policy is that the FDA uses a science-based approach for ensuring the safety of foods from new plant varieties. The FDA focuses its evaluation on the objective characteristics of the food or its components, rather than the fact that new development methods were used, at some point, to produce the food. Accordingly, the Agency has not required labeling for other non-GM methods of plant breeding, such as chemical-induced or radiation-induced mutation, somaclonal variation, or cell culture.

Labeling religiously

In May 1998, the Alliance for Bio-Integrity filed a lawsuit against the FDA seeking to institute mandatory labeling of all GM foods. The suit alleged, among other things, that current FDA policy violates the freedom of certain religions that adhere to dietry laws. Anti-GM food activists often raise the religion-based issue as a justification for labeling. This argument, however, does not seem particularly compelling. For example, both Orthodox Rabbis and Muslim leaders have decided that simple gene additions, which lead to one or a few new components in a species, are acceptable for kosher and halal law. Although animal-to-plant gene transfers could cause concern for people adhering to certain dietary restrictions, the FDA has pointed out that no such products are yet marketed, and that the Agency would have the opportunity to consider such a case if it arises.

The Vatican's Pontifical Academy for Life recently announced its decision that modifying the genes of plant and animals is theologically acceptable. Nevertheless, the vice-present of the Academy stated that consumers must be informed about GM products through proper labeling. This ill-defined "right to know" is another popular justification for labeling.

Labeling righteously

During November, the U.S. House of Representatives introduced H.R. 3377, a bill that would require the following notice on foods derived from GM crops: "Genetically engineered; United States government notice: This product contains genetically engineered material, or was produced with a genetically engineered material." The bill suggests that qualifying food would contain as low as 0.10 percent GM ingredients, a standard that is ten times more strict than the EU requirement. Represeentative Dennis Kucinich (D-OH), who co-sponsored the bill, explained, presumably sincerely, that no one is suggested that GM food is dangerous, but, "If we are what we eat, then consumers must know what they are eating." One of the doctrines of the legislation is that the process of genetically engineering foods results in the material change of such foods. This material change seems to be one of perception, and not based on fact.

H.R. 3377 is subtitled "Genetically Engineered Food Right to Know Act." Yet the Federal Food, Drug, and Cosmetic Act does not require disclosure in labeling of information solely based on the consumers' desire to know. According to the FDA's interpretation of the Act, the agency does not even have the authority to mandate labeling based solely upon a consumer's right to know the method of production if the final product is considered safe. And, despite the hoary cliché, there simply is no overriding "right to know" principle.

A federal appellate court clearly made this point in the International Dairy Foods Association case. Dairy manufacturers challenged the constitutionality of a Vermont statute that required ientification of products that were, or might have been, derived from dairy cows treated with recombinant bovine somatotropin. The appellate court agreed with the dairy manufacturers that the labeling law was contrary to the constitutional right not to speak. Moreover, the court noted that Vermont defended the statute, not on any health or safety concerns, but on the basis of the public's right to know. The court found that consumer curiosity is insufficient to justify compromising protected constitutional rights, and the court noted that it was unaware of any case in which consumer interest alone was sufficient to justify a requirement that is the functional equivalent of a warning about a production method that has no

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FSA appeal letter/*Cont. from page 3*
The farmer's decision is critical in that the correct completion of the NAD process is only way to preserve a right to judicial review.

Third, this issue arguably presents a disturbing lack of concern for the impact of USDA decisions upon the lives of real farmers. Officials at the FSA have been aware of this problem for some time and are aware that there are farmers that have been denied appeal rights because their FSA local office gave them erroneous advice. Yet, assistance has been declined. Farmers are likely to see this issue as simply one of fairness. If a farmer provides erroneous information to the FSA, he or she may be denied program benefits. If the FSA provides erroneous information to the farmer, there appears to be no recourse for the farmer, and the FSA actually benefits from the error.

—Susan A. Schneider, Assistant Prof. Graduate Program in Agric.Law, Univ. of Arkansas School of Law

Membership directory to appear on AALA website

The AALA Board of Directors is pleased to announce that it recently approved the posting of the AALA membership directory on our AALA Internet site. Initially, a listing of members and their practice areas will be posted in the "members only" section of the website. This is the area that can only be accessed by members with a valid AALA website password.

In addition, a membership directory will eventually be posted on the general website for access to anyone who visits the site. This general listing will not include practice areas, thus avoiding attorney advertising restrictions. We are confident that this membership listing will be helpful to members and to others with an interest in agricultural law matters. We are also hopeful that it will help to "spread the word" about the expertise of our members, enhancing the careers of our members and encouraging others to join with us.

If any members wish to exclude their name from the general website listing, please contact Prof. Drew L. Kershen in writing at the University of Oklahoma, 300 W. Timberdell Road, Norman, OK 73072-6331; or by e-mail at dkershen@ou.edu by April 1, 2000.

All members are encouraged to explore the recent improvements to our website. The address is http://www.aglaw-assn.org. Drew Kershen's extensive agricultural law bibliography is now online in searchable format and the *Ag Law Update* is now available to members, also with a convenient search mechanism. We are expanding our links with other sites and our listings with various search engines. Once again, the Board thanks Drew for his continuing efforts to develop and improve our Internet presence.

GM product labeling/Cont. from page 6
discernible impact on the final product.

Labeling voluntarily

Agriculture Secretary Glickman told Consumer Reports, "Frankly, if the consumers demand labeling—even if we think it doesn't convey a lot of good stuff—we're probably going to end up with a labeling scheme."There have been several reports that the USDA is advocating a labeling plan intended to meet demand of the European market. This plan complements the USDA's decision that a GM product would not qualify for certification as "organic." Moreover, in addition to the House's labeling bill, Senator Tom Hayden (D-CA) recently promised to introduce legislation that would require labeling of GM seeds, as well as GM raw and processed food. It is possible, therefore, that mandatory labeling will materialize by sheer momentum.

While the labeling of GM food may be a matter of time, the manner in which this change is brought about is of consequence. The institution of mandatory labeling forces a paradigm shift on the FDA from product-driver regulation to process-driven regulation, and from science-based regulation to a regulatory system grounded in social, political, and economic criteria. This change may well increase the consumer confusion that labels are supposed to prevent. As the International Dairy Foods Association court noted, if consumer interest alone were sufficient, then there would be no end to the information that manufacturers could be forced to disclose on labels.

The first generation of transgenic plant s had input traits designed to affect methods and costs of production. In contrast, the next generation of transgenic plants contains output traits designed to alter particular properties in the final product in response to consumer preferences. As an example, Monsanto recently announced the development of a new variety of rape seed plant that produces oil enriched in beta-carotene—the compound that the human body converts into vitamin A.

As this new generation of GM food products enters the marketplace, it is likely that manufacturers will voluntarily include information about their enhanced GM-based ingredients. Of course, voluntary labeling is unlikely to appease those anti-GM food activists who have experienced a funding windfall created by the GM food debate.

—Phillip B.C. Jones, Ph.D., J.D., Seattle, Washington, pbcj@wolfenet.com
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[1]*Alliance for Bio-Integrity et al. v. Donna Shalala et al.*, Civil Action No. 98-1300 (D.D.C., filed May 27, 1998).

[2]Vogt, Donna U. and Parish, Mickey. 1999. Food biotechnology in the United States: Science, regulation, and issues. *Congressional Research Service Report to Congress*. Available: http://www.usia.gov/topical/global/biotech.

[3]Barnett, Antony. 1999. Vatican theologians say "prudent yes" to GM foods. *The Observer*, 28 November, 13.

[4]*International Dairy Foods Association et al. v. Amestoy and Graves*, 93 F.3d 67 (2nd Cir. 1996).

[5]Seeds of Change, 1999. *Consumer Reports*, September 41-46.

Grain buyer recovers landlord lien losses

A Tennessee court on January 3, 2000 granted a grain buyer's claim for recovery of amounts paid on a statutory landlord lien.

The case is significant because grain buyers in many states are at risk from statutory liens that are not covered under the federal clear title lien law [7 U.S.C. section 1631].

The case involved a contracted purchase of grain by Continental Grain Co. from Floyd and Ann Garner, d.b.a. G&G Farms (the producer). Upon delivery of the grain in 1997, Continental issued a check for $264,560.55 made payable to both the producer and a secured creditor, Delta Corp.

Later, Rice Farm Products (the landlord) asserted a claim against Continental based upon a statutory lien under Tennessee law for rent owed by the producer. Continental said it had no prior knowledge of the existence of unpaid rent to the landlord or the statutory lien claim. When the producer failed to pay the full rent due, the landlord brought suit against Continental as the purchaser of the grain grown on the leased land. Continental paid $50,000 to Rice Farm Products to settle the statutory lien claim and took an assignment of the landlord's rights. Continental then sought recovery against the producer and Delta Corp. for the payment on the statutory landlord's lien.

Testimony in the case showed that Delta Corp. financed the producer's operations and was aware that the producer rented land from Rice Farm Products. Further, the facts showed that Delta Corp. did not seek a subordination agreement with the landlord; nor did it notify Continental of the existence of the landlord's lien. Delta Corp. received all of the proceeds paid by Continental in the joint check.

In its decision, the circuit court for Dyer County, Tennessee (at Dyersburg) found that Continental, as purchaser of the producer's grain, was liable to the landlord for unpaid rent based upon the Tennessee statute. Since the landlord's rights were superior to Delta Corp. (the secured creditor), the court found that "any proceeds from the sale of crops Delta received from Continental is held in a constructive trust for the payment of rent owed [to the landlord]." In so doing, the court found that Continental could recover from the secured creditor for the amounts paid by Continental to the landlord. This finding also means that the landlord could have sought payment directly from Delta Corp., rather than pursuing Continental in the first instance. Continental also was granted a default judgment against the producer.

—David C. Barrett, Jr., Counsel for Public Affairs, National Grain and Feed Association, Washington, D.C.
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Printed membership directory

In conjunction with the AALA year 2000 membership drive, a printed membership directory will be printed. This directory will list all current members and be organized by state. Areas of practice will be indicated. In the past, our printed directory has been a wonderful tool for keeping members in contact with each other as well as providing a valuable referral source for members in private practice. Please make sure that your year 2000 membership dues have been paid to ensure that you will be listed in the new directory. And, pass the word to lapsed or potential new members that now would be an excellent time to join the AALA. Only members that are paid up by April 1, 2000 will be listed. Contact Bill Babione with questions or for copies of an AALA application form, 501-575-7389; bbabione@comp.uark.edu.