Agricultural Law Update

VOLUME 23, NUMBER 11, WHOLE NUMBER 276 NOVEMBER 2006

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

In future issues:
- Transfer of development rights

Ninth Circuit developments in agricultural law

Over the past year, the United States Court of Appeals for the Ninth Circuit issued several decisions important to different aspects of agricultural law and production. This article examines three of thse cases--*Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) v. United States*, *Cactus Corner, LLC v. USDA*, and *Ecology Center, Inc. v. Austin*. This article discusses these cases as they are important indicators of how the Ninth Circuit, and, therefore, other courts may view future challenges to certain USDA agency actions.

Ninth Circuit rejects challenges to USDA Final Rules for importation of Canadian cattle and Spanish clementines

In *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) v. United States*[1] (*R-CALF II*), the United States Court of Appeals for the Ninth Circuit reversed a federal district court decision[22] to issue a preliminary injunction that enjoined the USDA from implementing a final rule allowing the importation of ruminants and ruminant products from Canada into the United States. *R-CALF II* represents a significant development in a series of regulatory and judicial developments triggered by the May 20, 2003 discovery of a cow in Alberta, Canada infected with Bovine Spongiform Encephalopathy (BSE), commonly known as "mad cow disease."[3]

Nine days after the May 20, 2003 discovery of the BSE-infected cow in Canada, the USDA Secretary issued an Emergency Order that prohibited the importation of all live ruminants and ruminant meat products from Canada into the United States.[4] This action was followed by the issuance of a notice of proposed rulemaking that proposed to allow the importation of ruminants from regions that presented "'a minimal risk of introducing [BSE] into the United States via live ruminants and ruminant products.'"[5] Canada was the only region identified in the notice of proposed rulemaking as a "minimal risk region." On January 4, 2005, the USDA published a final rule that permitted the importation of beef products derived from Canadian cattle of all ages and "the importation of Canadian cattle under 30 months of age provided the cattle were immediately slaughtered or fed and then slaughtered."[6]

On January 10, 2005, Ranchers Cattlemen Action Legal Fund (R-CALF) brought an

Cont. on p. 2

Property designated for agricultural use and home equity loans

Article XVI § 50(a)(6)(l) of the Texas Constitution provides: "...homestead property designated for agricultural use, as provided by statutes governing property tax, is precluded from serving as security for a home equity loan."[1]

In *LaSalle Bank National Association v. White*, No. 04-04-00548-CV (Tex. App. – San Antonio 2006, no pet.), 2006 WL 2871278 (hereinafter "*La Salle*"), the San Antonio Court of Appeals was faced with determining what constitutes "property designated for agricultural use as provided by the statues governing property tax."[2] On March 24, 1999, Lorae White executed a Texas Home Equity Note, in the principal amount of $260,000.00.[3] The note was assigned by the original lender to LaSalle Bank. The note was secured by a lien against a 10.147 acre tract of land that was part and parcel of a larger 53.722 acre tract that Lorae White owned.[4] White defaulted on the loan payments.[5] Consequently, on September 18, 2001, LaSalle Bank filed to foreclose on the 10.147 acres securing the home equity loan.[6] In response to LaSalle's foreclosure action, White filed a separate declaratory judgment suit, seeking a declaration that both the lien against the 10.147 acres and the loan were invalid, because the loan and the lien violated article XVI, § 50(a)(6)(l), of the Texas Constitution.[7]

The trial court ruled in favor of White and found that the property was designated for agricultural use, and therefore, the Texas Constitution prohibited the 10.147 acres

Cont. on page 2

action in the United States District Court for the District of Montana that sought to enjoin implementation of the final rule. R-CALF asserted that the USDA's rulemaking violated the Administrative Procedures Act[7] (APA), the Regulatory Flexibility Act[8] (RFA), and the National Environmental Policy Act[9] (NEPA).[10]

On March 2, 2005, the district court issued a preliminary injunction that prohibited the USDA from implementing its final rule.[11] The district court determined that the final rule was arbitrary and capricious under the APA, that the USDA failed to satisfy NEPA procedural requirements, and that the USDA violated the RFA.[12] In light of these conclusions, the federal district court determined that R-CALF "was likely to succeed on the merits, and that the balance of hardships tipped in R-CALF's favor ...."[13] The USDA immediately appealed the decision to the Ninth Circuit.

The Ninth Circuit explained that "'[a] district court's order granting a preliminary injunction is subject to limited review'" and will be reversed "'only where the district court abused *i*ts discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'"[14] The court also explained that while it has recognized two separate sets of factors for preliminary injunctive relief, the traditional test requires a plaintiff to establish "'(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)

Cont. on page 3

Agricultural Law Update

VOL. 23, NO. 11, WHOLE NO. 276 NOVEMBER 2006
AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: apamperedchef@peoplepc.com
(temporary)

Contributing Editors: Amber S. Brady, Lubbock, TX; Harrison M. Pittman, University of Arkansas, Fayetteville, AR; Eric Pendergrass, University of Arkansas, Fayetteville, AR; Robert P. Achenbach, Eugene, OR.

For AALA membership information, contact Robert Achenbach, Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: County Line Printing,Inc. 6292 NE 14th Street., Des Moines, IA 50313.

Agricultural use property/Cont. from p. 1

from being used as security for a home equity loan.[8] La Salle Bank appealed.[9] The court of appeals was faced with determining whether the 10.147 acres securing White's home equity loan was land "properly designated for agricultural use as provided by [t]he statutes governing property tax," and therefore was precluded from securing Ms. White's home equity loan.[10]

The Texas "statutes governing property tax" include those within Texas Tax Code, Chapter 23.11 In *LaSalle*, the parties disputed whether the 10.147 acres securing White's home equity loan was subject to the "statutes governing property tax" referred to in article XVI § 50(a)(6)(1), and therefore, the constitutional bar against using agricultural land to secure a home equity loan.[12]

The San Antonio Court of Appeals first explained that Texas Tax Code Chapter 23, Subchapter D, § 24.51 *et seq.* was enacted to implement article VIII, § 1-d-1 of the Texas Constitution. Section 1-d-1 of the Texas Constitution provides, in part:

> To promote the preservation of open-space land, the legislature shall provide by general law for taxation of *open-space land* devoted to farm or ranch purposes *on the basis of its productive capacity* …..[13]

That is, under Texas law, any land that qualifies as "open-space land" shall be taxed according to the "basis of [the land's] productive capacity," in lieu of the typical property taxation scheme that is based on the market value of the property.[14] "Qualified open-space land" is defined, in part, as:

> …land that is currently devoted principally to agricultural use to the degree of intensity generally accepted in the area and that has been devoted principally to agricultural use….for five of the preceding seven years…[15]

The *La Salle* court concluded that Ms. White's 10.147 acre tract was "qualified open-space land" under Subchapter D. The court's conclusion was based on the Mason County, Texas property tax rolls. The court noted that the 10.147 acres at issue was "valued for agricultural use" on the 1998 and 1999 tax rolls.[16] The evidence presented to the trial court included a copy of a tax certificate, located within the files of LaSalle Bank and the title company that closed the transaction, indicating the "special valuation" property taxes that were assessed on the 10.147 acres by the Mason County tax assessor-collector in 1998 and 1999.[17] In short, the 1998 and 1999 property tax assessed on the 10.147 acre tract was not based on the typical market value of the property, but rather, the property tax was a "special valuation" based on the 10.147 acres' qualification as "open-space land."

Because the land had been valued, for property tax purposes, as "Subchapter D" land, and Subchapter D defines "qualified open-space land" as "land…currently devoted principally to *agricultural* use…",[18] the *La Salle* court held that White's land was designated for agricultural use.[19] Consequently, La Salle Bank was precluded from advancing its foreclosure action. The lien on the 10.147 acres was invalid, under article XVI § 50(a)(6)(l) of the Texas Constitution.[20] The court further held that, because La Salle Bank failed to comply with the constitutional restrictions regarding home equity laons and corresponding liens on agricultural use property, La Salle Bank was subject to the "constitutionally-mandated penalty of forfeiture" of the right to receive further payments on the note.[21]

In light of *La Salle*, Texas practitioners, landowners, and financial institutions or mortgage lenders should consult county property tax rolls prior to executing a home equity loan, to determine if the property offered as collateral is constitutionally precluded from securing the home equity loan.

—Amber S. Brady, Zachary S. Brady, P.C., Lubbock, TX

---

[1] Tex. Const., art. XVI, § 50(a)(6)(1).
[2] *La Salle Bank Nat'l Assn. v. White*, No. 04-05-00548-CV (Tex. App. – San Antonio 2006, no pet.), 2006 WL 2871278.
[3] *Id.* at *1.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at *2.
[9] *Id.*
[10] *Id.*
[11] *See* Tex. Tax Code, Chapter 23, Subchapters C & D.
[12] *La Salle Bank Nat'l Assn*, at *2.
[13] Tex. Const., art. VII, § 1-d-1 (emphasis added).
[14] *See* Tex. Const., art. VII, § 1-d-1.
[15] Tex. Tax Code §23.51 (1).
[16] *La Salle Bank Nat'l Assn*, at *2.
[17] *Id.*
[18] Tex. Tax Code §23.51 (1) (emphasis added).
[19] *La Salle Bank Nat'l Assn*, at *4.
[20] *Id.*
[21] *Id.*

Ninth Circuit/Cont. from p. 2
advancement of the public interest (in certain cases) ....'"[15] It was in this legal context that the Ninth Circuit reviewed the district court's determinations regarding the APA, RFA, and NEPA.

The Ninth Circuit first considered whether the district court correctly ruled that R-CALF demonstrated a likelihood of success on the merits regarding the argument that the USDA's rulemaking was arbitrary and capricious under the APA. The court explained that under the APA, a court must "'hold unlawful and set aside any agency action, findings, and conclusions found to be . . . arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law.'"[16] The court also explained that "[d]eference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of expertise."[17]

The Ninth Circuit concluded that the district court incorrectly ruled that R-CALF had a strong likelihood of success on the merits of the APA claim.[18] In reaching this conclusion, the court engaged in a thorough analysis of each aspect of the district court's decision, a detailed review of which is outside the scope of this article. This aspect of the Ninth Circuit's decision, however, is succinctly summarized in the following passage:

> The district court failed to abide by ... [the] deferential standard [owed to an agency]. Instead, the district court committed legal error by failing to respect the agency's judgment and expertise. Rather than evaluating the Final Rule to determine if USDA had a basis for its conclusions, the district court repeatedly substituted its judgment for the agency's disagreeing with USDA's determinations even though they had a sound basis in the administrative record, and accepting the scientific judgments of R-CALF's experts over those of the agency.[19]

The Ninth Circuit added that the lower court's lack of deference to the agency "may be attributable" to its "misreading" of the Animal Health Protection Act[20] (AHPA), the statute under which the final rule at issue was promulgated.[21] AHPA provides, in relevant part, that "'the Secretary [of Agriculture] may prohibit or restrict ... the importation or entry of any animal, article, or means of conveyance ... if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock.'"[22] According to the Ninth Circuit, the district court "appears to have imposed a requirement on USDA that its Final Rule present no additional risk to human or animal health" when it stated that the AHPA "'directs the Secretary of the USDA to protect the health and welfare of the people of the United States.'"[23]

The Ninth Circuit stated that AHPA provides the USDA Secretary "wide discretion" when considering the importation of plant and animal products and "does not impose any requirement on USDA that all of its actions carry no associated increased risk of disease."[24] The court concluded that AHPA's structure "is therefore inconsistent with the district court's strict requirement that the USDA regulation remove all risk of BSE entering the United States. Because the district court interpreted the statute to contain such a requirement, its analysis of the Final Rule's compliance with the APA was fundamentally flawed."[25]

Having determined that R-CALF did not demonstrate a likelihood of success on the merits of its APA claim, the court turned to the issue of whether the district court correctly ruled that the final rule would cause R-CALF "significant irreparable harm." The district court determined that the final rule would inflict irreparable harm because it would, inter alia, increase the risk of vCJD to U.S. consumers and that the U.S. beef industry and economy would suffer "from a 'stigma' that tainted Canadian beef would inflict upon the U.S. meat supply."[26] The Ninth Circuit characterized the district court's concerns as "overstated," noting, for example, that the record fails to support the district court's "alarmist findings that the 'irreparable economic harm' ... [resulting] from the stigma of Canadian beef will actually befall the American beef industry."[27] Thus, the court rejected the district court ruling and held that R-CALF failed to demonstrate it would suffer irreparable harm.[28]

In a separate but related matter, *Cactus Corner, LLC v. USDA*,[29] the Ninth Circuit considered whether an APHIS-issued final rule that allowed the importation of clementines from Spain was arbitrary and capricious under the APA. The Ninth Circuit held that the final rule was not arbitrary and capricious because, inter alia, the plaintiffs' argument was "foreclosed" by a portion of its holding in *R-CALF II*.[30]

The Mediterranean fruit fly, commonly referred to as the medfly, is considered to be "one of the world's most destructive fruit pests" and represents a significant economic threat to the U.S. fruit industry.[31]

The medfly has not been established in the U.S. mainland due in large measure to the medfly detection and eradication programs implemented in the U.S. One such measure was the requirement that Spanish clementines undergo a "cold treatment" process that required the fruits to be stored at a temperature of 34°F for 12 days before they could be imported into the U.S.

In November of 2001, consumers and officials in the U.S. discovered medfly larvae in clementines that had been imported from Spain. On December 5, 2001, APHIS responded by temporarily suspending the importation of all clementines from Spain. Soon thereafter, APHIS sent a team of experts to Spain to study the medfly outbreak. The APHIS team identified potential causes of the medfly larvae appearance and recommended that a "systems approach" be adopted in order to combat the importation of medlfy larvae into the U.S. The systems approach required that the medflies "be subjected to multiple pest control measures, 'at least two of which have an independent effect in mitigating' the risk of infestation."[32]

In light of concerns about the efficacy of the APHIS team recommendation, APHIS also established a panel of experts to review existing literature on the cold treatment process. The APHIS panel determined that existing protocol did not satisfy medfly mortality goals and recommended that the cold treatment protocol be modified to require that clementines undergo the cold treatment process for 14 days rather than 12 days at 34°. The panel recommended immediate implementation of the modified protocol and that a long-term research plan be instituted in order to verify the modified protocol's effectiveness.

In addition, APHIS's Office of Risk Assessment and Cost-Benefit Analysis (ORACBA) studied existing and recommended cold treatment protocols. ORACBA agreed with the APHIS panel regarding existing cold treatment protocol and opined that the modified protocol would achieve desired medfly mortality rates.

APHIS also prepared a risk management analysis that provided a "more comprehensive evaluation of ... [fruit] control measures."[33] The risk management analysis studied the efficacy of the systems approach recommended by the APHIS team and a management program designed to mitigate medfly populations within Spanish orchards prior to cold treatment protocols or shipment to the United States. The management program analysis was constructed upon a five-variable model that consisted of (1) the number of Spanish clementines imported into the U.S., (2) the percentage of clementines infested with medfly larvae, (3) the number of larvae per fruit that mature into adulthood, (4) the mortality rate derived from the modified cold treatment protocol, and (5) the percentage of clementines "discarded in areas of United States with medfly-suitable climates."[34] Based on these variables, APHIS determined that "the proposed control measures would reduce the likelihood of medfly introduc-

Cont. on page 6

Varying state approaches to confidentiality with premises and animal identification systems

By Eric Pendergrass[1]

Since 2003, after it was discovered that a cow in Washington State had bovine spongiform encephalitis (BSE), the USDA has been making a concerted effort to implement a nationwide animal identification system.[2] With the aid of state animal health officials, the USDA has proposed a National Animal Identification System (NAIS) that will allow for a 48-hour trace back in the event of an outbreak of disease that threatens animal health.[3] The system is designed to be implemented in three phases, with each step representing a key component that allows for traceability.[4] First, the system calls for the registration of premises where livestock are managed and held.[5] Second, the animals themselves will be identified either by lot, as with commercially produced poultry and other animals that stay together as a group from birth through harvest, or on a individual basis when the production practices are less uniform, such as with cattle.[6] Finally, the premises registration and animal identification phases will be combined to allow for traceability and tracking with central record-keeping systems that utilize a unique premises registration number and the animal identification numbers.[7]

A primary concern facing the livestock industry as it moves toward the implementation of this nationwide animal identification program is the confidentiality of the information used to administer any system on the state and national level.[8] In an effort to comply with this USDA initiative,[9] the various states have undertaken the task of developing their own programs and the statutory authority to authorize the programs.[10] The approaches individual states have utilized while implementing this first phase of the NAIS have varied considerably when it comes to preserving the confidentiality of information maintained within the system.[11] The manner in which the states attempt to preserve the confidentiality of the information can be broken down into three broad categories. The three approaches include: (1) states that have yet to act upon confidentiality concerns and consequently offer no exemption from the states' open records laws, (2) states that rely on existing exemptions to the open records laws, and (3) states that has specifically addressed confidentiality concerns through specific legislative enactments.

Group one: the non-acting

The first group of states that have yet to act to preserve the confidentiality of information contained in the premises and animal identification systems can be considered to have adopted the default approach.[12] While these states have not necessarily made a decision to disclose records to the public, they have not taken any proactive steps to exclude the information from the state's open records laws.[13] Many of these states apparently rely upon the fact that participation in their program is voluntary and that voluntary participation somehow serves as a de facto waiver of the participant's right to privacy regarding the included information.[14]

The states that have taken this approach include Arkansas, Iowa, and Mississippi.[15] One reason that has been identified for this more reserved approach is the fact that the current premises identification programs include little more information than that contained in a standard telephone book and less than what can be found in a few minutes in the appropriate county courthouse.[16] At any rate, this group of non-acting states has yet to undertake the task of legislating assurances that the information maintained in their premises and animal identification system will remain confidential.

Group two: reliance on existing exceptions

A second group of states that are relatively few in number rely upon pre-existing exemptions to state open records laws.[17] Without enacting any new legislation, these states are attempting to protect the confidentiality of their premises and animal identification data by relying upon statutory exemptions already included in the state's open records scheme.[18] These pre-existing exemptions are broad exclusions that allow the state government to avoid disclosing the information necessary to perform a legitimate government function integral to the operation of state activities.[19] The states that are known to be taking this approach are Illinois and Hawaii.[20] As an example, the state of Hawaii plans to rely upon Haw. Rev. Stat § 92F-13 (3) to refuse the disclosure of the information contained within its premises and animal identification systems.[21] Under this theory, these premises and animal identification records would be exempt from disclosure because they are "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."[22] It should be noted, however, that this application of the exception and others similar to it have not been tested in court.[23] Yet, a distinct group of states have chosen to approach the preservation of the confidential nature of their premises and animal identification programs with general and pre-existing exceptions to their open records laws.[24]

Group three: specific enactments

The third and final group consists of states that have taken a proactive approach to preserve the confidentiality of its premises and animal identification data.[25] This classification can be further broken down into two sub-classifications, with one class of states enacting separate statutes and rules specifically addressing premises and animal identification issues, and another class of states addressing confidentiality concerns through amendments to the state's general open records law.[26]

States in the first group have chosen to address confidentiality concerns with separate and distinct legislative action that specifically implicates the premises and animal identification programs. These states include Alabama,[27] Arizona,[28] Kansas,[29] Maryland,[30] Oklahoma,[31] North Dakota,[32] Texas,[33] Vermont,[34] West Virginia,[35] and Wisconsin.[36] Each of these states has animal identification laws that include language prohibiting the dissemination of personal information necessary for its implementation and maintenance.[37] Each of the state laws allows for the disclosure of the information maintained within the system to preserve the health of the state's livestock herds or flocks.[38] A concise example of this type of law can be found in §2-1-11 of the Alabama Code:

> (a) The Department of Agriculture and Industries may develop and implement an animal identification program that is consistent with the United States Department of Agriculture's National Animal Identification System.
>
> (b) The department may request all persons subject to the identification program to voluntarily provide all information necessary as determined by the department to implement and maintain the program. Participation in the program will not be required until such time as same is mandated under federal laws or regulations.
>
> (c) All information collected by the de-

Eric Pendergrass is a graduate assistant at the National Center for Agricultural Law and candidate for his LL.M. in Agricultural Law at the University of Arkansas, School of Law in Fayetteville, Arkansas.

partment pursuant to this section is confidential and shall not be subject to public disclosure except by order of a court of competent jurisdiction or as authorized by rule of the department.[39]

The second group of states with specific statutory enactments addressing confidentiality consists of those who have chosen to address the issue through its open records statute.[40] States taking this approach include Maine,[41] Minnesota,[42] Missouri,[43] South Dakota,[44] Tennessee,[45] Utah,[46] and Wyoming.[47] Whether specifically within the state's open records provisions or with a stand-alone enactment, these states have addressed their confidentiality concerns with a statute that is separate and apart from the law that authorizes the state's animal and premises identification system.[48] The language used by the states of this group varies widely. An example of a broad provision that prevents disclosure of NAIS information can be found in Utah, which states:

Records of the Department of Agriculture and Food relating to the National Animal Identification System or any other program that provides for the identification, tracing, or control of livestock diseases, including any program established under Title 4, Chapter 24, Utah Livestock Brand and Anti-theft Act or Title 4, Chapter 31, Livestock Inspection and Quarantine;[49]

On the other hand, an example of a confidentiality provision that only relates to the premises registration program is exemplified by the Missouri statute:

Any information related to premises registration shall be confidential information, to be shared with no one except state and federal animal health officials, and shall not be subject to subpoena or other compulsory production.[50]

As with the other group of states that utilize specific statutory authority to protect confidentiality, the states in this group also allow for the disclosure of the information that is necessary to protect animal health in accordance with the implied and specific intent of the NAIS.[51]

Conclusion

Little uniformity exists within the three general and widely varying approaches to the confidentiality concerns that have been identified–inaction, reliance on existing law, and passage of new statutory exemptions. Some states have chosen not to implement untested legislation; others have relied on existing laws to provide the desired protection; and another set has implemented laws specifically providing for the confidentiality of NAIS information. While no one of these approaches is necessarily better than any of the others, the variation itself poses an interesting situation where different tools have been used to address a common concern. As the NAIS develops and further implementation takes place, time will tell how each of these three approaches accomplishes the goal of preserving the confidentiality of animal identification information while addressing the concerns of the livestock industry.

---

[1] Eric Pendergrass is a graduate assistant at the National Center for Agricultural Law and candidate for his LL.M. in Agricultural Law at the University of Arkansas, School of Law in Fayetteville, Arkansas. His interest in agricultural law stems from his family's cattle operation in the Arkansas River Valley. Upon completion of the LL.M. program, Eric will join the law firm of Smith, Maurras, Cohen, Redd, and Horan PLC in Fort Smith, Arkansas.

[2] Michael Roberts and Harrison Pittman, *Legal Issues In Developing an National Plan for Animal Identification,* National Agricultural Law Center, p.1, available at http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf (2004).

[3] USDA-APHIS, *(NAIS) National Animal Identification System: A Draft Users Guide and Additional Information*, (November 2006), p.6, available at http://animalid.aphis.usda.gov/nais/naislibrary/documents/instructions_guidelines/NAIS-UserGuide.pdf.

[4] *See id.* at 3.

[5] *Id.* at 3.

[6] *Id.* at 3-4.

[7] *Id.* at 4.

[8] *See* Michael Roberts and Doug O'Brien, *Animal Identification: Confidentiality of Information*, National Agricultural Law Center, p.1, available at http://lmic.info/memberspublic/animalID/fs05.pdf (2004).

[9] *See* Doug O'Brien, *Animal Identification and the Next Farm Bill,* National Agricultural Law Center, p.3, available at http://www.nationalaglawcenter.org/assets/articles/obrien_animalid-newfarmbill.pdf (2006).

[10] Margaret Rosso Grossman, *Animal Traceability: Background and Issues*, American Agriculture Law Association, Agriculture Law Symposium (2006).

[11] Compare Arkansas, which has not implemented any measures, statutory or otherwise, to protect the confidentiality of the information compiled with its premises registration program to Hawaii, which utilizes it general open records exemption found at Haw. Rev. Stat. § 92F-13(3) to protect its premises and animal identification programs, and Kansas, which specifically preserves the confidentiality of similar information with K.S.A. § 47-674(g).

[12] The analysis of these groups is based upon responses to an email sent to state animal identification coordinators whose contact information was correctly and properly posted in the USDA website. A copy of the email and responses are on file with the author (hereinafter State Survey).

[13] These open records laws in the individual states are generally the state's version of the federal Freedom of Information Act 5 U.S.C.A § 552

[14] State Survey *supra* note 13.

[15] State Survey *supra* note 13.

[16] This line of reasoning was identified by Charles Gann of the Arkansas Livestock and Poultry Commission.

[17] State Survey *supra* note 13.

[18] For example, *see* Haw. Rev. Stat § 92F-13 (3) and 5 Ill. Comp. Stat. 140/7.

[19] *Id.*

[20] State Survey *supra* note 13.

[21] State Survey *supra* note 13.

[22] *See* Haw. Rev. Stat § 92F-13 (3).

[23] State Survey *supra* note 13.

[24] State Survey *supra* note 13.

[25] State Survey *supra* note 13.

[26] State Survey *supra* note 13.

[27] Ala. Code § 2-1-11 (c)

[28] Ariz. Rev. Stat. § 3-1207

[29] Kan. Stat. Ann. § 47-674 (g)

[30] Md. Code Ann., Agriculture § 3-101 (d)

[31] 2 Okla. Stat. Ann. § 4-20 (F)

[32] N.D. St. § 36-09-28

[33] Tex. Agric. Code Ann. § 161.056 (e)

[34] 6 Vt. Stat. Ann. § 61

[35] W. Va. Code § 19-9-7a

[36] Wis. Stat. Ann. § 95.51 (5)

[37] *See supra* notes 27-36.

[38] *Id.*

[39] Ala. Code § 2-1-11.

[40] State Survey *supra* note 13.

[41] Me. Rev. Stat. Ann. Tit. 7, § 20.

[42] Minn. Stat. § 13.643 (6).

[43] Mo. Ann. Stat. § 268.063.

[44] S.D. Codified Laws § 39-24-5.

[45] Tenn. Code Ann. § 10-7-504(a)(9).

[46] U.C.A § 63-2-304 (49).

[47] Wyo. Stat. Ann. § 11-19-117.

[48] *See supra* notes 41-47.

[49] U.C.A § 63-2-304 (49).

[50] Mo. Ann. Stat. § 268.063.

[51] *See supra* notes 41-47.

Ninth Circuit/ cont. from page 3
tion to less than 0.0001, or 'less than one in more than ten thousand years.'"[35]

In July of 2002, APHIS published a proposed rule that called for the resumption of the importation of Spanish clementines.[36]

APHIS solicited comments on the proposed rule, revised the risk management analysis and proposed treatment methods in light of the comments received, and issued a final rule in October of 2002.[37] In the final rule, APHIS "expressly relied on the risk management analysis, the ... review panel, the ORACBA study, and the 'the determinations of USDA technical experts.'"[38]

The final rule followed the recommendations of the risk management analysis in two important ways. The rule required the use of the modified cold treatment protocol and mandated that "the Spanish government take aggressive steps, including an APHIS-approved management program, to reduce the ... [fruit fly] population in that country's orchards."[39]

Several California fruit growers and packers (hereinafter plaintiffs) challenged the rule on the grounds that "APHIS improperly issued the Final Rule without defining what level of risk it would accept in 'prevent[ing] the introduction' of ... [fruit flies] under the Plant Protection Act" in violation of the APA.[40] The plaintiffs cited *Harlan Land Company v. USDA*[41] in support of their argument, a case that "suggests that APHIS was required to 'provide a negligible risk threshold' before issuing the Final Rule."[42] *Harlan Land Company* overturned a final rule similar to the one at issue on the grounds that "APHIS 'did not establish a level above which the risk [of pest introduction] would no longer be negligible.'" [43]

The Ninth Circuit rejected the plaintiffs' argument on two fronts. First, it held that "[b]ecause the government has 'cogently explain[ed] why it has exercised its discretion in a given manner' ... we cannot conclude that the USDA's action in adopting the new rule was arbitrary and capricious."[44] The court added that while an agency "must 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' it need not define an explicit standard to guide its decisionmaking."[45]

Second, the court held that the holding in *Harlan Land Company* was "foreclosed" by its holding in *R-CALF II*.[46] The court noted that in *R-CALF I*, the federal district court relied on *Harlan Land Company* in its decision to enjoin the USDA final rule allowing the importation of Canadian ruminants and ruminant products into the United States. The court also noted that in *R-CALF II* it "squarely rejected" the district court's holding that the USDA "'failed ... to quantify the risk of Canadian cattle to humans'" when it held that AHPA "'does not require the Secretary to quantify a permissible level of risk or to conduct a risk assessment.'"[47] *In Cactus Corner*, the court concluded that where APHIS has issued a rule under the Plant Protection Act, a statute "substantially identical" to AHPA, "we follow our holding in *Ranchers Cattlemen* and reject this point of appeal."[48]

Ninth Circuit finds Forest Service plan arbitrary and capricious

Ecology Center, Inc. v. Austin[49] presented the Ninth Circuit the opportunity to consider whether the regulatory action of another USDA agency was arbitrary and capricious under the APA. In *Ecology Center*, an environmental organization known as Ecology Center, Inc. (hereinafter Ecology Center) challenged a Forest Service post-forest fire project plan (hereinafter Forest Service plan) that called for, among other items, commercial thinning of specified timber and prescribed burning in old-growth forest stands in the Lolo National Forest.

Ecology Center asserted that the old-growth forest treatment proposed in the Forest Service plan would be harmful to species dependent upon old-growth habitat and that there was considerable scientific uncertainty regarding the consequences of old-growth forest treatment.[50] It also argued that because the Forest Service failed to evaluate the impact of old-growth treatment on dependent species, it cannot be "reasonably certain" that old-growth treatment is consistent with the National Forest Management Act[51] (NFMA), which requires the Forest Service "'to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest ....'"[52]

The Forest Service pointed to studies that apparently indicated the old-growth treatment it proposed was necessary "to correct uncharacteristic forest development resulting from years of fire suppression."[53] The Forest Service also contended that the Forest Service plan was designed to maintain and improve the health of most of the desirable old-growth trees. The Forest Service did not dispute the plaintiff's claims that the agency failed to account for the impact of the old-growth treatment on dependent species. Rather, the agency contended that it was not required to do so because its presumption "that old-growth treatment does not harm old-growth dependent species is ... reasonable" since it had observed the short-term impacts of logging and prescribed burning of other old-growth stands and had "reason to believe that certain old-growth dependent species would prefer the post-treatment composition of old-growth forest stands."[54] The Forest Service also argued that the court owed deference to the "methodological choices regarding what to monitor and how to assess the impact of old-growth treatment."[55]

The Ninth Circuit explained that while a court owes deference to an agency's choice of methodology, there remains instances when the methodology chosen "and any decision predicated from that methodology are arbitrary and capricious."[56]

It noted that in *Lands Council v. Powell* it was determined that the Forest Service was required under NFMA to show the reliability of its scientific methodology. The court added the following:

> Here, as in *Lands Council*, the Forest Service's conclusion that treating old-growth forest is beneficial to dependent species is predicated on an unverified hypothesis. While the Service's predictions may be correct, the Service has not yet taken the time to test its theory with any "on the ground analysis, despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so.... In light of its responsibilities under NFMA, this is arbitrary and capricious.[57]

The court next considered the plaintiff's argument that the Forest Service plan failed to comply with NEPA. NEPA requires federal agencies "'to publicly consider the environmental impacts of their actions before going forward'" through a mechanism known as an Environmental Impact Statement (EIS).[58] The EIS must "'provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'"[59]

The court noted that Forest Service recognized in its EIS the reasons for its proposed old-growth treatment but that the Service "treats the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested or debated hypothesis."[60] It added that "[e]ven if the Service considered these issues but concluded that it need not or could not 'undertake further scientific study' regarding the impact of treatment on dependent species it should have explain[ed] in the EIS why such an undertaking [wa]s not necessary or feasible.'"[61] Thus, the court concluded that the Forest Service's analysis in its EIS of the effects of the old-growth treatment did not satisfy NEPA.

—Harrison M. Pittman, Research Assistant Professor of Law and Co-Director, the National Agricultural Law Center at the University of Arkansas School of Law, www.nationalaglawcenter.org

Cont. on page 7

Report/Cont. from p. 6

This work is part of the *Environmental, Energy, and Resources Law: Year in Review, 2005-2006* published by the American Bar Association Section of Environment, Energy, and Resources Law. Reproduced with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written permision of the American Bar Association. Special thanks is owed to Nancy Bryson, head of the food and agriculture practice group at Venable LLP and Chair of the ABA Agriculture Committee of the Administrative Law and Regulatory Practice Group, for her advice and recommendations regarding the writing of this article.

[1] 415 F.3d 1078 (9th Cir. 2005).

[2] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States*, 359 F.Supp.2d 1058 (D.Mon. 2005) (*R-CALF I*).

[3] BSE is a neurological disease that is fatal to cattle and is commonly believed to be spread by the feeding of infected cattle parts back to cattle. Geoffrey Becker, Cong. Res. Serv., BSE ("Mad Cow Disease"): A Brief Overview 1, http://www.nationalaglawcenter.org/assets/crs/RS22345.pdf. An estimated 187,000 BSE cases have been discovered in more than two dozen countries, though the number of new cases has declined significantly since 1992. *Id.* It is widely believed that humans who consume BSE-contaminated beef products can acquire a rare and fatal neurological disease known as Creutzfeld-Jakob disease (vCJD). *Id.* To date, none of the nearly 160 known cases of vCJD worldwide are attributed to the consumption of U.S. or Canadian cattle. *Id*.

[4] *R-CALF II*, 415 F.3d at 1088.

[5] *Id.* at 1089 (citation omitted).

[6] *Id.* (citation omitted).

[7] 5 U.S.C. §§ 500-504, 551-584, 701-706, 801-808.

[8] 5 U.S.C. §§ 601-612. See generally, Robin Miller, *Construction and Application of the Regulatory Flexibility Act*, 197 A.L.R. Fed. 519 (2004) (discussing cases that have interpreted and applied the Regulatory Flexibility Act).

[9] 42 U.S.C. §§ 4321-4370f. *Id.* at 1090. This article focuses on the Ninth Circuit's holding as it relates to the plaintiff's APA claim. An extensive discussion of the RFA and NEPA claims is outside the scope of this article.

[11] *Id.*

[12] *Id.* at 1093.

[13] *Id.* at 1092.

[14] *Id.*

[15] *Id.* It is not clear from the court's opinion which of the two separate sets of factors the court applied in its analysis. Thus, only the "traditional test" is mentioned for purposes of this article.

[16] *Id.* at 1093 (quoting 5 U.S.C. § 706).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1093-94.

[20] 7 U.S.C. §§ 8301-8321.

[21] *R-CALF II*, 415 F.3d at 1094.

[22] *Id.* (quoting 7 U.S.C. § 8303(a)(1)).

[23] *Id.* (quoting R-CALF I, 359 F.Supp.2d at 1065). The Ninth Circuit's characterization of the district court's holding regarding the district court's apparent misinterpretation of AHPA is noteworthy because this specific holding is the basis for "foreclosing" a principal argument raised by the plaintiff in *Cactus Corner, LLC v. USDA*, 450 F.3d 428 (9th Cir. 2006). *Cactus Corner* is discussed later in this article.

[24] *Id.* at 1094.

[25] *Id.* at 1095.

[26] *Id.* at 1104 (citation omitted). For a description of vCJD, see *supra*, note 3.

[27] *Id.* at 1105.

[28] Presumably, the *R-CALF* litigation returned to the federal district court as the appeal before the Ninth Circuit arose in the context of an appeal of a preliminary injunction, which dealt primarily with the likelihood of success on the merits rather than the substantive merits of the case.

[29] 450 F.3d 428 (9th Cir. 2006).

[30] For additional literature on the BSE issue, see Thomas O. McGarity, *Federal Regulation of Mad Cow Disease Risks*, 57 Admin. L. Rev. 289 (2005).

[31] *Id.* at 430.

[32] *Id.* at 431 (citations omitted).

[33] *Id.*

[34] *Id.* at 432.

[35] *Id.* See Importation of Clementines From Spain, 67 Fed. Reg. 45922 (July 11, 2002) (proposed rule) (to be codified at 7 C.F.R. pts. 300 and 319).

[37] See Importation of Clementines From Spain, 67 Fed. Reg. 64702 (Oct. 21, 2002) (final rule) (to be codified at 7 C.F.R. Part 319).

[38] *Cactus Corner II*, 450 F.3d at 432. (citation omitted).

[39] *Id.*

[40] *Id.* See *Cactus Corner, LLC v. USDA*, 346 F.Supp.2d 1075 (E.D. Cal. 2004) (rejecting the plaintiffs' arguments and granting summary judgment in favor of the USDA). In *Cactus Corner II*, the plaintiffs also argued that APHIS's factual determinations were not supported by the administrative record, an argument not explored in this article. The Ninth Circuit rejected this argument.

[41] 186 F.Supp.2d 1076 (E.D. Cal. 2001).

[42] *Cactus Corner II*, 450 F.3d at 433 (citation omitted).

[43] *Id.* (citation omitted).

[44] *Id.* at 430 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)).

[45] *Id.* (quoting *Motor Vehicle Mfrs.*, 436 U.S. at 43).

[46] Id. at 433.

[47] Id. (citations omitted).

[48] *Id.* at 433-34.

[49] 450 F.3d 1057 (9th Cir. 2005).

[50] *Id.* at 1063.

[51] 16 U.S.C. § 1600-1687.

[52] *Ecology Center*, 450 F.3d at 1062 (citations omitted).

[53] *Id.* at 1063.

[54] *Id.*

[55] *Id.* at 1063-64.

[56] *Id.* at 1064.

[57] *Id.*

[58] *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002)).

[59] 40 C.F.R. § 1502.1.

[60] *Ecology Center*, 430 F.3d at 1065.

[61] *Id.* (citation omitted).

Federal Register Summary from November 4 to December 1, 2006

CABBAGE. The FCIC has issued proposed regulations adding crop insurance coverage for cabbage under the Common Crop Insurance Policy Basic Provisions. The proposed regulations would convert the cabbage pilot crop insurance program to a permanent insurance program starting with the 2009 crop year. **71 Fed. Reg. 66694 (Nov. 16, 2006)**.

FARM LABOR. The National Agricultural Statistics Service has issued farm employment figures as of November 17, 2006. There were 1,077,000 hired workers on the nation's farms and ranches the week of October 8-14, 2006, down 5 percent from a year ago. Of these hired workers, 797,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 280,000 workers. Farm operators paid their hired workers an average wage of $9.95 per hour during the October 2006 reference week, up 34 cents from a year earlier. Field workers received an average of $9.25 per hour, up 35 cents from October 2005, while livestock workers earned $9.41 per hour compared with $9.15 a year earlier. The field and livestock worker combined wage rate, at $9.29 per hour, was up 33 cents from last year. The number of hours worked averaged 41.6 hours for hired workers during the survey week, down 1 percent from a year ago. All NASS reports are available free of charge on the internet. For access, go to the NASS Home Page at: http:/www.usda.gov/nass/ . **Sp Sy 8 (11-06).**

GRAIN. The CCC has announced that it will make available for sale a portion of its grain inventory beginning November 20, 2006, via the internet at http://www.GrainLink.com. **71 Fed. Reg. 66496 (Nov. 15, 2006)**.

KARNAL BUNT. The APHIS has issued interim regulations removing areas in Maricopa and Pinal counties in Arizona and Archer, Baylor, Knox, McCulloch, San Saba, Throckmorton, and Young counties in Texas from the list of regulated areas subject to quarantine for Karnal bunt. **71 Fed. Reg. 67432 (Nov. 22, 2006)**.

MUSTARD. The FCIC has issued proposed regulations adding crop insurance coverage for mustard under the Common Crop Insurance Policy Basic Provisions. The proposed regulations would convert the mustard pilot crop insurance program to a permanent insurance program starting with the 2008 crop year. **71 Fed. Reg. 66698 (Nov. 16, 2006)**.

PEANUTS. The CCC has announced that inventoried farmer-stock peanuts are available for sale as unrestricted use on November 29, 2006 on the internet at http://www.theseam.com. **71 Fed. Reg. 68529 (Nov. 27, 2006)**.

—Robert P. Achenbach, Jr. AALA Executive Director

First Class Mail
U.S. POSTAGE
PAID
Des Moines, Iowa
Permit No. 5297

6292 N.E. 14th Street
Des Moines, IA 50313

Agricultural Law Update

American Agricultural Law Association News

2006 Conference Handbook on CD-ROM

Didn't attend the conference in Savannah but still want a copy of the papers? Get the entire written handbook plus the 1998-2006 past issues of the *Agricultural Law Update* on CD. The files are in searchable PDF with a table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 2025, Eugene, OR 97402 or e-mail RobertA@aglaw-assn.org Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2006 conference registration form on the AALA web site.

Help decide whether to change the AALA logo

Don't forget to log on to the AALA web site and vote for your favorite new or old AALA logo. The three finalist logos are now presented to the current AALA members for voting on the AALA website (www.aglaw-assn.org) in the "Members Services" portion of the web site. Please choose one logo as your preference and click on the "submit" button at the bottom of the page. Each vote will be "tagged" with your ID to prevent duplicate voting. Please vote by December 31, 2006. The votes will be automatically tallied by the web site and will be reported to the AALA board at the January 10, 2007 board meeting, at which time the board will further discuss the issue of the AALA logo. If you do not have your username and password, send me an e-mail.

Robert P. Achenbach, Jr,
AALA Executive Director
RobertA@aglaw-assn.org
Ph 541-485-1090 Fax 541-302-1958