RECENT AGRICULTURAL LAW DEVELOPMENTS IMPACTING RANCHERS, THE CATTLE INDUSTRY, RURAL LANDOWNERS AND RURAL COMMUNITIES*

-By Roger A. McEowen**

I. Antitrust

A. U.S. Supreme Court Overrules Longstanding Antitrust Precedent. On the last day of its October 2006 term, the U.S. Supreme Court, in a 5-4 opinion, reversed a significant antitrust decision of the Court rendered in 1911. In its 1911 opinion, the Court held that resale price maintenance agreements (agreements through which manufacturers or distributors specify minimum prices below which retailers are not permitted to sell goods) were per se (automatically) illegal. In this case, the Court's majority replaced the per se rule with a case-by-case "rule of reason" analysis. The Court reasoned that minimum resale price maintenance has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between. The dissent criticized the majority's willingness to depart from longstanding precedent based on arguments that have been well-known for almost half a century, but which have not convinced the Congress to change the law. As a result of the Court's opinion, vertical minimum price fixing (which is almost always harmful to consumers) will only be prohibited if the manufacturer that imposes the minimum resale price restraint provides no reasonable, pro-competitive justification for it

The present case involved a dispute between a manufacturer of women's accessories and the owner of a retail shop in Texas. In violation of a price-setting agreement that the manufacturer imposed, the store discounted the manufacturer's products which prompted the manufacturer to ban the shop from selling its products in the future. The retail shop sued, claiming illegal price fixing. The jury agreed, awarding the shop $3.6 million in damages and $375,000 in attorney fees. The jury's decision was upheld by the United States Court of Appeals for the Fifth Circuit based on the Supreme Court's 1911 decision. *Leegin Creative Leather Products v. PSKS, Inc.*, No. 06-480, 2007 U.S. LEXIS 8668 (U.S. Sup. Ct. Jun. 28, 2007).

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B. **Producer *not* required to show that packer's conduct adversely impacted competition**. In recent years, numerous lawsuits have been filed against meatpackers alleging violations of the price manipulation clause of the Packers and Stockyards Act (PSA). Until this case, the courts were unanimous in holding that, to prevail, a producer had to establish that the packer's conduct adversely impacted competition. Here, however, the court reached a different conclusion. Here, contract chicken growers claimed that the defendant, a poultry processing firm, violated the PSA because it offered a more favorable financial arrangement for growing chickens to the defendant's founder and refused to make that arrangement available to the plaintiffs. The defendant moved for summary judgment on the basis that the plaintiffs failed to show that the different arrangements had an adverse impact on competition. However, the trial court disagreed and denied the defendant's motion. On appeal, the court affirmed. While the court acknowledged that its decision conflicted with nearly every decision issued by other U.S Circuit Courts of Appeal that had interpreted the PSA's price manipulation clause, the court found that the PSA's plain language did not require the plaintiffs to prove that the defendant's conduct adversely impacted competition to prevail on a price manipulation claim under the PSA. *Wheeler v. Pilgrim's Pride Corp., 536 F.3d 455 (5th Cir. 2008).*

> **Note:** The court's opinion was followed by a Federal District Court in *White, et al. v. Pilgrim's Pride Corporation, et al., No. 2-07-CV-522 (TJW), 2008 U.S. Dist. LEXIS 74793 (E.D. Tex. Sept. 29, 2008).* The court's opinion is contrary to U.S. Circuit Court of Appeal opinions from the Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. With the Fifth Circuit's contrary opinion, the U.S. Supreme Court may be asked to resolve the conflict between the Circuits.

II. Environmental

A. **Ruling limits courts' role in environmental review.** An important issue for agricultural landowners, particularly in the Western United States, involves the environmental regulation of activities on private as well as public land. Government regulation is sometimes challenged by environmental and animal rights groups as not being protective enough of the environment or wildlife (or both). How the courts handle these cases has significant implications for property owners and those that use public lands for livestock grazing. But, an opinion of the U.S. Court of Appeal for the Ninth Circuit may change the landscape. In the case, the court rebuffed environmentalists who challenged a logging project in the Idaho Panhandle National Forest, saying it is not the court's job to act as a panel of scientists and order the government to "explain every possible scientific

uncertainty." That means that, at least in the Ninth Circuit (which comprises the Western United States), the courts will not be as inclined as in the past to hear complaints from environmental groups challenging environmental regulation. *The Lands Council, et al. v. McNair, 537 F.3d 981 (9th Cir. 2008).*

> **Note:** On three occasions, the Federal District Court for the Eastern District of California has followed the Ninth Circuit's opinion. See People v. United States Department of Agriculture, No. 2:05-cv-0211-MCE-GGH, 2008 U.S. Dist. LEXIS 72817 (E.D. Cal. Aug. 18, 2008); Pacific Rivers Council v. United States Forest Service, No. 2:05-cv-00953-MCE-GGH, 2008 U.S. Dist. LEXIS 85403 (E.D. Cal. Sept. 18, 2008); California Forestry Association, et al. v. Bosworth, et al., No. 2:05-cv-00905-MCE-GGH, 2008 U.S. Dist. LEXIS 77079 (E.D. Cal. Sept. 23, 2008).

B. **USDA gets it wrong on wetland determination.** The "Swampbuster" rules were enacted as part of the conservation provisions of the 1985 Farm Bill. In general, the rules prohibit the conversion of "wetland" to crop production by producers that are receiving farm program payments. A farmer that is determined to have improperly converted wetland is deemed ineligible for farm program payments. But, an exception exists for wetland that was converted to crop production before December 23, 1985 – the effective date of the 1985 Farm Bill. Under the Swampbuster rules, "wetland" has: (1) a predominance of hydric soil; (2) is inundated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, and (3) under normal circumstances does support a prevalence of such vegetation. In other words, to be a wetland, a tract must have hydric soils, hydrophytic vegetation and wetland hydrology.

Here, the plaintiff purchased the tract in issue in 1997. The tract had been farmed by the prior owner's tenant from 1972 to 1986, and was enrolled in the Conservation Reserve Program from 1987 to 1997. The plaintiff purchased the property in 1999, before the USDA determined that a portion of the tract was wetland. In spite of that determination, the plaintiff removed some woody vegetation in 2000 because it was a nuisance to the plaintiff's farming operation. USDA determined that the plaintiff had "converted" 0.9 acres of wetland. However, the plaintiff claimed that the tract had been cropped before December 23, 1985, thereby making it prior converted cropland. Also, the plaintiff introduced evidence that a drainage tile had been installed before December 23, 1985, and that the tile, along with a road ditch, removed the wetland hydrology from the tract. But, USDA believed that the tile was not functioning as of December 23, 1985, because woody vegetation existed.

The plaintiff's expert civil engineer, however, concluded that if the drainage tile had been plugged, when the USDA broke the tile during the on-site field investigation, the resulting hole would have filled full of water and saturated the ground and would have continued to be fed from water from further up the tile

line. But, that did not occur. So, the plaintiff argued that the drainage tile coupled with the installation of a road ditch removed the presence of wetland hydrology from the tract. USDA disagreed, claiming that the presence of hydrophytic vegetation, by itself, demonstrated that wetland hydrology was present.

The court didn't buy the USDA's argument. The court noted the statute clearly specifies that a "wetland" has three separate, mandatory requirements: (1) hydric soil; (2) wetland hydrology, and; (3) hydrophytic vegetation. In addition, the court noted that the presence of hydrophytic vegetation is not sufficient to meet the wetland hydrology requirement. In addition, the court determined that the USDA reached its conclusion by disregarding evidence contrary to its experts that were relevant on the issues involved.

Accordingly, the court ruled that the USDA hearing officer's "final" determination must be overturned as arbitrary and capricious, an abuse of discretion, or contrary to law. As for attorney fees, the court stated that it would reserve the issue for consideration upon a specific application for attorney fees. *B & D Livestock Co. v. Schafer, No. C 07-3070-MWB, 2008 U.S. Dist. LEXIS 90038 (N.D. Iowa Nov. 5, 2008).*

C. **U.S. Justice Department seeks clarity on federal jurisdiction over isolated wetlands.** The U.S. Supreme Court's fractured opinion in *Rapanos* failed to clear up the uncertainty that existed over the extent of the federal government's jurisdiction over isolated wetlands. After the Court's opinion, lower courts have reached inconsistent conclusions on the issue. Recently, the U.S. Justice Department filed an appeal with the Supreme Court in a case from the Eleventh Circuit. In that case – *United States v. McWane, Inc*. – the court ruled that the Clean Water Act's ban on pollution into "waters of the United States" does not apply to wetlands unless they have a "significant nexus" to traditional streams. That was the test set forth by Justice Kennedy in his separate opinion in the *Rapanos* case. The Justice Department claims that the appropriate test to apply is that of the four-Justice plurality and the four dissenting Justices. The Justice Department's appeal is actually one of two petitions asking the Supreme Court to revisit and clarify *Rapanos*. The other petition was filed in June in the case of *Lucas v. United States*, to which the Justice Department must file a reply by August 29. However, in a footnote in *McWane*, the Justice Department notes that it believes that *McWane* is a better case for dealing with the issue.

The basic problem is that the Justice Department views federal jurisdiction over isolated wetlands to extend to traditional rivers and their tributaries, and wetlands that are adjacent to such rivers and streams. But, in *Rapanos*, the four Justices supporting the Court's main opinion that was written by Justice Scalia, determined that the waters protected by the Clean Water Act are those that are "relatively permanent, standing or continuously flowing bodies of water" connected to traditional rivers or streams that can carry navigation, as well as

wetlands with a "continuous surface connection to such water bodies." Justice Kennedy, however, said that the Clean Water Act protects wetlands that "possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." The four dissenting Justices said that lower courts could apply either the Scalia or Kennedy rationale, although they preferred the long-standing government definition that protected more wetlands from pollution. The Eleventh Circuit, however, in *McWane*, followed Justice Kennedy's approach, with the result that the defendants' convictions for dumping large quantities of untreated industrial waste water from a pipe-making foundry into a creek that flowed into other permanent streams feeding into navigable waters in the traditional sense. The Justice department maintains that the creek at issue flowed year-round and fed into a traditional navigable water, and would be subject to federal jurisdiction under the Rapanos plurality and dissenting opinions.

The U.S. Supreme Court declined to hear the case on December 1, 2008.

D. **U.S. Army Corps of Engineers "incidental fallback" regulation invalidated (again).** The federal Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) regulate "wetlands" under the Clean Water Act. The CWA prohibits the "discharge of any pollutant" into regulable waters without a federal permit. The CWA defines "discharge" as the "addition of any pollutant to navigable waters from a point source." In the early 1990s, the EPA and the Corps issued a joint regulation requiring permits for wetland excavation activities that resulted in "incidental fallback" of dredged materials, including a mere redeposit (which is not an "addition of a pollutant") of dredged material. The regulation was invalidated by the Federal District Court for the District of Columbia in 1997 and that decision was affirmed by the U.S. Circuit Court of Appeals for the D.C. Circuit in 1998. In 2000, the Corps issued a new regulation stating that a regulable discharge of dredged material was presumed to result from mechanized landclearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in regulable waters. The presumption could be overcome by the party proposing the activity demonstrates that only incidental fallback would result from its activity. The regulation went on to define "incidental fallback" (which is exempt from the permit requirement) as the redeposit of small volumes of dredged material. The same trial court has now invalidated the new regulation for continuing to define "incidental fallback" in terms of volume rather than in terms of being an "addition of a pollutant" to a regulable water. The court termed the Corps' regulation as reflecting a "degree of official recalcitrance that is unworthy of the Corps." *National Association of Home Builders, et al. v. U.S. Army Corps of Engineers, et al., No. 01-0274 (JR), 2007 U.S. Dist. LEXIS 6366 (D. D.C. Jan. 30, 2007).*

E. **EPA consent agreements with animal feeding operations upheld.** In early 2005, EPA announced the Air Quality Compliance Consent Agreement to facilitate the development of scientifically credible methodologies for estimating emissions from animal feeding operations (AFOs). A key part of the agreement is

a two-year benchmark stud of the air emissions from livestock and poultry operations. Based on the findings of the study, EPA will set national air policies, identify farm emission thresholds and then regulate excessive levels.

Participating AFOs must pay a civil penalty and pay an additional amount into a fund for a nationwide emissions monitoring program. Participating AFOs must apply for all applicable permits, comply with the permit conditions, install technology to control air emissions, and report any releases of regulated substances. AFOs that satisfy these conditions receive a covenant not to sue for past violations of the Clean Air Act permitting requirements. The consent agreements were challenged as beyond the scope of the EPA and that EPA was basically giving a "pass" to AFOs that had violated federal law. However, the court upheld the EPA's ability to enter into the consent agreements. Community and environmental groups had challenged the consent agreements as rules disguised as enforcement actions, that the EPA had not followed proper procedures for rulemaking and that EPA had exceeded its statutory authority by entering into the agreements. The court disagreed, holding that the consent agreements did not constitute rules, but were enforcement actions within EPA's statutory authority that the court could not review. *Association of Irritated Residents v. EPA, 494 F.3d 1027(D.C. Cir.2007).*

F. **Another federal court rules on federal jurisdiction over isolated wetlands.** For purposes of Clean Water Act (CWA), the federal government has jurisdiction over "waters of the United States." Under the CWA, a permit is required before a "pollutant" can be discharged into such waters. The definition of "pollutant" is very broad, as is the definition of "waters of the United States." In 2001, the U.S. Supreme Court ruled that the federal government had no regulatory authority over isolated wetlands that did not have a substantive connection to interstate commerce. That had the effect of removing federal jurisdiction over private ponds and seasonal or ephemeral waters were the only connection with interstate commerce is migratory waterfowl. But, later court opinions have indicated that other factors are relevant in determining whether the federal government can regulate isolated water where the potential connection with interstate waters is more than migratory waterfowl. In any event, federal jurisdiction over open waters that ultimately flow into interstate waters or waters that are navigable-in-fact still exists. The key question in any particular case was whether the isolated wetland had a sufficient connection with "waters of the United States" to be subject to the permit requirement of Section 404 of the CWA.

In this case, Cargill was sued for allegedly discharging pollutants into "waters of the United States" without a permit. The isolated water body at issue is a non-navigable, intrastate pond which, by itself, is not a regulable wetland. The pond collects runoff within Cargill's waste containment facility at its salt-making operations located near the edge of San Francisco Bay. The pond is adjacent to a slough that is a protected "water of the United States." The slough is a tributary to other protected waters. The pond is separated from the slough by a berm which

regularly leaked during high tide. The trial court ruled that the pond qualified as a "water of the United States" due to the adjacency to the protected waters. However, the appellate court reversed. The court pointed out that mere adjacency provides a basis for CWA coverage only when the relevant waterbody is itself a "wetland." *San Francisco Baykeeper, et al. v. Cargill, 481 F.3d 700 (9th Cir.2007).*

G. **The Conclusion of the *Hage* Litigation**. In 1978, Hage bought 7,000 acres of Nevada land for $2 million and acquired grazing allotments and water rights on 700,000 acres of surrounding federal land. The ranch covers 1,100 square miles with average rainfall of less than five inches. At the peak of its operation, the ranch ran 2,400 head of cattle. In the 1980, the U.S. Forest Service began piping water that was subject to the Hage's water rights to a nearby ranger station, and introduced nonindigenous elk into the area which competed with the plaintiff's cattle for forage. In 1988, the USFS ordered Hage to reduce the number of cattle on a portion of Hage's federal land allotment, which USFS officials claimed had been overgrazed. Hage refused to comply and federal agents impounded and auctioned 104 head of cattle. As a result, Hage could not continue to run the ranch economically with fewer cattle, sold off the rest of his herd and filed a $28 million takings claim in the U.S. Court of Federal Claims.

Timeline and outcome of litigation:

1. 1996: U.S. Court of Federal Claims held that a federal grazing permit does not create any property interest in federal rangeland. *Hage v. United States, 35 Fed. Cl. 147 (1996).*

2. 2002: U.S. Court of Federal Claims ruled that Hage had vested water rights under Nevada law in more than 20,000 acre-feet of water in his grazing allotment. In addition, the court held that Hage had vested water rights in ten ditches under the 1866 Ditch Rights-of-Way Act, and that the scope of the right was 50-feet on either side of the ditch. Thus, Hage's livestock had the right to use the forage adjacent to the ditch right-of-way. The court also held that the USFS could not require Hage to obtain a special permit in order to maintain the 1866 ditches, and could not adjudicate title to the 1866 ditch right-of-way. Thus, the government could not deny Hage access to his vested water rights without providing him a way to divert the water to another beneficial purpose if one exists. *Hage v. United States, 51 Fed. Cl. 570 (2002).*

3. 2008: U.S. Court of Federal Claims ruled that Hage had no right to compensation based on the loss of the grazing permit, but that surface waters flowing from federal land to patented lands had been taken. The court also ruled that the 1866 Act irrigation ditches had been taken. Thus, the court ruled that Hage's estate was entitled to $2,854,816 for the water rights that had been taken, plus $904,400 for

fences, $458,065 for roads and trails and $3,150 for improvements at seven springs and wells. So, the total award was $4,220,431, plus interest, from the date of the taking, plus attorney's fees and costs. *Estate of Hage v. United States, 82 Fed. Cl. 202 (2008).*

III. Regulatory Law

USDA Can Block "Mad Cow" Testing. The plaintiff raises and slaughters Black Angus cattle and developed a plan to test for the presence of BSE (an untreatable disease) each of the approximately 300,000 cattle it slaughters each year. The plaintiff claimed to have lost $200,000 per day in revenue as a result of the diminished export market. Japan, the plaintiff's export market, had placed a ban on U.S. imports upon discovery of BSE-infected cattle in the U.S. Japan required 100% testing, and the plaintiff's inability to do so cost them the loss of the Japanese export market Privately, the major packers and their state lobby groups complained to USDA that such a practice would provide the plaintiff with a competitive marketing advantage. Publicly, the major packers couched their objection to the plaintiff's proposal on the basis that the "rapid" BSE test at issue would not likely detect the disease and provide false food safety value. Accordingly, USDA asserted authority under the Virus-Serum-Toxin Act (VSTA) and denied the plaintiff's request to purchase or use a BSE test kit. The plaintiff then requested that Kansas State University designate the plaintiff's facility as a satellite laboratory allowed to use a BSE-testing program. USDA denied the request on the basis that BSE testing was an inherently governmental function that must be conducted by Federal and state laboratories. The plaintiff challenged the USDA's action alleging that two of the USDA's regulations were ultra vires under the VSTA and that, assuming the regulations were valid, did not authorize the USDA to restrict the use or sale of BSE test kits.

The VSTA, enacted in 1913, makes it unlawful to "prepare, sell, barter, or exchange…or to ship or deliver for shipment…any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals." VSTA requires that "any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals…be prepared under and in compliance with regulations prescribed by the Secretary of Agriculture at an establishment holding [a] license issued by the Secretary of Agriculture. A USDA regulation defines "analogous products" as "substances… which are intended for use in the treatment of animals through the detection or measurement of antigens, antibodies, nucleic acids, or immunity." "Treatment" is defined as the "prevention, diagnosis, management, or cure of disease of animals." The purpose of VSTA was to address the problem of ineffective hog-cholera serum being sold to farmers. The trial court ruled that while USDA had the authority to regulate the "use" of products associated with BSE testing and agreed with the USDA's broad interpretation of "treatment", the trial court held that "treatment" of cattle was not involved inasmuch as BSE testing can only be done post-mortem.

On appeal, the court noted that the USDA's regulations were entitled to deference and that the restrictions on the "use" of a product associated with public health were reasonably related to the purposes of the VSTA. That was the case, the court ruled, even though USDA never claimed the authority to regulated biological products until 63 years after enactment of VSTA. The court also upheld the USDA regulation which gave USDA the authority to regulate diagnostic testing related to the "treatment" of domestic animals. The court held that the regulation was valid because it referred to the "diagnosis" of animal diseases. The court viewed it as irrelevant that the "diagnosis" occurred on dead animals and disregarded USDA's prior acknowledgement that BSE testing of cattle at slaughter was not "meaningful in the context of …animal health" and that surveillance testing for BSE "is not a [disease] mitigation measure." The court also disregarded the fact that "treatment" was not possible insomuch as if the disease was detected it cannot be "treated."

A dissent, authored by Justice Sentelle (Reagan appointee) would not have accorded deference to the USDA position, stating that USDA's position "exceeds the bounds of reasonableness in the interpretation assumed in its regulations." The dissent opined that USDA went further than it reasonably could in aggregating power to itself. Accordingly, the dissent would have upheld the trial court's grant of summary judgment for the plaintiff on the USDA's "use" regulation, and would have reversed the trial court's grant of summary judgment for USDA on the USDA's "treatment" regulation.

The dissent also pointed out that all the plaintiff wanted to do was assure foreign buyers that the beef they sell is as well tested as would be the case with beef produced in the home countries of those buyers, rather than (as the major packers and USDA argued) providing buyers with a false assurance of BSE-free beef. *Creekstone Farms Premium Beef, L.L.C. v. Department of Agriculture, 539 F.3d 492 (D.C. Cir. 2008).*

> **Note:** The case is not over. The court remanded the case to the trial court to rule on whether the USDA acted arbitrarily and capriciously in refusing to allow the plaintiff to test its cattle in violation of the Administrative Procedures Act.

B. USDA loses again – court says farmers can recover attorney fees and costs in USDA administrative appeals. The Equal Access to Justice Act **(**EAJA) provides that a party who prevails administratively against government action can recover fees and expenses if the administrative officer determines that the government's position was not substantially justified. However, the USDA's long-held position is that the EAJA does not apply to administrative hearings before the National Appeals Division (NAD) because NAD proceedings are not adversarial adjudications that are held "under" the Administrative Procedure Act (APA). The Eighth Circuit Court of Appeals rejected the USDA's position in

1997 and, in 2007, the Ninth Circuit agreed. Now the Seventh Circuit has also ruled that the EAJA applies to USDA administrative hearings.

The USDA's position has been that successful appeals from adverse agency decisions are not subject to EAJA, because NAD appeals do not fall under the realm of the APA. According to the USDA, NAD administrative appeals involve an exclusive administrative appeal process that is not subject to the APA. But, that position was rejected by the U.S. Court of Appeals for the Eighth Circuit in a 1997 case, where the court determined that nothing in the NAD authorizing statutes stated that the NAD was to be the exclusive means of adjudicating issues with the USDA. The court further held that NAD proceedings involved an adversarial administrative adjudication thereby subjecting them to the EAJA by virtue of the APA.

The USDA has abided by the court's decision in the Eighth Circuit, but has continued to maintain its position that the Eighth Circuit case was wrongly decided and that the EAJA does not apply to NAD administrative appeals outside the Eighth Circuit. But, recently two more Federal Circuit Courts have ruled against the USDA on the issue.

The first case, from the Ninth Circuit, involved several Montana farmers who filed claims with the USDA's Farm Service Agency (FSA) under the Noninsured Crop Disaster Assistance Program (NAP) for losses to perennial grasses. FSA denied the claim on the basis that it was the state FSA's policy that all perennial grasses were not covered during their first year. The farmers appealed to the NAD, and the NAD held a hearing which resulted in the NAD hearing officer reversing the FSA's decision on the basis that it was "over-restrictive and avoided the requirement for NAP coverage. The FSA did not request NAD Director review, which had the effect of making the hearing officer's decision final. The farmers applied for an award of attorney's fees and expenses under the EAJA in the amount of $17,943.84, and the NAD refused to consider the application based on the USDA's longstanding position that the EAJA did not apply to NAD proceedings outside the Eighth Circuit. The farmers filed a petition for judicial review and the Montana district court ruled in the farmers' favor, determining that the Eighth Circuit case was correctly decided and directly applicable to the case. The court remanded the case to the NAD, but the USDA appealed.

On appeal, the USDA continued to maintain that the Eighth Circuit case was incorrectly decided because NAD administrative proceedings are, in the USDA's view, the sole and exclusive procedure for determining eligibility for farm program benefits and, as such, are not subject to the EAJA. The Ninth Circuit rejected the USDA's argument, agreeing with the Eighth Circuit that the statutory language governing NAD proceedings did not create an exclusive means of adjudicating issues with the USDA. Thus, the pertinent question became whether NAD proceedings were subject to the EAJA by virtue of the APA. On that issue, the court noted that the USDA's position at the NAD hearing was represented by

two program specialists. Thus, USDA had taken a position which had the effect of making the proceeding adversarial – a threshold requirement for potential EAJA application. Second, on the question of whether NAD proceedings are "under" Section 554 of the APA, the court noted that the governing statute required a NAD adjudication that was on the record and also required an opportunity for a hearing. As such, the court reasoned that NAD proceedings occur "under" Section 554 of the APA and are subject to the EAJA. In addition, the court noted that the statute governing NAD proceedings provide for judicial review pursuant to the provisions of the APA.

The Seventh Circuit case involved FSA's order that the plaintiff refund certain farm program benefits. The plaintiff appealed to the NAD, which reversed FSA's determination. The plaintiff then applied to the NAD for attorney fees, but the NAD stuck to the historic USDA position that the EAJA did not apply to NAD adjudications. The court, citing the 8th and 9th Circuit opinions, disagreed. The court noted that review of determinations by the NAD met the definition of an adjudication, provide an opportunity for a hearing, and that the proceedings occur "under" Section 554 of the APA and are, therefore, subject to the EAJA

While the Eighth Circuit's 1997 decision did not result in a change of USDA policy on the issue of whether the EAJA applied to NAD proceedings, the Ninth Circuit's 2007 opinion and the Seventh Circuit's 2008 opinion could cause the agency to rethink its position. *Five Points Road Joint Venture, et al. v. Johanns, 542 F.3d 1121 (7th Cir. 2008).*

> **Note:**The Eighth Circuit case is *Lane v. United States Department of Agriculture, 120 F.3d 106 (8th Cir. 1997),* and the Ninth Circuit case is *Aageson Grain and Cattle, et al. v. United States Department of Agriculture, 500 F.3d 1038 (9th Cir. 2007).*

C. **Injunction entered against USDA's "Mad Cow" rules.** The plaintiffs, a consortium of cattle producers and food safety groups, sued the USDA over its "over thirty-month" (OTM) rule. The rule, promulgated in 2007, among other things, reversed a prior restriction and allowed cattle more than 30 months old to be imported from Canada, where cases of "Mad Cow" disease had been reported. The plaintiffs sued shortly before the rule took effect. The court found that plaintiffs were likely to prevail on their claim that the USDA violated federal law by failing to provide the public with sufficient notice and an opportunity to comment on its decision to relax the ban on importing the older beef. Given that finding, the court did not have to address plaintiffs' other legal claims. The court held that prior notice provided in connection with an earlier proposed rule, which was later suspended, did not constitute proper notice with regard to the challenged rule. The court determined that the suspension reflected the USDA's belief that further notice and comment were needed. In addition, the court noted that the USDA's reliance on evidence gathered in connection with the earlier rule did not reflect reasoned decisionmaking. As such, a remand of the rule for notice and

comment and possible revision was the appropriate relief. *Ranchers Cattlemen Action Legal Fund ; United Stockgrowers of America, et al. v. United States Department of Agriculture, 566 F. Supp. 2d 995 (D. S.D. 2008).*

D. **Recent developments concerning the USDA's national animal identification system.**

1. The USDA's attempt to create a nationalized animal identification program (a plan to electronically track every livestock animal in the U.S. – more than 120 million animals) has recently generated a couple of federal cases in recent weeks. On June 4, the U.S. District Court for the District of Columbia forced the USDA to suspend indefinitely its plan to establish a new Privacy Act system of records titled "National Animal Identification System (NAIS). In April of 2008, USDA proposed to establish the NAIS system of records, which was to become effective June 9, 2008, and had published a notice soliciting public comments. The plaintiff had filed a Freedom of Information Act (FOIA) request for the list of contacts in the database, but USDA claimed that some of those records were not subject to disclosure under FOIA. To keep the records available during the plaintiff's attempt to access them, the plaintiff filed for a temporary restraining order. The suit claimed that USDA misrepresented the purpose, scope and nature of its proposed new system of records, and that USDA's actual purposes of the proposed new system was simply to develop a national registry of real, personal and private property. The suit also claimed that the actual scope of the registry was anything but voluntary inasmuch as there were likely thousands of U.S. citizens whose property was added to the NAIS registry against their will or without their knowledge. Comments submitted to USDA during the comment period were largely negative and pointed out that USDA had provided no evidence to demonstrate that the NAIS registry is even feasible, as no cost/benefit analysis has been conducted to determine if the cost of NAIS to food-animal owners can be recovered in the marketplace, nor has the USDA provided evidence to show that things like normal loss of ear tags, data entry errors and/or computer malfunctions would not effectively thwart any traceback efforts. USDA published notice of the indefinite postponement in the Federal Register on June 10. *Zanoni v. United States Department of Agriculture, temporary restraining order entered on June 8, 2008 (D. D.C. Jun. 8, 2008).*

2. In mid-July, the Farm-to-Consumer Legal Defense Fund filed a lawsuit in the United States Federal District Court for the District of Columbia against the USDA to stop the USDA and the Michigan Department of Agriculture (MDA) from implementing NAIS. The MDA has implemented the first two stages of NAIS – property registration and animal identification – for all cattle and farmers across the state as part of a mandatory bovine tuberculosis disease control program required by a grant from the USDA. The suit asks the court to issue an injunction to stop the implementation of NAIS at either the state or federal levels by any state or federal agency. If successful, the suit would halt

the program nationwide. The plaintiff asserts that current disease reporting procedures and animal tracking methods provide the kind of information health officials need to respond to animal disease events. The suit points out that existing programs for diseases such as tuberculosis, brucellosis and scrapie together with state laws on branding and the existing recordkeeping by sales barns and livestock shows provide the mechanisms needed for tracking any disease outbreaks. The suit charges that USDA has never published rules regarding NAIS, in violation of the Federal Administrative Procedures Act, has never performed an Environmental Impact Statement or an Environmental Assessment as required by the National Environmental Policy Act, and is in violation of the Regulatory Flexibility Act that requires the USDA to analyze proposed rules for their impact on small entities and local governments. The suit also claims that USDA's actions violate the Religious Freedom Restoration Act. The suit argues that USDA is presently attempting to strong-arm farmers and ranchers into participating in the purported "voluntary" program by various types of bribes. For example, the suit alleges that USDA grants to states have been made conditional on state-mandated premises registration (such as in Wisconsin and Indiana), drought-stricken North Carolina and Tennessee have been required to register their premises in order to obtain hay relief, and county fairs in Colorado have required participants to register their premises under NAIS. *Farm-to Consumer Legal Defense Fund v. United States Department of Agriculture,*

3. **USDA Cancels Mandatory Premises Registration Directive.** On September 22, 2008, USDA's Animal and Plant Health Inspection Service-Veterinary Services (APHIS-VS), issued Memorandum No. 575.19 mandating premises registration under the National Animal Identification System (NAIS) for producers engaged in interstate commerce and who participate in any one of the dozen or more federally regulated disease programs. The Memorandum was challenged by cattle producers and private landowners as constituting an unlawful, final regulatory action that was initiated and implemented without public notice or opportunity for comment in violation of the Administrative Procedures Act. In order to stave off litigation over the Memorandum, USDA's APHIS-VS canceled the memorandum on December 22, 2008, by issuing a new Memorandum canceling the earlier Memorandum and stating that APHIS-VS "has an established procedure for producers who request their premises record be removed from the NAIS premises database." The parties challenging the September Memorandum pointed out that USDA could simply use and improve existing disease traceback methods including state-sanctioned brand programs that do not require individual producers to register their property under a national premises registration program in order to improve USDA's disease traceback capabilities. Such a move would not violate private property rights of producers. *USDA APHIS-VS Memo. No. 575.19, rescinding USDA APHIS-VS Memo. No. 575.19 (Sept. 22, 2008).*

Note: Even though USDA APHIS-VS has rescinded the Sept. 22, 2008 Memo, problems remain. Individual states, such as Michigan and Wisconsin, will need to rescind their mandatory NAIS regulations. In Wisconsin, for example, the state agriculture department has filed suit against Emmanuel Miller, an Amish farmer, for refusing to register his premises.

E. **Issue exhaustion required when pursuing USDA administrative appeals.** It is critical for agricultural clients to have a general understanding of how administrative agencies must first be dealt with in accordance with the particular agency's own procedural rules before a matter in dispute can be addressed by a court of law. This is known as exhausting administrative remedies. But, does the exhaustion of administrative remedies by completing the administrative appeal process also require that legal issues must be raised during the administrative process so as to be preserved for judicial review? That issue was recently addressed in a case involving converted wetlands.

In this case, the plaintiff, an Iowa resident, owned and operated farmland in Missouri. Upon his purchase of the farmland at issue in 1996, the seller informed the plaintiff that the farm did not contain any wetlands and no wetland delineation had been made. The plaintiff cleared woody vegetation and other plants from approximately five acres of the property for conversion to crop production and then enrolled the property in the farm program. In 2002, the local Farm Service Agency (FSA) sought a determination from the Natural Resources Conservation Service (NRCS) that the plaintiff's farm, for crop year 2000, was in compliance with the highly erodible and wetland provisions of the 1985 Farm Bill. The wetland provisions of that legislation prohibit the conversion of "wetlands" to crop production on land enrolled in the farm program. NRCS made field visits to the plaintiff's farm in 2002 and again in late 2003, ultimately concluding that the plaintiff had converted 4.5 acres of wetlands.

The plaintiff appealed the NRCS' decision to the county FSA, specifically stating that he had not sought an exception for "good faith" or pursued mitigation. Apparently, the plaintiff believed that doing so would have amounted to his agreement (or acquiescence) with the NRCS wetland determination. The county FSA affirmed the NRCS' determination, and the plaintiff filed an administrative appeal with the USDA's National Appeals Division (USDA NAD). USDA NAD affirmed the county FSA's decision, and the plaintiff further appealed administratively to the USDA Deputy Director. The Deputy Director likewise affirmed. After exhausting all administrative appeals, the plaintiff filed suit in federal district court.

The plaintiff clearly exhausted his administrative remedies before filing suit in federal district court – there was no administrative body remaining that could hear an appeal. So, the plaintiff was entitled to move his case to federal court. However, at the district court, the plaintiff raised several issues that had not been

raised during the administrative appeal process. The plaintiff argued that NRCS improperly relied on data from field visits that occurred at times outside of the crop growing season; that NRCS did not follow the proper wetland determination methodology; and that NRCS failed to determine whether his conversion activities had a minimal effect on wetland functions. The court ruled that it could not consider these issues because the plaintiff had not raised them during the administrative appeal process - it was insufficient for the plaintiff to merely exhaust administrative remedies. Instead, the court ruled that the plaintiff must also raise and exhaust legal issues in the administrative process (known as "issue exhaustion) in order to preserve them for further review in the judicial process. The plaintiff appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. The court noted that the U.S. Supreme Court, in 2000 had established the rule that issue exhaustion applies in administrative appeal proceedings if required by statute or, if no statute applies, if the proceeding is adversarial in nature. In applying that rule to this case, the court noted that while no statute requires issue exhaustion in the context of wetland appeals, the applicable regulations (after the filing of an appeal) prohibit ex parte communications between NAD officers or employees and interested persons, provide for the subpoenaing of evidence and witnesses and generally describe a process that is similar to a trial. In addition, the regulations state that the party challenging an agency decision bears the burden of proof to establish by a preponderance of the evidence that the agency decision was erroneous. The regulations also specify that the NAD is independent from all other USDA agencies and offices at all levels. Based on these factors, the court reasoned that the USDA administrative appeal process (at least as applied to wetland determinations) was adversarial in nature, and that the plaintiff had a duty to develop the administrative record and preserve legal issues for eventual judicial review. The court also noted that it had previously required issue exhaustion in a wetland determination case.

Clearly, the lesson of the case is that producers must take care to preserve evidence, all disputed factual issues, and raise all potential legal issues during the administrative process that could help their case upon eventual judicial review. While it is not the rule that issue exhaustion automatically applies in administrative appeal proceedings, it is the general rule. As such, agricultural producers should seriously consider retaining legal counsel at the beginning of the administrative appeal process, and practitioners should communicate to clients the need and rationale for representation. *Ballanger v. Johanns, 495 F.3d 866 (8th Cir. 2007).*