



An Agricultural Law Research Article

**Developments in Administrative Law and  
Regulatory Practice, 2005-2006 – Agriculture**

by

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## Developments in Administrative Law and Regulatory Practice, 2005-2006 – Agriculture\*

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### Part I. Judicial Developments

#### **A. 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*<sup>1</sup> (*R-CALF II*), the United States Court of Appeals for the Ninth Circuit reversed a federal district court decision<sup>2</sup> 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.”<sup>3</sup>

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.<sup>4</sup> 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.”<sup>5</sup> 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

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<sup>1</sup> 415 F.3d 1078 (9<sup>th</sup> Cir. 2005).

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

<sup>3</sup> 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 Creutzfeldt-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.*

<sup>4</sup> *R-CALF II*, 415 F.3d at 1088.

<sup>5</sup> *Id.* at 1089 (citation omitted).

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.”<sup>6</sup>

On January 10, 2005, Ranchers Cattlemen Action Legal Fund (R-CALF) brought an 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<sup>7</sup> (APA), the Regulatory Flexibility Act<sup>8</sup> (RFA), and the National Environmental Policy Act<sup>9</sup> (NEPA).<sup>10</sup> On March 2, 2005, the district court issued a preliminary injunction that prohibited the USDA from implementing its final rule.<sup>11</sup> 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.<sup>12</sup> 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 . . . .”<sup>13</sup> 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 its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.”<sup>14</sup> 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) advancement of the public interest (in certain cases) . . . .”<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup> 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:

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<sup>6</sup> *Id.* (citation omitted).

<sup>7</sup> 5 U.S.C. §§ 500-504, 551-584, 701-706, 801-808.

<sup>8</sup> 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).

<sup>9</sup> 42 U.S.C. §§ 4321-4370f.

<sup>10</sup> *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.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1093.

<sup>13</sup> *Id.* at 1092.

<sup>14</sup> *Id.*

<sup>15</sup> *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.

<sup>16</sup> *Id.* at 1093 (quoting 5 U.S.C. § 706).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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.<sup>19</sup>

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<sup>20</sup> (AHPA), the statute under which the final rule at issue was promulgated.<sup>21</sup> 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."<sup>22</sup> 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."<sup>23</sup>

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."<sup>24</sup> 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."<sup>25</sup>

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."<sup>26</sup> 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."<sup>27</sup> Thus, the court rejected the district court ruling and held that R-CALF failed to demonstrate it would suffer irreparable harm.<sup>28</sup>

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<sup>19</sup> *Id.* at 1093-94.

<sup>20</sup> 7 U.S.C. §§ 8301-8321.

<sup>21</sup> *R-CALF II*, 415 F.3d at 1094.

<sup>22</sup> *Id.* (quoting 7 U.S.C. § 8303(a)(1)).

<sup>23</sup> *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 (9<sup>th</sup> Cir. 2006). *Cactus Corner* is discussed later in this article.

<sup>24</sup> *Id.* at 1094.

<sup>25</sup> *Id.* at 1095.

<sup>26</sup> *Id.* at 1104 (citation omitted). For a description of vCJD, see *supra*, note 3.

<sup>27</sup> *Id.* at 1105.

<sup>28</sup> 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.

In a separate but related matter, *Cactus Corner, LLC v. USDA*,<sup>29</sup> 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*.<sup>30</sup>

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.<sup>31</sup> 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 medfly 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."<sup>32</sup>

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."<sup>33</sup> 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."<sup>34</sup> Based on these variables, APHIS determined that "the proposed control measures would reduce the likelihood of medfly introduction to less than 0.0001, or 'less than one in more than ten thousand years.'"<sup>35</sup>

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<sup>29</sup> 450 F.3d 428 (9<sup>th</sup> Cir. 2006).

<sup>30</sup> For additional literature on the BSE issue, see Thomas O. McGarity, *Federal Regulation of Mad Cow Disease Risks*, 57 ADMIN. L. REV. 289 (2005).

<sup>31</sup> *Id.* at 430.

<sup>32</sup> *Id.* at 431 (citations omitted).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 432.

<sup>35</sup> *Id.*

In July of 2002, APHIS published a proposed rule that called for the resumption of the importation of Spanish clementines.<sup>36</sup> 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.<sup>37</sup> 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.’”<sup>38</sup>

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.”<sup>39</sup>

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.<sup>40</sup> The plaintiffs cited *Harlan Land Company v. USDA*<sup>41</sup> in support of their argument, a case that “suggests that APHIS was required to ‘provide a negligible risk threshold’ before issuing the Final Rule.”<sup>42</sup> *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.’”<sup>43</sup>

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.”<sup>44</sup> 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.”<sup>45</sup>

Second, the court held that the holding in *Harlan Land Company* was “foreclosed” by its holding in *R-CALF II*.<sup>46</sup> 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.’”<sup>47</sup> In *Cactus Corner*, the court concluded

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<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> *Cactus Corner II*, 450 F.3d at 432.. (citation omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *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.

<sup>41</sup> 186 F.Supp.2d 1076 (E.D. Cal. 2001).

<sup>42</sup> *Cactus Corner II*, 450 F.3d at 433 (citation omitted).

<sup>43</sup> *Id.* (citation omitted).

<sup>44</sup> *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)).

<sup>45</sup> *Id.* (quoting *Motor Vehicle Mfrs.*, 436 U.S. at 43).

<sup>46</sup> *Id.* at 433.

<sup>47</sup> *Id.* (citations omitted).

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.”<sup>48</sup>

## B. Ninth Circuit Finds Forest Service Plan Arbitrary and Capricious

*Ecology Center, Inc. v. Austin*<sup>49</sup> 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.<sup>50</sup> 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<sup>51</sup> (NFMA), which requires the Forest Service “to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest . . . .”<sup>52</sup>

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.”<sup>53</sup> 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.”<sup>54</sup> 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.”<sup>55</sup>

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.”<sup>56</sup> 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

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<sup>48</sup> *Id.* at 433-34.

<sup>49</sup> 450 F.3d 1057 (9<sup>th</sup> Cir. 2005).

<sup>50</sup> *Id.* at 1063.

<sup>51</sup> 16 U.S.C. § 1600-1687.

<sup>52</sup> *Ecology Center*, 450 F.3d at 1062 (citations omitted).

<sup>53</sup> *Id.* at 1063.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1063-64.

<sup>56</sup> *Id.* at 1064.

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.<sup>57</sup>

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).<sup>58</sup> 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."<sup>59</sup>

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."<sup>60</sup> 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."<sup>61</sup> 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.

### **C. Federal Circuit Decides Two Cases Stemming from Peanut Quota Changes Enacted under 2002 Farm Bill**

In *Members of Peanut Quota Holders Association, Inc. v. United States*,<sup>62</sup> the United States Court of Appeals for the Federal Circuit considered whether the federal government effectuated a compensable taking of a property interest when Congress amended the peanut quota program established under the Federal Agriculture Improvement and Reform Act of 1996<sup>63</sup> (hereinafter FAIR), commonly referred to as the 1996 Farm Bill.

FAIR provided, *inter alia*, peanut quotas to farmers that allowed the farmers to receive favorable loan rates for their peanuts crops "by setting a floor on the price they would receive for their crop."<sup>64</sup> FAIR also allowed peanut quota holders to sell or lease their peanut quotas to other producers, subject to certain conditions. In addition, FAIR provided that "[a]ny . . . quota transferred under this paragraph shall not result in any reduction in the . . . quota for the transferring farm if the transferred quota is produced or considered produced on the receiving farm."<sup>65</sup>

In 2002, Congress enacted the Farm Security and Rural Investment Act of 2002,<sup>66</sup> commonly referred to as the 2002 Farm Bill (hereinafter 2002 Act). The 2002 Act significantly altered the peanut quota provisions established under FAIR. In particular, the 2002 Act established a new peanut quota program that set forth the new eligibility requirement that a producer must have been a "a producer on a farm in the United States that produced or was prevented from planting peanuts during any or all of the 1998 through 2001 crop years."<sup>67</sup> This new quota was available to "an owner, operator, landlord, tenant, or sharecropper that shares in the risk of producing a crop on a farm and is entitled to share in the crop available for marketing from the farm."<sup>68</sup> The 2002 Act was significantly different

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<sup>57</sup> *Id.*

<sup>58</sup> *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9<sup>th</sup> Cir. 2002).

<sup>59</sup> 40 C.F.R. § 1502.1.

<sup>60</sup> *Ecology Center*, 430 F.3d at 1065.

<sup>61</sup> *Id.* (citation omitted).

<sup>62</sup> 421 F.3d 1323 (Fed. Cir. 2005).

<sup>63</sup> Pub. L. No. 104-127, § 155, 110 Stat. 888, 922-30.

<sup>64</sup> *Peanut Quota Holders*, 421 F.3d at 1328.

<sup>65</sup> *Id.* (citation omitted).

<sup>66</sup> Pub. L. No. 107-171, 115 Stat. 134 (codified in scattered sections of titles 7, 15, 16, and 21 of the U.S.C.)

<sup>67</sup> *Peanut Quota Holders*, 421 F.3d at 1328 (citation omitted).

<sup>68</sup> *Id.* (citation omitted).

from FAIR “because it excluded from consideration farmers who leased or transferred their quotas to other producers.”<sup>69</sup> Under FAIR, peanut farmers were entitled to a quota even if they did not share in the risk of producing a crop because—unlike the 2002 Act—a farmer who had leased his or her quota was considered a producer.

In *Peanut Quota Holders*, several peanut farmers who leased or sold their peanut quotas in accordance with FAIR brought an action against the government alleging that the elimination of their quotas under the 2002 Act constituted a regulatory taking under the Fifth Amendment. The Court of Federal Claims awarded summary judgment in favor of the government, and the plaintiffs appealed to the Federal Circuit.

The Federal Circuit first considered whether the plaintiffs possessed a property interest in the peanut quotas established under FAIR for purposes of the Fifth Amendment. The court explained that “the decisions by both the Supreme Court and this court imply that a compensable interest is indicated by the absence of express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude.”<sup>70</sup>

The government argued that the peanut quota established under FAIR merely “created a right to plant and produce a certain amount of peanuts for a guaranteed minimum price” and, therefore, was “no more a property right than [the] government issued licenses or permits” at issue in *American Pelagic Fishing Co. v. United States* and *Conti v. United States*.<sup>71</sup> In *Conti*, the Federal Circuit determined that a petitioner lacked a property interest in a fishing permit due to the petitioner’s “inability to assign, sell, or otherwise transfer the permit,” “lack of authority to exclude others from the Atlantic Swordfish Fishery,” and “the government’s right to revoke, suspend, or modify the permit . . . .”<sup>72</sup> Similarly, the Federal Circuit held in *American Pelagic* that “there was no protectable property interest in fishery permits and authorizations on the grounds that the petitioner did not have the authority to assign, sell, or transfer its permit and authorization letter and that those legal instruments did not grant the petitioner exclusive privileges to fish for Atlantic mackerel and herring.”<sup>73</sup> The plaintiffs argued that there existed a property right in the peanut quotas because, unlike the permits and licenses at issue in *Conti* and *American Pelagic*, the peanut quotas were transferable and excludable under FAIR and state law.

The court agreed with the plaintiffs regarding the transferability of the peanut quotas under FAIR and state laws. Thus, it concluded that the transferability of the quotas evidences that the quotas constitute property.

The court also determined that the plaintiffs held an excludable property interest, unlike the license holders in *Conti* and *American Pelagic*, because the quota “isolated their particular interest from competition.”<sup>74</sup> It reasoned that the license holders in *Conti* and *American Pelagic* were not isolated from competition because each additional license issued by the government decreases the value of all previously issued licenses. The court continued, “[s]o long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive.”<sup>75</sup> The court further reasoned that because a peanut quota holder was guaranteed an established price for a set amount of peanuts, “the

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<sup>69</sup> *Id.* at 1329.

<sup>70</sup> *Id.* at 1330.

<sup>71</sup> *Id.* at 1331. See *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004) and *Conti v. United States*, 291 F.3d 1334 (Fed. Cir. 2002).

<sup>72</sup> *Id.* (citation omitted).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1334.

<sup>75</sup> *Id.*

government established a defined market for each quota holder—a market exclusive to that quota holder.”<sup>76</sup>

The court then turned to the issue of whether the plaintiffs’ property interest was compensable under the Fifth Amendment. It held that the interest was not compensable since the peanut quota program “was entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the . . . statute indicated that the benefits could not be altered or extinguished at the government’s election.”<sup>77</sup> In so doing, the court rejected the plaintiffs’ argument that the sunset provision in FAIR created an “irrevocable grant of property.” Here, the court held that a sunset provision does not transform “a regulatory scheme for the distribution of subsidies into a compensable property interest under the Fifth Amendment.”<sup>78</sup>

In *Texas Peanut Farmers v. United States*,<sup>79</sup> the Federal Circuit was confronted with a crop insurance dispute triggered by amendments to the peanut quota program under the 2002 Act. The amendments modified the crop insurance coverage rates that peanut producers could receive under Multiple Peril Crop Insurance (MPCI) policies.

MPCI policies are crop insurance policies that are issued by private insurers and reinsured by the Federal Crop Insurance Corporation (FCIC) for protection against weather-related crop losses. Prior to enactment of the 2002 Act, MPCI coverage for peanuts was based upon whether lost peanuts were considered “quota” or “non-quota.” Quota peanuts were covered at \$0.31 per pound and non-quota peanuts were covered at \$0.16 per pound. The 2002 Act terminated the peanut quota, classified all peanuts as non-quota, and covered the non-quota peanuts at \$0.1775 per pound.

In *Texas Peanut Farmers*, several peanut farmers from South Carolina, Georgia, Alabama, Texas, and Florida purchased MPCI coverage for their 2001 and 2002 peanut crops. After the farmers’ suffered weather-related damage in 2002, they filed claims for their losses in accordance with their MPCI policies, expecting the losses to be covered at \$0.31 per pound. They were informed, however, that in accordance with the 2002 Act their losses would be covered at \$0.1775 per pound.

The farmers brought a breach of contract action against the government and requested damages equal to the difference between the \$0.31 and \$0.1775 per pound coverage rates. The Court of Federal Claims dismissed the action for lack of subject matter jurisdiction, holding that 7 U.S.C. §§ 1508(j) and 1506(d) placed exclusive jurisdiction in the federal district courts.<sup>80</sup> The farmers appealed to the Federal Circuit, arguing that §§ 1508(j) and 1506(d) were inapplicable because their complaint did not list the FCIC as a defendant and that the Court of Federal Claims had concurrent jurisdiction with the federal district courts pursuant to the “Big” Tucker Act<sup>81</sup> and the “Little” Tucker Act.<sup>82</sup>

Section 1508(j) provides that if a claim of loss is denied, “an action on the claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located.”<sup>83</sup> Section 1506(d) provides that the FCIC,

Subject to the provisions of 1508(j) . . . , may sue and be sued in its corporate name . . .  
. [and that] [t]he district courts of the United States . . . shall have exclusive original

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1335.

<sup>79</sup> 409 F.3d 1370 (Fed. Cir. 2005).

<sup>80</sup> See *Texas Peanut Farmers v. United States*, 59 Fed. Cl. 70 (Fed. Cl. 2003).

<sup>81</sup> 28 U.S.C. § 1491(a)(1).

<sup>82</sup> 28 U.S.C. § 1346(a)(2).

<sup>83</sup> 7 U.S.C. § 1508(j).

jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation. The Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest. . . .<sup>84</sup>

The Federal Circuit rejected the farmers' argument that §§ 1508(j) and 1506(d) were inapplicable, stating that "[i]t is well settled that this court 'looks to the true nature of the action in determining the existence or not of jurisdiction.'"<sup>85</sup> It added that the contract and pleadings reveals that the farmers' action was an action against the FCIC and that the farmers' "strategic decision not to name the FCIC as a defendant is merely an attempt to avoid the strictures of the MPCI and sections 1508(j) and 1506(d)."<sup>86</sup> The court also rejected the farmers' argument that the Court of Federal Claims possessed concurrent jurisdiction with the federal district courts. Here, the court held that §§ 1508(j) and 1506(d) governed because Congress granted federal district courts exclusive jurisdiction over claims against the FCIC.<sup>87</sup>

## **Part II. Administrative Developments**<sup>88</sup>

### **A. National Organic Program Regulations Amended**

On June 7, 2006, the Agricultural Marketing Service (AMS) issued a final rule that amended in several ways the National Organic Program (NOP) regulations.<sup>89</sup> The NOP amendments were instituted in response to the First Circuit's decision in *Harvey v. Veneman*<sup>90</sup> and amendments made to the Organic Foods Production Act of 1990<sup>91</sup> in November of 2005.<sup>92</sup> According to the AMS, the final rule "restores the National List of synthetics used in products labeled as 'organic' to the pre-lawsuit status made by the 2005 amendments to the Act."<sup>93</sup> In addition, the final rule amends the NOP regulations "to clarify that only nonorganically produced agricultural products listed in the NOP regulations may be used as ingredients in or on processed products listed as 'organic.'"<sup>94</sup> The final rule also terminates the so-called "80/20" rule set forth at 7 C.F.R. § 205.236. Consequently, after June 9, 2007 milk cannot be labeled organic or enter the stream of commerce if it has been produced in accordance with the "80/20" rule. Finally, the final rule is modified to permit a dairy farm in its third year of organic management to feed crops and forage from land included in the dairy system plan to a dairy herd converting from nonorganic to organic.

### **B. EPA Issues Proposed Rule to Revise Regulations Affecting Concentrated Animal Feeding Operations**

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<sup>84</sup> *Id.* at 1506(d).

<sup>85</sup> *Texas Peanut Farmers*, 409 F.3d at 1372 (citation omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1373.

<sup>88</sup> The National Agricultural Law Center web site, [www.nationalaglawcenter.org](http://www.nationalaglawcenter.org), maintains a database of agriculture-related administrative developments that is updated weekly.

<sup>89</sup> National Organic Program—Revisions to Livestock Standards Based on Court Order (*Harvey v. Johanns*) and 2005 Amendment to the Organic Foods Production Act of 1990 (OFPA), 71 Fed. Reg. 32803 (June 7, 2006) (final rule) (to be codified at 7 C.F.R. pt. 205).

<sup>90</sup> 396 F.3d 28 (1<sup>st</sup> Cir. 2005).

<sup>91</sup> 7 U.S.C. § 6501-6523.

<sup>92</sup> See H.R. 2744, 109<sup>th</sup> Cong. (1999). See also, STEPHEN R. VIÑA, CONG. RES. SERV., *HARVEY V. VENEMAN AND THE NATIONAL ORGANIC PROGRAM: A LEGAL ANALYSIS*,

<http://www.nationalaglawcenter.org/assets/crs/RS22318.pdf>. Additional legal and policy information regarding the National Organic Program is available at <http://www.nationalaglawcenter.org/readingrooms/organicprogram/>.

<sup>93</sup> USDA, AGRIC. MARKETING SERV., AMS NEWS RELEASE: USDA PUBLISHES FINAL RULE TO REVISE NATIONAL ORGANIC PROGRAM REGULATIONS, <http://www.ams.usda.gov/news/138-06.htm>.

<sup>94</sup> National Organic Program—Revisions to Livestock Standards Based on Court Order (*Harvey v. Johanns*) and 2005 Amendment to the Organic Foods Production Act of 1990 (OFPA), 71 Fed. Reg. 32803 (June 7, 2006) (to be codified at 7 C.F.R. pt. 205).

On June 30, 2006, the Environmental Protection Agency (EPA) issued a proposed rule titled “Revised National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations and Standards Guidelines for Concentrated Animal Feeding Operations.”<sup>95</sup> EPA issued the proposed rule in response to the Second Circuit’s decision in *Waterkeeper Alliance, et al v. EPA*.<sup>96</sup>

The proposed rule would revise the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluents Limitations Guidelines and Standards (ELGS) for Concentrated Animal Feeding Operations (CAFOs) in several ways. Two ways that the proposed rule would revise NPDES and ELGS rules are that only owners and operators of discharging CAFOs would be required to seek coverage under a permit and that CAFOs seeking coverage under a permit would be required to submit their nutrient management plan with their permit application or notice of intent to be authorized under a general permit.

### **C. Animal and Plant Health Inspection Service Proposes Amendments to Rule on BSE-Minimal Risk Regions**

On August 9, 2006, the Animal and Plant Health Inspection Service published a proposed rule that would revise the final rule APHIS issued on January 4, 2005 that established a category of regions that present a minimal risk of introducing Bovine Spongiform Encephalopathy (BSE) into the United States.<sup>97</sup> The January 4, 2005 was at issue in *R-CALF II*, discussed more fully in Part I of this article. The proposed rule would abolish several restrictions regarding the identification of animals and the processing of ruminant materials from BSE-minimal risk regions.

## **Part III. Legislative Developments**

The most significant legislative development is that most provisions of the Farm Security and Rural Investment of 2002,<sup>98</sup> commonly referred to as the 2002 Farm Bill, are set to expire in 2007. Debate over the next Farm Bill has begun and will intensify throughout 2006 and 2007. In light of World Trade Organization developments,<sup>99</sup> federal budget pressures, and other domestic political influences, the next farm bill may be historically significant.<sup>100</sup>

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<sup>95</sup> Revised National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations and Standards Guidelines for Concentrated Animal Feeding Operations, 71 Fed. Reg. 37744 (June 30, 2006) (proposed rule) (to be codified at 7 C.F.R. pts. 122 and 412). On August 4, 2006, EPA extended the comment period for the proposed rule through August 29, 2006, which was initially scheduled to end on August 14, 2006. See 71 Fed. Reg. 44252 (Aug. 4, 2006) (proposed rule) (to be codified at 40 C.F.R. pts. 122 and 412).

<sup>96</sup> 399 F.3d 486 (2d Cir. 2005).

<sup>97</sup> Bovine Spongiform Encephalopathy; Minimal-Risk Regions, Identification of Ruminants and Processing and Importation of Commodities, 71 Fed. Reg. 45439 (Aug. 9, 2006) (proposed rule) (to be codified at 9 C.F.R. pts. 93, 94, and 95).

<sup>98</sup> Pub. L. No. 107-171, 115 Stat. 134 (codified in scattered sections of U.S.C. titles 7, 15, 16, and 21 of the U.S.C.).

<sup>99</sup> See *generally*, RANDY SCHNEPF, CONG. RES. SERV., U.S. AGRICULTURAL POLICY RESPONSE TO WTO COTTON DECISION, <http://www.nationalaglawcenter.org/assets/crs/RS22187.pdf> (explaining and analyzing WTO developments and their potential impacts on U.S. agricultural policy); RANDY SCHNEPF, CONG. RES. SERV., BACKGROUND ON THE U.S.-BRAZIL WTO COTTON SUBSIDY DISPUTE, <http://www.nationalaglawcenter.org/assets/crs/RL32571.pdf> (discussing WTO Cotton decision); and JASPER WOMACH, CONG. RES. SERV., PREVIEWING A 2007 FARM BILL, <http://www.nationalaglawcenter.org/assets/crs/RL33037.pdf> (discussing possible changes to current farm bill legislation).

<sup>100</sup> Comprehensive information regarding past, current, and future farm bills and debate over the next farm bill is available at the National Agricultural Law Center, <http://www.nationalaglawcenter.org>. See, e.g., the Center’s Farm Commodity Programs Reading Room, <http://www.nationalaglawcenter.org/readingrooms/commodityprograms/>, the Farm Bills Page, <http://www.nationalaglawcenter.org/farmbills/>, and the Congressional Research Service Reports Page, <http://www.nationalaglawcenter.org/crs/>, which features an extensive database of agriculture-related Congressional Research Service reports.

