



# Ag Decision Maker



## A Business Newsletter for Agriculture

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### Top ten agricultural law developments in 2004

by Roger McEowen, associate professor of agricultural law, (515) 294-4076, mceowen@iastate.edu

(second in a series)

#### 5. Agricultural check-offs.

2004 was another busy year in the courts concerning agricultural check-offs. On February 24, the United States Court of Appeals for the Third Circuit held the Dairy check-off (mandatory 15 cent/hundredweight of milk sold) unconstitutional on First Amendment free-speech grounds. The court determined that the Dairy Act that authorizes the check-off constituted private speech and was, therefore, subject to scrutiny under the First Amendment. The court noted that the Secretary of Agriculture, under the Dairy Act, acted only in a supervisory role and that the government described the dairy check-off as a non-governmental program financed and directed by dairy farmers. Thus, the check-off was private speech.

On the free-speech issue, the court noted that the Dairy Act is a stand-alone law that was not passed as part of a scheme of greater economic regulation of the dairy industry. Dairy producers, the court noted, are not bound together and required by law to market their products according to cooperative rules for purposes other than advertising or speech. Thus, compelled funding of generic advertising is a violation of the free-speech rights of those who object to the promotion of milk as a generic product. *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), rev'g, 252 F. Supp. 2d 126 (M.D. Pa. 2003).

On May 24, the U.S. Supreme Court (upon request by the U.S. Solicitor General) granted certiorari on a limited basis in a case from the United States Court of Appeals for the Eighth Circuit involving the constitutionality of the beef check-off. The case involves

#### Handbook updates

For those of you subscribing to the handbook, the following updates are included.

**2005 Crop Production Cost Budgets** – A1-20 (13 pages)

**Commodity Programs for Crops** – A1-32 (6 pages)

**2005 Livestock Enterprise Budget Prices** – B1-20 (1 page)

**Livestock Enterprise Budgets** – B1-21 (23 pages)

**Retained Ownership Strategies for Cow Herds** – B1-72 (5 pages)

**Feeder Cattle Basis** – B2-43 (1 page)

Please add these files to your handbook and remove the out-of-date material.

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plaintiffs who were livestock producers subject to an assessment of one dollar per head of cattle to be used by the USDA and the Cattlemen’s Beef Board for promotion of the beef industry, as provided by the Beef Promotion and Research Act (7 U.S.C. §2901 et seq.). The plaintiffs challenged the law as an unconstitutional violation of the First Amendment. The plaintiffs objected to the assessment because it paid for advertising beef products, such as steak, which is not the product (live cattle) that the plaintiffs sold. The trial court held that (based on prior U.S. Supreme Court precedent) the assessment violated the First Amendment. The Eighth Circuit affirmed, check-off did not constitute government speech. Oral arguments were heard in the Supreme Court on December 8. *Livestock Marketing Association v. United States Department of Agriculture*, 355 F.3d 711 (8th Cir. 2003), cert. granted sub. nom., *Veneman v. Livestock Marketing Assoc.*, 124 S. Ct. 2389 (2004).

While the beef check-off case will be the first time that the U.S. Supreme Court has addressed the free speech issue in the context of an agricultural check-off, two Circuit Courts of Appeal have dealt with the matter. The U.S. Court of Appeals for the Third Circuit, in *United States v. Frame*, 885 F.2d 119 (3d Cir. 1989), while upholding the beef check-off as constitutional (the rationale of the court on this point is no longer valid due to a later U.S. Supreme Court opinion), rejected the USDA’s argument that the beef check-off was government speech. As noted above, the Eighth Circuit has also held that the beef check-off does not constitute government speech.

For a check-off to constitute government speech, the government must exercise sufficient control over the content of the

check-off to be deemed ultimately responsible for the message, the source of the check-off assessments must come from a large, non-discrete group, and the central purpose of the check-off must be identified as the government’s. The beef check-off likely clears only the first hurdle. The source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group, and the check-off has as its central purpose that of being a “self-help” program designed to improve markets for beef. That central purpose has been articulated clearly by the Congress in the legislative history of the Act, and readily admitted to publicly by the current president of the National Cattlemen’s Beef Association.

**6. Key eminent domain case reaches the Supreme Court.**

In recent years, a significant question has arisen as to whether the government’s eminent domain power can be exercised either by or on behalf of private parties to take private homes, land and businesses for commercial development. The argument is that the resulting “economic development” increases jobs and tax revenue in the area and that this satisfies the Fifth Amendment’s “public use” requirement. In late September, the U.S. Supreme Court agreed to hear a case from Connecticut on the issue. In *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), cert. granted, 125 S. Ct. 27 (2004), the City transferred its eminent domain power to a private company who then exercised it to take several homes that were in the path of their plans for the development of private businesses. The company argued that the taking was for a “public purpose” because the businesses would increase tax revenue from the subject area. The Connecticut Supreme Court agreed. In 2003, the Arizona Supreme

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Court reached an opposite conclusion, and in 2004 the Michigan Supreme court, in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), ruled that the exercise of the eminent domain power is proper only if (1) the private entities involved are public utilities that operate highways, railroads, canals, power lines, gas pipelines, and other instrumentalities of commerce; (2) the property remains under the supervision or control of a governmental entity; or (3) the public concern is accomplished by the condemnation itself (i.e., blighted housing has become a threat to public health and safety).

It goes without saying that the U.S. Supreme Court's opinion in the Connecticut case is of primary significance to private landowners (urban as well as rural) throughout the United States. An opinion is expected by the end of June, 2005.

**7. Second federal court holds that CERCLA reporting requirements apply to agricultural confinement operations.**

With respect to releases of "hazardous" substances, the federal Comprehensive Environmental Response Compensation & Liability Act (CERCLA) provides that any person in charge of a "facility" from which a hazardous substance has been released in a reportable quantity must immediately notify the National Response Center (a comparable state-level requirement also applies under the Emergency Planning and Community Right to Know Act). Releases that exceed 100 pounds per day must be reported. A key question of major importance to agriculture is whether large-scale livestock/poultry confinement operations constitute a single "facility," or whether each confinement structure on a farm is a separate facility. In 2003, a federal district

court in Kentucky held that a vertically integrated firm was an "operator" of the farms at issue pursuant to production contracts with the farm owners, and that each farm was a single "facility" for the reporting rule. In late 2004, the United States Court of Appeals for the Tenth Circuit held that the statutory definition of "facility" unambiguously included any site or area where a hazardous substance has been disposed of. The case involved the defendant's operation of two hog farms in western Oklahoma comprised of eight confinement buildings housing 25,000 hogs that utilized a common waste management system. The plaintiff claimed that the defendant knew of the ammonia emissions from the hog operations and failed to report them as required under CERCLA. CERCLA classifies ammonia as a hazardous substance, but the defendant claimed that that hog farms consisted of numerous "facilities" such as lagoons, barns, and land application areas, and that each barn, lagoon, and land application area was a separate "facility" for CERCLA reporting purposes. As such, the defendant argued, no single "facility" exceeded the reporting requirements under CERCLA. *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003); *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167 (10th Cir. 2004).

The rulings make it more likely that large-scale confinement operations will be subject to the reporting requirements of CERCLA.

*\*This series will conclude in next month's newsletter.*



## Crop insurance and marketing strategies for 2005

by William Edwards, Extension Economist, 515-294-6161, wedwards@iastate.edu

Corn and soybean producers in the Midwest need to make decisions about crop insurance by March 15 each year. If you don't advise your agent to make any changes, your coverage will be the same as last year. However, changing market conditions make it advisable to review your policy specifications each year.

### Indemnity Prices

Even if you don't alter your coverage from year to year, the dollar value of your guarantee will change according to market prices. The price used to calculate your guarantee and determine your payment in case of a loss is called the "indemnity price." How high the indemnity price is each year depends on market projections and the type of insurance you have. Traditional yield insurance, or APH (actual production history), uses a projected harvest cash price set by the USDA. For 2005 these prices have been fixed at \$2.20 for corn and \$5.00 for soybeans, considerably lower than last year's levels (see table).

Revenue insurance, both RA (Revenue Assurance) and CRC (Crop Revenue Coverage), set their indemnity prices equal to the average Chicago Board of Trade prices during the month of February. Prices for November soybean contracts and December corn contracts are used. While these average prices won't be known until March 1, it is likely that they will be much lower than last year.

### Group Insurance

Still another type of crop insurance, the Group Risk Income Protection (GRIP) policy, uses the average futures prices during just the last 5 days of February. Last year a late month market rally resulted in very attractive indemnity prices of \$2.93 for corn and \$7.27 for soybeans. The fall market prices used to calculate the "actual" revenues were \$1.99 and \$5.26, a decrease of 32 percent for corn and nearly 28 percent for soybeans. Actual county yields for 2004 haven't been released yet, but even if they are above long-term averages, some producers who purchased GRIP with a high level of coverage will receive a payment due solely to the decline in price.

GRIP and its yield insurance counterpart, GRP, have not been very popular in Iowa. Only 3 percent of corn and soybean acres in the state were insured with group policies last year. This can be attributed to the fact that protection is based on average county yields instead of individual farm yields. However, producers who have land in several locations within a county or who can safely carry more financial risk may find group insurance to be a low cost alternative with a significant chance of paying an indemnity. Of course the value of group coverage available for 2005 is likely to be quite a bit lower than last year, as well.

### USDA Payments

USDA commodity program payments should also be taken into account when analyzing crop insurance coverage. Loan deficiency payments provide direct price protection when prices are low at harvest, and counter

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cyclical payments provide some additional protection. When insurance indemnity prices are near USDA loan rates (after adjusting for basis difference), ordinary yield insurance with LDP eligibility provides about the same protection as standard revenue insurance alone. In both cases, yield and price risk are reduced. Of course, if you purchase revenue insurance and prices go low enough to trigger indemnity payments, you will probably collect from both the insurance company and the USDA!

### Preharvest Pricing

Producers who purchase Revenue Assurance policies this year should seriously consider the “harvest price option,” since low February prices increase the odds that prices will rise by harvest. This is especially true for soybeans, given the possibility of yield losses due to Asian rust. Crop Revenue Coverage has the increasing guarantee as a standard feature. However,

CRC limits the increase in coverage to \$1.50 per bushel for corn and \$3.00 for soybeans. Revenue Assurance without the harvest price option is probably the least attractive alternative this year, due to the low levels of coverage available, and no prospect of increasing coverage if markets rally.

Producers who like to forward price much of their production prior to harvest can utilize CRC or RA insurance with the harvest price option to protect themselves against harvesting fewer bushels than they contract. As long as they don’t commit more bushels than they have insured, they can rely on the insurance indemnity payment to cover the cost of any shortfall. This was especially helpful in 2004, when preharvest pricing opportunities were attractive.

Indemnity and Harvest Prices for Crop Insurance

	Corn		Soybeans	
	2004	2005	2004	2005
<u>Beginning Indemnity Price</u>				
APH, GRP	\$2.45	\$2.20	\$5.60	\$5.00
RA, CRC	\$2.83	Feb. futures	\$6.72	Feb. futures
GRIP	\$2.93	Last 5 days of Feb. futures	\$7.27	Last 5 days of Feb. futures
<u>Harvest price</u>	<u>2004</u>	<u>2005</u>	<u>2004</u>	<u>2005</u>
APH, GRP	Not applic.	Not applic.	Not applic.	Not applic.
RA, GRIP	\$1.99	Nov. futures	\$5.26	Oct. futures
CRC	\$2.05	Oct. futures	\$5.26	Oct. futures
<u>USDA payment prices</u>				
Loan rate (Iowa average)	\$1.90	\$1.90	\$4.93	\$4.93
Counter cyclical trigger	\$2.35	\$2.35	\$5.36	\$5.36

**Internet updates**

In addition to those listed on page one, the following updates have been added to [www.extension.iastate.edu/agdm](http://www.extension.iastate.edu/agdm).

**Hiring Good Employees – C5-100 (3 pages)**

**Improving your Interviewing Skills– C5-101 (2 pages)**

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