

Policy Matters

Cattle Industry Convention alerts cattlemen to timely policy matters.

by *Kasey Brown*, associate editor & *Troy Smith*, field editor

The 2015 Cattle Industry Convention & NCBA Trade Show welcomed more than 8,100 cattlemen to San Antonio, Texas, Feb. 4-7. During Cattlemen's College® sessions, committee meetings and Learning Lounge sessions, several timely policy issues were discussed.

The Equal Access to Justice Act

Due to a broken piece of legislation, nonprofit anti-agriculture groups are getting funding from the federal government through means of the *Equal Access to Justice Act* (EAJA).

Wyoming attorney Karen Budd-Falen explained that the Act was signed into being by Ronald Reagan to protect people from wrongdoing by the government. Through the EAJA, if you sued the government and the government was wrong, then the government would pay the attorney fees.

The senior partner of Budd-Falen Law Offices LLC spoke to attendees of the Property Rights & Environmental Management Committee Business Meeting.

Budd-Falen said the cap for attorney fees was \$200 per hour when the piece of legislature was signed. For-profit companies with a net worth of more than \$7 million are ineligible to recoup attorney fees for a suit against the federal government, she said. However, nonprofit groups, regardless of net worth, have no cap because they are working for the "public interest."

However, in California, environmental law is considered a specialty, and environmental groups got it through the federal government that they should be allowed to charge

California attorney fees (\$775 per hour) anywhere, she said. Several nonprofit groups are gaining a great deal of funding from taxpayer dollars in this way.

"There is something broken with this system," she asserted, adding that there are 6,500 national environmental groups and 20,000 local environmental groups who are claiming that protection of the environment is their primary concern. In the eyes of some of those groups, the alleged protection for this "public interest" goes as far as excusing

trespassing onto ranchers' land and extraneous litigation.

Although Budd-Falen and other groups like the U.S. Chamber of Commerce have been able to document these outrageous payments, in 21% of the cases, the public will never know how much was spent in a lawsuit, she explained. In those cases, the Justice Department agreed that attorney fee payments don't have to be released, so she said these groups don't have to share how much they make from EAJA cases. Frustratingly, she explained that most of these cases are not litigating scientific practice, but rather litigating the process and procedural hoops.

Most notably, she said that environmental groups litigate on the *Endangered Species Act* (ESA) often because they can get paid if the federal government doesn't respond to a petition to list a species in 90 days. To clarify, she said they win the case because it was not addressed in time, not because the species listing is valid or warranted.

There are two bills in the House of Representatives working to fix this problem. The first, H.R. 384, sponsored by Cynthia Lummis of Wyoming, would get an accounting of how many taxpayer dollars are spent in these EAJA fees. It would also require a publicly searchable database related to these payments, including the name of the person or group receiving the fees, the substance of the litigation and the court case number. It would work to increase the transparency of



the EAJA fee payments. She hopes it might get the EAJA back to what it was designed to do instead of being exploited. Rep. Lummis is looking for co-sponsors for that bill.

In 2014, Lummis also introduced H.R. 2919, which would set a hard cap on attorneys' fees at \$250 per hour, regardless of specialty. She said this legislation would work to ensure serial litigants would no longer get fees after a certain number of cases in a calendar year. It would also apply the \$7 million cap to for-profit and nonprofit organizations.

"We need to shut off the money supply of these groups to affect change," she emphasized. "This isn't just an ag problem. There is money flying out of every taxpayer's pocket. This is everyone's problem."

— by *Kasey Brown*

The Endangered Species Act

The ESA is a widely encompassing act that often affects farmers and ranchers in their stewardship or conservation efforts. Attendees of the Property Rights & Environmental Management and Federal Lands Policy Committee joint meeting heard about two new aspects of the ESA that can affect cattlemen.

Jonathan Wood, Pacific Legal Foundation (PLF), explained the Utah Prairie Dog Case and its broader implications. The PLF sued on behalf of the People for the Ethical Treatment of Property Owners (PETPO) in Cedar City, Utah, because federal regulations prohibited private property owners from capturing or killing the Utah prairie dog (*see www.pacificlegal.org*). The rodent is generally considered a pest; however, it was being protected under the interstate commerce clause.

Wood explained that this listed animal is specific to the state and does not affect interstate commerce. Of the approximately 1,500 animals listed on the ESA, 70% are state-specific, like the Utah prairie dog.

Nov. 5, 2014, Federal Judge Dee Benson struck down the federal government's regulations for the Utah prairie dog as unconstitutional because the prairie dog does

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not substantially affect interstate commerce. This case represents the sixth time the federal government has been challenged in terms of the ESA, but it is the first win, Wood added.

He said environmental groups try to list species to shut down natural gas production or watershed usage. Fish are being petitioned to be listed because that would give the federal government power over the entire watershed, Wood noted. This type of strategy will keep being used.

Another issue of the ESA is adverse habitat modification, said Scott Horgren, Western Resources Legal Center. The U.S. Fish and Wildlife Service (FWS) or the National Fisheries Service determines the critical habitat for ESA-listed animals. Critical habitat is a geographic area and vegetation/aquatic features that (1) is occupied at the time of listing and (2) is not occupied at the time of listing, but is an area essential for the conservation of the species.

Horgren said that two new rules are being introduced to critical habitat guidelines. The first is that “occupied” habitat includes where the entire range in which a species “occurs” and “even if not used on a regular basis.” Horgren likened that to saying the mailman occupied your house because he stops at your house daily.



PHOTO BY JAMES MELVIN PHELPS COURTESY OF WIKIMEDIA COMMONS

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Interest rates and their impact on agriculture

A good many of the 8,100 convention attendees took advantage of the National Cattlemen’s Beef Association (NCBA) Learning Lounge, sitting in on one or more of the informal educational sessions hosted in the NCBA Trade Show. In each of a series of 30-minute Learning Lounge sessions, an industry expert addressed a different timely topic.

Kentucky-based Michael Smith, a regional vice president for Farm Credit Mid-America, spoke on the subject of interest rates and their impact on agriculture. He talked about the economic outlook globally and in the United States. Smith said 3.4% growth in global productivity is expected in 2015, while U.S. gross domestic product (GDP) is projected to grow by 3.4%.

Smith suggested that economic growth may be sufficient to encourage the Federal Reserve to raise interest rates. Currently, interest rates are at historical lows, ranging from 1.75% to 1.77%.

“Take advantage of it while you can,” advised Smith.

If or when interest rates rise and borrowing costs increase, said Smith, supply-side pressure on grain prices and the exit of speculative money from commodity markets could decrease commodity prices by 30% to 40%. Lower grain prices should mean lower input costs for livestock enterprises. Declining commodity prices could put downward pressure on land rental and purchase prices.

Smith advised his audience to be proactive, recommending that every operation have a five-year plan, plus individual enterprise analysis and financial planning. He recommended balancing short-, intermediate- and long-term debt, and securing fixed interest rates for the latter. Smith recommends the use of risk-management tools that make sense for the particular operator and enterprise. He also advised producers to build cash reserves.

“Manage your cash to make sure you are adequately capitalized,” said Smith. “Prepare cash flows for higher interest rates. They are coming.”

— by Troy Smith

The second proposed rule would create a new definition of destruction or adverse modification of critical habitat. The former definition considered destruction only if the survival of the species as a whole was “appreciably diminished.” The new rule, Horgren explained, makes the destruction definition more vague. Adverse modification could include places that could be inhabited in the future.

The livestock industry’s comments to these proposed rules have included that critical habitat will expand by millions of acres under the definition of critical habitat. The destruction and adverse modification of critical habitat is defined too broadly. These changes will increase actions requiring Section 7 consultation, which means more meetings with federal agencies.

When asked what the livestock industry can do, Horgren suggested the possibility of lawsuits to push legislature to reconsider these changes. However, he was not optimistic about other options.

— by Kasey Brown

Future use of antibiotics

Antibiotics are a hot topic right now, and their use in the agricultural industry will be changing in December 2016, said Mike Apley, veterinarian and professor of production medicine and clinical pharmacology at Kansas State University.

There are two main Guidance for the Industry (GFI) documents — 209 and 213 — of concern, he said, explaining that GFI documents are the way the U.S. Food and Drug Administration (FDA) communicates with producers, veterinarians and pharmaceutical companies.

GFI 209 has two main principles, Apley explained. The first is that the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that are considered necessary for assuring animal health. The second is the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that include veterinary oversight or consultations.

He highlighted the quote, “However, the Agency believes that it is not limited to making risk determinations based solely on documented scientific information, but may use other suitable information as appropriate.”

Apley said glycopeptides, fluoroquinolones, cephalosporins and macrolides are listed as critically important drugs. Those that are not medically important include ionophores, flavophospholipol, bacitracin and pleuromutilins such as tiamulin. The ability to use rumensin will not be affected by GFI 209.

The second principle means that producers will not be able to buy medicated anything in the feed store after December 2016. Over-the-

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counter (OTC) injectables will be available, but he predicted that may not last long.

Of those drugs used in food animals, he reported that tetracyclines make up 41% of the medically important category, and medically important drugs make up 61% of total usage. Ionophores make up 31% of the medically unimportant category, which is 39% of total usage. Ninety-seven percent of medically important drugs sold are OTC and available without a prescription. This is why GFI 209 came about.



PHOTO BY KASEY BROWN

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GFI 213 is the road map for pharmaceutical companies to fulfill the voluntary methods in 209. Drug labels will change by December 2016.

According to the Veterinary Feed Directive (VFD), veterinarians will be required to fill out a prescription for feeds containing medically important drugs. Veterinarians are responsible and accountable for drug use, Apley said, even if it is delivered in the feed.

He added that when ionophores and a VFD-required medication are used concurrently, the ionophore will have to be included in the VFD, even though ionophores are not classified as medically important.

Another hot topic is antimicrobial use

reporting. Apley suggested the beef industry come up with a solution that works for the industry and propose it, as opposed to being told how to report usage in regulations.

— by Kasey Brown

D.C. issues update

NCBA members engaged in policy development met with the association's Washington, D.C., staff Feb. 5. In preparation for the following day's policy-driving committee meetings, Vice President of Government Affairs Colin Woodall and other NCBA staffers informed cattlemen about developments associated with priority issues.

Woodall recounted recent favorable events counted as "wins" for NCBA lobbying efforts. Heading the list was the scrapping of Secretary of Agriculture Tom Vilsack's plan to create a second beef checkoff to be administered by USDA. Additionally, an Environmental Protection Agency (EPA) interpretive rule was rescinded. Woodall explained that the rule placed virtually every ditch, pond and puddle within *Waters of the United States* (WOTUS) and subject to regulation by EPA.

Woodall said passage of improved legislation affecting public lands grazing will make grazing permits more secure.

"In the current political climate, I think these should be considered huge victories," said Woodall. "With Republicans now in control of the House and Senate, I'm optimistic about 2015."

While last year's hopes for tax reform were dashed, Woodall said the new Congress appears more inclined to try to improve the 30-year-old tax code. NCBA will continue efforts to abolish the death tax.

Woodall said NCBA must remain watchful of the current administration's efforts to push forward with its regulatory agenda, being particularly watchful of EPA. One thing on which NCBA and the Obama administration can agree is the need for Congress to reauthorize presidential trade promotion authority (TPA) to ease foreign trade negotiations. NCBA also favors passage of the Trans-Pacific Partnership (TPP) trade agreement, which promises to enhance U.S. beef exports to multiple countries in Southeast Asia.

Woodall warned cattlemen to expect



PHOTO BY TROY SMITH

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retaliation from Canada in response to the mandatory country-of-origin labeling (COOL) law. Noting how the World Trade Organization (WTO) has ruled — three

times — that COOL constitutes a trade barrier, Woodall said Canadian officials are prepared to place tariffs on a long list of U.S. products, including beef. A tariff on beef is expected to cost the U.S. beef industry in excess of \$2 billion dollars.

Mexico has not announced retaliatory plans, but Woodall expects a similar reaction from south of the Rio Grande.

NCBA staffers said they believe there are a number of congressmen ready to work on killing COOL. Their discussions are no longer about compromise, but focus on repeal.

"There is plenty to do," said Woodall. "We're under pressure to get things done — as much as we can — before silly season starts and Congress turns its attention to the 2016 elections."

— by Troy Smith



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Editor's Note: This article includes Angus Journal coverage of the 2015 Cattle Industry Convention & NCBA Trade Show. Comprehensive coverage of the event is available in the newsroom at www.4cattlemen.com diet.

