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For Farmers, Ranchers, and Landowners

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Note: The information in this section is based on general principles of agricultural and estate law, including the latest legislation, regulations, and legal rulings. This information should not be construed as specific legal advice. Always consult legal counsel for advice on specific situations. Legal citations are included so that this information can be used by legal professionals if needed. Questions on farm and estate law will be accepted from subscribers, and answered directly by email and printed in the newsletter (without using names or locations). You may ask general questions such as what the law is regarding certain situations. For example, “Does a written notice in February constitute a legal termination of a written lease for land planted to wheat?” We cannot intervene for you in specific cases or grievances, however.

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Feature Article

LEGAL ISSUES ASSOCIATED WITH A NATIONAL ANIMAL IDENTIFICATION PLAN

Overview

In recent years, the federal government has been promoting the establishment of a national animal identification program. The government’s interest in such a program is purportedly tied to animal health and food safety. The National Animal Identification System (NAIS) is a national program to identify and track livestock animals, including poultry, horses, cattle, goats, and sheep for the purpose of disease containment. NAIS plans to use radio frequency identification (RFID) and global positioning system (GPS) technology to track animals, and requires that every farm or “premises” be registered with government agencies, even if that premises houses a single animal. While NAIS’s purported goal of disease containment appears to be beneficial, the requirement that American citizens register privately-owned farm animals for tracking and monitoring purposes has very serious implications for individual privacy, rights, and freedoms. Any eventual mandatory identification program would likely face constitutional and other legal challenges.

Development of a National Animal Identification Plan

The original push for a nationwide animal identification program came from the National Institute for Animal Agriculture (NIAA), a private membership group consisting of major agribusiness and pharmaceutical corporations (and their lobby groups at the state and national level) including Cargill Meat Solutions, Monsanto Co., Pfizer Animal Health, Ltd., and the National Pork Producers Council. In 2002, the NIAA organized a task force composed of approximately 70 representatives from more than 30 stakeholder groups to produce a National Identification Work Plan. The plan was promoted as a way to ensure the health of the nation’s animal herd, improve the ability to respond to biosecurity threats, add value to meat products, and compete with international trading partners. The work plan was drafted and accepted by the United States Animal Health Association, which also passed a resolution requesting USDA’s Animal and Plant Health Inspection Service (APHIS) to establish a national animal identification development team. The resolution requested further that the development team establish a national plan using the work plan as a guide. As a result, in the spring of 2003, the development team completed a 74-page United States Animal Identification Plan (USAIP).

The USAIP's objective is to develop a traceback system that can identify all animals and premises exposed potentially to a diseased animal within 48 hours after discovery. The animal species included in the plan are domestic cattle, bison, swine, sheep, goats, cervids (deer and elk), equine, poultry, game birds, aquaculture, camelids (llamas, alpacas, etc.), and ratites (ostriches, emus, etc.). USAIP envisions that APHIS will administer the program, but recommends governance as a joint federal-state responsibility with industry input. Implementation of USAIP is scheduled to take place in three phases: Phase I involves premises identification and began in the summer of 2004, and is to be completed by the end of 2006. Required in this phase is the establishment of standardized premises identification numbers for all production operations, markets, assembly points, exhibitions, and processing plants. Phase II is designed to enable individual or group/lot identification (animal registration) for interstate and intrastate commerce, and is to be completed by the end of 2007. Phase III involves retrofitting remaining processing plants and markets and other industry segments with appropriate technology to enhance traceability of animals throughout the livestock marketing system (*i.e.*, movement of livestock off a registered premises can be traced). Phase III is to be completed by the end of 2008.

Mad Cow Disease Used as a Rationale for a National Animal Identification Plan

In late 2003, a Holstein cow infected with Mad Cow disease was detected at a dairy in Washington state. Attempts to trace the origins of the infected Holstein and the 80 cows that entered the United States with it were delayed and subjected the USDA to criticism. Allegedly hampering the investigators was the lack of a modern tracking and identification system. So, USDA began to openly and aggressively promote implementation of a national animal identification program as a major policy priority for mad cow disease prevention. In reality, however, USDA had already been working with the meatpacking industry for more than the prior year to develop standards for a verifiable nationwide animal identification system.

Interestingly, 2 weeks before the USDA's announcement of the presence of BSE in the United States, the U.S. Circuit Court of Appeals for the Second Circuit denied the USDA's motion to dismiss a challenge to a USDA regulation that permitted meat from downed livestock to be used for human consumption after passing post-mortem inspection. The plaintiff, a beef consumer, claimed that the USDA policy violated the Federal Meat Inspection Act and the Federal Food, Drug, and Cosmetic Act on the basis that those laws define "adulterated" food as any product of a diseased animal, and that the USDA regulation was, therefore, impermissibly broad in that it allowed meat from downed livestock to enter the human food chain by not designating the meat from such animals as "adulterated." During the litigation, the USDA maintained that there was no evidence of the presence of BSE in the United States and that it was never likely to enter the United States. The court, however, disagreed and pointed out that the USDA's Food Safety Inspection Service, in a Think Paper, had acknowledged that BSE-infected animals may pass the required post-mortem examination and be offered for human consumption in the United States.

So, instead of ensuring that the regulatory process was adequate to keep BSE-infected animals out of the food supply, the USDA continued to maintain that BSE was never likely to enter the United States. Once BSE showed up in the Washington state Holstein, however, the USDA used the Mad Cow incident to begin pushing for a mandatory identification system.

Legal Issues

A nationwide animal identification program gives rise to numerous legal issues.

Confidentiality of information. A primary concern of livestock owners is the degree and scope of access to confidential records that would be collected with respect to livestock on a particular farm or ranch. The major question is whether collected records could be accessed by other government agencies (such as the IRS), animal rights extremists, or even other livestock owners. The USAIP does not answer this question. Instead, the USAIP merely states that "only essential information will be reported to the central database" and that "only state and federal officials will have access to the premises animal identification information when performing their duties to maintain the health of the national herd." Neither USAIP nor APHIS discloses how the program will restrict access to certain federal and state officials or identify the safeguards necessary to protect the data from public disclosure.

Whether any eventual national animal identification plan is voluntary or mandatory may determine whether the collected information can be obtained by the general public. The Freedom of Information Act (FOIA) allows access to government agency records that are maintained by agencies with the executive branch of the federal government. Agency records that are subject to disclosure under the FOIA are those that are either created or maintained by an agency and under agency control at the time the FOIA request is made.

It is unlikely that the FOIA would apply to data gathered in accordance with a voluntary program operated by the livestock industry. Conversely, a mandatory program operated by a federal government agency (such as the USDA or a branch thereof) would most likely result in collected records being subject to a FOIA request. While that may not necessarily result in private information being disclosed, the possibility of a successful FOIA request does inject a degree of uncertainty concerning confidentiality of collected data in a mandatory program.

In addition, it is possible that private records could be accessed via litigation pursuant to a court's subpoena power. Even if particular information is exempt under the FOIA, it may still be obtained through the discovery process in a legal proceeding if the party's need for information exceeds the government's need for confidentiality.

Producer liability. Another significant issue is whether a national identification program will increase the possible legal exposure of livestock producers for events that occur after the livestock leave the farm. While livestock producers are responsible for the livestock they produce, and the USAIP does not change any existing liability rules, enhanced traceability may provide the ability to more readily track problems quickly and provide documentation to determine whether appropriate methods and measures were followed to avoid disease contamination. That could result in greater potential liability at the producer level. Conversely, enhanced record-keeping and documentation of events concerning livestock could make it easier to defend against baseless charges.

First Amendment concerns. The First Amendment protects the free exercise of religion. While recognized limits apply to the free exercise of religion, particularly when criminal activity is involved, a mandatory identification program would conflict with the religious belief of numerous groups (most notably the Amish) that participation in government programs violates Scriptural teachings. These groups could challenge a mandatory identification program on Constitutional grounds unless exempted from participation.

Fourth Amendment concerns. The Fourth Amendment protects against unreasonable searches and seizures. The proposed surveillance of every premises where even a single animal of any covered livestock is kept, and the requirement of RFID of every animal raises significant Fourth Amendment concerns. Indeed, the "premises" that USDA plans to subject to GPS satellite surveillance and RFID includes the private homes of citizens. The U.S. Supreme Court has ruled that the government cannot use sense-enhancing technologies to invade the privacy of citizens' homes. Likewise the Court has ruled that the sanctity of the home is entitled to greater privacy protections than are industrial complexes. In an agricultural context, the question of what is the "home" for purposes of the Fourth Amendment involves how far the "curtilage" of the home extends. Caselaw illustrates that curtilage can include farm buildings, outbuildings, and associated land areas — anywhere there is a reasonable expectation of privacy. Consequently, a mandatory identification program, unless smaller-sized, non-industrialized family farming operations and hobby farms are exempted, could be challenged on Fourth Amendment grounds.

Fifth and Fourteenth Amendments. The proposed NAIS is the first attempt by the federal government at forced registration in a large, permanent federal database of individual citizens' real property (the homes and farms where animals are kept) and personal property (the animals themselves). Presently, the only general systems of permanent registration of personal property in the United States involve systems for motor vehicles and guns — two items that are highly dangerous if misused. It is difficult to imagine any acceptable basis for the USDA to subject the owner of an animal (except, perhaps, those that are highly dangerous) to more intrusive surveillance than the owner of a gun or automobile. But, even with respect to a gun, an owner can use the gun on his own property without notifying the government. However, under the proposed identification program, the government would require the reporting within 24 hours of any instance of an animal's leaving or returning to the registered property. Almost assuredly, a mandatory identification plan could be successfully challenged on Fifth and Fourteenth Amendment grounds in situations involving the constant surveillance of a premises where the owner is only attempting to raise food for the household or for a limited local area and has no intention of distributing the food on a wider scale.

Implementation timetable. On April 25, 2005, the USDA released “Draft Program Standards” and a “Draft Strategic Plan” concerning the NAIS. The goal is that by January 1, 2008, the NAIS will be mandatory. Every person who owns even one horse, cow, pig, chicken, sheep, pigeon, or virtually any livestock animal, will be forced to register their home — including the owner’s name, address, and telephone number — and be keyed to GPS coordinates for satellite monitoring in a federal database under a 7-digit “premises ID number.” No exemptions from the registration requirement are provided. In addition, the USDA does not plan to issue any “alerts” to inform livestock owners of the requirements of the program until April of 2007.

Conclusion

The proposed mandatory animal identification program is fraught with numerous potential legal problems. Perhaps the most fatal flaw of the proposed NAIS is its blatant disregard for fundamental constitutional rights — the right to free exercise of religion, the right of property ownership, and the right to be free from unreasonable governmental searches. Without significant modification of the proposal, the NAIS appears doomed legally. What remains amazing at the present time is the seeming lack of organized protest by the agricultural sector against such government intrusion into private business operations and attack on private property rights.

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