

Dakota Counsel

ALFALFA JUSTICE

A February 13 Federal Court ruling could stop Roundup Ready alfalfa in its tracks.

In what will likely be a precedent-setting ruling, U.S. District Court Judge Charles R. Breyer of the Northern District of California decided in favor of a Center for Food Safety suit calling the USDA’s approval of genetically modified (GM) alfalfa a threat to farmers’ livelihoods and a risk to the environment.

“This ruling will help protect my rights as a consumer to choose, and I choose organic foods whenever and wherever I can,” said Dean Hulse, Fargo, DRC Past Chair.

“The decision rejects Monsanto’s claims that transgenic crops are safe for the environment,” he added. “Many people have been skeptical of those claims, and now we have a judge who’s skeptical as well – a judge who has actually studied the facts.”

DRC, together with a number of farmers and consumer and environmental organizations joined in the suit.

Judge Breyer ordered that a full Environmental Impact Statement must be carried out on “Roundup Ready” alfalfa, the GM variety developed by Monsanto and Forage Genetics. The decision may prevent this season’s sales and planting of Monsanto’s GM alfalfa and future submissions of other GM crops for commercial deregulation.

“This year, for the first time, we have not been able to guarantee our customers GM free alfalfa seed because of the release of GM alfalfa,” said Blaine Schmaltz, Rugby, a seed producer and DRC member.

“We cannot afford the expensive testing needed to prove our seed hasn’t been contaminated by Monsanto’s,” he said. “The release of GM alfalfa has disrupted our overseas sprouting markets, domestic seed sales, and domestic feed supply for organic dairies and livestock.

“This decision gives me hope that one day soon I can resume providing a pure product for my customers and a living for my family, free from genetic contamination,” said Schmaltz.

Consistently unswayed by USDA’s arguments, the judge upheld plaintiffs’ concerns that Roundup Ready alfalfa will contaminate natural and organic alfalfa.

“For those farmers who choose to grow non-genetically engineered alfalfa, the possibility that their crops will be infected with the engineered gene is tantamount to the elimination of all alfalfa,” said Breyer. “They cannot grow their chosen crop.”

USDA argued it did not have to address the economic risks to organic and conventional growers whose alfalfa crop could be contaminated by Monsanto’s GM variety.

The judge ruled, however, that economic effects are relevant when they are “interrelated” with “natural or physical environmental effects.”

Japan and South Korea, America’s most important alfalfa customers, have warned that they will discontinue imports of U.S. alfalfa if a GM variety is grown in this country.

U.S. alfalfa exports total nearly \$480 million per year, with about 75% headed to Japan. The Court disagreed with USDA’s assertion that exports to Japan would not be harmed by deregulation of GM alfalfa.

Breyer also said USDA should have addressed the problem of Roundup-resistant “superweeds” that could follow commercial planting of GM alfalfa and called USDA’s failure to do so “cavalier.”

Alfalfa is grown on over 21 million acres, and is worth \$8 billion per year (not including the value of final products, such as dairy), making it the country’s third most valuable and fourth most widely grown crop.

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THE RAZOR'S EDGE

By DRC Board Chair Dean Remboldt

Each year my wife Terry and I try to take Super Bowl week off and fly down to Las Vegas. When we flew over the Hoover Dam, I was dumbstruck by how you could see that the normal watermarks on the shoreline were well above the pool level that the lake maintains today.

As part of the trip we rent a car and drive down to Bullhead City, Arizona to spend a few days with Aunt Ella. While there, I usually make my way down to the Colorado River in Auntie's back yard to sit on the dock and feed the wild ducks or just sit and relax.

I'm always amazed by the speed of the flow that the Colorado River has. Water is such an important resource to our existence that we need to insure that we do everything that we can to protect it from contamination and use it wisely. I hope that a lot of the snow that they have been getting in Colorado this winter will help on the west side of the divide and increase the flow of the Colorado River.

Hardly a day in North Dakota goes by without a news story about water; too much in the Devils Lake area, too little in the Missouri River system, but rarely did we see much about water quality issues until the Zenergy saltwater spill near Alexander. More information came out in the news about the wastewater from the oil fields being used on our roads for de-icing. Because of the push for CAFOs and ethanol production and both having water usage and potential contamination issues, we need to be sure that DRC members and the general public are educated on the issues.

Of course our work on the water issues are going to draw the ire of some industries and their minions, who oppose any regulations or rules so they can do anything that they want, just to make a buck. Be prepared for them to try to marginalize our ideas and us personally. They have resorted to name-calling by calling us a fringe group of extremists. I think a 6000 hog barn would be considered extreme. Salt water in a creek is extreme. The biggest fear our opponents have is an informed public.

There aren't many animals in this world that would foul their own nests, but humans are capable and willing even though we know the consequences. I've noticed a full court press by the naysayers on the global warming issue the last few weeks. They are trying to confuse the public every chance they get and it's working. The amount and type of misinformation has many people caught up in the rhetoric surrounding the role that we humans have on our world.

Abraham Flexner said, "We must not overlook the role that extremists play. They are the gadflies that keep society from being too complacent." I guess Abraham was right... those pig manure and saltwater spilling extremists are keeping me from being too complacent.



STOP IMPRUDENT BS2

DRC said “no” to Montana-Dakota Utilities and Otter Tail Power’s request for a “blessing” from the state’s Public Service Commission on their proposed Big Stone II power plant near Milbank, South Dakota.

DRC formally intervened in the process, called “predetermination of prudence,” on February 15. If North Dakota Public Service Commissioners find the project prudent, the companies will be better able to obtain funding for construction and in addition, could raise North Dakota customers’ utility rates to cover costs.

The proposed project made news last year when the estimated cost of construction increased by half.

MDU and Otter Tail Power partnered with five other utilities to develop the traditional coal-fired power plant.

Critics throughout the region say the project has ignored the inevitable emissions constraints—on CO2 and other global warming gases—that coal plants

will face as nations attempt to mitigate global warming. Backers of the project have not addressed the additional costs of burning coal.

There are other options for meeting the region’s electric needs, including locally generated power from wind; North Dakota has the greatest potential for wind power in the country.

“The 50-year life expectancy of a new coal plant would lock ratepayers into very unpredictable costs to offset the millions of tons of heat-trapping gases it emits,” said Marie Hoff, Bismarck, of DRC’s Clean Energy Task Force.

“Another risk is a federal mandate to retrofit global warming pollution technology,” added Hoff. “In this event, ratepayers could be forced to pay for the lack of vision exercised by the investors.”

DRC’s intervention brief says the proposed plant is a bad idea because it does not capture carbon dioxide, because wind energy is less expensive and

because ratepayers in North Dakota will be subsidizing the plant but will see little if any benefits from its construction.

“These utilities need to look at other viable options to meet their energy needs,” said Hoff.

“Options, such as clean, reliable and readily available wind energy generated in North Dakota, may actually cost less and provide more local economic benefits,” said Hoff. “DRC calls on the PSC to exercise foresight, look at the options, think through the implications of building an outmoded coal plant and put North Dakota in a strong position for the future.”

DRC members raised questions about the plant in PSC-sponsored public input sessions February 5 in Bismarck and February 12 in Jamestown.

DRC must file testimony by May 11. PSC scheduled the hearing for June 7-8. DRC is asking for a date change because the hearing would overlap with the Western Organization of Resource Councils meeting in Medora.

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HOUSE PASSES OIL AND GAS BILLS

DRC is halfway home with two state oil and gas bills that would help protect surface owners and give the public more leverage in cleaning up abandoned sites.

The House passed the reclamation bill February 14, 62-28. It previously passed almost unanimously a bill giving earlier notice to surface owners prior to drilling, and keeping oil activities farther from occupied dwellings.

The reclamation bill (HB 1511) requires state action on idle wells that have not produced oil or gas in paying quantities for a year.

Sponsors of the bill are Reps. Shirley Meyer (D-Dickinson), David Drovdal (R-Watford City), George Keiser (R-Bismarck), Kenton Onstad

(D-Parshall) and Sen. Joel Heitkamp (D-Hankinson).

The bill says these wells must be put back into production, properly temporarily abandoned, or plugged and reclaimed.

If the owner takes none of those actions, the state will require a single well bond equal to the actual cost of reclamation.

“This bill will force oil companies who do not properly reclaim their wells to put up or clean up,” said Tom Irgens, a Springbrook farmer and DRC Board member.

“The costs of plugging and reclamation are rising,” said Irgens. “With this bill, we are protecting North Dakota tax payers from being responsible for those costs.”

DRC released the “Filling the Gaps” report in North Dakota in August 2005. The report estimated the cost of reclaiming a single well at over \$13,000 per acre. A well site can consist of several acres.

The study reviewed 43 wells in western North Dakota. The actual cost to plug and reclaim those 43 wells was



An abandoned oil site in McKenzie County

THE LOSS COLUMN

Despite progress on oil and gas initiatives, not everything has gone DRC’s way in the first half of the legislative session. Here’s a sampler:

Fair Trade. The House voted down a resolution urging federal officials to stop giving more rights to corporations than to U. S. citizens.

The resolution, HCR 3040, introduced by Rep. Jim Kerzman (D-Mott) asked the U.S. Trade Representative not to negotiate further trade agreements including “investor-to-state” privileges.

Such provisions allow foreign investors to come before secret trade tribunals, not U.S. Courts, and seek relief from the laws or rules of another sovereign nation.

“In 2004, a group of Canadian cattlemen filed a \$300 million complaint against U.S. Department of Agriculture under NAFTA because we closed the Canadian border upon the discovery of bovine spongiform encephalopathy (BSE),” noted former DRC chair, Donald Nelson, Keene.

The plaintiffs said they were losing profits because of the U.S. rule restricting imported cattle to protect public health.

The House Industry, Business and Labor Committee had issued a Do Not Pass recommendation on a 9-4 partisan vote.

Wind Rights. The House moved to allow landowners to continue to receive wind energy royalties after selling the land, effectively gutting a non-severance law passed in 2005 with DRC support.

over \$7 million. The state currently has only \$250,000 in bond available in case it has to take over reclamation of these wells.

The House also passed HB 1229, which offers some relief to those living near oil and gas activity.

The bill allows no oil and gas wells drilled within 500 feet of a residence. The current law is 300 feet, and the original bill read 660. DRC prefers 1,320.

The bill also requires companies to give 20 days notice of their intent to drill to owners of occupied dwellings within one-fourth mile of the site. DRC would prefer one mile.

Notification allows homeowners to have their wells tested prior to drilling operations, which occasionally damage wells. Without a well test, water users face difficult odds in proving damages due to oil and gas activity.

HB 1229 passed the House 83-6.

See The Loss Column p. 5

ZONING SAVED AGAIN

The Senate voted February 16 to let counties and townships keep zoning for concentrated livestock operations, ending any immediate threat to local control.

Ten Republicans and 19 Democrats voted against SB 2331, while two Democrats joined 16 Republicans in favor.

The bill would have given the state Department of Health sole authority for dealing with environmental issues related to animal feeding operations.

Days earlier, the House Agriculture Committee dropped language similarly limiting county zoning authority from HB 1420. The House passed the now toothless bill.

A late resolution has been introduced, which could lead to further state-level study of animal zoning issues.

Hearings on HB 1420 and SB 2331 had filled the large Brynhild Haugland Room at the State Capitol.

Joining DRC in opposing the bills were the Farmers Union and the state’s township and county associations.

Testimony from Joe Lawson of the Ramsey County Planning and Zoning Commission was particularly effective in demonstrating the protections missing from state animal feeding supervision—including closure bonding and on-the-ground testing to make sure soils are not damaged by manure applications.

At least seven County Commissions—Divide, Griggs, McLean, Nelson, Oliver, Ramsey, Stutsman—passed resolutions opposing the two bills.

“There are just some decisions we need to make locally,” said Stutsman County Commissioner Dale Marks, Ypsilanti. “These bills are an over-regulation on the part of the states in regards to counties.

The resolutions noted that each county has passed its own ordinance in order to “regulate odor and water setbacks of large concentrated animal feeding operations to protect the environment and health” of the county as encouraged by state law and the state’s model livestock zoning ordinance.

Other counties, including Grand Forks, Ramsey and McLean have adopted local regulations requiring a closure plan and financial assurance from feeding operations.

“I’d rather go to my county commissioners than a state agency to make sure these operations are done right,” said Lori Carlson, Jamestown, chair of South Central Citizens Coalition, and a livestock producer. “Local public health and safety is an important part of their job, and it should be kept that way.”

The effort to restrict county zoning, led by the Farm Bureau, was the first since 1999, when Purina Mills was pushing huge farrowing facilities in the state. Only one, Enviropork, near Larimore, was ever built.

The 1999 session also eliminated property taxes on factory farm buildings, weakened the state odor standard, and specifically exempted hog and dairy lagoons from state waste disposal regulations.

But efforts to restrict zoning failed.

THE LOSS COLUMN, from p. 4

The bill, HB 1231, would create a situation parallel to the split estates that are common in the case of oil, gas and coal rights.

The House passed the bill, 74-18, with 17 Democrats and only one Republican opposed.

Renewable Energy. The House and Senate each took a promising renewable energy bill and changed it to provide new benefits to non-renewable fossil fuels.

The Senate bill, SB 2288, now sets up an “energy independence research council” rather than the renewable energy research council the original bill called for.

The newly-defined council would have responsibility for promoting research on North Dakota-produced coal, oil and natural gas as well as renewable energy sources.

In addition, the North Dakota lignite and oil industries would have a seat on the council.

Funding was also reduced to from \$20 to \$3 million.

The Fargo *Forum* called the bill a “sham” whose amendments turned “visionary legislation” into “another piggy bank for the state’s established and well-connected fossil fuel companies.”

The House bill, HB 1462, initially signed North Dakota onto the “25x25” initiative, which calls for 25% of U.S. energy to come from renewable resources by 2525.

The original bill included a tax break for shallow gas production, but the amended bill goes farther in providing benefits to the fossil fuel industry.

For example, the amended bill includes in the definition of renewable energy “use of waste heat” and “low emission technologies that create or use hydrogen.”

It also adds new sales tax exemptions for gas production and oil refinery construction.

Each amended measure passed its respective chamber with only one dissenting vote.

GASCOYNE GETS PERMIT EXTENSION

No one plans to build it, but it has a permit.

Disregarding DRC's comments in opposition, the state Department of Health extended the air quality permit for a proposed 175-megawatt pulverized coal plant near Gascoyne.

But Montana-Dakota Utilities, which holds the permit, decided last year to invest in a proposed South Dakota power plant instead (see p. 3).

"They just want to get the permit as a place holder in case someone decides to build a plant there," said Terrence Kardong, Richardton, chair of the DRC Clean Electricity Task Force. "That's not legal."

DRC and the Dacotah Chapter of the Sierra Club filed an objection to the permit, in part because of the state's measurement techniques for Prevention of Significant Deterioration (PSD).

The state's PSD measurement

techniques, blasted by EPA air quality professionals across the country in 2004, are a key part of the MDU permit.

"The state is still bending the rules to accommodate coal," said Kardong.

Former EPA Region VIII director of air quality programs, Richard Long, who retired last month, spent more than four years trying to prevent permits like this until "politics took over," he told the *Rocky Mountain News*.

PSD sets limits on how much new pollution can be allowed to degrade air quality in a particular area.

The current comments by the two groups also point out that the permit does not call for Best Available Control Technology to control pollutants. For example, the cleanest available technology (Integrated Gas Combustion Cycle) is not considered, nor is Selective Catalytic Reduction, which one new Kentucky power plant permit

calls for. It would reduce nitrogen oxide emissions by over 20%.

The plant would do nothing to curb carbon dioxide emissions that cause global warming.

"This is what's happening now across the country," said Kardong. "Get a permit before they start cracking down, and see if you can't get it grandfathered after they do."

DRC twice sued over the state's rules, but the court never dealt with the real question—whether the state's PSD measurement program was legal.

As it stands now, the EPA has denied DRC's petition that the agency compel the state to undertake a revision of its State Implementation Plan, which shows how the state will comply with the Clean Air Act. However, EPA has not specifically endorsed the way North Dakota measures PSD.

DRC also opposed the original Gascoyne permit when it was issued.

WIND OVERCHARGING

Xcel Energy wants to charge customers far too much for the Windsource green-pricing program it plans to offer customers as a response to the nearly-successful Fargo and Grand Forks 20/20 campaigns, DRC has charged.

While several cooperatives charge customers only 50 cents per 100 kilowatt-hours of wind-generated electricity, Xcel has asked the state Public Service Commission for a fee of \$3.00, or six times greater.

"The cost should be at least comparable to other green pricing programs in the state," argued Dean Hulse, DRC past chair and Xcel ratepayer, who testified at a January 24 PSC hearing on Windsource.

The utility opposed the 20/20 renewable energy standard, saying wind energy should be a personal, not a community choice.

Fargo and Grand Forks 20/20 promoters noted during the campaign that North Dakota customers could not make such a choice because Xcel did not offer it.

Hulse noted that the 60 megawatts of wind in Xcel's Colorado Windsource program actually saved the company money in 2005, when natural gas prices spiked. Xcel is proposing more than 1,000 additional megawatts of Colorado wind energy in the next year.

Colorado regulators have responded by initiating steps to end the cost premium to Windsource customers.

"Charging a small group of customers a price premium for these 60 megawatts when the cost of the remaining 1,000 will be shared by all ratepayers makes little sense," the state's Public Utilities Commission said.

With carbon dioxide regulation looking more likely in the near future, Hulse suggested that Xcel's North Dakota Windsource participants should be shielded from payment of carbon taxes or any other costs associated with fossil fuels.

The PSC has not yet issued a decision on Xcel's rate request.

CELLULOSIC ETHANOL: NO SUBSTITUTES

by Dean Hulse

Waste heat from power plants should not qualify as cellulosic ethanol.



North Dakota sits poised to help the United States kick its addiction to imported petroleum and the social and environmental ills associated with it.

Mixtures of native cool- and warm-season perennials such as wheatgrass, switchgrass and big bluestem can be grown here efficiently (low inputs, good yields), and the cellulose these crops produce can be converted into cellulosic ethanol.

We'll need to produce ethanol from cellulosic crops because supplies of ethanol derived from other feedstocks, such as corn and other grains, can't match projected demand.

But there's a catch: Rapid commercialization of a cellulosic ethanol industry currently is hindered by cost competitiveness, compared to corn-based ethanol. Unless corn prices rise dramatically (which would negatively affect U.S. cattle producers), cellulosic ethanol will continue to be more expensive than ethanol from corn.

Recognizing the need to assist the fledgling cellulosic ethanol industry, Congress mandated the production of 250 million gallons of cellulosic ethanol annually by 2013, an amount requiring the construction of about 10 plants, or more, depending upon scale. This mandate appears in the Energy Policy Act of 2005 (Public Law 109-58).

However, also appearing in Title XV, Section 1501 of that law is a pesky sentence that reads as follows: "The

term also includes any ethanol produced in facilities where animal wastes or other waste materials are digested or otherwise used to displace 90 percent or more of the fossil fuel normally used in the production of ethanol."

The problem comes with the phrases "other waste materials" and "otherwise used" because the U.S. Environmental Protection Agency has taken the position that waste heat from a fossil-fueled boiler or power plant should qualify.

So what? Suppose any of North Dakota's coal-fired power plants decided to use waste heat to produce ethanol (one such facility is already under construction near Underwood). As long as the waste heat displaces "90 percent or more of the fossil fuel normally used in the production of ethanol," these ethanol plants could use waste heat derived from fossil fuel combustion and corn as a feedstock—and the resulting product would still qualify as "cellulosic" ethanol.

What's more, because of this loophole, the entire congressional mandate for producing 250 million gallons of cellulosic ethanol by 2013 could be met—but without having produced ONE GALLON of ethanol actually derived from cellulose.

This is a mistake that needs correcting. I urge concerned North Dakotans to contact our congressional delegation

and ask them to fix the problem so that only ethanol derived from feedstocks of cellulose qualifies as cellulosic ethanol.

(Dean Hulse, Fargo, is Past DRC Chair.)

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OIL AND WATER

Well, Well, Well

The state Water Commission recommended in late January that Zenergy receive permits for 20 of the 21 water wells it has applied for in McKenzie County—but under conditions.

Under the order, Zenergy must have check valves installed, and up to three basal Tongue River monitoring wells would be installed. DRC recommended both these conditions.

The state also has required drilling the wells deeper than proposed into the Tongue River aquifer.

The state denied one permit application because the oil lease has a rider stating that no water wells can be drilled without landowner permission.

Zenergy was responsible for spilling nearly a million gallons of contaminated water into Charbonneau Creek.

“We are concerned with the long-term implications from this type of water use,” said DRC member Donald Nelson, Keene, “and we think that granting permits for this type of water use sets a precedent that may damage the water

supplies of landowners in an area where water is king.”

DRC is still reviewing the decision, which is several hundred pages long.

The De-Ice Age

Dumping wastewater from oil production on roads as a de-icing agent is illegal, according to a legal analysis obtained by DRC from the Environmental Law and Policy Center, Chicago.

“At no time shall saltwater liquids or brines be allowed to flow over or pool on the surface of the land or infiltrate the soil,” according to state oil and gas law.

State solid waste law may also have been broken. Drilling wastes and produced water are “solid wastes” under state and federal waste management law, and state law prohibits transporting such wastes off an oil and gas site without a valid permit.

Steve Tillotson, Coordinator of the state’s Solid Waste Program said the state has never given approval for the use of oil wastewater to de-ice roads.

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