

# Dakota Counsel

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## PROTEIN DISCOUNT WOES WARRANT INVESTIGATION

DRC urged North Dakota’s Congressional delegation in September to investigate possible price-fixing in connection with wheat protein discounts that have sent receipts for this year’s bumper crop into freefall.

“Given the high level of concentration in the wheat processing industry, there is great opportunity for price-fixing in the area of protein discounts,” says DRC’s letter.

“Elevators are commonly deducting around a dollar for protein levels below 14%, and another dollar under 13%,” said Todd Leake, Emerado, a farmer and DRC member. “Some people are getting less than a dollar for their wheat, when break-even is probably about six dollars.”

Leake said he doesn’t see anything in the existing farm program or conventional crop insurance that would allow compensation for these losses, although he has heard the delegation is looking into possible remedies under the SURE and ACRE programs in the 2007 farm bill.

“A fair price for the 2009 crop would be good, but fair markets would be better,” said Leake.

Leake says wheat markets suffer from “buyer power,” a kind of mirror image of monopoly, where a huge number of sellers must deal with only a handful of buyers. “There is a discontinuity between the value of the protein in 14 percent hard red spring (HRS) wheat and the protein discounts in the marker place.”



Todd Leake

The top three flour milling companies—Cargill, ADM and ConAgra—held a 55% market share in flour milling in 2005.

In an August 7 speech to the Organization for Competitive Markets, Deputy Assistant Attorney General Philip J. Weiser identified “buyer power” as one of five areas of

focus for the U.S. Justice Department in evaluating the fairness of current agricultural markets, starting this year.

OCM brought the *Pickett v. IBP* lawsuit, in which a jury found that meat packers used “buyer power” to force cattle feeders into secret forward contracts without a base price in violation of the Packers and Stockyards Act, and awarded damages of \$1.28 billion. A federal judge later nullified the award.

“Millers and other end users of wheat faced dwindling stocks a couple of years ago and had to pay upwards of \$10 for wheat,” said Leake.

“Twelve percent protein wheat still provides 85 percent of the protein in wheat flour, and all the carbohydrates, yet HRS wheat is being discounted to historically low levels. The farmer’s share is being reduced to a negligible amount.”

“Now it looks like they’re trying to recoup lost profits by sticking us with a huge discount that far surpasses their additional blending costs they will incur by buying wheat gluten from Europe,” added Leake.

In addition to “buyer power,” Weiser said the Justice Department is looking at antitrust enforcement opportunities relating to vertical integration, market transparency, enforcement of the Packers and Stockyards Act, and growing concentration in the dairy and seed industries.

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The Dakota Counsel is published six times a year by Dakota Resource Council, a nonprofit, grassroots activist organization. The mission of Dakota Resource Council is to form enduring, democratic local groups that empower people to influence decision-making processes that affect their lives. DRC is committed to preserving sustainable agriculture and natural resources.

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# **COOL LAW BEING CHALLENGED- CAN THE COOL LAW SURVIVE?**

**By DRC Board Chair Roger Brenna**

COOL (Country of Origin Labeling) is a part of the U.S. Food, Conservation and Energy Act of June 2008. The United States passed legislation imposing mandatory country of origin labeling for beef, pork, lamb, chicken and goat meat, and certain perishable commodities sold at retail outlets in U.S. The final rule was entered into force on March 16, 2009.



Each retailer has to, by law, label the country of origin of the product being sold. The original intent was that each country would have a label, but the Canadian government, in the eleventh hour after negotiating with the U.S.D.A., was able to get a label with more than one country on it. This also allowed mixed origin labels on products from the U.S.

COOL intent was for the consumers' right to choose the origin of their food. It was also the intent of Congress that meat products must be exclusively born, raised and slaughtered in the U.S. to carry the United States label.

The U.S. COOL law imposes no duties or restrictions on any foreign government, nor imposes any limits on the volume or type of commodities a foreign country may export to the United States. A foreign country's decision to market its products in, and under rules of, the United States' markets is voluntary. COOL jurisdiction is exclusively limited to United States retailers.

Now the Canadian government is asking the World Trade Organization (WTO – an international tribunal) to hear their complaint about how COOL is affecting Canada's ability to fair trade and exports into the United States – that tracking the origin of beef products imposes an unfair and unnecessary cost.

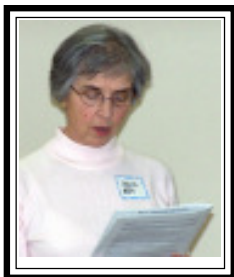
Verifying the origin of beef products should not be a problem since they are using records already maintained in the course of normal business. Market information shows there is not a reduction in imports from Canada due to COOL. The reduction has been because of supply and demand – with the consumer demand down, there is less need for beef products from the United States and from imports from Canada.

This COOL complaint by Canada is a good example of how the United States has traded away our sovereign rights to self-government and the right to be informed where our food originated and our right to choose what we want to buy.

We have unelected officials who are not accountable to the citizens of the United States. As a result, our constitutional right to self-government rule has been eroded.

# ASKING FOR OIL AND GAS REFORM

DRC Vice-Chair Marie Hoff, Bismarck, and Staff Director Mark Trechock joined five other WORC members and staff from the region in traveling to Washington, D.C. to ask for Congressional support of improved property rights and stronger water resource protection in oil and gas country.



**Marie Hoff**

Hoff and others found that the natural gas industry has also been stepping up its lobby effort, touting the fuel as clean and plentiful and urging Congress to increase its use.

WORC members took another message to Capitol Hill, reminding members of Congress of oil and gas impacts on air, water, land, wildlife and public health that must be addressed.

“Westerners expect oil and gas companies to act responsibly and ‘do it right,’” said Jessie Huffman, a rancher from Busby, Montana, and Northern Plains Resource Council member.

“We need a law that protects the private property rights of landowners who don’t own the rights to the minerals beneath their land, so they can continue to operate their farm or ranch with minimal disruption and destruction.”

The group visited more than 25 Congressional offices, sharing stories and information about drinking water contaminated by hydraulic fracturing in Wyoming, and by salt water in North Dakota.

They also talked about the massive oil and gas drilling project encroaching on the community of Battlement Mesa, Colorado, and the federal Bureau of Land Management mineral leases awarded next to and under the historic Rosebud Battlefield in Montana.

They urged support for legislation introduced in both houses of Congress to end the loophole exempting hydraulic fracturing fluids from the Safe Drinking Water Act.

And they asked for support of the concept that surface owners above federal minerals should be notified prior to leasing or drilling, and should receive a surface use agreement offered in good faith by the driller.

“I was heartened by the fact that we generally received a positive response to our advocacy efforts on behalf of Western landowners,” said Hoff.

“It also strengthened my conviction that DRC is doing important work in our efforts to protect the people and natural environment of our beautiful state,” she added.

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# LESS MONEY FOR ANIMAL ID

DRC livestock issue leaders see a recent cut in Congressional funding for a controversial animal identification program as a move in the right direction.

“It’s a great first step towards stopping a bad idea,” said rancher DeJon Bakken, a Dakota Resource Council member from Adams County. “Congress should end funding, period.”

What a Congressional conference committee did was to cut over \$9 million, or nearly two-thirds, from the administration’s requested funding for the National Animal Identification System (NAIS).

NAIS would identify and track all livestock and poultry animals owned by producers and others across the country in a supposed attempt to improve animal health and food security.

But Bakken said NAIS would not be an improvement over existing disease programs run by state agencies, and would simply impose high costs and paperwork burdens on family farmers.

The conference committee noted that USDA has already spent more than \$140 million in funding for NAIS, but has registered only about 37% of the estimated number of properties under the first phase of NAIS.

“There are many sound reasons why the majority of animal owners have rejected the NAIS, despite the USDA’s efforts to sell the program,” said Judith McGeary, a Texas livestock farmer and President of the Farm and Ranch Freedom Alliance. “The bottom line is that NAIS will not improve animal health or food security.”

The reduced level of funding is expected to end USDA’s distribution of grants to state agencies and private organizations to promote NAIS.

“The USDA still has money to propose the rules for the animal identification program, but ranchers will have an opportunity to influence those rules,” said South Dakota rancher Shane Kolb, a member of Dakota Rural Action. “This cut indicates a lack of confidence in the program.”



# ONE SIZE DOESN’T FIT ALL

## WHEN IT COMES TO FOOD SAFETY LEGISLATION

Dakota Resource Council joined 20 other grassroots organizations this week in urging U.S. Senators to change pending food safety legislation to remove impediments to producers and consumers of locally grown food.

“We all want healthier food, and local foods are part of the answer,” said Daryl Bragg, Grand Forks, chair of GFC3.

“Unfortunately, what’s going through Congress now will make the development of local food systems more difficult without really improving food safety,” he added.

The U.S. House of Representatives passed The Food Safety Enhancement Act (H.R.2749) in July, and the Senate will soon be taking up the Food Safety Modernization Act (S. 510), sponsored by Sen. Dick Durbin (D-IL).

Congressman Pomeroy voted in favor of H.R.2749.

Both bills allow the U.S. Food and Drug Administration to adopt rules to govern how farms of any size grow and harvest their crops. The House bill includes a mandatory \$500 per year fee for all facilities, regardless of size, including small local businesses processing local foods for local markets.

The bills “bring direct market farmers and small local processors under an onerous regulatory regime, when these small producers represent a viable alternative to industrialized foods, and also are regulated by longstanding local and state public health and agricultural laws,” said Jeanne Charter, a member of Northern Plains Resource Council who direct markets grassfed beef in Montana.

“When it comes to food safety, one size does not fit all,” Charter added.

The letter calls on Congress to remove local processors processing lo-

cal foods for local markets and direct market farmers from the federal legislation, to remove doubling regulations on meat, poultry, and organic farms, and to hold the Food and Drug Administration accountable for its regulatory oversight.

“More inspections and red tape will not make our food supply any safer,” according to William A. Powers of the Nebraska Sustainable Agriculture Society. “Look at all the beef recalls, each beef is ‘inspected,’ but that does not make it safe.”

“We need to address the root causes for food contamination,” said Powers. “The food safety bills under consideration are trying to address traceability and accountability. There is no better way to trace food and be held accountable than selling your products directly to the customer.”

# ROUNDUP UNREADY BEETS

Monsanto's Roundup Ready sugar beets met the same fate in federal court as its Roundup Ready alfalfa.

A judge in California ruled September 21 that the genetically modified beets were not ready for deregulation and commercialization because the U.S. Department of Agriculture failed to prepare an Environmental Impact Statement (EIS) before deregulation.

Judge Jeffrey S. White ordered the USDA to conduct a rigorous assessment of the environmental and economic impacts of the crop on farmers and the environment.

The judge will meet with all parties October 30 to discuss remedies, including a potential injunction.

"This court decision is a wakeup call for the Obama USDA that they will not be allowed to ignore the biological pollution and economic impacts of gene

altered crops," stated Andrew Kimbrell, Executive Director of the Center for Food Safety, which filed the suit in January 2008 along with the Organic Seed Alliance, High Mowing Seeds, Sierra Club and Earthjustice.

"The courts have made it clear that USDA's job is to protect America's farmers and consumers, not the interests of Monsanto," added Kimbrell.

Judge White found "no support in the record" for USDA's Animal and Plant Health Inspection Service's conclusion that conventional sugar beets would remain available for farmers and consumers and held that the agency's decision that there would be no impacts from the GE beets "unreasonable."

He also held that APHIS failed to analyze the impacts of biological contamination on the related crops of red table beets and Swiss chard.

The decision follows on the heels of a June 2009 decision from the Ninth Circuit Court of Appeals affirming the illegality of the APHIS' approval of Monsanto's genetically engineered alfalfa. DRC was a plaintiff in the original suit.

Both cases focused on APHIS' failure to take seriously the inevitability of contamination, which presents farmers with the possibility of market losses and reduces their ability to choose what to grow—and the ability of consumer to choose what to eat.

The suit also stressed the growing problem of weed resistance resulting from the overuse of Roundup, and increases in pesticide use as a result.

APHIS has yet to produce the EIS required in the Roundup Ready alfalfa case, more than two years after the ruling.



## DRC JOINS BRIEF AGAINST UNFAIR PACKER CONTROL

DRC joined a coalition of more than 50 farmer, rancher, and consumer groups in filing a friend of the court brief September 16 in a lawsuit to fully protect the rights of farmers, ranchers, and poultry growers from unfair and deceptive practices by livestock and poultry processing companies.

At issue in the case, *Wheeler v. Pilgrim's Pride*, is the usefulness of Packers and Stockyards Act (PSA), which Congress enacted over 80 years ago, to protect farmers and ranchers from deceptive practices.

Some recent court decisions have required that any plaintiff under the PSA must demonstrate "an adverse effect on competition."

The brief signed by DRC argues that these decisions are contrary to the explicit language of the statute and Congressional intent.

"Even though the Packers and Stockyards Act has not been enforced as it was intended, it's the only protection ranchers have from monopoly exploitation," said Gilles Stockton, a rancher from Grass Range, Montana and member of Northern Plains Resource Council. "We have to defend it every chance we get."

"It should be implemented as it was written, in plain language, and as intended," said Stockton.

Signing the brief were 54 organizations, representing poultry growers,

farmers, ranchers, people of faith, rural communities, and consumers.

In July, a three-judge panel of the U.S. Fifth Circuit Court of Appeals, based in New Orleans, upheld a district court decision in *Wheeler v. Pilgrim's Pride* that producers do not have to prove an adverse effect on competition when bringing a case against allegedly unfair or deceptive practices by a poultry company or meatpacker.

The Fifth Circuit decided to rehear that decision and the case was argued on September 24.

The PSA prohibits livestock, pork, and poultry companies from engaging in "any unfair, unjustly discriminatory, or deceptive practice or device."

# BIG STONE STUMBLES

Otter Tail Power Company pulled out of the proposed \$1.6 billion Big Stone II coal-fired power plant in South Dakota September 11, leaving Montana-Dakota Utilities the only remaining BS2 partner that sells electricity in North Dakota.

The company, which provides electricity to Jamestown and many other North Dakota cities, cited financial risk as the reason for its withdrawal.

The Minnesota Public Utilities Commission authorized a power line for BS2 electricity in January, but with conditions.

One condition was that Otter Tail must close its Hoot Lake coal burner within 10 years.

The other condition was that none of the BS2 utilities could stick Minnesota ratepayers with the bill for any costs

above their estimated construction price tag, or their estimated costs for compliance with federal climate change legislation.

By contrast, the North Dakota Public Service Commission wrote the utilities a blank check in its “pre-prudence” finding, and prevented DRC from submitting for the record the expert testimony of David Schlissel on the estimated costs of climate change compliance.

MDU, which has no Minnesota customers, said it would continue to seek new partners for the project.

DRC challenged the North Dakota PSC decision in court on the basis that state law forbidding the PSC to consider costs of future environmental regulations violated North Dakota

ratepayers’ constitutional right to equal protection under the law.

Burleigh County Court ruled against DRC August 19.

DRC entered the PSC “pre-prudence” proceedings in early 2007, and several partners withdrew from the project later that year, including Great River Energy, a co-operative which produces electricity at Coal Creek Station, near Underwood for its Minnesota customers, forcing a scale-down of the proposed plant.

By withdrawing, GRE turned its back on a \$10 million grant awarded by the North Dakota Industrial Commission.

The PSC granted Otter Tail and MDU pre-prudence in September 2008 for their participation in BS2.



# STARK COUNTY REZONES FOR GTL

The Stark County Commission expressed its support for GTL Energy’s coal preparation plant over the past two months by changing its zoning ordinance and rezoning an area near South Heart for industrial use.

The Commission approved the zoning change unanimously October 6.

Proponents of the project cited economic development as their rationale, and also the hope that GTL’s experimental coal drying process would allow North Dakota lignite to be shipped to distant markets and compete with Powder River Basin coal.

A judge’s decision nullified an earlier zoning change for the same area on the basis that the county failed to follow its own zoning rules and comprehensive plan.

The Commissioners gave no consideration to conditions proposed by DRC’s attorney, Derrick Braaten.

Braaten proposed conditions requiring that at least 50% of plant employees should be Stark County residents.

He also suggested that the county take a more active role in monitoring emissions, solid waste and road use in connection with the plant.

Instead, the county attached the same four conditions included in the permit the first time around, and claimed they had all been met.

It said the States Attorney’s review of the permit’s compliance was complete, and that a public meeting held earlier in South Heart would not have to be repeated.

The county also cited a road agreement reached with the company, ignoring area resident Mary Hodel’s testimony that it was already being routinely violated.

Commissioners also agreed that GTL had received all its state permits.

However, DRC has filed a complaint with the state Public Service Commission that GTL has failed to obtain the mining permit normally required for coal preparation facilities.

Great Northern Project Development has yet to submit state or county permit applications for coal mining or coal conversion facilities.

The county made the new zoning possible by acting in September to strike a regulation requiring consent from all adjacent landowners.

# TAKING THE 50-YEAR VIEW

by Verle Reinicke

Electrical energy needs are growing, resulting in the need for even more generation—so say energy producers lately. That means proposals for even more, and often bigger, coal-fired power plants.

One such project, Big Stone II, in northeast South Dakota has been planned for years, a cost-sharing, seven-utility-company consortium agreeing to build it, among them Otter Tail Power, Minnesota, and North Dakota-based Montana Dakota Utilities.

Big Stone II has a history of gains and losses. Most recently, Otter Tail Power announced its withdrawal (see p. 6), citing the economic downturn and uncertainty about regulation of carbon emissions.

Two other members, Great River Energy and Southern Minnesota Municipal Power Agency, preceded Otter Tail.

I applaud Otter Tail and think MDU should follow suit. If the \$1.4 to \$1.6 billion project were completed, my MDU bill would increase because a share of the plant costs being passed on to me and all other MDU customers, but not one watt of Big Stone generation would ever be sent to my house. A kind of taxation without representation.



The reality is that energy costs are going up even without any carbon regulation because the cost of fossil fuel-generated electricity is going up all by itself.

Those saying costs will skyrocket with carbon emission regulation say next to nothing about how all of us can be more efficient in our use of energy, thus reducing the need for more power and generation and the possibility of lower costs.

I think planning our energy policy means that we start by thinking 50 years into the future and working back from there. That is, what do we need to be doing now, how do we need to think now in order to realize a smaller need for fossil fuel-load-base electrical generation in the future?

*(Verle Reinicke is a retired Lutheran pastor living in Bismarck, and currently Assistant Secretary of the DRC Board of Directors. His com-*

*ments appeared as a letter to the editor in the Bismarck Tribune.)*



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# CLIMATE CONTROL: EPA OR CONGRESS?

It may not have been a coincidence that the U.S. Environmental Protection Agency and the U.S. Senate moved on climate change on the same day.

EPA proposed September 30 that polluters reduce emissions of carbon dioxide and five other greenhouse gases by installing best available technology whenever a new facility is built or an old one significantly modified.

On the same day, Sens. Barbara Boxer (D-CA) and John Kerry (D-MA) presented climate change legislation to the Senate.

Like the House bill, American Clean Energy and Security Act (ACES), which barely passed that chamber in May, the Senate version is a cap and trade bill, featuring free carbon allowances to utilities, which are then expected but not required to pass along the savings to consumers.

One feature of ACES opposed by DRC and many other groups was that it would strip EPA of the right to regulate

the greenhouse gases that it determined in April to be a threat to human health and the environment.

The Senate bill would reportedly lift that ban on EPA regulation of the gases—but not for about 20 years.

Passage of a Senate climate bill any time soon is far from certain, however, with Republicans largely opposed and some Democrats too, and the need for 60 votes to avoid a filibuster.

Meanwhile, the global warming clock is ticking away.

EPA Administrator Lisa Jackson told press the agency’s plan, modeled on regulation of other pollutants such as sulfur dioxide, would apply to industrial plants that emit at least 25,000 tons of greenhouse gases a year.

Such facilities are responsible for about 70% of U.S. greenhouse gas emissions.

“We know the corner coffee shop is not the meaningful place to look for carbon reductions,” Jackson told the Associated Press.

*Don't forget the annual meeting  
October 24 in Devils Lake*

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