

The U.S. District Court has dismissed claims by the Farm-to-Consumer Legal Defense Fund that Michigan's mandatory cattle-tagging program violates federal laws.

By Claire Swedberg

July 30, 2009—A federal judge has quashed a lawsuit instituted by the [Farm-to-Consumer Legal Defense Fund](#) (FTCLDF). The national nonprofit organization, representing small farmers, filed the suit in 2008 against the [U.S. Department of Agriculture](#) (USDA) and the [Michigan Department of Agriculture](#) (MDA).

The FTCLDF had argued that the USDA's [National Animal Identification System](#) (NAIS) violated federal laws, and that the MDA's cattle-tracking program—which requires all Michigan cattle farmers to identify every animal by means of an RFID tag—is a financial burden to small farmers. In addition, the group had maintained that NAIS violates the religious freedoms of cattle owners who believe God prohibits their participation in any sort of governmental regulatory system that imposes upon them a "mark of the beast," as described in the *Bible's* Book of Revelations.

The FTCLDF also claimed that rules under the National Environmental Policy Act (NEPA) were violated—namely, that environmental, economic and social impacts were not properly evaluated before the establishment of Michigan's and the USDA's cattle-tracking programs. What's more, the suit contended that the USDA unfairly pressured the state into adopting a mandatory cattle-identification program.

U.S. District Judge Rosemary M. Collyer determined, however, in a July 23 decision, that the MDA's program was not influenced by the USDA, indicating that the agency does not require any state or rancher to employ RFID technology to track cattle. The judge ruled that the MDA program was instead a state regulation subject to Michigan's laws, rather than those of the federal government. For that reason, she ruled the counts against the MDA to be invalid. In her decision, Judge Collyer noted that with NAIS, states "may choose to keep premises registration voluntary or not, based on local needs."

Furthermore, the judge ruled that "each of [the] plaintiffs' six counts against USDA hinges on the erroneous assertion that NAIS requires the registration of PINs and the use of RFID tags.... NAIS is neither 'federal law' nor 'federal regulation.' It is an identification and tracking program developed by USDA and adopted by state agriculture departments on a voluntary basis." She, therefore, dismissed the plaintiffs' counts against the USDA.

In the wake of Judge Collyer's decision, the FTCLDF now has four options before it, according to the organization's president, Pete Kennedy: filing a motion for reconsideration with the judge (which must be done this week); appealing the decision at the appellate court level; filing a new lawsuit against only the MDA, since the judge rejected the suit largely because the MDA program is a state rather than federal regulation; or dropping the matter entirely. Of those options, Kennedy says, the first is the most likely to be considered, though he adds that the group has yet to decide on its next course of action.

The FTCLDF, along with six Michigan farmers who are among the organization's members, challenged the implementation and enforcement of the mandatory program created to control outbreaks of disease. Bovine tuberculosis (TB) was discovered in Michigan in 1998, and is suspected to have been originally transmitted by wild deer. At that time, the MDA launched early stages of the cattle-identification program that is still in place today. Initially, specific zones within the state were targeted for animal identification. In October 2002, farmers in some zones were required to utilize electronic tags—namely, RFID.

The following year, the USDA launched the National Animal Identification System to help the federal agency track animals nationwide in the case of disease outbreak. The MDA and the USDA entered into memorandums of understanding (MOUs) in which they set up zones for animal tracking in Michigan. In March 2007, the state's electronic tagging requirement became statewide.

Unlike Michigan's program, NAIS does not require that RFID tags be used, nor that identification be made mandatory on all farms. The plaintiffs, however, complained that "the USDA was using the State of Michigan as a puppet to implement NAIS in Michigan under the guise of eradicating TB." While the FTCLDF argued that the agency had pressured the Michigan Department of Agriculture into the program, the USDA and the MDA responded that the state's animal-identification program was launched before they'd established any agreements or MOUs.

Kevin Kirk, special assistant to the MDA's division director, says "We implemented this program nearly 10 years ago in the lower peninsula" to identify cattle and farmers in an area considered vulnerable to bovine TB. "This was done pre-NAIS. The state already had implemented its program when the USDA established NAIS. Michigan is the only state with a mandatory electronic animal-tracking program, but it is also the only state with documented bovine TB cases, so other states haven't had the reason for it."

For a period of time, the state subsidized farmers in some counties, but since June 2009, most have had to pay for the RFID tags themselves. The greatest concern among small farmers, Kirk indicates, seems to be the expense of the tags, which cost approximately \$2.25 apiece. Thus far, he says, Michigan users have purchased about \$2 million worth of tags.

"It's a small cost," Kirk says of the tag expense, noting that a small farmer purchases a correspondingly low quantity of tags. "But it's important in protecting the health of that farm."

According to Kirk, the average Michigan cattle farm has 65 animals. "I think the next step is [to follow] the improving quality of readers in the market," he says, adding that many of the state's cattle owners have begun using the tags as a management tool. "It's become a vital tool on the farm" to track animals, he explains, as well as their health and vaccination history.

For some, Kennedy counters, the benefits are not worth the expense. "We still think the economic impact on small farmers is going to be significant," he says.

Judge Collyer seemed to agree. "Living a pastoral life in the 21st century is clearly a struggle," she wrote, "and plaintiffs' complaints about forced electronic tagging and forced inclusion in a national database are understandable."

The plaintiffs' lawsuit contained 11 separate counts: five directed at the USDA, five at the MDA and one at both. Specifically, the parties alleged that in the USDA's establishment of the National Animal Identification System, the agency violated the requirements of the Administrative Procedure Act (APA), the Regulatory Flexibility Act (RFA), the National Environmental Policy Act (NEPA) and the Religious Freedom Restoration Act (RFRA), as well as procedural and substantive due process under the Fifth Amendment to the U.S. Constitution. The plaintiffs further alleged that Michigan's implementation of NAIS violated procedural and substantive due process under the Constitution's Fourteenth Amendment, as well as NEPA, RFRA, the requirements of Michigan's Administrative Procedure Act and the free-exercise clause of the state's constitution.