

MEDIATION MINUTE

NORTH DAKOTA DEPARTMENT OF AGRICULTURE

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Federal court rules against USDA on organic program administration

A federal appellate court has ruled that U.S. Department of Agriculture overstepped its authority in implementing the National Organic Program.

Established under the federal Organic Foods Production Act (OFPA), the program provides for third-party certification of organic farmers and food processors. Food that is certified organic may bear the USDA organic seal; food that is certified as containing a qualifying percentage of organic ingredients may make that claim on its label.

In 2003, Arthur Harvey, an organic blueberry grower, organic inspector and organic food consumer, sued USDA in federal district court claiming that regulations implementing the organic program were inconsistent with the OFPA

in nine different respects. After the district court granted summary judgment for USDA on all nine claims, Harvey appealed the judgment on seven of the claims to the First Circuit Court of Appeals, claiming in general that some regulatory exceptions were unlawfully broad and some restrictions on certifying agents were unlawfully stringent.

The Farmers' Legal Action Group (FLAG) and the Center for Food Safety submitted an *amici curiae* (friends of the court) brief to the court on behalf of the Rural Advancement Foundation International-USA (RAFI), the Center for Food Safety, and Beyond Pesticides. The brief provided additional information and support for three of Harvey's claims.

On Jan. 26, 2005, the circuit court ruled in Harvey's favor on the issues addressed in the *amici* brief. The three National Organic Program regulations that the appeals

court found to be in violation of the OFPA involved use of certain synthetic ingredients in organic processed foods, use of non-organic ingredients in organic processed foods when organic ingredients are commercially unavailable, and allowance of a percentage of non-organic feed to be fed to dairy animals during the transition to organic management.

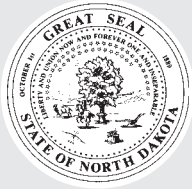
After further clarifying its determination on the use of certain synthetic ingredients in organic processed foods, the circuit court returned the case to the district court in Maine for a final judgment.

“The Secretary’s rule-making authority does not extend to the adoption of regulations that are inconsistent with the act.”

Amicus curiae filed by FLAG
in Harvey v. Veneman

On June 9, the district court issued a consent final judgment and order in the case. The order directs USDA to adopt a specific, more restrictive interpretation of program regulations concerning the use of non-organic agricultural products in organic processed foods when organic ingredients are not commercially available, and directs USDA to notify the public and all certifying agents of the change. With respect to the use of certain synthetic ingredients in organic processed foods and the conversion of dairy herds from non-organic to organic management, the order directs USDA to adopt new rules complying with the court's order within one year. The order gives farmers and food processors a two-year grace period (until June 9, 2007) to come into compliance with the changes required by the appellate court's ruling, the declaratory judgment and the two new rules.

The original version of this article is by Jill Krueger, an attorney with the Farmers' Legal Action Group (FLAG) and appeared in the January 2005 issue of Farmers Legal Action Report.



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Administrator's corner . . .

Since its beginning about 15 years ago, the North Dakota Agricultural Mediation Service (NDAMS) has directed most of its energies toward helping farmers and ranchers deal with financial problems, such as resolving disputes with creditors.

Fewer farmers and an improved agricultural economy has lessened the need for help with resolving these types disputes.

In the meantime, however, certified state mediation programs like North Dakota have proven to be a valuable tool for U.S. Department of Agriculture, which has expanded the use of mediation to a number of other programs. Mediation is now used to resolve disputes involving wetland determinations, conservation programs, rural water issues, grazing on public lands, pesticides and others.



Tom Silbernagel

According to recent information from the Farm Service Agency's Office of Civil Rights, FSA will increase the use of "alternative dispute resolution" techniques, such as the USDA Certified State Mediation Program, to achieve satisfactory resolution of program issues as quickly as possible and at the lowest possible level.

Since FSA has chosen to use mediation in other programs, we must change our program to meet the new challenges. This transition may be difficult, but it is sure to make NDAMS stronger and more versatile.

The author is administrator of the North Dakota Agricultural Mediation Service.

Rule affects borrowers on active duty

The Farm Service Agency (FSA) has posted FLP-368 providing guidance on laws for Farm Loan Program (FLP) borrowers who are impacted by military deployment. Under the Service Members Act and the National Defense Act, existing FLP payments of borrowers on active duty will be deferred and interest will not accrue beginning on Oct. 28, 2004, or the date in which they enter active duty (whichever is later). FSA will not foreclose on property while a borrower is in active duty and for three months thereafter. Treasury and internal administrative offset will be discontinued once a borrower is ordered to report for induction or military service. Co-borrowers associated with such debts must also not be offset in an effort to reduce hardship on the family. Similar provisions also affect guaranteed loan borrowers.

The notice, effective Dec. 9, 2004, can be found at ftp://ftp.fsa.usda.gov/public/notices/FLP_368.pdf.

A mediation success story

Guaranteed loan/loss case resolved

The following story is an actual case, and is published by the U.S. Department of Agriculture

Context: The Farm Service Agency (FSA) regularly guarantees loans that local banks make to farmers on FSA's behalf. When a farmer defaults on the loan, the bank can then apply to FSA for reimbursement of its loss. However, eligibility for reimbursement is forfeited if the lender has not complied with FSA regulations on filing claims and issuing the loan. In the summer of 1999, a bank received a letter from the state FSA office giving notice of the refusal to reimburse the bank on a loan loss claim. The bank's vice president requested mediation in order to discuss face to face with the FSA official the reasoning behind the refusal.

Intervention: Upon receiving the request for mediation from the bank, the state agricultural mediation program staff contacted one of the mediators under contract and set up a mediation session with the FSA representative and

the bank vice president. Neither the FSA representative nor the bank officer had participated in mediation previously. The vice president chose mediation because he wanted to further discuss the "dictum" stated within the refusal letter and because he believed that up to this point, FSA had been unresponsive to his requests for explanation. Although he was aware of FSA regulations regarding loan loss reimbursement, he believed that this reimbursement request fell into a "gray area." Both parties were surprised that they did most of the talking in the mediation session. The mediator saw that they were communicating well and decided to "take a back seat." The FSA representative clarified that the bank had allowed inappropriate use of the funds and had completed the required paperwork incorrectly. He made the reasons for FSA's denial of the reimbursement clearer to the bank vice president.

Outcome: Once the bank vice president understood what had been wrong in the loan processing, he accepted the

State office's decision. The two men then decided to meet again, without the mediator, so that the FSA official could coach the vice president on how future guaranteed loans should be completed. This meeting soon followed, which, the bank vice president noted, was "useful for us."

Cost/Benefit: The FSA representative does not believe that mediation is always effective, but felt it was necessary here, as both men had come to a "hard stand" in their views and positions on the issue. According to the FSA representative, the mediation allowed the dispute to be resolved calmly without further escalation. The bank vice president sensed that he and the representative "did not see eye to eye," but the tenor of his relationship with the representative changed dramatically as a result of the mediation. "When people take the time to sit down one on one there's a lot of respect." Not only was an increasingly tense situation resolved, but also the working relationship between the two men is now on positive, productive footing. The bank holds \$4.8 million dollars in guaranteed FSA loans, and its ability to continue making these loans is crucial to the small farming community in which it is located. The bank vice president now feels more assured in going to his board of trustees and urging them to continue making FSA guaranteed loans, and the FSA official feels confident the bank will now adhere closely to FSA regulations. This came at no cost to the FSA office, and involved only two short meetings of the office's director. As a result of the mediation, this FSA office now has a better working relationship with a key partner to its mission to assist farmers. FSA can now better serve its clients with less time spent doing so.

Mediation briefs

Legislation extends mediation to 2010

Recently introduced federal legislation would extend state mediation programs until the year 2010. U.S. Sen. Pat Roberts, R-KS, introduced Senate Bill 643, while the House version was introduced by Rep. Frank Lucas, R-OK. Both bills are moving through Congress with little opposition.

Negotiators get new software

The North Dakota Agricultural Mediation Service has purchased a new financial software program, Farm Equity Manager, for its field staff. The program provides detailed financial information on farm operations ranging from trend analysis to performance ratios. The program can handle FSA guarantees. Information is usually inputted only once and flows from area to area as needed. Many banks are now using the program, and the Farm Service Agency recently adopted a web-based version of the software. NDAMS Administrator Tom Silbernagel said he hopes that the agency will be able to exchange information electronically with lenders, including FSA.

Meet the staff

Negotiator Tony Wixo actually predates the Agricultural Mediation Service; Tony started with the Farm Credit



Tony Wixo

Counseling Program in 1984. Since then he has served as senior negotiator and as agricultural representative on the award-winning Farmer-Rancher Demonstration Project with Job

Service. He now works out of a field office in McVille and operates a farm near Larimore.

Tony and his wife Sylvia, a registered nurse at the McVille Clinic, live in McVille. They have two grown children, Tony and Angela, and four grandchildren.

Ag credit legislation now law

Several bills affecting agricultural credit were considered by the 2005 North Dakota Legislature and have now become law.

House Bill 1312 creates a new section of North Dakota Century Code that deals specifically with deficiency judgments on agricultural land. Under the old law (most of which has now been changed) creditors found it difficult, if not impossible, to obtain judgments on agricultural land. The law required a jury to determine the fair value (different from fair market value) of the land. Not only was the process time consuming, it often prevented the award of judgment, since juries often determined the land was worth less than the amount of the debt. Under the new law, the court alone, not a jury, determines the fair value.

House Bill 1315 affects the redemption period during the foreclosure process. The redemption period is the time during which the debtor may redeem or buy back the property from the purchaser and is normally one year from the time of the sheriff's sale (forced sale) of the property. Under the new version of this law the redemption period remains one year but begins at the time the summons and complaint is filed against the debtor. The final day for redemption however may not be earlier than 60 days after the sheriff's sale.

The Legislature killed House Bill 1026 which would have reduced the period of property tax delinquency before foreclosure from four to two years before the tax would become due. Although the bill came to the floor of the House with a do-pass recommendation, it was defeated 52 to 38.

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