



• Kava •

Boykin Spaniel, An All American Breed

MEMORANDUM

Robert S Simon
Post Office Box 820035
Sellwood Station
Portland, Oregon 97282-1035
503-417-8766 • 503-417-8767 (facsimile)

PREPARED BY: Legal Counsel; Robert S Simon, for **THE Robert S Simon LAW FIRM**, Robert S Simon P.C., an Oregon Professional Corporation; Robert@RSSimonlaw.com

TO: Animal Law Section Members

DATE: Wednesday, March 25, 2009

RE: Proposed Mandatory National Animal Identification System (NAIS) and the Effect on Small Lot and Organic Animal Husbandry Economics

The USDA has requested comments on the proposed rule to make mandatory the NAIS for all livestock husbandry. All action on the rule making was suspended by President Obama for 9 months under a full executive branch review of Bush Administration rules. The USDA is still taking comments. The issue has become hotly contested, and in my view, echoes the local debates on the licensing/registration of dogs, cats, and in particular urban chickens. The battle is being joined on all sides covering the same fields as we see in the local debates for companion animals and the role of animal services and vector control departments. The USDA side, as supported by the AVMA, is that in the event of a medical emergency there is a probability that we could locate most at risk animals rapidly. The opposition side, reflected in editorial comments and a pending lawsuit, is that small and organic farms will be overwhelmed by the cost and paperwork of the existing system which is designed for large scale husbandry operations, and that privacy will be invaded through the registration process which requires using only the federally provided number series.

Currently, the NAIS is voluntary and registration is spread across several different databases and jurisdictions. Numbering (if used at all) follows the branding laws in some states and the vector control laws in others. Through NAIS the USDA provides a link to each state for site specific registrations performed through the state level interface. <http://animalID.aphis.usda.gov/nais> . Through the requirement that all livestock numbering be with a "840" prefix (international numbering which identifies the United States as the country of origin) the USDA will effectively require NAIS universal livestock registration .

The U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) released the proposed rule making permanent as series of interim rules dating back to 2004 regarding official animal identification (ID) numbering systems. This proposed rule, published in the *Federal Register* Jan. 13, 2009, (Volume 74, Number 8, pp. 1624-1643), is titled USDA APHIS “Official Animal Identification Numbering Systems” and will directly affect cattlemen, according to National Cattlemen’s Beef Association (NCBA). The rule is intended to create uniformity of official numbering systems and ear tags used in official animal disease programs and the National Animal Identification System (NAIS), according to APHIS. The proposed rule can be found at www.regulations.gov (search for Document ID: APHIS-2007-0096-0001).

The Federal Register reports in part that “[m]oving to one uniform, standardized, technology-neutral numbering system for the identification of livestock, however, is essential to achieving more efficient and effective animal disease traceability. Therefore, in the Supplementary Information section of our July 2007 final rule, we noted that we viewed the [existing] USA and manufacturer’s code numbering systems as transitional. We anticipated phasing them out as we focused our efforts on moving toward a single system whereby APHIS would recognize as official only the AIN with the 840 prefix to the extent practical.”

The proposed APHIS rule seeks to amend current domestic livestock regulations to allow only numbers beginning with an 840 prefix to be used to tag animals for use in official programs such as existing disease control efforts. Numbers beginning with 840 are specific to the NAIS program, and, in order to obtain an 840-numbered tag, animal owners will need to first register their premises with NAIS.

The cattle industry press has reported support for NAIS from the medical community. Beef Magazine (<http://beefmagazine.com>) recently posted the following: “Making the National Animal Identification System (NAIS) mandatory would allow for the quick control of diseases entering the food supply, W. Ron DeHaven, CEO and executive vice-president of the American Veterinary Medical Association (AVMA) told Congress this week. Currently it is a voluntary program in which about 35% of livestock operations in the U.S. have registered AVMA says a mandatory animal ID tracking system would be the most effective way to minimize an animal disease outbreak. Administered by USDA's Animal and Plant Health Inspection Service (APHIS), NAIS is an information system under which food animals are tagged so their movements can be tracked in the event of a disease outbreak. The speedy turnaround could save millions of animal lives and billions of dollars, as well as shield public health and U.S. trade from profound damages, DeHaven told Congress.”

The opposition finds the NAIS as an intrusion into traditional farm life style. One typical opinion is found on <http://nonais.org> . Recently the site posted the following: “Sharon Zecchinelli, a.k.a. HenWhisperer, has written a semi-fictional historical account of NAIS to

date and a little into the future. *** *First They Came for the Cows* is a good narrative of the story of the struggle against the USDA's proposed National Animal Identification System (NAIS). Everyone involved, from farmers to activists to government officials will find nits to pick. Sharon has things in there that will piss off some people and left out things that will upset other people. It is never worth trying to please everyone."

The Farm-to-Consumer Legal Defense Fund (<http://www.ftcldf.org>) called on the Obama administration to permanently halt the NAIS proposed rule. "The APHIS regulation is further evidence of the department's unrelenting effort to make a so called voluntary program mandatory, and it should be permanently stopped by the new administration," said interim Fund president Pete Kennedy according to the press releases posted on the Fund's web site. The Fund filed suit last year against the USDA to stop the mandatory implementation of NAIS. The suit was filed in the U.S. District Court for the District of Columbia on September 8, 2008 and amended on January 16, 2009 and requests injunctive relief against the rule making. The allegations include violations of the FAPA, NEPA, the Religious Freedom Restoration Act, and the Regulatory Flexibility Act (that requires the USDA to analyze proposed rules for the effects on small farms). "This proposed rule is just the latest in a series of actions taken by the USDA to make NAIS mandatory over the objections of small farmers, ranchers and four state legislatures," Kennedy noted. "Not only will the use of the 840 tags cost them money, but their private information and data will now be entered into a national database that will be accessible not only by state and federal agencies, but also by private organizations. Farmers don't want that," Kennedy said.

The New York Times, March 11, 2009, Op -Ed Section printed comments from Shannon Hayes ("Tag, We're It") from Warnerville, N.Y. "For factory farms, the costs of following the procedures for the system would be negligible. These operations already use computer technology, and under the system, swine and poultry that move through a production chain at the same time could be given a single number. On small, traditional farms like my family's, each animal would require its own number. That means the cost of tracking 1,000 animals moving together through a factory system would be roughly equal to the expense that a small farmer would incur for tracking one animal. These ID chips are estimated to cost \$1.50 to \$3 each, depending on the quantity purchased. A rudimentary machine to read the tags may be \$100 to \$200. It is expected that most reporting would have to be done online (requiring monthly Internet fees), then there would be the fee for the database subscription; together that would cost about \$500 to \$1,000 (conservatively) per year per premise. I estimate the combined cost for our farm at \$10,000 annually — that's 10 percent of our gross receipts. Imagine the reporting nightmare we would face each May, when 100 ewes give birth to 200 lambs out on pasture, and then six weeks later, when those pastures are grazed off and the entire flock must be herded a mile up the road to a second farm that we rent. *** Each time one of those animals is sold or dies, or is trucked to a slaughterhouse, we would have to notify the Agriculture Department. And there would be penalties if we failed to account for a lamb quietly stolen by a coyote, and medical bills if we were injured when trying to come between a protective sow and her piglets so we could tag them. For my family, the upshot would be more expenses and a lot more time swearing at the computer. The burden would be even worse for rural families that don't farm full-

time, but make ends meet by keeping a flock of chickens or a cow for milk. The cost of participating in the system would make backyard farming prohibitively expensive.”

The comparison to the current local government debates over companion animal registrations reveals an echo of many of the same concerns. The government wants the revenue from registration and the information for safety of first responders and vector control, according to the City of Portland and Multnomah County Joint Task Force Report on Animal Services. <http://www.portlandonline.com/leonard/index.cfm?c=47796> . Yet many citizens do not see the benefit of the information or do not think the benefit outweighs the intrusion.