

## IT'S ELEVEN O'CLOCK, DO YOU KNOW WHERE YOUR CHICKEN IS?

### THE CONTROVERSY SURROUNDING THE NATIONAL ANIMAL IDENTIFICATION SYSTEM AND ITS APPLICATION TO SMALL AND ORGANIC FARMERS

#### INTRODUCTION

Bovine Spongiform Encephalopathy (BSE), or “Mad Cow Disease,” is devastating not only to persons who contract the human variant of the disease, but to national economies as well. In the wake of the December 22, 2003, discovery of BSE in a Washington dairy cow, many foreign countries banned the importation of ruminants (sheep and cattle) and ruminant products from the United States.<sup>1</sup> These countries accounted for ninety percent of all U.S. beef exports at the time.<sup>2</sup> Foot and Mouth Disease (FMD), while not transferable to humans,<sup>3</sup> nonetheless can be equally economically devastating. The 2001 FMD outbreak in the United Kingdom caused an estimated \$5 billion in damage to its agriculture industry and \$3–\$4 billion in damage to its tourism industry.<sup>4</sup> The United Kingdom’s efforts to control and eradicate BSE in 1988 led to the wholesale slaughter of 3.7 million animals.<sup>5</sup> Only 183,000 were confirmed as BSE positive.<sup>6</sup> The 2001 United Kingdom FMD outbreak resulted in the slaughter of nearly 3 million animals.<sup>7</sup> The risks presented by contagious animal diseases such as BSE and FMD have led to calls for a database that would allow federal and state agricultural agencies to quickly trace the path and current locations of diseased animals. This database would allow the agencies to rapidly contain and deal with disease outbreaks.

As envisioned by the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS), this database, now known as the National Animal Identification System (NAIS), has the potential to enable federal government tracking of agricultural animals in near real-time. The USDA originally intended to make participation in the

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1. GEOFFREY S. BECKER, CONG. RESEARCH SERV., BOVINE SPONGIFORM ENCEPHALOPATHY (BSE, OR “MAD COW DISEASE”) IN NORTH AMERICA: A CHRONOLOGY OF SELECTED EVENTS 11 (2006) [hereinafter BECKER, BSE].

2. *Id.*

3. Andrew H. Nelson, Comment, *High Steaks: Defending North Carolina’s Response to Contagious Animal Diseases*, 83 N.C. L. REV. 238, 241 (2004).

4. *Id.* at 244–45.

5. BECKER, BSE, *supra* note 1, at 3.

6. *Id.*

7. Nelson, *supra* note 3, at 244.

NAIS mandatory for all owners of agricultural animals.<sup>8</sup> It has since backed off this requirement, though perhaps only temporarily.<sup>9</sup> The NAIS makes sense for farmers following the modern industrial agriculture model, where animals from many different sources intermingle and traverse long distances in interstate (and international) commerce.<sup>10</sup> However, the same recordkeeping and reporting requirements which make the NAIS beneficial to modern industrial agriculture make it extremely burdensome to small and organic farmers.<sup>11</sup> This Note is written primarily from the perspective of small and organic farmers, those in the agricultural community who have voiced the most ardent opposition to mandatory implementation of the NAIS. Parts I and II track the history and development of the NAIS. Part III introduces the opposition of small and organic farmers to the NAIS, and Part IV explores that opposition. Part V explores legal challenges to the NAIS, and Part VI explores the policy challenges. Part VII examines the USDA's response to small and organic farmers' concerns with the NAIS. Finally, Part VIII suggests possible solutions to small and organic farmers' issues raised by the NAIS.

## I. THE PATH LEADING TO THE NAIS

### A. *Animal-Disease Control Efforts Prior to the NAIS*

State and federal authorities have regulated contagious animal diseases for over 100 years. Initial efforts were met with resistance. In 1877 the Supreme Court ruled unconstitutional a Missouri statute aimed at preventing the spread of "Spanish or Texas fever" among cattle.<sup>12</sup> Then, in 1884 Congress passed a statute entitled: "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle,

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8. See Theo Emory, *Plan for Tracking Animals Meets Farmers' Resistance*, N.Y. TIMES, Dec. 13, 2006, at A23 ("Although the effort, the National Animal Identification System, intended to trace a sick animal to the property it came from within 48 hours, is still in early, voluntary stages, the United States Department of Agriculture has had to retreat from a proposal to make it mandatory.").

9. *Id.*

10. See E-mail from Chuck Wooster, Owner, Sunrise Farm, to author (Mar. 8, 2007) (on file with Vermont Law Review) (explaining that the NAIS will benefit large producers because they will be allowed to "identify animals by lots, not individually").

11. See *id.* (discussing the burdens the system will place on small farmers, including increased costs for tracking devices and significantly larger paperwork loads).

12. See *R.R. Co. v. Husen*, 95 U.S. 465, 468–69, 473–74 (1877) (holding that the statute in question, prohibiting the transportation through or into Missouri of any "Texas, Mexican, or Indian cattle . . . between the first day of March and the first day of November in each year," violated the Commerce Clause).

and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals.”<sup>13</sup> The act prohibited, among other things, the interstate transportation of “any live stock affected with any contagious, infectious, or communicable disease.”<sup>14</sup> The act did not, however, preempt the states from regulating the movement of diseased animals.<sup>15</sup> Instead it created a parallel state and federal structure for animal-disease regulation;<sup>16</sup> subsequent state regulation regarding the importation of diseased livestock has been upheld.<sup>17</sup>

Over time, the methods and regulations used to control contagious animal diseases have grown increasingly sophisticated. In the 1940s APHIS’s predecessor created an ear-tagging program to individually identify cattle vaccinated against and/or tested for brucellosis.<sup>18</sup> Thanks in part to this program, brucellosis has largely been eradicated in the United States.<sup>19</sup> APHIS also currently has eradication or control programs in place for tuberculosis, scrapie (sheep), pseudorabies (swine), Texas fever (cattle), scabies (cattle), and several poultry diseases.<sup>20</sup> Each of these programs has “established rules and procedures to identify and track animals, herds, or flocks back to their origin, if necessary,”<sup>21</sup> but only for the specific animals and diseases that they cover. These programs serve limited purposes. They are often victims of their own success; as their respective diseases come

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13. Act of May 29, 1884, ch. 60, 23 Stat. 31, 31 (originally codified as amended in scattered sections of 7 U.S.C. and 21 U.S.C. and partially repealed by the Animal Health Protection Act, Pub. L. No. 107-171, 116 Stat. 494 (2002)); *see also* Reid v. Colorado, 187 U.S. 137, 142–43 (1902) (discussing the scope and effect of the Act of May 29, 1884).

14. Act of May 29, 1884, § 6, 23 Stat. at 32, *repealed by* Animal Health Protection Act, Pub. L. No. 107-171, § 10418(a)(8), 116 Stat. 494, 508 (2002).

15. *See Reid*, 187 U.S. at 147–49 (stating that whatever power the states had to regulate was unimpaired by the act).

16. *Id.* at 143–44, 147–48.

17. *See id.* at 153. The Court held constitutional a Colorado statute prohibiting the importation “between the first day of April and the first day of November, [of] any cattle or horses from a State, Territory, or county south of the 36th parallel of north latitude” unless the animals had either been held in quarantine for ninety days previously or the owners had “procure[d] from the State Veterinary Sanitary Board a certificate . . . to the effect that said cattle or horses are free from all infectious or contagious diseases.” *Id.* at 139. The Court concluded that the Act of May 29, 1884, expressly invited the states to participate in the regulation of contagious animal disease and thus the Colorado statute did not violate the Supremacy Clause. *Id.* at 147–49, 153.

18. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., FACTSHEET: THE EVOLUTION OF THE NATIONAL ANIMAL IDENTIFICATION SYSTEM IN THE UNITED STATES (2005), *available at* [http://www.aphis.usda.gov/publications/animal\\_health/content/printable\\_version/fs\\_ahnaisevo.pdf](http://www.aphis.usda.gov/publications/animal_health/content/printable_version/fs_ahnaisevo.pdf) [hereinafter NAIS FACTSHEET]; GEOFFREY S. BECKER, CONG. RESEARCH SERV., ANIMAL IDENTIFICATION AND MEAT TRACEABILITY 4 (2006) [hereinafter BECKER, ANIMAL ID].

19. BECKER, ANIMAL ID, *supra* note 18, at 4.

20. *Id.*

21. *Id.*

under control, the incentive to participate disappears.<sup>22</sup> Only ten percent of U.S. calves are now vaccinated for brucellosis and tagged.<sup>23</sup> None of these programs provide the comprehensive data collection and tracking abilities envisioned for the NAIS.

*B. The Development of a National Animal Identification System*

As mentioned above, many of the successful animal disease eradication and control programs enable identification and tracking of animals back to their place of origin. In order to effectively control a contagious animal disease outbreak a government agency needs to know two things: (1) where a diseased animal was infected; and (2) where a diseased animal may have infected other animals. Such information allows the agency to track down animals carrying the disease and prevent them from spreading it to others. The United Kingdom BSE and FMD outbreaks mentioned in the introduction to this Note demonstrate the devastating rapidity with which contagious animal diseases can spread in the modern industrial agriculture system. FMD, for example, is capable of being transmitted “through the exhaled air, milk, semen, and blood of the infected animals, among other means.”<sup>24</sup> It “has a remarkable capacity for remaining viable in carcasses, in animal byproducts, in water, in such materials as straw and bedding, and even in pastures.”<sup>25</sup> The 2001 United Kingdom FMD outbreak went from a single case to an epidemic in one month.<sup>26</sup> The first diseased animal was discovered on February 20, 2001, and by May 2001 the government had slaughtered nearly 3 million animals in its attempt to control the outbreak.<sup>27</sup> This set the stage for discussion of how to prevent and control such an animal disease outbreak in the United States.

In 2002 the National Institute for Animal Agriculture (NIAA) organized a task force to create a work plan for a national animal identification program.<sup>28</sup> In October 2002 the work plan was presented to and accepted by the United States Animal Health Association (USAHA).<sup>29</sup> USAHA approached APHIS and requested that they establish a joint government-industry National Identification Development Team to create a

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22. *See id.* (“Generally, as disease programs succeed, fewer animals receive tags.”).

23. *Id.*

24. Nelson, *supra* note 3, at 242.

25. *Id.* (quoting PL 107-9 FED. INTER-AGENCY WORKING GROUP, ANIMAL DISEASE RISK ASSESSMENT, PREVENTION, AND CONTROL ACT OF 2001 (PL 107-9): FINAL REPORT 3 (2003)).

26. *Id.* at 244.

27. *Id.*

28. BECKER, ANIMAL ID, *supra* note 18, at 5.

29. *Id.*

national animal identification program, using NIAA's work plan as a guide.<sup>30</sup> The timing was perfect for APHIS because the USDA had been funding pilot animal identification projects for several years.<sup>31</sup> Consisting of "more than 100 professionals from approximately 70 agencies and organizations," the National Identification Development Team began drafting and in October 2003 presented USAHA with the United States Animal Identification Plan (USAIP).<sup>32</sup> USAHA approved the USAIP and the final draft was published in December 2003.<sup>33</sup>

USAIP sought to develop a system that could "identify individual animals or groups, the premises where they are located, and the date of entry to that premises."<sup>34</sup> The primary goal was to have the ability "within 48 hours of confirmation of a disease outbreak" to retrieve that information and make it available to the appropriate agencies.<sup>35</sup> USAIP asserts that forty-eight hour traceback is necessary "in order to achieve optimal success in controlling or eradicating an animal health threat."<sup>36</sup> USAIP envisioned a system administered by APHIS but jointly governed by federal and state authorities with industry input.<sup>37</sup> As luck would have it, while the final draft USAIP was going to press, a certain dairy cow in Washington State was going to slaughter. In the midst of the fear and Monday-morning quarterbacking following the first confirmed case of BSE in this country, the USDA stepped forward and began to take animal identification more seriously.<sup>38</sup>

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30. *Id.*; MICHAEL T. ROBERTS & HARRISON M. PITTMAN, NAT'L AGRIC. LAW CTR., LEGAL ISSUES IN DEVELOPING A NATIONAL PLAN FOR ANIMAL IDENTIFICATION 2-3 (2004), available at [http://nationalaglawcenter.org/assets/articles/roberts\\_animalid.pdf](http://nationalaglawcenter.org/assets/articles/roberts_animalid.pdf).

31. BECKER, ANIMAL ID, *supra* note 18, at 5.

32. *Id.*

33. *Id.*

34. NAT'L IDENTIFICATION DEV. TEAM, UNITED STATES ANIMAL IDENTIFICATION PLAN 5 (Draft Version 4.0 2003) [hereinafter USAIP DRAFT].

35. *Id.*

36. *Id.*

37. ROBERTS & PITTMAN, *supra* note 30, at 3.

38. See BECKER, ANIMAL ID, *supra* note 18, at 5 (noting that shortly after BSE was discovered in a cow from Washington State the "department stated that it would assume a more prominent role in the animal ID effort").

## II. THE NATIONAL ANIMAL IDENTIFICATION SYSTEM

### A. Basic Overview

The NAIS is presently still in development. While the USDA views the “USAIP plan [as] an important step in moving toward the implementation of the NAIS,” it does not seek to follow USAIP as a blueprint.<sup>39</sup> On April 25, 2005, the USDA produced two key documents related to the NAIS: its draft strategic plan for the implementation of the NAIS (2005 Draft Plan) and its draft program standards for the NAIS (2005 Draft Standards). Under the 2005 Draft Plan, the goal of the NAIS is the same as that of USAIP: “[T]o be able to identify all animals and premises that have had contact with a foreign or domestic animal disease of concern within 48 hours after discovery.”<sup>40</sup> Under the 2005 Draft Plan, the NAIS has three key components: premises identification, animal identification, and animal tracking.<sup>41</sup>

Premises identification is exactly what it sounds like: any location that “manage[s] or hold[s] animals” is to be assigned a seven-character premises identification number.<sup>42</sup> While the exact definition of “premises” is to be left to the states and tribes,<sup>43</sup> it is safe to assume that “premises” will include any location that houses an animal other than a standard domestic pet.<sup>44</sup>

Animals are to be tracked one of two ways. They will be given either an individual “Animal Identification Number” (AIN) or a “Group/Lot Identification Number” (GIN) (for animals that are raised and managed in groups, such as poultry).<sup>45</sup> The method of identifying each animal is to be determined by the animal industry, though there is a focus on methods which lend themselves to easy computerization and quick information

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39. NAIS FACTSHEET, *supra* note 18.

40. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., NATIONAL ANIMAL IDENTIFICATION SYSTEM (NAIS): DRAFT STRATEGIC PLAN 2005 TO 2009, at 12 (2005) [hereinafter 2005 DRAFT PLAN].

41. *Id.*

42. *Id.*

43. *Id.* at 8.

44. *See id.* at 13 (stating that tracing plans are being developed “for camelids (llamas and alpacas), cattle and bison, cervids (deer and elk), equines [horses], goats, poultry, sheep, and swine [pigs]”); USAIP DRAFT, *supra* note 34, at 5. The USAIP draft report lists affected species and industries as including “bison, beef cattle, dairy cattle, swine, sheep, goats, camelids (alpacas and llamas), horses, cervids (deer and elk), poultry (eight species including game birds), and aquaculture (eleven species).” *Id.* “These [identification] standards will apply to all animals within the represented industries regardless of their intended use as seedstock, commercial, pets, or other personal uses.” *Id.*

45. 2005 DRAFT PLAN, *supra* note 40, at 12.

access.<sup>46</sup>

Animal tracking integrates the premises identification and animal identification components. As each animal or group of animals moves from premises to premises, the movement is recorded,<sup>47</sup> allowing the USDA to know not only where an animal is but where it has been. This is the key to achieving the forty-eight hour traceback goal.<sup>48</sup>

### B. How It Would Look in Action

Farmer Jeff and Farmer Harold both raise and sell beef cattle. Each of their farms has a Premises ID. Each one of their cows has its own AIN. Farmer Jeff is very conscientious and as a result his cows are healthy and disease free. Farmer Harold does not put the same care and effort into his operation, and as a result his cows have become infected with Perturbed Cow Disease,<sup>49</sup> a nervous disorder which can be passed directly from cow to cow. Jeff and Harold both sell some of their cows to Bob's Feedlot. Bob's Feedlot finishes raising the cows for slaughter along with many others it has purchased. Harold's cows have not shown any outward signs of Perturbed Cow Disease yet, but they have managed to infect almost the entire feedlot. Once the cows have been fed out, Bob's Feedlot sells them to Beef Corp., a large slaughterhouse and meat packing company that processes beef for sale in national supermarket chains.<sup>50</sup>

Once at Beef Corp.'s slaughterhouse, the cows begin to show signs of Perturbed Cow Disease. On-site USDA inspectors stop the slaughtering operation and begin testing the cows for Perturbed Cow Disease. Using the AINs assigned to each cow, they use the NAIS database to determine that the infected cows came from Bob's Feedlot. The USDA stops Bob's Feedlot from purchasing or selling any more cows and conducts testing on the animals remaining there. They discover more cows infected with Perturbed Cow Disease which had been recently purchased from a number of farmers including Jeff and Harold. Finally, USDA inspectors travel to each of the farms to test the animals there. It is discovered that Harold's cows are the only ones infected with Perturbed Cow Disease and the USDA works to eradicate the disease there.

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46. See *id.* at 13 (listing animal identification methods such as "electronic identification, retinal scan, DNA, etc.").

47. *Id.* at 12.

48. *Id.*

49. A fictitious disease created solely for purposes of this hypothetical.

50. This is the modern beef production chain on a small scale. For a more complete account of modern industrial beef production, see generally ERIC SCHLOSSER, *FAST FOOD NATION* 133–224 (2001) (discussing beef production from calf to cheeseburger).

### C. Implementation

The 2005 Draft Plan calls for a phased approach to NAIS implementation.<sup>51</sup> Participation would at first be voluntary, eventually becoming mandatory. The following timeline is laid out in the plan:

- 2005: Premises Identification operational in all states.
- 2006: Twenty-five percent of premises registered. Animal Identification Number system fully operational.
- 2007: Push for participation in Premises Identification and Animal Identification programs. Animal tracking system fully operational.
- 2008: Premises Identification and Animal Identification participation becomes mandatory with enforcement. Push for reporting animal movements into tracking system.
- 2009: Full NAIS implementation. Mandatory reporting of animal movements with enforcement.<sup>52</sup>

The USDA has asserted that no new legislation is required for it to make participation in the NAIS mandatory.<sup>53</sup> The USDA is developing the NAIS with the administrative rulemaking process in mind.<sup>54</sup>

### D. Concerns with the NAIS

The 2005 Draft Plan identifies four major areas of concern: cost, confidentiality, flexibility, and liability.<sup>55</sup> The first concern is summed up in the question: “Who will pay for all this?” Even if the cost of setting up

51. 2005 DRAFT PLAN, *supra* note 40, at 16–17.

52. *Id.*

53. U.S. Dep’t of Agric., Transcript of Tele-News Conference with Agriculture Secretary Mike Johanns and Dr. John Clifford, USDA’s Chief Veterinarian, Regarding the National Animal Identification System (Apr. 6, 2006), *available at* [http://www.usda.gov/wps/portal/!ut/p/\\_s.7\\_0\\_A/7\\_0\\_1\\_OB?contentidonly=true&contentid=2006/04/0121.xml](http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1_OB?contentidonly=true&contentid=2006/04/0121.xml).

54. *See id.* (suggesting that the USDA has considered the rulemaking process in developing NAIS); 2005 DRAFT PLAN, *supra* note 40, at 9 (describing the USDA’s authority under existing statutory law and stating that “USDA will follow the normal rulemaking process in changing the status of the NAIS from voluntary to mandatory”).

55. 2005 DRAFT PLAN, *supra* note 40, at 11.



the required databases is covered by public funds, producers will still bear the cost of whatever identification method is used and the recordkeeping involved.<sup>56</sup>

The confidentiality concerns focus on “who will have access to [the NAIS] data and how the data will be used.”<sup>57</sup> Producers do not want to have the NAIS data used for purposes beyond animal-disease control.<sup>58</sup> Their first worry is that other government agencies would be able to use NAIS data for regulatory purposes beyond animal-disease control.<sup>59</sup> Producers’ second worry is that under the Freedom of Information Act (FOIA),<sup>60</sup> members of the general public or industry competitors would be able to gain information which could be used against them.<sup>61</sup>

The flexibility concerns are more general, focusing on the ability to integrate existing animal identification systems (such as branding, thus avoiding “reinventing the wheel”).<sup>62</sup> They also focus on the need for whatever system is adopted to be able to adapt to the animal management needs of each individual operation.<sup>63</sup>

Finally, the 2005 Draft Plan simply states that there is concern NAIS information could be used “by individuals (other than animal health authorities) for food safety issues and that traceability of food products would increase [producers’] risk of liability and financial loss from food safety issues for which they are not responsible.”<sup>64</sup> Essentially, producers fear that plaintiffs’ (or defendants’) attorneys would be able to use NAIS tracking data to determine exactly where an animal came from and subject them to a lawsuit, regardless of their responsibility for causing the alleged injury.<sup>65</sup>

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56. Keeping in mind the focus on high-tech identification methods, such as radio-frequency identification (RFID) ear tags, the costs to producers could be significant. The 2005 Draft Plan does not discuss this directly, but instead simply states that, “[e]ven with public funding, there will be costs to producers.” *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Freedom of Information Act, 5 U.S.C. § 552 (2000 & Supp. III 2003).

61. 2005 DRAFT PLAN, *supra* note 40, at 11.

62. *Id.*

63. *Id.*

64. *Id.*

65. See generally MICHAEL ROBERTS & DOUG O’BRIEN, NAT’L AGRIC. LAW CTR., ANIMAL IDENTIFICATION: LIABILITY EXPOSURE AND RISK MANAGEMENT 2–3 (2004), available at <http://imic.info/memberspublic/animalID/fs06.pdf> (discussing current tort liability law for agricultural producers and the NAIS’s potential to increase producers’ tort liability if implemented).

## III. SMALL AND ORGANIC FARMERS SPEAK OUT AGAINST THE NAIS

Opposition to the NAIS was slow to develop at first; large producers and livestock associations had been involved in the development of national animal identification from the start and had thus helped to determine its final form.<sup>66</sup> Once small and organic farmers had a chance to see what the NAIS entailed, the cat was out of the bag.<sup>67</sup> The Winter 2006 issue of *Small Farmer's Journal* featured an editorial and short article on the topic.<sup>68</sup> The NAIS “generated more response than anything [the magazine had] published in 30 years.”<sup>69</sup> In Maine two state agriculture officials were assaulted with “manure pies” at a meeting discussing state animal identification system legislation.<sup>70</sup> The Spring 2006 issue of *Small Farmer's Journal* featured a short follow-up article by the same author as the first.<sup>71</sup> The Summer 2006 issue featured extensive criticism of the NAIS, ranging from an article titled “*NAIS - Nefarious Animal Identification System*” to free posters created by the magazine to draw attention to the debate.<sup>72</sup>

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66. See USAIP DRAFT, *supra* note 34, at 7 (noting that “[m]ore than 70 national livestock industry organizations were invited to participate on the [National Identification] Task Force” in 2002).

67. While the development of the NAIS was not a secret, its potential effect on small and organic farmers was not evident until the 2005 Draft Plan was released. See Mary Zaroni, *The “National Animal Identification System”: A New Threat to Rural Freedom*, SMALL FARMER'S J., Winter 2006, at 55 (stating that NIAA began lobbying for the development of the NAIS in 2002, but it wasn't until the 2005 Draft Plan was released that it became evident that it could potentially “drive small producers out of the market”).

68. Lynn R. Miller, *USDA Poised to Push Us off Our Farms with the National Animal Identification System*, SMALL FARMER'S J., Winter 2006, at 4; Zaroni, *supra* note 67, at 55.

69. *Animal Id Letters*, SMALL FARMER'S J., Spring 2006, at 30.

70. Rich Hewitt, *Protestors Assault Officials with Manure*, BANGOR DAILY NEWS, Mar. 13, 2006, at B1, reprinted in SMALL FARMER'S J., Spring 2006, at 18.

71. Mary Zaroni, *Animal Id Update; Let Those Who Have Ears Listen Very, Very Closely: USDA and State Agency Doublespeak on Mandatory Animal ID*, SMALL FARMER'S J., Spring 2006, at 29.

72. Jodie Gilmore, *NAIS - Nefarious Animal Identification System*, SMALL FARMER'S J., Summer 2006, at 23; Advertisement, *Difficult Times Require Striking Poster Images*, SMALL FARMER'S J., Summer 2006, at 121 [hereinafter *Difficult Times*].



Figure 1: Poster created by Small Farmer's Journal in response to development of the NAIS.<sup>73</sup>

A picture of a sign posted on a Vermont farmer's barn summed up much of the sentiment:

THIS LAND IS  
**POSTED TO ALL OFFICIALS**

**NO** VERMONT STATE POLICE

**NO** VERMONT FISH & GAME

**NO** BORDER PATROL

**NO** CUSTOM AGENT

**DO NOT BEWARE OF THE DOG • BEWARE OF OWNER**<sup>74</sup>

73. *Difficult Times*, supra note 72.

74. *What's in a Sign?*, SMALL FARMER'S J., Summer 2006, at 26.

## IV. THE BASIS OF THE OPPOSITION

A. *Small and Organic Farming vs. Modern Industrial Agriculture*

The starting point for the opposition to the NAIS is the philosophical difference between the practices of small and organic farmers and those using modern industrial agriculture methods. Modern industrial agriculture tends to focus primarily on production. For example, the trend in the beef industry over the past fifty years has been to use growth hormones and cheap grain (feed) to increase cattle slaughter weight over a shorter period of time.<sup>75</sup> While this trend has allowed great gains in output, it has also come at a cost. Cattle fed primarily a grain diet must also be fed calcium carbonate to combat acidosis.<sup>76</sup> Combined with the crowded living conditions found in most feedlots, this high grain diet also requires that the cattle be fed antibiotics to ward off disease.<sup>77</sup> Feedlots themselves come with a significant set of environmental problems, mostly stemming from the amount of animal waste they generate.<sup>78</sup> High grain production (necessary to feed the large number of cattle) requires high fertilizer inputs.<sup>79</sup> All of this adds up to a system that, in the eyes of small and organic farmers, pushes each component part (soil, crops, animals, farmers) to the max while yielding little in return.<sup>80</sup>

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75. Joel Huesby, *A Brief History of the Cattle Industry, and How Grains Effect Beef*, SMALL FARMER'S J., Winter 2006, at 33.

76. *Id.*

77. *Id.*

78. See SCHLOSSER, *supra* note 50, at 150 (describing two ConAgra Foods, Inc. feedlots located just outside of Greeley, Colorado). "Unlike human waste, this manure is not sent to a treatment plant. It is dumped into pits, huge pools of excrement that the industry calls 'lagoons.' . . . The two . . . feedlots outside Greeley produce more excrement than the cities of Denver, Boston, Atlanta, and St. Louis—combined." *Id.*

79. See Debra J. Brubaker, *Sustainable Agriculture: A Necessary Alternative to Industrial Agriculture in the Twenty-First Century* (Nov. 18, 2002), <http://www.goshen.edu/bio/Biol410/bsspapers02/deb.htm> (discussing the increase in nitrogen fertilizer use in the past forty-five years from 2 to 75 million tons due to the increased production demands of industrial agriculture).

80. See *id.* ("Dependence on external inputs to keep production rates high results in farmers reliance on agrochemical companies which can keep prices of their product high while farmers get less and less for their product because of increasing production nationwide."). See generally JAMES E. HORNE & MAURA McDERMOTT, *THE NEXT GREEN REVOLUTION* 261–63 fig.10.1 (2001) (this chart is available in substantially similar format at <http://www.kercenter.com/publications/howtheycompare.pdf>) (comparing negative aspects of modern industrial agriculture with corresponding positive aspects of sustainable agriculture); GAIL FEENSTRA ET AL., UNIV. OF CAL. SUSTAINABLE AGRIC. RESEARCH & EDUC. PROGRAM, *WHAT IS SUSTAINABLE AGRICULTURE?* (1997), <http://www.sarep.ucdavis.edu/concept.htm> (defining sustainable agriculture by comparing it to industrial agriculture).

Small and organic farmers focus instead on the quality of what they produce, getting paid a fair price for it, and keeping their inputs (and thus costs) low. They also tend to focus on diversification and self-sustainability. Take for example Peacemeal Farm, a small organic produce farm in Dixmont, Maine, visited by the author in 2004.<sup>81</sup> The couple who owns the farm has about twelve tillable acres upon which to make their entire living. They do not grow produce on all twelve acres at once, but instead rotate their crops, planting some fields in clover or other cover crops as a “green manure” each year. When they are ready to put a field back into production they till the cover crop into the soil, thus providing fertilizer for their produce crops. They do not plant a single crop, but instead vary both what they plant and when they plant it, with the overall goal being a season-long harvest.<sup>82</sup> The couple uses their small tractor a few times per year, but relies mainly on hired labor (their biggest expense) to do the planting, weeding, harvesting, etc.<sup>83</sup> They sell their produce directly to consumers at a number of farmers’ markets as well as selling to local cooperative markets and restaurants.<sup>84</sup> They raise a small number of chickens for eggs and a few cows on their pasture land for beef.<sup>85</sup> In short, they are the polar opposite of the modern industrial agriculture model.

### B. *The Rift Between the USDA and Small and Organic Farmers*

Over the years, the USDA has chosen primarily to support the modern industrial model. This has led to antipathy, and at times animosity, towards the USDA on the part of small and organic farmers.<sup>86</sup> The initial

81. For a more detailed description of Peacemeal Farm, see Maine Organic Farmers and Gardeners Association, MOFGA Apprenticeship Farm Details: PEN-01, <http://www.mofga.org/mofga/farmapps/pen-01.html> (last visited Sept. 17, 2007) [hereinafter Apprenticeship Details].

82. *See id.* (noting that Peacemeal Farm grows “mixed vegetables in rotation with small grain/legume cover crops” as well as “culinary herbs and cut flowers”).

83. *See id.* (advertising for applicants for a paid apprenticeship and stating that “[t]ractors are used to prepare the fields for planting” and that “both tractors and small hand tools [are used] for planting and weeding”).

84. *The Slaw Daddy*, BANGOR METRO, Sept. 2006, available at <http://www.bangormetro.com/media/Bangor-Metro/September-2006/The-Slaw-Daddy/> (describing Peacemeal’s participation in six Maine farmers’ markets each week); Apprenticeship Details, *supra* note 81 (noting that “[p]roduce is sold at six farmers markets each week, food co-ops, restaurants and farmstand”).

85. Apprenticeship Details, *supra* note 81.

86. *See, e.g.,* Wooster, *supra* note 10 (“I think we’d be better off if the entire USDA were overhauled and reprioritized.”). United States Undersecretary of Agriculture for Rural Affairs Thomas Dorr has predicted that in the near future the average farm size will be 250,000 acres. Judith Hoffman, *Farmer’s Factoid Index*, SMALL FARMER’S J., Fall 2006, at 17. The author witnessed Lynn R. Miller, publisher and editor of Small Farmer’s Journal, reference this statement in a speech given at MOFGAs Common Ground Fair in September 2004. The audience—to put it mildly—exhibited their

development of the NAIS is a perfect example. The USDA failed to include small and organic farmers from the start.<sup>87</sup> The initial impetus for the NAIS came from NIAA, an organization representing the interests of modern industrial agriculture.<sup>88</sup> The National Identification Development Team was again made up of representatives from modern industrial agriculture.<sup>89</sup>

Looking at the NAIS itself, the envisioned system is a good fit for modern industrial agriculture. Its standardized identification and tracking system allows for easier management of animals throughout the production process.<sup>90</sup> This works to prevent the rapid spread of animal disease that can occur in modern industrial agriculture.<sup>91</sup> Small and organic farmers, on the other hand, see the industrial model of agriculture as the cause of many animal-disease problems.<sup>92</sup>

The recordkeeping and tagging requirements envisioned in the 2005 Draft Plan only add fuel to the fire.<sup>93</sup> While a large producer would be able to absorb the costs of compliance, such requirements could potentially shut

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disagreement with this prediction.

87. See E-mail from Walter Jeffries, owner, <http://NoNAIS.org>, to author (Mar. 6, 2007) (on file with Vermont Law Review) [hereinafter Jeffries E-mail]. Mr. Jeffries, owner of Sugar Mountain Farm and NoNAIS.org, on why he created the NoNAIS.org web log: "I felt ignored by the government. I was just one person. I figured . . . if there were enough people maybe we could get the propose[d] NAIS regulations changed to better fit the needs of small livestock owners because we weren't being represented as it stood." *Id.*

88. See Nat'l Inst. for Animal Agric., NIAA Board of Directors, <http://animalagriculture.org/aboutNIAA/leadersstaff/BOD.asp> (last visited April 22, 2007) (listing board members from a number of organizations either directly involved in or supportive of modern industrial agriculture); Press Release, Animal & Plant Health Inspection Serv., Veterinary Serv. Program, U.S. Dep't of Agric., USDA and Industry Developing National Animal Identification Plan (June 13, 2003), available at [http://www.animalagriculture.org/id/USDA\\_andIndustry.htm](http://www.animalagriculture.org/id/USDA_andIndustry.htm) (noting that the movement to develop a national identification plan "to safeguard[] the Nation's livestock herds from the drastic effects of disease" started "when the [NIAA] organized a task force").

89. See Press Release, Nat'l Inst. for Animal Agric., U.S. Is Developing a National Animal Identification Plan to Help Protect Animal Agriculture (Aug. 6, 2003), available at [http://animalagriculture.org/id/TaskForce/USAIP\\_Aug6\\_2003.htm](http://animalagriculture.org/id/TaskForce/USAIP_Aug6_2003.htm) (describing the groups working on USAIP as "[s]tate animal health officials, livestock industry groups and the federal government").

90. See ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., THE NATIONAL ANIMAL IDENTIFICATION SYSTEM: A GUIDE FOR SMALL-SCALE OR NON-COMMERCIAL PRODUCERS 3 (2006) [hereinafter 2006 GUIDE] (highlighting the use of the NAIS to track movement of commercial animals through their lifecycles).

91. See *id.* (noting that "NAIS efforts will largely focus on *commercial operations and animals* . . . due to their higher risk of spreading diseases among multiple locations and for greater distances").

92. The now-banned practice of feeding cattle meat and bone meal derived from the remains of other cattle slaughtered for beef is believed to be the cause of BSE. BECKER, BSE, *supra* note 1, at 3. An organic farmer raising pastured livestock is not likely to think highly of such methods. "NAIS does nothing for BSE. BSE is caused by feeding cows to cows. Cows probably have a dim view of cannibalism." Jeffries E-mail, *supra* note 87.

93. 2005 DRAFT PLAN, *supra* note 40 at 8, 12.

down a small producer.<sup>94</sup> In light of the USDA's focus on modern industrial agriculture and ignorance of small and organic farmers' needs, many feel that the NAIS is simply another attempt by the USDA to push small and organic farmers out of the picture.<sup>95</sup> While the discussion of animal tracking in the 2005 Draft Plan is minimal,<sup>96</sup> the primary fear of small and organic farmers is that they will get caught in a regulatory web, facing either large fines or the destruction of their livestock because they innocently failed to comply with an obscure requirement.<sup>97</sup> Finally, there are the privacy concerns of those who either wish to minimize government intrusion in their lives or quite simply do not trust what the government will do with information gathered about them.<sup>98</sup> The 2005 Draft Standards for the NAIS include Global Positioning System (GPS) coordinates for Premises IDs.<sup>99</sup> The animal identification standards outlined for cattle focus on radio-frequency identification (RFID) eartags.<sup>100</sup> Privacy advocates seem justified in their concern about what the USDA has in mind for the future.

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94. Jeffries E-mail, *supra* note 87.

95. *See supra* note 68 (citing articles labeling the NAIS as a threat to small and organic farmers' continued existence).

96. *See* 2005 DRAFT PLAN, *supra* note 40, at 13, 14 (laying out "event codes" for the tracking program but not mentioning exactly what events must be reported).

97. *See* Miller, *supra* note 68, at 4, 5 (predicting a bleak future for small and organic farmers in the wake of the NAIS due to burdensome and difficult to comply with regulations).

98. *See, e.g.,* Jennifer Brooks, *Backyard Poultry Farms on Front Line of Flu Fight*, THE NEWS J., Mar. 11, 2006, at A1; Zaroni, *supra* note 71, at 30 (quoting statement from Dr. Fidelis Hegngi, Senior Staff Veterinarian at USDA/APHIS, that THE USDA's "focus is on surveillance, surveillance, surveillance"); Jeffries E-mail, *supra* note 87 ("When the government sticks its noses in our lives then they start regulating, licensing and telling us how to live."). While the author will not explore the validity of claims made against the NAIS by those who believe the federal government is constructing an Orwellian future, he does note that federal agencies have in the past shown a desire to utilize private databases and networks for law enforcement purposes involving the monitoring of citizens' activities. *See In re* U.S. Order Auth. Roving Interception, 349 F.3d 1132 (9th Cir. 2003). The court denied a Federal Bureau of Investigation request for an order requiring the unnamed private operator of a vehicle monitoring system (such as General Motors' OnStar) to assist the Bureau in monitoring (with warrants) suspected criminals' conversations in their vehicles. *Id.* at 1146. The requested order was denied, not because of Fourth Amendment concerns, but because the statute authorizing the Bureau to make the request did not authorize the Bureau to force the unnamed operator to make changes to their system which would have been required to avoid alerting persons in the vehicle that their conversations had been monitored. *Id.* at n.27.

99. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., NATIONAL ANIMAL IDENTIFICATION SYSTEM (NAIS): DRAFT PROGRAM STANDARDS 10 tbl.4 (2005) [hereinafter 2005 DRAFT STANDARDS].

100. *See id.* at 27 ("The NAIS Cattle Working Group (CWG) fully endorses the utilization of ISO-compliant radio frequency identification (RFID) eartags as the standard for implementing NAIS in the U.S. cattle industry.").

## V. LEGAL CHALLENGES TO THE NAIS

The strongest constitutional challenge raised against the NAIS sounds in the Commerce Clause.<sup>101</sup> Many small and organic farmers sell their products directly to consumers or to (presumably in-state) local markets. Some only raise animals for their own use. The small and organic farmers' position is that if they are engaged in commerce at all, they are only engaged in intrastate commerce and thus the federal government cannot reach their activities.<sup>102</sup> The success of such a challenge to the NAIS will turn on how broadly (or narrowly) the deciding court construes "interstate commerce."

The controlling case in this context is *Wickard v. Filburn*.<sup>103</sup> Roscoe C. Filburn was an Ohio farmer who grew (among other crops) wheat.<sup>104</sup> Under the Agricultural Adjustment Act of 1938,<sup>105</sup> farmers were given an

101. U.S. CONST. art. I, § 8, cl. 3. Challenges under the First, Fourth, Fifth, Fourteenth, and possibly Thirteenth Amendments have been raised as well. Jeffries E-mail, *supra* note 87. The First Amendment challenge arises from the Free Exercise clause. *See, e.g.*, Emery, *supra* note 8, at A23 (noting that Amish farmers, whose religion does not permit the use of "technology," are "conscientiously opposed and have religious convictions against the identification system"). Since the release of the 2005 Draft Plan, the USDA has recognized this issue and appears willing to make an exception. 2006 GUIDE, *supra* note 90, at 10. The author feels that the remaining challenges are, for all intents and purposes, inapplicable to the NAIS and thus does not address them in this Note.

102. *See* ME. ORGANIC FARMERS & GARDENERS ASS'N, MOFGA POSITION STATEMENT ON THE NATIONAL ANIMAL IDENTIFICATION SYSTEM (2006), <http://www.mofga.org/Default.aspx?tabid=267>.

[MOFGA] strongly opposes the National Animal Identification System (NAIS) proposed by the U.S. Department of Agriculture (USDA).

....

This program is intended to cover every place where farmers keep livestock - from huge feedlots and confinement dairies with 20,000 animals or more, to small backyards where families keep three chickens to produce fresh eggs for themselves.

....

... [NAIS] ultimately[] will discourage more people from producing food for themselves and their communities. . . . The proposed system will treat everyone who has any livestock the same - as if everyone ships his or her animals into anonymous, national markets, even if the animals never leave the farm.

....

... Any animal wellness program implemented to help prevent the spread of an animal disease epidemic should be voluntary, confidential, provide appropriate exemptions for farms not participating in interstate commerce, and emphasize a continued investment in livestock health.

*Id.*; *see also* Jeffries E-mail, *supra* note 87. "USDA is fighting having any exceptions [to NAIS registration requirements]. But, they can't legally mess with intrastate commerce." *Id.*

103. *Wickard v. Filburn*, 317 U.S. 111 (1942).

104. *Id.* at 114.

105. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.) The Act sought to stabilize the wheat market by controlling the amount grown



allotment of the national wheat production quota for each production year.<sup>106</sup> Farmers who grew more than their allotted amount faced possible penalties based on the excess they had grown.<sup>107</sup> Filburn was given an allotment of 11.1 acres at a normal yield of 20.1 bushels per acre for the 1941 growing season.<sup>108</sup> Filburn instead planted twenty-three acres of wheat, exceeding his allotment by 239 bushels.<sup>109</sup> Filburn was assessed a penalty of \$117.11.<sup>110</sup> Filburn refused to pay the penalty and instead filed suit against Secretary of Agriculture for the United States Claude R. Wickard and a number of Ohio state and county agricultural officials.<sup>111</sup> Filburn sought an injunction preventing the enforcement of the marketing penalty and a declaratory judgment that the provisions of the Act as applied to him were unconstitutional “under the Commerce Clause or . . . the Due Process Clause of the Fifth Amendment.”<sup>112</sup>

The Court quickly dismissed Filburn’s Fifth Amendment claim.<sup>113</sup> It then turned its attention to the Commerce Clause claim.<sup>114</sup> Filburn’s practice had been to grow wheat each year.<sup>115</sup> He usually sold a portion of his crop, used part as animal feed, ground some of it into flour for his own use, and kept the remainder as seed for the following year.<sup>116</sup> Filburn did not make a statement of how he had intended to divide up the crop in question.<sup>117</sup> Ultimately it did not matter. The Court first found that the Act’s marketing quotas reached not only wheat grown for sale but also wheat grown for consumption on the farm.<sup>118</sup> After an extensive discussion of its prior Commerce Clause jurisprudence, the Court held the Act constitutional.<sup>119</sup> Farmers, the Court found, affect the wheat market not only by the amount of wheat they sell but also the amount of wheat they

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each year, thus avoiding large surpluses and shortages and their resultant price fluctuations. *Wickard*, 317 U.S. at 115.

106. Agricultural Adjustment Act of 1938, §§ 331–339, 52 Stat. at 52–55 (codified as amended at 7 U.S.C. §§ 1331–1339 (2000)); *Wickard*, 317 U.S. at 115–16.

107. *Wickard*, at 114–15.

108. *Id.* at 114.

109. *Id.*

110. *Id.* at 115.

111. *Id.* at 113, 115.

112. *Id.* at 113–14.

113. *Id.* at 129–33. The court below had granted Filburn a partial injunction reducing the penalty amount, based on his Fifth Amendment claim. *Id.* at 116–17. The Fifth Amendment question at issue in the case is of little significance here, so this Note will not further discuss it.

114. *Id.* at 118.

115. *Id.* at 114.

116. *Id.*

117. *Id.*

118. *Id.* at 118–19.

119. *Id.* at 119–29.

consume.<sup>120</sup> Therefore, the Court reasoned, the government could maintain stable wheat prices not only by regulating demand but also by limiting supply.<sup>121</sup> Looking to its past decisions, the Court found it “well established . . . that the power to regulate [interstate] commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices.”<sup>122</sup> Because homegrown wheat effectively competes with wheat for sale in the open market, Congress can thus regulate it in order to control the price of wheat sold in interstate commerce.<sup>123</sup> Essentially, under *Wickard*, Congress can force individuals to participate in interstate agricultural markets by limiting the amount they can produce for themselves.

In 2005 the Supreme Court reiterated its support for *Wickard*, relying heavily upon it in its decision in *Gonzales v. Raich*.<sup>124</sup> In *Raich*, the plaintiffs were California residents legally eligible under state law to use and possess marijuana for medical purposes.<sup>125</sup> Much like the plaintiff in *Wickard*, they sought injunctive and declaratory relief prohibiting the enforcement of a federal statute against them,<sup>126</sup> in this case the Controlled Substances Act.<sup>127</sup> The Court found that “*Wickard* . . . establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>128</sup> While the market at issue was lawful in *Wickard* (wheat) and unlawful in *Gonzales* (marijuana), the Court found this unimportant. Congress’s power to regulate commerce in a given commodity includes the power to prohibit it.<sup>129</sup> The Court ultimately held

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120. See *id.* at 126–27 (discussing wheat production in the United States and the various uses of the crop).

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

*Id.* at 127.

121. *Id.*

122. *Id.* at 128.

123. *Id.* at 128–29.

124. See *Gonzales v. Raich*, 545 U.S. 1, 17–18, 33 (2005) (“Our decision in *Wickard* is of particular relevance. . . . The similarities between this case and *Wickard* are striking.”) (citation omitted).

125. *Id.* at 6–7.

126. *Id.* at 7.

127. *Id.*; 21 U.S.C. §§ 801–971 (2000).

128. *Raich*, 545 U.S. at 18.

129. *Id.* at 19–20 n.29.

that the Controlled Substances Act as applied did not violate the Commerce Clause.<sup>130</sup>

Given the broad holdings of *Wickard* and *Gonzales*, it seems unlikely that a Commerce Clause challenge to the NAIS would be successful. If, regardless of actual involvement in interstate commerce, Congress can regulate the amount grown of an agricultural commodity up to and including the outright elimination of it, why would it not be able to regulate the particulars of its production?

## VI. POLICY CHALLENGES TO THE NAIS

Much of the policy debate surrounding NAIS boils down to a debate about what kind of farming practices the USDA should support and encourage—essentially, the philosophical debate outlined in Part IV of this Note. Small and organic farmers have another strong policy challenge to the NAIS with regard to its role in the USDA’s response to animal-disease outbreaks. As this Part will explore, the USDA has traditionally relied on destruction as its primary method of dealing with animal-disease outbreaks. Widespread participation is necessary for the NAIS to be an effective part of the USDA’s current disease response strategy;<sup>131</sup> The USDA needs to know what animals have been exposed so it can destroy them all.

### A. *The Authority to Order the Destruction of Diseased Animals and Compensate Owners of Such Animals*

#### 1. History

The Act of May 29, 1884, discussed earlier in this Note,<sup>132</sup> contained a provision allowing the Commissioners of the District of Columbia to “require the destruction of animals affected with contagious, infectious, or communicable disease.”<sup>133</sup> Destruction, or slaughter, is a common method of controlling animal-disease outbreaks.

In *Crary v. United States*, the plaintiffs had purchased 5238 head of sheep from a rancher in Mexico.<sup>134</sup> The rancher was reputable, and although scabies (a disease affecting sheep) was present in the area, it did

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130. *Id.* at 32–33.

131. *See infra* Part VII.

132. *See supra* Part I.A.

133. Act of May 29, 1884, ch. 60, § 8, 23 Stat. 31, 33 (repealed 2002).

134. *Crary v. United States*, 44 Ct. Cl. 388, 388 (Ct. Cl. 1909) (per curiam) (Reporter’s statement of the case).

not seem to be present in the flock from which the sheep were purchased.<sup>135</sup> The plaintiffs made arrangements to ship the sheep into the United States through El Paso, Texas.<sup>136</sup> Under the regulations of the Bureau of Animal Industry, predecessor to the USDA, the sheep should have been inspected in Ciudad Juarez, Mexico, just across the border from El Paso.<sup>137</sup> However, there was no officer on duty to inspect the sheep, so permission was obtained from the customs agent in El Paso to bring the sheep into the United States uninspected.<sup>138</sup> While the sheep were still under quarantine in El Paso, Bureau of Animal Industry inspectors discovered that some of the sheep were infected with scabies.<sup>139</sup> After some back and forth between the Bureau inspectors and their superiors, it was determined that approximately forty percent of the sheep were infected.<sup>140</sup> The chief inspector then ordered all of the sheep destroyed.<sup>141</sup>

The statute authorizing the destruction of the sheep provided for compensation of the owners, but only for the value of the non-diseased animals that were destroyed.<sup>142</sup> The court held that since forty percent of the sheep were infected, compensation would be limited to payment for the remaining sixty percent, 3143 sheep.<sup>143</sup>

In *Julius Goldman's Egg City v. United States*, the problem was not imported animals, but a new disease.<sup>144</sup> In 1971 Exotic Newcastle Disease (END) first appeared in the United States in a southern California commercial poultry flock.<sup>145</sup> The disease soon spread, leading the U.S. Secretary of Agriculture to declare a national emergency and begin a control program of "destroying infected or exposed flocks and cleaning and disinfecting premises."<sup>146</sup> At the time, the plaintiff was the largest

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135. *Id.* at 388–89.

136. *Id.* at 389.

137. *Id.* at 390.

138. *Id.* at 389–90 (this was apparently a common and allowed practice at this particular border crossing).

139. *Id.* at 390.

140. *Id.* at 391.

141. *Id.*

142. *Id.*; see also Act of August 30, 1890, ch. 839, § 8, 26 Stat. 414, 416 (declaring that the Secretary of Agriculture "may cause to be slaughtered" any animals found to be exposed to or infected with any contagious disease).

143. See *Crary*, 44 Ct. Cl. at 391 (noting that the court found "that at least 40 per cent of the sheep so imported, or 2,095, were affected more or less with scabies, and if the claimants are entitled to recover, said number should be deducted from 5,238, leaving 3,143 sheep"); *Id.* at 392 (finding that "the sheep so exposed, but not infected, were appraised at \$1 per head, and that, plus the duty, \$836, amounting in all to \$3,979, measures the liability of the Government for which judgment is ordered").

144. *Julius Goldman's Egg City v. United States*, 556 F.2d 1096, 1097 (Ct. Cl. 1977).

145. *Id.*

146. *Id.* at 1097–98.

commercial egg producer in the country, with a flock of 3 million birds.<sup>147</sup> the USDA placed “sentinel birds” with plaintiff’s flock in order to detect the presence of END.<sup>148</sup> A number of the sentinel birds died and tested positive for the disease.<sup>149</sup> The USDA, acting pursuant to statutory authority, “notified [plaintiff] that his flock was infected and demanded [slaughter of the flock] and disinfection of all buildings and equipment.”<sup>150</sup> The plaintiff cooperated in this but contested the indemnity payments made to him, alleging that they were insufficient.<sup>151</sup> When the plaintiff filed suit against the USDA, the agency moved for summary judgment, asserting in part that “there can be no judicial review at all of these indemnity payments.”<sup>152</sup> The court did not agree.<sup>153</sup> The court found that 21 U.S.C. § 134a(d) stated in pertinent part that “‘the Secretary [of Agriculture] shall compensate the owner of any animal . . . destroyed pursuant to the provisions of this section’ and . . . ‘such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal . . . at the time of destruction thereof.’”<sup>154</sup> There being no statutory provision declaring that the Secretary’s determination is final, the court held that it could review whether the determination was arbitrary or capricious.<sup>155</sup>

## 2. Current Law

In 2002, 21 U.S.C. § 134a(d) was repealed by the Animal Health Protection Act.<sup>156</sup> The Act, now codified at 7 U.S.C. §§ 8301–20, removes judicial review of compensation paid to owners of diseased livestock.<sup>157</sup> Compensation is no longer provided to the owners of imported animals destroyed for disease control.<sup>158</sup> The USDA has broad authority to order

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147. *Id.* at 1098.

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 1098–99 (stating that plaintiff cooperated and received indemnification but “expressed disagreement” and “consistently protested” the indemnities until finally filing the present suit against the government).

152. *Id.* at 1099.

153. *Id.*

154. *Id.* (emphasis omitted) (quoting 21 U.S.C. § 134a(d) (1976)).

155. *Id.* at 1099–1100.

156. *See* Animal Health Protection Act, Pub. L. No. 107-171, § 10418(a)(17), 116 Stat. 494, 508 (2002) (repealing 21 U.S.C. §§ 134–134h (2000)).

157. 7 U.S.C. § 8306(d)(2)(C) (Supp. III 2003) (“The determination by the Secretary [of Agriculture] of the amount to be paid [to the owner of a destroyed animal] under this subsection *shall be final and not subject to judicial review* . . . .”) (emphasis added).

158. *See id.* § 8303(c) (authorizing the Secretary of Agriculture to order the destruction or removal of animals imported into the United States “to prevent the introduction into or dissemination

the owner of not only diseased animals but any “article, facility, or means of conveyance” associated with such animals to “maintain in quarantine, dispose of, or take other remedial action with respect to” any such “animal, article, facility, or means of conveyance.”<sup>159</sup> If the owner refuses to comply, the USDA may take the ordered action itself and then bill the owner for the costs incurred.<sup>160</sup> The USDA may make inspections (in some cases without warrants)<sup>161</sup> and carry out animal-disease “detect[ion], control, and eradicat[ion]” programs which “includ[e] the drawing of blood and diagnostic testing of animals.”<sup>162</sup> Essentially, if a farmer own animals which the USDA determines are infected with, have been exposed to, or pose a risk of spreading “any pest or disease of livestock,” then the USDA may order the destruction of their animals and the disposal or disinfection of their property. The USDA will compensate the farmer by an amount the agency determines, unreviewable by a court, and the farmer has virtually no recourse.

### B. *The USDA’s (Ab)Use of Authority*

The broad authority of the USDA to bring about the destruction of animals and property in order to prevent the spread of contagious animal disease would not be so worrisome to small and organic farmers if it were exercised in a reasonable manner. However, history shows that this is not always the case. The plaintiff in *Wright v. United States* was contesting the compensation paid to him by the USDA following the destruction of his flock and the disinfection of his property.<sup>163</sup> The case is notable here not so much for the valuation dispute but for the court’s findings of fact regarding the USDA’s behavior.

Plaintiff Frederick Wright was a highly successful poultry breeder, selling not only commercial meat and egg chickens but prize-winning exhibition birds and other poultry.<sup>164</sup> Wright’s “Day Old Bird Business shipped 250,000 to 300,000 birds a year to over 10,000 customers located on every continent save Antarctica and Australia.”<sup>165</sup> In April 1983 an outbreak of “lethal avian influenza” began in Lancaster County,

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within the United States of any pest or disease of livestock” but nowhere providing for compensation of the owners).

159. *Id.* § 8306(c)(1).

160. *Id.* § 8306(c)(2).

161. *Id.* § 8307(b).

162. *Id.* § 8308(a).

163. *Wright v. United States*, 19 Cl. Ct. 590, 591 (Cl. Ct. 1990).

164. *Id.*

165. *Id.*

Pennsylvania.<sup>166</sup> Efforts to prevent the spread of the virus failed, and on November 9, 1983, the USDA declared the outbreak an emergency.<sup>167</sup> By February 1984 the quarantine area included the entirety of Wright's operation, effectively shutting him down.<sup>168</sup> In June 1984 tests showed that at least part of Wright's flock "had been exposed to the virus."<sup>169</sup> "[O]n July 23, 1984, USDA ordered [Wright] to destroy his flock by July 26, 1984."<sup>170</sup> Operating under the mistaken belief that the USDA was willing to discuss saving that portion of his flock which had not been exposed, Wright did not carry out the order.<sup>171</sup> In response, "[o]n August 1, 1984 [USDA] entered upon [Wright's] farms with two federal marshals, four state police officers and seventy-five other federal employees who destroyed [Wright's] flock, sheep, pigs and pet dogs."<sup>172</sup>

The USDA then ordered Wright "to clean and disinfect his premises before the quarantines placed on his properties could be lifted."<sup>173</sup> Wright was unable to comply with the order due to his financial situation.<sup>174</sup> He had been out of business for some time because of the quarantine and ultimate destruction of his birds.<sup>175</sup> Finally, on March 28, 1985, an agreement was negotiated "whereby [USDA] would clean and disinfect [Wright's] premises at [USDA's] expense."<sup>176</sup> Wright documented the poorly-managed cleanup operation, including photos of "tire tracks over knocked-down fences, various piles of materials outside buildings, and workers throwing material out of second-story windows onto the ground below."<sup>177</sup> The quarantine on Wright's property was "finally lifted in June of 1985."<sup>178</sup>

More recently, in 2000 the USDA seized and destroyed a flock of sheep in Vermont which had been imported from Belgium and potentially carried a variant of BSE.<sup>179</sup> "On July 14, 2000, the [USDA] issued an administrative order mandating that the plaintiffs allow the USDA to seize

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166. *Id.*

167. *Id.* at 591–92.

168. *Id.* at 592.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 593.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 605.

178. *Id.* at 603.

179. *Ag-Innovations, Inc. v. U.S. Dep't of Agric.*, No. 1:02CV332, 2006 WL 462580, at \*1–2 (D. Vt. Feb. 24, 2006).

and destroy of [sic] some of their sheep and any associated germ plasm (sperm and embryos).”<sup>180</sup> “[P]laintiffs brought suit against the USDA, asking the district court to pronounce the order and the declaration of extraordinary emergency [which authorized the order] invalid, unlawful, and unenforceable, and to enjoin the [USDA] from seizing their sheep and germ plasm.”<sup>181</sup> Upon reviewing the record, the district court entered judgment for USDA “and instructed the plaintiffs to comply with the order.”<sup>182</sup> Plaintiffs appealed and sought a stay pending appeal, which was denied.<sup>183</sup> As the appeal was pending, and “[w]ith no stay in effect, the USDA seized and destroyed the sheep and germ plasm in question.”<sup>184</sup> The court dismissed the plaintiffs’ appeal as moot because the subject matter of the suit had been destroyed.<sup>185</sup>

### C. *The Need to Explore a Better Approach*

What these cases demonstrate is that the USDA prefers “scorched-earth” tactics when it comes to the control of animal disease. Rather than waiting to see if exposed animals actually develop disease or attempting some other non-lethal method, it simply destroys them. This tendency has not gone unnoticed outside of the agricultural community. In 2005 the Government Accountability Office (GAO) studied the federal government’s readiness to respond to a terrorist attack on U.S. agriculture (one of the touted reasons for the NAIS).<sup>186</sup> It found that although there is a Presidential Directive requiring the development of “a National Veterinary Stockpile . . . contain[ing] sufficient amounts of animal vaccines and other therapeutic products for responding to the most damaging animal diseases affecting human health and the economy,” significant action in this has yet to take place.<sup>187</sup> “USDA usually prefers to immediately slaughter diseased animals rather than vaccinate.”<sup>188</sup> The GAO report does not paint a pretty

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180. *Ag-Innovations, Inc. v. U.S. Dep’t of Agric.*, 95 F. App’x 384, 385 (2d Cir. 2004).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Ag-Innovations, Inc. v. U.S. Dep’t. of Agric.*, 6 F. App’x 97, 98 (2d Cir. 2001). While the author does not debate here the validity of the USDA’s determination that destruction of the sheep was necessary, he finds it exceedingly troubling that the USDA was able to rid itself of the plaintiff’s suit by simply fast-forwarding the process.

186. Phillip B.C. Jones, *GAO Sees Deficiencies in Efforts to Guard Agriculture from Terrorism*, ISB NEWS REPORT, May 2005, at 10, 11, available at <http://www.isb.vt.edu/news/2005/May05.pdf>, reprinted in AGRIC. L. UPDATE, Apr. 2005, at 3, 7.

187. *Id.* at 7.

188. *Id.*



picture of what the USDA plans to do in the event of an animal-disease outbreak: “Should USDA officially confirm the presence of a disease . . . the affected herd and all cattle, sheep, goats, swine, and susceptible wildlife—infected or not—within a minimum 10-kilometer zone around the infected farm would be killed.”<sup>189</sup> GAO ultimately recommended that the USDA explore the development of ready-to-use vaccine stockpiles for animal-disease outbreaks,<sup>190</sup> thus reducing the need to systematically slaughter animals in a vain attempt to contain the outbreak.<sup>191</sup>

## VII. THE USDA’S RESPONSE TO NAIS CONCERNS

The USDA knew from the beginning that NAIS development and implementation would encounter resistance. For example, USAIP discusses the need for “a strategy to inform and educate stakeholders . . . [in order] to ensure industry understanding and support.”<sup>192</sup> To counter resistance, the USDA involved state and industry representatives in the development of the NAIS,<sup>193</sup> touting it as a “State-Federal-industry effort.”<sup>194</sup> However, as discussed above, this did nothing to alleviate the concerns of small and organic farmers. The public comment period for the 2005 Draft Plan closed on July 5, 2005.<sup>195</sup> In April 2006, amidst growing small and organic farmer resistance to the NAIS, the USDA released the final version of its “Strategies for the Implementation of NAIS” (2006 Final Plan).<sup>196</sup>

### A. Changes in the 2006 Final Plan

The biggest change from the 2005 Draft Plan is that participation in the

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189. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-214, *HOMELAND SECURITY: MUCH IS BEING DONE TO PROTECT AGRICULTURE FROM A TERRORIST ATTACK, BUT IMPORTANT CHALLENGES REMAIN* 31 (2005). Using the example of an FMD outbreak, the report goes on to note that if the disease were to spread beyond the initial 10-kilometer zone, the USDA would “continue to quarantine and kill animals until the disease was ‘stamped out.’” *Id.* Under such an approach the number of animals slaughtered could reach into the millions, causing huge financial losses and producing “precisely the type of high-visibility destruction that some experts told us terrorists seek.” *Id.*

190. *Id.* at inside cover.

191. *Id.* at 37.

192. USAIP DRAFT, *supra* note 34, at 8.

193. 2005 DRAFT PLAN, *supra* note 40, at 4–6.

194. *Id.* at 4.

195. BECKER, ANIMAL ID, *supra* note 18, at 6.

196. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., NATIONAL ANIMAL IDENTIFICATION SYSTEM (NAIS): STRATEGIES FOR THE IMPLEMENTATION OF NAIS (2006) [hereinafter 2006 FINAL PLAN].

NAIS is to remain, for the moment, voluntary.<sup>197</sup> The USDA's thinking is that "[m]arket demands (age, source and process verification, traceability, etc.) are becoming of greater importance for certain species and could become a primary 'driver' for achieving a successful level of participation in the NAIS."<sup>198</sup> "Allowing market forces and industry needs to drive producer participation in the NAIS is preferable to mandatory Federal regulations."<sup>199</sup> The second biggest change is that the NAIS databases are now to be "owned and managed by the industry and States."<sup>200</sup> Instead of a single "meta-database" accessible at any time by APHIS, the plan is instead for APHIS to request data from the multiple databases only as needed to respond to disease outbreaks or "other emerging animal health concern[s]."<sup>201</sup> Finally, the USDA seems to have backed off on the "high-tech" identification method requirements for individual animals. "With regard to the question of how an animal could be identified (i.e., ear tag, tattoo, microchip, leg-banding), USDA has remained neutral . . . . [W]e respect the needs of different producers and different species groups."<sup>202</sup>

### *B. Effects of the Changes*

#### 1. "Voluntariness"

On its face, the USDA's decision to have participation in the NAIS be voluntary seems to solve all of the major concerns. Small and organic farmers will be able to "opt out" of participation in the NAIS if they have objections to its methodology.<sup>203</sup> Since such farmers make up a small proportion of the overall industry, their non-participation will not likely have a serious impact on the overall effectiveness of the NAIS. This is particularly true when considering that many small and organic farmers sell their products either directly to the consumer or to small, local butchers and markets. If such farmers were to be the point of origin for a contagious animal disease the disease would likely not spread far, nor would it be difficult to track.

Two problems arise that prevent voluntary participation from being the panacea for NAIS concerns of small and organic farmers. First, the USDA

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197. *Id.* at 1.

198. *Id.* at 2.

199. *Id.*

200. *Id.* at 1.

201. 2006 GUIDE, *supra* note 90, at 8.

202. *Id.* at 9.

203. 2006 FINAL PLAN, *supra* note 196, at 1.

has not dropped the option of making NAIS participation mandatory. “The system will require a high degree of producer participation in order to achieve its goal of 48-hour traceability.”<sup>204</sup> The USDA still wants to have *full* NAIS participation by 2009.<sup>205</sup> If the USDA does not feel that participation is “increasing at rates that will achieve full participation by 2009,” then it will seek to make participation mandatory.<sup>206</sup>

Second, while participation in the NAIS may be voluntary, participation in state animal identification systems may not be. As the NAIS was being debated on a national level many states enacted or began pursuing mandatory premises identification requirements.<sup>207</sup> Under the “new” multiple-database plan, state data would be directly accessible by APHIS in the event of an outbreak or “other emerging animal health concern.”<sup>208</sup> If state participation is mandatory, the USDA would not need to concern itself with participation in the NAIS; all the agency would have to do is go to the states, just as it would do in the absence of the NAIS.

## 2. Multiple Databases

The plan to have multiple state and private databases seems to be in part a response to FOIA concerns about the privacy of NAIS information. Since the data will not be held by the USDA, it would potentially be unavailable under FOIA.<sup>209</sup> The availability of NAIS information to the public or competitors is not really a concern of small and organic farmers, though the availability of such information to other government agencies is. Multiple databases do not therefore favor or disfavor small and organic farmers. A central database arouses concern about the oversight of “big brother.” The existence of multiple databases would mean that the fight to contest mandatory NAIS participation is moved from the federal arena to the states.

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204. *Id.* at 2.

205. *Id.* at 3.

206. *Id.*

207. See Zaroni, *supra* note 71, at 30 (“Agriculture officials in many states—e.g., Wisconsin, Vermont, Maine, Washington—are aggressively pursuing mandatory programs”).

208. 2006 GUIDE, *supra* note 90, at 8.

209. See Amy K. Guerra, Comment, *Agricultural Accountability: The National Animal Identification Plan, Confidentiality and the Freedom of Information Act*, 15 SAN JOAQUIN AGRIC. L. REV. 213, 225–26 (2005–2006) (noting that, unlike state and local governments, the USDA is subject to FOIA).

### 3. Less Intrusive Animal Identification

The prospect of having their animals electronically tagged and trackable in real-time is one of the biggest concerns for small and organic farmers. This is again in part because the USDA failed to make clear that it is not necessarily considering requiring such identification for *all* species; RFID eartags have been discussed only for cattle, and then only because the working group for cattle found them to be the most preferable method.<sup>210</sup> The USDA has since sought to allay these fears. On June 2, 2006, the USDA published an NAIS guide for “small-scale or non-commercial producers.”<sup>211</sup> In this publication the USDA specifically stated twice that “USDA will not track animals in real-time. The USDA has no interest in knowing where animals are all of the time.”<sup>212</sup> The USDA states in the NAIS Guide that it “is not mandating what technique or device should be used to identify animals. Appropriate means of identifying animals vary by species.”<sup>213</sup> “Some livestock are already identified as part of ongoing disease control programs, and USDA is working to incorporate those existing ID systems into the NAIS to minimize or eliminate any further costs to producers.”<sup>214</sup> The NAIS guide also discusses more fully what “reportable events” are for animal movements, stating that animal owners “are *not* expected to report *all* animal movements.”<sup>215</sup> “Reportable movements are those that involve a high risk of spreading disease, such as moving livestock from a farm to an event where . . . large numbers of animals are brought together from many sources.”<sup>216</sup>

#### C. The November 2006 User Guide

In November 2006 the USDA took a surprising step. It released “National Animal Identification System (NAIS): A User Guide” (November 2006 User Guide).<sup>217</sup> The November 2006 User Guide

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210. See 2005 DRAFT STANDARDS, *supra* note 99, at 27 (stating that the Cattle Working Group found RFID eartags to be the “most practical technology used today in automating the collection of individual animal identification for *cattle*”) (emphasis added).

211. 2006 GUIDE, *supra* note 90, at 1.

212. *Id.* at 4, 8.

213. *Id.* at 4.

214. *Id.*

215. *Id.*

216. *Id.*

217. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., NATIONAL ANIMAL IDENTIFICATION SYSTEM (NAIS): A USER GUIDE (2006) (draft version).

explicitly replaces all previous NAIS documents, including the 2006 Final Plan.<sup>218</sup> Most significantly, the November 2006 User Guide softens yet again the USDA's language concerning possible mandatory implementation of the NAIS.<sup>219</sup> The USDA continues to assert that as producers become aware of the benefits of taking part in NAIS, participation will increase to an effective level.<sup>220</sup> The USDA also emphasized the limited nature of the NAIS and the protections given to the private information it collects.<sup>221</sup> Essentially, the USDA seemed to recognize that it stirred up a hornets' nest when its initial NAIS proposals came to light and has tried to address the various stakeholders' concerns.

### VIII. LOOKING FORWARD

The NAIS is still in development. At this stage, nothing is final. This last section suggests what course the USDA should take in bringing the NAIS to fruition.

#### *A. Recognize the Validity of Small and Organic Farmers' Interests and Work to Accommodate Them*

The USDA needs to acknowledge that small and organic farmers do not fit well within the full model of the NAIS. These farmers do not generally ship animals nationwide. They do not generally move their animals from premises to premises more than a handful of times during the animals' lives. Small and organic farmers also are very focused on the health of their animals and generally know the history of their animals. While modern industrial producers also are generally focused on the health of their animals, their concern is different. Health to a modern industrial producer means profit; health to a small or organic farmer includes quality of life and, depending on the animal, longevity. Small and organic farmers often focus on selling their products directly to consumers, as opposed to modern industrial producers, whose products may be sold nationwide. Small and organic farmers thus come with built-in traceability. They know where their animals have come from and where they have gone. The traces are short; they may be directly from farm to butcher; or perhaps from the farm of birth, to the farm where raised, to the butcher. Small and organic

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218. *Id.* at title page.

219. *Id.* at 4. "Under our current authorities, USDA could make the NAIS mandatory, but we are choosing not to do so—again, participation in every component of NAIS is voluntary at the Federal level." *Id.*

220. *Id.*

221. *Id.*

farmers would also encounter significantly higher costs in implementing high-tech animal ID techniques. A farmer with a dairy herd of twenty-five cows is not likely to have a computerized database in place for managing his livestock, whereas a 30,000-cow dairy would be impossible to run without such a system.<sup>222</sup>

Premises ID, already mandatory in many states, is probably the best fit for small and organic farmers. Although many contest such a requirement as tantamount to “losing [the] right to farm” (registration turning a right into a privilege),<sup>223</sup> requiring only premises ID for small and organic farmers would best split the difference between the wants and needs of the USDA and such farmers. Mandatory premises ID would allow the USDA to effectively respond to disease outbreaks while avoiding the tracking and animal identification concerns of small and organic farmers. Those farmers who wish to sell animals into the larger “stream of commerce” would have to identify them for the NAIS, but those who operate on a more local level would not.

*B. Work to Develop Alternatives to Slaughter as the Primary Method of Controlling Animal-Disease Outbreaks*

While not technically part of the NAIS, underlying much of small and organic farmer resistance to it is how the USDA has traditionally responded to animal disease. An industrial commercial chicken producer with millions of birds is not likely to feel significant emotional loss if its flock is destroyed, particularly if the producer is compensated for its loss. Small and organic farmers, who often have as much emotional equity invested in their animals as they do sweat equity, feel such a loss much more acutely. The chicken producer will likely purchase more birds and start over again. The small or organic farmer who loses most (if not all) of her animals to a USDA destruction order may never recover, perhaps avoiding animal agriculture entirely so as to not go through the experience again.

Developing methods beyond slaughter for dealing with animal disease goes beyond farmers’ emotions however. While it cannot be argued that the USDA’s tactics have been ineffective, the tactics may often be use a sledgehammer where a flyswatter would do. With the focus on destruction

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222. Both examples exist. The author’s father-in-law currently milks approximately twenty cows in central Pennsylvania. Fair Oaks Dairy Products, LLC, milks 30,000 cows on its farm in Fair Oaks, Indiana. Fair Oaks Farms, Dairy Adventure: Behind the Scenes Tour, <http://www.fofarms.com/place/behindScenes.html> (last visited Sept. 13, 2007).

223. See Franklin Sanders, *Will We Be Required to Register with the Government in Order to Farm?*, SMALL FARMER’S J., Summer 2006, at 25–26 (recounting one farmer’s reaction to “voluntary” registration).

instead of on finding alternatives, we may never know. The GAO report mentioned previously found that the USDA only maintains vaccines for one foreign animal disease: Foot and Mouth Disease (FMD). “Even these vaccines cannot be rapidly deployed, because they first need to be sent to the United Kingdom for bottling and testing.”<sup>224</sup> Recall that the UK slaughtered almost 3 million animals during the 2001 FMD outbreak.<sup>225</sup> If effective vaccines are available, surely it would be preferable to vaccinate animals against the disease rather than attempt to eradicate the disease by force.

#### CONCLUSION

The NAIS stands at this point in a state of flux. While not the Orwellian nightmare it has been accused of being, it does present a number of concerns that highlight the collision between modern industrial agriculture and the small and organic farm model. The USDA should work to make exceptions to the NAIS should it become mandatory. This would allow small and organic farmers to continue their way of life while sufficiently protecting U.S. agriculture from the threat of widespread contagious animal disease. More pointedly, the USDA needs to re-evaluate its current response methods for controlling and eradicating animal disease as part of developing the NAIS. If the NAIS continues to be flexible and responsive it has the potential to be a useful system for the protection of U.S. agriculture, while at the same time allowing for the continued coexistence of modern industrial agriculture with small scale and organic farming.

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224. Jones, *supra* note 186, at 11.

225. Nelson, *supra* note 3, at 244.

<sup>†</sup> The author would like to thank Josh Adams for his assistance and insight as Personal Note Editor; Sarah Merlo and the Volume 32 Staff for their efforts in preparing this Note for publication; and finally, my wife Rebecca Rohrbaugh, for supporting me in my various endeavors over the years and without whom I would not have made it this far.