

Cornhusker Economics

Cooperative Extension

Institute of Agriculture & Natural Resources
Department of Agricultural Economics
University of Nebraska - Lincoln

Livestock Checkoff Cases

Market Report	Yr Ago	4 Wks Ago	12/13/02
<u>Livestock and Products,</u>			
<u>Average Prices for Week Ending</u>			
Slaughter Steers, Ch. 204, 1100-1300 lb Omaha, cwt	\$62.84	\$68.48	\$72.19
Feeder Steers, Med. Frame, 600-650 lb Dodge City, KS, cwt	83.60	83.00	86.49
Feeder Steers, Med. Frame 600-650 lb, Nebraska Auction Wght. Avg	90.52	87.08	89.79
Carcass Price, Ch. 1-3, 550-700 lb Cent. US, Equiv. Index Value, cwt	103.89	105.32	111.96
Hogs, US 1-2, 220-230 lb Sioux Falls, SD, cwt	32.00	27.00	30.50
Feeder Pigs, US 1-2, 40-45 lb Sioux Falls, SD, hd	44.80	*	*
Vacuum Packed Pork Loins, Wholesale, 13-19 lb, 1/4" Trim, Cent. US, cwt	91.40	82.00	92.78
Slaughter Lambs, Ch. & Pr., 115-125 lb Sioux Falls, SD, cwt	55.00	81.87	*
Carcass Lambs, Ch. & Pr., 1-4, 55-65 lb FOB Midwest, cwt	128.60	162.17	164.39
<u>Crops,</u>			
<u>Cash Truck Prices for Date Shown</u>			
Wheat, No. 1, H.W. Omaha, bu	2.98	4.41	4.06
Corn, No. 2, Yellow Omaha, bu	1.94	2.31	2.26
Soybeans, No. 1, Yellow Omaha, bu	4.21	5.53	5.46
Grain Sorghum, No. 2, Yellow Kansas City, cwt	3.62	4.77	4.61
Oats, No. 2, Heavy Minneapolis, MN, bu	2.29	2.05	2.14
<u>Hay,</u>			
<u>First Day of Week Pile Prices</u>			
Alfalfa, Sm. Square, RFV 150 or better Platte Valley, ton	115.00	150.00	150.00
Alfalfa, Lg. Round, Good Northeast Nebraska, ton	77.50	80.00	80.00
Prairie, Sm. Square, Good Northeast Nebraska, ton	105.00	122.50	117.50
* No market.			

Over the past thirty-five years, Congress has authorized generic promotion programs, known as checkoff programs, for a variety of agricultural commodities. Within the past year, the beef checkoff has been invalidated, the pork checkoff has been invalidated, and the legality of the beef checkoff has been upheld. The two cases invalidating checkoff programs relied on U.S. Supreme Court rulings that checkoff programs violated the producers free speech rights. The one case ruling the beef checkoff constitutional characterized the checkoff advertising program as government speech, which is exempt from constitutional free speech protections. This article takes a look at legal issues associated with commodity checkoff programs.

The first U.S. Supreme Court checkoff case is *Glickman v Wileman Brothers*, 521 US 456 (1997). This case involved the federal fruit tree marketing order program. Under marketing orders, there is no competition in the sale of the protected commodities (in this case nectarines, plums and peaches). Instead, prices are established through the federal marketing order process (similar to the dairy program). Producers are restricted in how much of the commodity they may market, and products must meet quality and grade requirements. Producers paid assessments which were used for research and generic product marketing.

In a close 5-4 decision, the U.S. Supreme Court ruled that the fruit tree promotion program was constitutional. The Court determined that advertising the program was part of the overall marketing order program, and therefore was constitutional. Four dissenting Justices (Souter, Chief Justice Rehnquist, Scalia and Thomas) would have invalidated the fruit tree advertising program as being an impermissible interference with free speech rights.

In 2001 the U.S. Supreme Court invalidated the mushroom checkoff. *US v United Foods, Inc*, 533 US ____ (2001). In that case the court voted 6-3 that paying for



generic product advertising violated the free speech rights of mushroom growers. The majority distinguished the mushroom checkoff from the fruit tree marketing order program in that the checkoff was primarily an advertising and promotion program, whereas the marketing order dealt with production quotas, pricing, and quality and grade requirements in addition to product marketing. The 2001 mushroom decision was widely viewed as posing a serious legal threat to all commodity checkoff programs.

Neither the fruit tree case nor the mushroom case dealt with the issue of whether the commodity marketing program constituted governmental speech and therefore was exempt from constitutional free speech protections. In the fruit tree case USDA never asserted that the commodity promotion was governmental speech. In the mushroom case, USDA did not raise the governmental speech exception issue in the lower federal courts, and the U.S. Supreme Court ruled that this precluded the governmental speech exception from being considered by the Supreme Court. So it is possible (but in my opinion unlikely) that the Supreme Court would agree that the governmental speech exception would protect current checkoff programs from constitutional free speech requirements.

In June 2002 a federal judge in South Dakota invalidated the beef checkoff. In October 2002 a Federal judge in Michigan invalidated the pork checkoff. Both cases followed the legal reasoning of the mushroom case, that mandatory checkoffs violated producers' free speech rights. The South Dakota beef checkoff decision indicated that the beef checkoff program did not constitute government speech. The decision noted that government speech is usually initiated by elected public officials or government employees and is paid for from general tax revenues. The checkoff promotion program in contrast, is initiated by industry representatives that have been appointed to commodity boards and who are not governmental officials or employees. Further, checkoff advertising programs are paid for by the commodity checkoff funds, not by general governmental revenues.

In November 2002 a federal judge in Montana ruled that the beef checkoff was legal because the beef advertising campaign was government speech and therefore legally exempt from free speech requirements. The judge ruled that there was sufficient governmental involvement in, and oversight of the beef checkoff program to make the advertising program government speech.

All three of the livestock checkoff cases are on appeal. If all three Federal Appeals Courts follow the mushroom checkoff case, the U.S. Supreme Court is unlikely to take an appeal of the checkoff cases. If one or more of the appeals courts rules that the checkoffs are legal, however,

it is more likely that the issue will ultimately be decided by the Supreme Court. The checkoffs are likely to continue operating until the appeals have run their course.

If the checkoffs are invalidated, what are some of the options? One is to put USDA in charge of the checkoff programs. While USDA could have producer advisory committees, the USDA would probably need to be in charge of the program in order to qualify for the government speech exemption. A second option would be a voluntary checkoff program, which would probably be much smaller than the current mandatory checkoffs. A third option is to drop the promotion program and spend those dollars on research and producer education programs.

J. David Aiken, (402) 472-1848
Water & Agricultural Law Specialist
daiken@unl.edu



Last Issue of the Year

Have a Safe and Happy Holiday!!!