WORC comments to USDA and DOJ
DOJ/USDA Anti-trust Workshops
December 30, 2009
Submitted electronically at www.usdoj.gov/atr

The Western Organization of Resource Councils (WORC) is a regional network of seven grassroots community organizations that include 10,000 members and 45 local chapters in Colorado, Idaho, Montana, North Dakota, Oregon, South Dakota, and Wyoming. WORC members are farmers, ranchers, other working people, and consumers. Our members and their communities are all negatively impacted by a concentrated livestock industry.

WORC would like to thank you for the opportunity to comment about these very important workshops you will be holding throughout the spring and summer of 2010. The following are the main concerns we have about concentration in the livestock industry. We have also provided solutions for you to consider as you move forward in this process.

We also look forward to working with you as you develop these workshops and their scope more fully and are available to answer any questions you may have or provide additional information. For more information, please contact Jeri Lynn Bakken, WORC's Regional Organizer for Agricultural Issues at 701-376-3333 or by email at jerilynn@worc.org.

Brief History of the WORC Rule, 1989-2009:
In 1989, WORC organized our members and ranchers across the country to bring national attention to the problems of captive supplies. Captive supplies are 1) cattle and hogs that packers actually own in feedlots and confinements and 2) cattle and hogs the packers procure through contracts.

In the past 20 years, WORC leaders and our allies moved diligently forward seeking administrative and legislative remedies to this price manipulation that drives producers out of business and in turn destroys their rural communities.

Since bringing the issue forward, WORC leaders have had dozens of meetings with the U.S. Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA) seeking enforcement of the Packers and Stockyards Act (P&SA). In 1996 WORC submitted a Petition for Rulemaking to USDA with the endorsement of over 100 state and national organizations. The proposed rule was then published in the Federal Register in 1997 and became known as the "WORC Rule." However, no action has been taken by USDA and 12 years later, WORC's Petition for Rulemaking remains on the Agriculture Secretary's desk awaiting action.

WORC's Petition for rulemaking would amend the P&S Act to

1) prohibit packers from procuring cattle for slaughter through the use of a forward contract, unless the contract contains a firm base price that can be

equated to a fixed dollar amount on the day the contract is signed and the forward contract is offered or bid in an open, public manner and;

2) prohibit packers from owning and feeding cattle, unless the cattle are sold for slaughter in an open, public market.

A copy of that petition for rulemaking is attached.

Unfortunately, in the past 12 years, no action has been taken to stop the concentration and market power of the top four multi-national meat packers. The problems faced by producers have worsened as the livestock sector of the food industry have become even more concentrated and prices further manipulated.

A Brief History of Packer Concentration 1921 to today:

When the P&SA was implemented in 1921, five companies controlled about 75% of all interstate slaughter of cattle. At this time, forward-thinking congressmen saw the problems created when only a few companies controlled so much of the market share, and implemented the most comprehensive anti-trust legislation ever enacted in the United States.

However, throughout the nearly 90 years since its passage, federal agencies in Washington have not enforced the law as intended. This has resulted in a packer cartel of today exceeding concentration levels of those when the law was enacted.

The last comprehensive study of concentration numbers in agriculture was issued in 2007 by Dr. Bill Heffernan and Dr. Mary Hendricks of Missouri State University. Their study reported a four firm concentration of 83.5% in 2005. At that time the top four firms included, in order, Tyson, Cargill, Swift & Co. and National Beef. In the four short years since that study, one new packer to the country, JBS, based out of Brazil, has acquired Swift & Co. making them the largest livestock packer in the country and the world. This purchase bumped the concentration numbers up significantly.

Today, we believe the four multi-national meat packers slaughter and process nearly 90% of the heifers and steers sold for slaughter. Unfortunately, that concentration number cannot be reported more accurately, because of the lack of transparency in today's market.

Just this year, DOJ stopped the purchase of the third largest meat packer, National Beef, by JBS. This was a relief to the livestock producers who are desperately looking for a move towards more competition in the marketplace. However, DOJ did allow JBS to purchase the largest cattle feedlot in the U.S., giving them even more captive supply power over cattle producers.

It is clear that such a concentrated market system cannot work for the cow/calf producer. It is no surprise that the fewer packers there are to procure cattle, the more control they have over the markets and the greater their ability to drive down prices through captive supplies. In such a concentrated market, buyers (the packers) can—and do—use captive supplies to manipulate markets.

The Problem of Captive Supplies:

Meat packers acquire 50% to 100% of all cattle and hogs they slaughter through captive supplies. Captive supplies are livestock that packers own or control through contracts with farmers, ranchers and feedlot owners. By calling on captive supplies to fill slaughter needs, packers do not have to bid for cattle in an open, public manner. A false period of low demand is created and prices are driven even lower.

The use of captive supplies in a highly concentrated market has led to uncompetitive conditions in the markets for fed cattle. The dysfunctional nature of today's cattle markets is made evident by extremely thin cash markets; small market windows; a failure to reward quality in production; and the lack of innovation in the meat processing industry, as well as lowering safety standards.

Contracting cattle for future delivery, in itself, can be a good thing. However, packers are using a contract method known as "formula pricing" in which feeders are enticed to contract their cattle basing the contract price on the cash market on a delivery date, rather than a firm bid price. For example, a packer might offer the feeder 50 cents per hundred-weight over the cash market price on the day of delivery. Meanwhile, packers have enough cattle committed through captive supply so they do not need to buy on the cash market, driving down the cash price more than the premium offered the seller.

The Solutions:

The first part of the solution is for the Secretary of Agriculture to adopt the WORC Rule, a move which will benefit the department, the public and the economy.

The WORC rule would provide an open public market with true price transparency that would benefit all buyers and sellers in the market. It would provide the opportunity for smaller producers and packers to benefit and compete for forward contracts, while they may otherwise be blocked from the market by the large packers and feeders. The rule could encourage more value-based pricing by affording more producers the opportunity to participate in publicly traded contracts, which are likely to include grade quality and other value-based premiums. The rule would allow forward contracting to continue, a practice that packers argue is necessary in order to coordinate slaughter supplies.

In this time of economic struggle for family farmers and ranchers, their communities and our country, it is vital that the solutions we provide be economically feasible. This rule would ensure that packers cannot pay discriminatory prices or give undue preferences to one producer of like quality cattle over another. It eliminates the potential of the use of captive supplies by packers to manipulate prices, without prohibiting the use of forward contracts or marketing agreements. This rule effectively increases buyer competition in fed cattle markets without resorting to breaking up the packers through forced divestiture while increasing the number of buyers. And it eliminates the price-manipulative effect of imported, captive cattle from Canada and other countries, since both imported and domestic cattle under contracts would be acquired only through open public markets, without banning or restricting imports.

USDA would benefit on a number of levels. By requiring open, public markets the agency can more easily prevent price discrimination and identify undue preference violation, instead of using expensive and intrusive case-by-case investigation of individual contracts after the fact. The rule would also provide the industry with a clear statement of policy with regard to captive supplies, while affording the packers the information necessary to ensure their own compliance without huge expenditures of USDA resources in monitoring and investigating all captive supply procurement transactions. It would reduce the time and resources USDA expends on monitoring and reporting cattle prices and captive supply information. Finally, adoption of the WORC the rule would provide incentives for the development of private electronic markets for cattle trading. As greater numbers of cattle are traded through such markets, timely captive supply and price information will become accessible to both buyers and sellers of cattle at all levels.

Overall this rule would solve the problems of price discrimination and provide price transparency so desperately needed in our livestock and other agriculture markets today.

The second part of the solution lies within the Department of Justice.

In 20 short years, we have seen the four-firm concentration in steer and heifer slaughter increased from about 35% to nearly 90%. Many of the same companies like Tyson, Cargill/Excel, and most recently JBS have excessive market power in a number of different agricultural sectors. This results in an even more concentrated food system, harming not only farmers and ranchers, but consumers as well.

Traditionally, the DOJ has reviewed these mergers on a case by case basis, looking at the impact to consumers and the immediate sector of agriculture of the merging companies. The rapid rate of consolidation in all agriculture sectors has moved more quickly than the government's ability to adjust laws and regulations to address these new problems.

Therefore, WORC requests a moratorium on any mergers and acquisitions by any companies with four-firm concentration of 50% or greater in any agricultural sector until the laws and regulations can be adequately updated to meet the needs of a changing climate in corporate agriculture and the agency has the resources in place to enforce those laws and rules.

Furthermore, both USDA and DOJ should consider the following criteria when determining new laws and regulations to ensure a competitive marketplace.

- Evaluate whether common practices developed over the years by packers and poultry processors have the potential to create undue preferences violating the Packers and Stockyards Act and/or are an antitrust violation;

- Establish detailed and specific criteria to ensure that under certain factual scenarios a finding of a violation will be made;
- Develop separate criteria addressing each sector of the poultry, hog and cattle industries; and
- Create different sets of criteria for analyzing different aspects of the relationships between packers/processors and livestock producers/poultry growers.

Workshop Participation Request:

Finally, WORC would like you to consider a number of experts and ranchers to address these issues at the workshop to be held in Ft. Collins, Colorado.

- Lynn Hayes—Legal Council at Farmers Legal Action Group (FLAG)
- Dr. Bill Heffernan—Rural Sociologist with Missouri State University
- Gilles Stockton—Rancher from Grass Range, MT and long time WORC leader
- Dr. Peter Carstenson—Law Professor at the University of Wisconsin
- Dr. Robert Taylor—Agricultural Economist at Auburn University

Sincerely,

Shane Kolb
WORC Chair
Meadow, SD

Mabel Dobbs
WORC Livestock Committee Chair
Weiser, ID

Also submitted on behalf of:
Dakota Resource Council—North Dakota
Dakota Rural Action—South Dakota
Northern Plains Resource Council—Montana
Powder River Basin Resource Council—Wyoming

Attachment