

DOWNED ANIMALS: CAN YOUR STEAK STAND UP FOR ITSELF?

I. INTRODUCTION

Downed animals, also referred to as “downers,” present both food-safety and humane treatment issues. They are commonly left where they lie without food, water, or medical care,¹ or are dragged by chains to the slaughterhouse² to be processed for human consumption.

On December 24, 2003, American newspapers announced that America had its first case of suspected mad cow disease.³ The animal came from a herd in Washington state⁴ and was confirmed as a downed cow.⁵ A downed animal is one that is diseased or injured to the point that it cannot stand up on it’s own.⁶ The United States Department of Agriculture (“USDA”) officials announced that the cow was removed from its herd after she became paralyzed from calving (birthing).⁷ On December 26, 2003, Britain’s Veterinary Laboratories Agency, a leader in Bovine Spongiform Encephalopathy (“BSE”) studies, confirmed preliminary positive tests of BSE in the animal.⁸ BSE is a progressive neurological

¹ *No Downers*, at <http://www.nodowners.org/> (last visited Sept. 1, 2003) (on file with the San Joaquin Agricultural Law Review).

² *Id.*

³ Stephen Smith and Scott Allen, *First U.S. Case of Mad Cow Suspected*, BAKERSFIELD CALIFORNIAN, December 24, 2003, at A1.

⁴ *Id.*

⁵ *Farm Sanctuary Calls for Ban on Slaughter of Downed Animals to Reduce Threat of Mad Cow Disease*, at http://www.nodowners.org/pr_mad_cow.htm (last visited Dec. 25, 2003) (on file with the San Joaquin Agricultural Law Review).

⁶ GENE BAUSTON, BATTERED BIRDS/CRATED HERDS: HOW WE TREAT THE ANIMALS WE EAT 47 (Farm Sanctuary 1996).

⁷ Ira Dreyfuss, *U.S. Probes How Cow Contracted Disease*, Associated Press, at <http://story.news.yahoo.com> (Dec. 24, 2003) (on file with the San Joaquin Agricultural Law Review).

⁸ Mark Sherman, *Mad Cow Suspicions Confirmed*, BAKERSFIELD CALIFORNIAN, December 26, 2003, at A1.

disorder found in cattle.⁹ The Center For Disease Control believes that there is strong evidence that BSE can be transmitted to humans.¹⁰

Stock prices immediately reflected the situation as McDonald's, Wendy's, and Tyson Foods all dropped in value on December 24, 2003.¹¹ By December 27, 2003, the United States had lost nearly all of its beef exports, and more than a dozen foreign countries stopped buying American beef.¹²

In 2002, cattle represented 72.8 billion dollars in retail value in America.¹³ Prior to the December 30, 2003 announcement by the United States Department of Agriculture Secretary Ann Veneman that downers would no longer be allowed in the food supply,¹⁴ "[a]cross the United States, downed animals...[we]re being marketed and slaughtered for human food. They suffer[ed] horribly at stockyards and slaughterhouses, and their use in the human food chain pose[d] a threat to human health."¹⁵ The announcement came on the heels of the first discovery of mad cow disease in the United States.

The Downed Animal Amendment, also referred to as the Ackerman-LaTourette Amendment, attempted to amend the Federal Farm Bill of 2002 by prohibiting the USDA from spending money to approve meat for human consumption that comes from downed animals.¹⁶ New York Congressman, Gary Ackerman, introduced the legislation in an attempt to force the USDA to keep downers out of the food supply.¹⁷ The Congressional Research Service ("CRS") Issue Brief for Congress, of Sep-

⁹ *Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Creutzfeldt-Jakob Disease (CJD)*, Center for Disease Control-National Center for Infectious Diseases, at http://www.cdc.gov/ncidod/diseases/cjd/bse_cjd_qa.htm (last visited Feb. 13, 2004) (on file with the San Joaquin Agricultural Law Review).

¹⁰ *Id.*

¹¹ Dreyfuss, *supra* note 7.

¹² Emily Gersma, *Mad Cow Issue Hits U.S. Beef Exports*, Associated Press, at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20031227/ap_on_he_me/mad_cow&cid=541&ncid=716 (Dec. 27, 2003) (on file with the San Joaquin Agricultural Law Review).

¹³ 2003 USDA-NASS Ag. Stats. Ch. 7 at 1, at <http://www.usda.gov/nass/pubs/agr03/acro03.htm> (last visited Mar. 9, 2004).

¹⁴ Press Release, Ann Veneman Secretary of USDA, *USDA BSE Update* (December 30, 2003), at <http://www.usda.gov/Newsroom/0452.03.html> (on file with the San Joaquin Agricultural Law Review).

¹⁵ *Downed Animals: Diseased Food on Your Plate*, Impact Press, N.Y., Apr.-May. 2001, at 1. at <http://www.impactpress.com/articles/aprmay01/downed040501.html> (last visited Sept. 27, 2003).

¹⁶ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), 108th CONG., MEAT AND POULTRY INSPECTION ISSUES 14 (September 17, 2003).

¹⁷ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298 Before Congress*, 108th Cong. 100 (2003) (statement of Mr. Gary Ackerman, New York Congressman).

tember 17, 2003, states, “[B]y denying inspection, no meat from downed animals could be processed for human consumption, even if the reason for their inability to stand would not affect the wholesomeness and safety of meat processed from them.”¹⁸ The amendment only bans funding the approval of downed animals for consumption. Nothing in the amendment bans the USDA from testing these animals for BSE.¹⁹

This law review comment will address the issue of downed cattle in the food supply and how the Ackerman-LaTourette Amendment to the Federal Farm Bill of 2002 could have possibly prevented the current BSE occurrence in America. Suggestions will be offered regarding enforcement of current laws which would strengthen the safety of the food supply. Finally, this review suggests that the Ackerman/LaTourette Amendment should be introduced to legislators again as soon as possible in response to the current BSE situation in the United States.

II. AMERICA EATS DOWNED MEAT

Generally, a controversy exists between ranchers who wish to include downed animal meat in the food supply and animal rights activists who wish to protect these animals. The controversy itself suggests that some stockyards must have been processing at least some downed animals into the food supply prior to the December 31, 2003 ban. The actual number of downed cattle per year varies, and accurate records do not appear to be kept. It should be noted that there is no exact statistic on the amount of downed cattle in America. According to the Associated Press, the USDA estimates that 130,000 are brought to slaughterhouses.²⁰ In an attempt to verify the estimate given, the Government Information Librarian at Cornell University, Greg Lawrence, traced the sources given for the USDA estimate in the Associated Press article.²¹ Mr. Lawrence

¹⁸ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 14.

¹⁹ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 17, at 102.

²⁰ Frederic J. Frommer, *House Narrowly Defeats Ban on Sale of “Downed Animals,”* Associated Press, July 14, 2003, at <http://www.belleville.com/mld/newsdemocrat/6303429.htm> (July 14, 2003) (on file with the San Joaquin Agricultural Law Review). The AP article is the only source found with a USDA quoted estimate of downed animals.

²¹ Letter from Greg Lawrence, Government Information Librarian at Cornell University to author, Kevin A. Briley (March 22, 2004) (on file with San Joaquin College of Law Agricultural Law Review). Mr. Lawrence was kind enough to respond to an inquiry for an accurate estimate of downed cattle. He had recently done research for another person on the same subject and discovered that the USDA sources led nowhere.

stated that, “the paper trail breaks down when you follow the citation back to a source.”²²

The total population of cattle in the United States in 2002 was 96.1 million.²³ The average price of all cattle, per head, was \$747 in 2003.²⁴ If all 130,000 estimated downers were sold at an average price, the amount would be roughly 97 million dollars.²⁵ Seemingly significant, this figure pales in comparison to the 2003 overall cattle sales: 72.2 billion dollars.²⁶

Not all parties in the American beef industry supported the idea of marketing downed animals before the current ban. United Stockyards, of St. Paul, Minnesota, began an examination of non-ambulatory policies when they acquired a large share of the mid-west market in November of 1989.²⁷ “Movement towards a non-ambulatory policy continued until May 7 [1991], when United Stockyards president, Gail Tritle, announced such a plan [to not accept any downed animals] would go into effect in all company-owned stockyards as soon as possible.”²⁸

When an animal goes down, it is not worth much to the rancher, especially if the slaughterhouse refuses to receive it. In 2000, Mark Barnett, owner of the Kentucky-Tennessee Livestock, commented that there is no market for downers at his auction. “If they don’t walk[,] they don’t sell.”²⁹

A. Industry Support Before the Ban

American Stockyards in the beef industry were aware that downed animals presented public relations issues long before the current ban. Colorado State University beef scientist, Tom Field, stated: “It [a downed animal] yields a real, real problem for our industry. It is a public relations nightmare.”³⁰ United Stockyards of St. Paul was well aware of the damage negative publicity could do to their business. “Because we

²² *Id.*

²³ ERS-USDA Background Data for BSE Coverage, at <http://www.ers.usda.gov/news/BSECoverage.htm> (last visited Oct. 10, 2003) (on file with the San Joaquin Agricultural Law Review).

²⁴ 2003 USDA-NASS Ag. Stats. Ch. 7 at 1, at <http://www.usda.gov/nass/pubs/agr03/acro03.htm> (last visited Mar. 9, 2004) (on file with the San Joaquin Agricultural Law Review).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Send the Cow While She Can Still Walk*, DAIRY TODAY, Jan. 1993.

²⁸ *Id.*

²⁹ Becky Mills, *Zero Tolerance for Downer Cows*, BEEF TODAY, June/July 2000.

³⁰ *Id.*

are in the public light, we didn't need non-ambulatory livestock... Animal rights groups only caused us to become aggressive publicly with our announcement of our new policy."³¹

In response to heavily publicized news coverage of downed animal mistreatment, Gene Bauston quotes *Hoards Dairyman* (July 1991) in *Battered Birds/Crated Herds*: "Frankly, we got what we deserved ... Because of that unfortunate exposure, the image of livestock people has been tarnished."³² Clearly, ranchers were concerned about the potential harm to their businesses as early as 1991.

Terry Lemons, of Dickson Livestock Center in Tennessee stated, "It's a nightmare of an image problem ... [y]ou have got to take care of your stock."³³ Partner Sandy Fussell agreed, "If somebody pulls up here with a down[ed] animal, we will not let them unload it."³⁴ Ted Friend, of Texas A&M University's Department of Animal Science suggests that support for banning downers also comes from humanitarian concerns and possible drug residue problems.³⁵ "According to the Food and Drug Administration, downed animals are responsible for half of the drug residue found in meat because these animals are often very sick animals, and therefore, often receive a variety of drug treatments."³⁶

Dale Chambers, general manager of Empire Livestock, New York's largest livestock marketing organization, has a long-standing policy that downed animals will not be accepted at their stockyard. Furthermore, "animals that become non-ambulatory while at our facilities are euthanized and disposed of in a proper fashion."³⁷

III. THE FOOD SUPPLY

Carol Tucker Foreman, of Consumer Federation of America, argued in support of banning downers in the food supply.

The Government Accounting Office (GAO) statement of fact on problems with the implementation of [the] USDA's new meat and poultry inspection

³¹ *Send the Cow While She Can Still Walk*, DAIRY TODAY, Jan. 1993.

³² BAUSTON, *supra* note 6, at 47.

³³ Becky Mills, *Zero Tolerance for Downer Cows*, BEEF TODAY, June/July 2000.

³⁴ *Id.*

³⁵ Ted Friend, PhD., *Ban on Downed Cattle Not Opposed by Most Livestock Ranchers*, FOOD CHEMICAL NEWS, October 19, 1998.

³⁶ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298 Before Congress*, 108th Cong. 108 (2003) (statement of Mr. Chris Smith, New Jersey Congressman).

³⁷ Letter from Dale Chambers, General Manager of Empire Livestock Marketing Inc., to United States Food and Drug Administration (Sept. 3, 1998) (on file with the San Joaquin Agricultural Law Review).

system demonstrates once again that the Department allows irresponsible, un-fit companies to continue selling meat and poultry to the American people. The draft GAO statement of fact says [the] USDA's implementation is so poor that it raises questions about whether the program is ensuring the safety of the food supply. Neither the meat and poultry companies nor [the] USDA has met its responsibility to protect the American people. Both the industry and the government have put profit ahead of public health.³⁸

Three of the top fast food restaurants voluntarily chose to implement downed meat policies. "Concerned about human health risks and animal welfare problems, McDonald's, Burger King, and Wendy's ... all instituted policies against buying meat from downed animals for their hamburgers."³⁹ Safeway and Albertson's grocery stores also refused to buy meat from any dairy cows that arrived downed at the slaughterhouse.⁴⁰

The USDA's decision to ban downed meat from the federal school lunch program in June of 2000 is evidence that it recognized the potential human health risks.⁴¹ "While deciding to keep downers out of school lunches, the USDA also decided to allow any meat from animals with cancers, tumors, lymphomas, open sores, infectious arthritis, and diseases caused by intestinal worms, to enter the food chain."⁴²

"The Federal Meat Inspection Act of 1906, as amended [21 U.S.C. §§ 601 et seq.], requires the USDA to inspect all cattle ... brought into any plant to be slaughtered and processed into products for human consumption."⁴³ The Food Safety and Inspection Service (FSIS) is the branch of the USDA that is responsible for ensuring only safe meat is put into the food supply.⁴⁴ The CRS Issue Brief for Congress details how the safety of the American food supply was protected before the USDA announcement banning downers.

³⁸ Press Release, Consumer Federation of America, Carol Tucker Foreman on GAO Report Highlighting Serious Problems in USDA's Meat Inspection System (July 10, 2002), at http://www.consumerfed.org/071002_tucker_statement.html. (on file with the San Joaquin Agricultural Law Review).

³⁹ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 36, at 108.

⁴⁰ KiroTV, *Market for Downer Cow Beef is Dying*, at <http://www.kirotv.com/news/2269582/detail.html> (last visited June 13, 2003) (on file with the San Joaquin Agricultural Law Review).

⁴¹ *News From The Factory Farm-Some of it Good*, Animal News, (fall/winter 2000), at <http://www.allanimals.org/newsletter/currentissue/> (last visited Sept. 10, 2003) (on file with the San Joaquin Agricultural Law Review).

⁴² *Id.*

⁴³ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 3.

⁴⁴ *Id.* at Summary.

Current regulations do not require an FSIS inspector to remain constantly on the production line or to inspect each and every processed item. Instead, inspectors are on site daily to monitor operations, check sanitary conditions, examine ingredient levels and packaging, review records, and conduct statistical samples and testing of products [animals]. Such plants also are required to have HACCP [Hazardous Analysis and Critical Control Point] plans, which are verified daily by USDA inspectors. Processing inspectors often have responsibility for two or more plants that must be visited each day; consequently, these plants are processing meat or poultry without on site federal oversight for a large portion of their workday. Nonetheless, because each plant is visited daily, processing inspection is considered to be continuous.⁴⁵

A survey of Washington state meat consumers revealed that the majority felt that even if crippled or sick cows were properly inspected, “they’d prefer to eat meat from a healthier source.”⁴⁶ Consumers commented that “[i]t shouldn’t go in[to the food supply] at all, it should be destroyed.”⁴⁷

A. *Why Cows go Down*

USDA records show that downed animals are often afflicted with gangrene, malignant lymphoma, pneumonia, and other serious illnesses.⁴⁸ For most of them, the process starts when they are sick or injured on the farm and not given veterinary care.⁴⁹ Colorado State University Animal Scientist, Temple Grandin commented, “[T]he number one cause [of downer problems] is letting a cow get too far gone, too skinny, too debilitated, before selling it.”⁵⁰

B. *BSE and vCJD*

USDA testing procedures indicate a concern for the suggested link between downed animals and BSE. In 2002, USDA testing focused particularly on high risk animals, “...including downers... animals that die on farms, older animals, and those showing signs of neurological distress.”⁵¹ USDA research “supports the idea that [some] downed cows in the U.S. are infected with a BSE like agent.”⁵² “BSE is one of several transmissible spongiform encephalopathies [TSE]. [BSE] affect[s] the

⁴⁵ *Id.* at 5.

⁴⁶ KiroTV, *supra* note 40.

⁴⁷ *Id.*

⁴⁸ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298 Before Congress*, 108th Cong. 104 (2003) (statement of Ms. Marcie Kaptur, Ohio Congresswoman).

⁴⁹ THE DOWN SIDE OF LIVESTOCK MARKETING (Farm Sanctuary 1991).

⁵⁰ Becky Mills, *Zero Tolerance for Downer Cows*, BEEF TODAY, June/July 2000.

⁵¹ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 13.

⁵² BAUSTON, *supra* note 6, at 34.

brain, disrupting or destroying neurons in large numbers, which inevitably leads to the death of the infected animal.”⁵³

The scientific community is undecided on the origins of BSE. However, “BSE is thought to have come from a similar disease in sheep called scrapie.”⁵⁴ “Scrapie is the name of a disease affecting sheep which has been known for centuries.”⁵⁵ According to the Center for Disease Control, the BSE outbreak in Britain in the early 1990s, “...may have resulted from the feeding of scrapie-containing sheep meat-and-bone meal to cattle.”⁵⁶ Scientists agree there is strong evidence that the outbreak was amplified by feeding rendered bovine meat-and-bone meal to young calves.⁵⁷ Carcasses from which all consumable parts had been removed were boiled down into a high protein slurry that was then sold to livestock owners as feed.⁵⁸ Basically, cows were fed the byproducts of other cows.

One theory is that consumption of contaminated feed led to cattle displaying signs of BSE.⁵⁹ “The use of ruminant tissue in ruminant feed was probably a necessary factor responsible for the BSE outbreak in the United Kingdom.”⁶⁰ In response to the current evidence for possible transmission of BSE to humans, “the Food and Drug Administration [FDA] instituted a ruminant feed ban in June 1997 that became fully

⁵³ *The Nature of the Diseases*, at <http://www.pbs.org/wgbh/nova/madcow/prions.html> (last visited Sept. 12, 2003). Author Robert A. Somerville is affiliated with the BBSRC and MRC Neuropathogenesis Unit, Institute for Animal Health in Scotland. David C. Bolton, Ph.D. is affiliated with the Department of Molecular Biology, New York State Institute for Basic Research.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Creutzfeldt-Jakob Disease (CJD), *supra* note 9, at 1.

⁵⁷ *Id.*

⁵⁸ Paul Brown, et.al., *Bovine Spongiform Encephalopathy and Variant Creutzfeldt-Jakob Disease: Background, Evolution, and Current Concerns*, *Emerging Infectious Diseases Journal*, Vol. 7 No.1 (Jan-Feb 2001), at <http://www.cdc.gov/ncidod/EID/vol7no1/brown.htm> (last visited Sept. 12, 2003) (on file with the San Joaquin Agricultural Law Review). This is a work produced by five experts and organizations around the world: National Institute of Neurological Disorders and Stroke, National Institute of Health, Center for Biologics Evaluation and Research, Food and Drug Administration, Animal and Plant Health Inspection Service, USDA, National Creutzfeldt-Jakob Disease Surveillance Unit (Scotland), and Central Veterinary Laboratory (England).

⁵⁹ Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Creutzfeldt-Jakob Disease (CJD), *supra* note 9, at 1.

⁶⁰ *Fact Sheet: New Variant Creutzfeldt-Jakob Disease*, Center for Disease Control-National Center for Infectious Diseases, at http://www.cdc.gov/ncidod/diseases/cjd/cjd_fact_sheet.htm (last visited Feb. 13, 2004) (on file with the San Joaquin Agricultural Law Review).

effective as of October 1997.”⁶¹ Title 21 U.S.C. § 589.2000 prohibits the inclusion of dangerous substances in animal feed. Subsection (a) prohibits the use of any protein derived from mammalian tissue, defined as “any protein-containing portion of mammalian animals, excluding blood, blood products, and gelatin,”⁶² in ruminant feed. Ruminants are prohibited from eating feed made from cattle, sheep, goats, deer, elk, and antelopes.⁶³

Although little is known about BSE and the infective BSE agent, researchers believe it is transmitted by a protein called a “prion,”⁶⁴ which affects the central nervous system of the animal.⁶⁵ The presence of the BSE agent has been discovered in the brain, spinal cord, retina, and bone marrow of cattle experimentally infected with BSE tainted feed.⁶⁶ The unknown agent “disrupts and destroys neurons in large numbers,” causing sponge-like holes to form in the brain.⁶⁷ Cattle then become aggressive, lack coordination, and are unsteady while standing.⁶⁸

Perhaps the most disturbing of the spongiform encephalopathies is the human variant, a “disease similar to BSE called [variant] Creutzfeldt-Jakob Disease [vCJD].”⁶⁹ The classic form of vCJD exists independent from BSE and affects a small percentage of people worldwide.⁷⁰

“There is strong scientific evidence that the agent that causes BSE in cattle is the agent that causes vCJD in people.”⁷¹ “Atypically, [vCJD] features include prominent psychiatric or sensory symptoms at the time of clinical presentation.”⁷² Human symptoms are similar to BSE and

⁶¹ *Id.*

⁶² Substances Prohibited From Use in Animal Food or Feed, 26 Fed. Reg. 108 (June 5, 1997) (codified at 21 C.F.R. §589.2000(a)(1)).

⁶³ *Id.* at (a)(5) and (a)(7).

⁶⁴ Somerville, *supra* note 53, at 4.

⁶⁵ *Consumer Questions and Answers About BSE*, U.S. Dept. of Health and Human Services, U.S. Food and Drug Administration, Center for Food Safety and Applied Nutrition, at <http://www.cfsan.fda.gov/~cpmm/bsefaq.html> (May 2003).

⁶⁶ *Update 2002: Bovine Spongiform Encephalopathy and Variant Creutzfeldt-Jakob Disease*, Center for Disease Control-National Center for Infectious Diseases, at http://www.cdc.gov/ncidod/diseases/cjd/bse_cjd.htm (last visited Sept. 27, 2003) (on file with the San Joaquin Agricultural Law Review).

⁶⁷ Somerville, *supra* note 53, at 1.

⁶⁸ Amy Foulkes, *Mad Cow: The Symptoms*, at http://www.cbc.ca/news/indepth/background/madcow_science.html (last visited Aug. 20, 2003) (on file with the San Joaquin Agricultural Law Review).

⁶⁹ *Consumer Questions and Answers About BSE*, *supra* note 65.

⁷⁰ *Fact Sheet: New Variant Creutzfeldt-Jakob Disease*, *supra* note 60, at 1.

⁷¹ *Consumer Questions and Answers About BSE*, *supra* note 65.

⁷² *Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Creutzfeldt-Jakob Disease (CJD)*, *supra* note 9, at 2.

include dementia, weakened muscles and motor difficulties while standing.⁷³ “Autopsies of human brains show the same spongy appearance as cow and sheep brains affected by BSE and scrapies.”⁷⁴ Only time will tell the extent to which BSE-like agents exist in the U.S. and the extent to which it causes vCJD in humans.⁷⁵

The Center for Disease Control believes that, “[T]here is strong epidemiologic and laboratory evidence for a causal association between variant CJD [vCJD] and BSE.”⁷⁶ “From 1995 through June 2002, a total of 124 human cases of vCJD were reported in the United Kingdom, 6 cases in France, and 1 case each in Ireland, Italy, and the United States.”⁷⁷

While the causes of classic CJD remain uncertain, the leading theory is that humans contract a new variant of CJD by ingesting meat contaminated with BSE infected nervous tissue.⁷⁸ Documented cases show that CJD victims lived in areas where outbreaks of BSE had occurred in cattle years earlier.⁷⁹ No victims have been found outside areas of BSE outbreaks.⁸⁰ In Britain, four slaughterhouse workers in one area died from CJD and a dairy farmer who owned a herd with BSE positive animals died of CJD.⁸¹ The fact that these people spent time in BSE affected areas suggests that it is possible they died of vCJD, and not the randomly occurring classic CJD.

IV. THE VOTE

On July 14, 2003, Congressman Gary Ackerman argued for the passage of the Ackerman-LaTourette Amendment. Also referred to as the Downed Animal Amendment, it would have prohibited the USDA from expending any funds to approve meat from downed animals for human consumption.⁸² Mr. Ackerman estimated, “[I]ess than one percent of all

⁷³ Foulkes, *supra* note 68, at 1.

⁷⁴ *Id.*

⁷⁵ BAUSTON, *supra* note 6, at 34.

⁷⁶ Questions and Answers Regarding Bovine Spongiform Encephalopathy (BSE) and Creutzfeldt-Jakob Disease (CJD), *supra* note 9, at 2.

⁷⁷ *Update 2002: Bovine Spongiform Encephalopathy and Variant Creutzfeldt-Jakob Disease*, *supra* note 66.

⁷⁸ *Fact Sheet: New Variant Creutzfeldt-Jakob Disease*, *supra* note 60, at 1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Foulkes, *supra* note 68, at 2.

⁸² *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 17, at 100.

animals are downed animals, not a big dent in the industry.”⁸³ According to Mr. Ackerman, USDA research supports the theory that the occurrence of mad cow disease in the United States would likely be found among downed cattle.⁸⁴

Congressman Bob Goodlatte, an opponent of the amendment, argued that non-ambulatory animals should be taken to the slaughterhouse because veterinarians are on hand to inspect them and make sure that unhealthy animals do not enter the food supply.⁸⁵ Mr. Goodlatte is concerned that veterinarians find out why the animals are downed. “It might simply be a dislocated hip or something else that is of no danger to human consumption...”⁸⁶ Congressman Charles Stenholm of Texas also opposed the amendment. Mr. Stenholm was similarly concerned that downed animals, which have a very good food value, are kept out of the food supply simply because they have a dislocated hip or a broken leg.⁸⁷ Given the apparently minimal amount of downers in the country, it is difficult to determine why downed meat must be put into the food supply.

Mr. Goodlatte suggests that downed animals should be euthanized where veterinarians are on hand and can properly inspect them.⁸⁸ Opponents of the amendment worried that banning the sale of downed animals completely would prevent USDA inspectors from detecting possible cases of mad cow disease.⁸⁹ Mr. Goodlatte argued that animals will be buried on the farm or possibly enter the food supply illegitimately because ranchers would have no incentive to do anything otherwise. “There [would be] no compensation to them whatsoever.”⁹⁰

The opposition characterized the amendment as an attempt to end BSE testing of downed animals. The opposition’s argument completely misses the point. Nothing in the amendment prohibited BSE testing. The intent of the amendment was to “(1) end the mistreatment that downed animals have been known to experience at various points along

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298 Before Congress*, 108th Cong. 101 (2003) (statement of Mr. Robert Goodlatte, Virginia Congressman).

⁸⁶ *Id.*

⁸⁷ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298 Before Congress*, 108th Cong. 103 (2003) (statement of Mr. Charles Stenholm, Texas Congressman).

⁸⁸ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 85, at 101.

⁸⁹ Frommer, *supra* note 20.

⁹⁰ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 85, at 101.

the marketing chain; and (2) to ensure that such animals were not processed for food.”⁹¹

The intent was not to stop testing those animals for BSE. The CRS Issue Brief for Congress does not address the complete issue in stating, “The Downed Animal Amendment would... require that downed animals... be euthanized immediately and barred from federal inspection.”⁹² This argument ignores the humane purpose of the amendment. Mr. Ackerman states:

What we are doing here is we are not preventing the animal from getting there [to slaughterhouse inspection]. We are preventing it from entering the food supply... This just prevents the use of any funds from approving this animal from entering the food supply. It does not prevent the animal from being tested. It does not prevent the animal from being researched.⁹³

Congressman Bill Thomas of California also opposed the Ackerman-LaTourette Amendment. He reasoned that the amendment would “eliminate an incentive for farmers to ship downed animals to the slaughterhouse This in turn could result not only in the inhumane treatment of these animals ... these animals would not be subject to the mandatory veterinarian examinations that downed animals are subject to.”⁹⁴ Mr. Thomas does not address the entire purpose of the amendment. The purpose is that in addition to public safety issues, “...there is a humanitarian issue present for those who appreciate the inhumane treatment of animals.”⁹⁵

A. *Defeat of the Amendment on BSE Testing Issue*

The amendment was defeated by a 202-199 vote.⁹⁶ The CRS Issue Brief for Congress commented that the close vote on the amendment indicates continuing concern about BSE and downed animal issues.⁹⁷ Mr. Ackerman’s immediate response to the vote accused the cattle indus-

⁹¹ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 14.

⁹² *Id.*

⁹³ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298, supra* note 17, at 108.

⁹⁴ Letter from Representative Bill Thomas to Kevin Briley, author (October 7, 2003) (on file with San Joaquin Agricultural Law Review).

⁹⁵ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298, supra* note 17, at 106.

⁹⁶ Press Release, Congressman Gary Ackerman, Ackerman Criticizes Squashing of His Food Safety/Animal Rights Legislation (July 14, 2003) (on file with the San Joaquin Agricultural Law Review).

⁹⁷ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 14.

try of putting profits over human health and confidence in the nation's beef supply.⁹⁸

Opponents of the amendment firmly centered their argument on the BSE testing issue. This review has already pointed out one fallacy in that argument, namely, that the amendment does not prohibit testing at all. However, to fully grasp the issue, it is important to analyze the amount of animals tested for BSE.

B. BSE Testing in America

The following analysis will focus on the number of downed cattle suggested by the USDA: 130,000 per year.⁹⁹

The amount of cattle tested for BSE is not confined to the downed cow population. The USDA tests "...the highest risk animals, including downer animals, animals that die on the farm, older animals, and animals exhibiting signs of neurological distress."¹⁰⁰ Test figures represent the amount of cattle tested from the entire population of American cattle. At this writing, the last fiscal year for which records are available is 2002. In 2002, the total population of cattle in America was 96.1 million,¹⁰¹ of which 19,900 were tested for BSE.¹⁰² The amount tested was .0002, or two one hundredths of one percent of the entire population.¹⁰³ Approximately 35.737 million cattle were slaughtered in 2002.¹⁰⁴ The percentage of cattle slaughtered that were tested for BSE is six one hundredths of one percent.¹⁰⁵ The estimated population of downers is 130,000; therefore, .0014, or fourteen one hundredths of one percent of the total cattle population are downers.¹⁰⁶ Downers comprise .0036, or thirty six one hundredths of one percent, of the slaughter population in America.¹⁰⁷ The amount of animals tested is an insignificant percentage of the entire population of cattle in America.

⁹⁸ Ackerman, *supra* note 96.

⁹⁹ Frommer, *supra* note 20. The AP article is the only source found with a USDA quoted estimate of downed animals. Also see footnotes 21 and 22 discussing the amount of downer animals believed to exist.

¹⁰⁰ Press Release, USDA, USDA Marks Progress on BSE Prevention Action Steps, (Jan. 15, 2003) (on file with the San Joaquin Agricultural Law Review).

¹⁰¹ Background Data for BSE Coverage, *supra* note 23.

¹⁰² USDA Marks Progress on BSE Prevention Action Steps, *supra* note 100.

¹⁰³ This figure was obtained using a simple calculator to determine the amount of downers out of the entire cattle population listed by the USDA in America.

¹⁰⁴ Background Data for BSE Coverage, *supra* note 23.

¹⁰⁵ This figure was obtained using a simple calculator to determine the amount of downers out of the slaughtered cattle population listed by the USDA in America.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

The argument against the Ackerman-LaTourette Amendment rested upon the foundation that testing these animals was critical to protecting against BSE. In May of 2003, the USDA stated, "There is no evidence to date of BSE affecting U.S. cattle, despite an aggressive surveillance program under which nearly 20,000 animals were tested last year."¹⁰⁸ The amount tested does not suggest an aggressive stance. Only 5,272 animals were tested for BSE in 2001.¹⁰⁹

V. ECONOMIC CONSEQUENCES

A. Canada

BSE brought the Canadian beef industry to a halt in May of 2003. In Alberta, a single downed cow was discovered to have BSE¹¹⁰ and shortly thereafter, virtually every market in the world closed to Canadian beef. The animal was killed on January 31, 2003, because it was deemed unfit for human consumption.¹¹¹ Roughly three and a half months later, on May 20, 2003, the World Reference Laboratory confirmed the cow had BSE.¹¹²

The entire economy of Canada has been affected. By July 18, 2003, Canadian Human Resources received 4,238 requests for unemployment insurance from workers who lost their jobs over the BSE scare.¹¹³ Roughly 2,620 came from Alberta, 872 from Quebec, 434 from Ontario, and the rest were scattered throughout other provinces.¹¹⁴ The number of Canadian jobs lost due to the BSE scare are likely higher, as the employment insurance figures do not take into account the number of people who quickly found another job or do not qualify for unemployment insurance.¹¹⁵

¹⁰⁸ USDA Marks Progress on BSE Prevention Action Steps, *supra* note 100.

¹⁰⁹ *Id.*

¹¹⁰ CBC News, *Mad Cow Might Have Come From U.S.*, (July 3, 2003), at http://www.cbc.ca/stories/2003/07/03madcow_us030703 (last visited Sept. 2, 2003) (on file with the San Joaquin Agricultural Law Review).

¹¹¹ Justin Thompson, CBC News, *Timeline of BSE in Canada*, (August 28, 2003), at http://www.cbc.ca/news/indepth/background/madcow_cdn_timeline.html (last visited Sept. 1, 2003) (on file with the San Joaquin Agricultural Law Review).

¹¹² *Id.* at 2.

¹¹³ Dawn Walton, The Globe and Mail, *Thousands Jobless over BSE*, (Aug. 1, 2003) at A5, at http://www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030801/UMADDN_4/?query=BSE (on file with the San Joaquin Agricultural Law Review).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Canada has close to 13.5 million cattle, 5.7 million of which are in Alberta.¹¹⁶ Canada's beef production is a 2.2 billion dollar a year industry.¹¹⁷ Alberta's share is approximately 39 percent, which is 860 million dollars a year.¹¹⁸ As of August 3, 2003, Canada had lost 4,200 beef industry jobs and an estimated \$11 million daily.¹¹⁹

B. Effects on A Small Town

An analysis of the Canadian beef industry may illustrate what the future holds for the American beef industry. Ponoka, in northern Alberta, serves as an example. It was not uncommon for livestock trucks to sit parked for most of the summer of 2003.¹²⁰ Cindy McCreath, of the Canadian Cattlemen's Association states, "It's really important that people understand that this is not an issue that just affects beef farmers. It affects the underpinnings of rural society. And it is not just an Alberta issue - it's right across the country."¹²¹ Eighty of Roberge Trucking's one hundred and forty trucks are sitting idle because there is no place to haul cattle.¹²² Within three months of the initial outbreak of mad cow disease, the company closed offices in Winnipeg and Prince Albert in Saskatchewan, and in Clyde in Alberta.¹²³

Allowing downer cows to be processed for food also increased the chances of other food safety abuses beyond simple inclusion in the food supply. "In the U.S., the routine slaughter and processing of downed animals for human food opens the door to unscrupulous slaughterhouse operators who may attempt to claim that dead animals [deadstock] were down, and therefore still allowed to be used for human [consumption]."¹²⁴ On August 24, 2003, The Canadian Food Inspection Agency (CFIA) announced a recall of beef from the Aylmer Meat Packing plant

¹¹⁶ CBC News, *Mad Cow: The Science and The Story*, at <http://www.cbc.ca/news/in-depth/background/madcow.html> (last visited Sept. 1, 2003) (on file with the San Joaquin Agricultural Law Review).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Darcy Henton, Canadian Press, *Mad Cow Crisis Scourges Alberta*, at http://www.canoe.ca/CNEWS/Canada/2003/08/03/153030_cp.html (Aug. 3, 2003) (on file with the San Joaquin Agricultural Law Review).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Could Dead Animals Be Confused With Downed Animals?*, Farm Sanctuary E-News and Action Alert, (Farm Sanctuary, New York), Sept. 9, 2003, at 1.

in Aylmer, Ontario.¹²⁵ The Agency has not commented on the specific cause of the recall; however, a CFIA document of questions and answers prepared specifically for the Aylmer Meat Packers recall focuses primarily on deadstock issues.¹²⁶

C. Borders Close to Canadian Beef

Shirley McClellan, Alberta's Agricultural Minister, responded to the Canadian mad cow incident: "We have a very thorough and respected inspection system."¹²⁷ Ms. McClellan insisted that BSE is not contagious within the herd.¹²⁸ The scientific community is undecided on this issue.

By May 24, 2003, sixteen farms were under quarantine: three in British Columbia, two in Saskatchewan, and eleven in Alberta.¹²⁹ On May 26, 2003, just six days after the official announcement of BSE contamination, federal officials confirmed that the total number of cows slaughtered in relation to the outbreak numbered nearly 400.¹³⁰ "Two entire herds - including the 192-head northern Alberta herd where the infected cow last lived, and another in Saskatchewan where it *might* have stayed for up to four years - have been killed and the animals' brains tested for BSE (emphasis added)."¹³¹

Japan, the United States, and Mexico banned beef and cattle from Canada on May 20, 2003.¹³² On August 28, 2003, officials in Alberta were still hoping that beef could be moving across the United States border in a few days.¹³³ On September 4, 2003, the first shipments of meat came into the United States from Canada.¹³⁴ The Canadian government

¹²⁵ Press Release, Health Hazard Alert: Minister Orders Recall of Aylmer Meat Packers Inc. Beef or Beef Products (Aug. 24, 2003), at <http://www.inspection.gc.ca/English/corpaffr/recarapp/2003/20030824e.shtml>. (on file with the San Joaquin Agricultural Law Review).

¹²⁶ Press Release, Questions and Answers: Aylmer Meat Packers Food Recall (last visited Dec. 3, 2004), at <http://www.inspection.gc.ca/English/corpaffr/recarapp.2003/20030824qae.shtml>. (on file with the San Joaquin Agricultural Law Review).

¹²⁷ *Mad Cow: The Science and The Story*, *supra* note 116.

¹²⁸ *Id.*

¹²⁹ Thompson, *supra* note 111, at 2.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Robin Rowland, CBC News, *Canada, The United States and Japan: What's The Beef?* (last visited Sept. 2, 2003), at http://www.cbc.ca/news/indepth/background/mad-cow_canusjapan.html (on file with the San Joaquin Agricultural Law Review).

¹³³ Thompson, *supra* note 111, at 6.

¹³⁴ Judy Monchuck, Canadian Press, *Major Packer Says Canadian Beef Will Roll Across U.S. Border Wednesday*, at <http://www.canada.com/search/story.aspx?id=5e785440-c84b-478e-a42c-e0bde284e6e0> (last visited Sept. 27, 2003) (on file with the San Joaquin Agricultural Law Review).

realized that a full resumption of the meat trade with the United States would take some time.¹³⁵ Japan has not been so kind in easing its ban on Canadian beef. Japan dealt with an outbreak of mad cow disease on September 10, 2001.¹³⁶ “Six Japanese cattle have tested positive for BSE since the fall of 2001.”¹³⁷ The Japanese government demanded that any beef sent from the United States to their markets be certified not to have come from Canadian sources.¹³⁸ “Japan threatened to ban American beef imports if it reopened the borders to Canadian beef.”¹³⁹

The link between the United States, Canada, and Japan is crucial to Japan’s beef industry. The geographical proximity of the United States and Canada appears to have led Japan to follow the words of BSE expert Dr. Michael Greger: “...if Canada has mad cow disease, then it stands to reason that the United States does as well.”¹⁴⁰ Japan imports only a tiny amount of Canadian beef each year, but insisted it will not accept American imports unless the United States can guarantee its beef had no contact with Canadian cattle. “Since the Canadian and U.S. market is highly integrated, Japan’s stand was a major stumbling block in getting borders reopened.”¹⁴¹ Beef exports from Canada to Japan were close to \$21.5 million Canadian dollars in 2002¹⁴² and nearly \$45.6 million Canadian dollars in 2001.¹⁴³ At the time, Japan was the single largest importer of U.S. beef and wanted assurance that U.S. beef shipments would contain no Canadian meat.¹⁴⁴ Canadian exports of beef to America totaled

¹³⁵ CONGRESSIONAL RESEARCH SERVICE ISSUE BRIEF FOR CONGRESS (Jean M. Rawson), *supra* note 16, at 1.

¹³⁶ Rowland, *supra* note 132.

¹³⁷ CBC News, *Japan Using Mad Cow to Boost Own Beef Industry: Economist*, at http://www.cbc.ca/stories/2003/06/28/bse_japan030628 (last visited Sept. 3, 2003) (on file with the San Joaquin Agricultural Law Review).

¹³⁸ *Mad Cow Might Have Come From U.S.*, *supra* note 110.

¹³⁹ Rowland, *supra* note 132.

¹⁴⁰ *Canadian Mad Cow Discovery is Grave Warning for U.S.*, at http://www.farmsanctuary.org/media/pr_madcow.htm (last visited Sept. 2, 2003) (on file with the San Joaquin Agricultural Law Review).

¹⁴¹ Judy Monchuck, Canadian Press, *Alta’s Klein Mocks Japan’s Mad Cow Stance as Asian Dignitary Declines Beef*, at <http://www.cp.org/english/online/full/agriculture/030905/a090536A.html> (Sept. 5, 2003) (on file with the San Joaquin Agricultural Law Review).

¹⁴² Rowland, *supra* note 132, at 2.

¹⁴³ *Id.*

¹⁴⁴ Randi Fabi, Reuters, *Japan to Decide on Mad Cow Issue Next Week-USDA*, at http://www.agriculture.com/worldwide/IDS/2003-0806T230033Z_01_N06373834_RTRIDST_0_HEALTH-MADCOW-USA.html (Aug. 6, 2003) (on file with the San Joaquin Agricultural Law Review).

close to \$3.5 billion Canadian dollars in 2002¹⁴⁵ and almost \$3.3 billion Canadian dollars in 2001.¹⁴⁶

D. Canadian Responses

Ralph Klein, Alberta's Premier, was the most vocal opponent of Japan's ban on Canadian beef. Klein ridiculed a visiting Japanese dignitary for declining roast beef at an international business forum stating that he, "faced more harm from a falling sign [referring to a sign above the seated dignitaries chair] than mad cow disease."¹⁴⁷ "I would hope that Mr. Yamaguchi starts to pay attention to BSE and the ridiculousness of the situation relative to the international reaction The chances of that sign behind him, falling over, knocking him on the head and killing him are about a million times more [likely] than mad cow disease."¹⁴⁸ Speaking at a meeting of U.S. governors and Western Canadian Premiers in Montana, Mr. Klein attacked the man upon whose farm the BSE positive animal was discovered:

This all came about through the discovery of a single isolated case of mad cow disease in one Alberta cow on May 20th... The farmer – I think he was a Louisiana fish farmer who knew nothing about cattle ranching. I guess any self-respecting rancher would have shot, shovelled, and shut up, but he didn't do that. Instead he took it to an abattoir and it was discovered after testing in both Winnipeg and the U.K. that this older cow had mad cow disease.¹⁴⁹

Klein's spokesman, Gordon Turtle stated that, "He [Klein] was reflecting on the irony of the fact that one isolated case of [BSE] could have this kind of impact on the economy...."¹⁵⁰

On September 10, 2003, another animal suffering from mad cow disease was discovered in Japan.¹⁵¹ Japan's latest outbreak nearly makes its present policy regarding the importation of Canadian beef moot.

¹⁴⁵ Rowland, *supra* note 132, at 2.

¹⁴⁶ *Id.*

¹⁴⁷ Monchuck, *supra* note 141.

¹⁴⁸ *Id.*

¹⁴⁹ Canadian Press, *Farmer Should Have Covered Up Mad Cow, Klein Says*, at <http://www.globeandmail.com/servlet/story/RTGAM.20030619.wral0916/BNSStory/National/> (Sept. 16, 2003) (on file with the San Joaquin Agricultural Law Review).

¹⁵⁰ *Id.*

¹⁵¹ Mainichi Daily News, *UK Lab Confirms Japan's Mad Cow Affliction*, at <http://mdn.mainichi.co.jp/news/archive/200109/22/20010922p2a00m0dm005000c.html> (Sept. 10, 2003) (on file with the San Joaquin Agricultural Law Review).

VI. HUMANITARIAN AND SOCIAL CONSEQUENCES

A. *What Happens After a Cow goes Down*

Downed cows are moved or left where they lie. Beef industry groups, such as Central Livestock and Empire Livestock admit, "... it is near impossible to unload and/or move downed animals in a humane manner without first euthanizing them."¹⁵² Animals are often dragged with a chain that is wenched,¹⁵³ or pushed with a bulldozer or forklift to slaughter.¹⁵⁴

The Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-2156, was enacted in 1966.¹⁵⁵ The AWA does not apply to animals raised for food or food production,¹⁵⁶ and § 2132(g) specifically excludes farm animals from protection.¹⁵⁷ Furthermore, many states provide an exemption in their animal cruelty laws for commonly accepted animal husbandry¹⁵⁸ practices. Although California has a cruelty exemption for slaughtering an animal for food,¹⁵⁹ the state has enacted what is probably the toughest legislation in the country, punishing offenders for the mistreatment of downed animals.

B. *California's Downed Animal Law*

California's Downed Animal Bill Protection Act passed on August 26, 1995.¹⁶⁰ California Penal Code section 599f, subsection (a) provides misdemeanor penalties for a slaughterhouse that buys, sells, or receives a downed animal.¹⁶¹ Subsection (b) provides penalties for holding a non-ambulatory¹⁶² animal without taking immediate steps to humanely euthanize or remove the animal from the stockyard.¹⁶³ Subsection (c) provides penalties for dragging a downed animal at any time and requires that a

¹⁵² *Downed Animals: Diseased Food on Your Plate*, *supra* note 15.

¹⁵³ THE DOWN SIDE OF LIVESTOCK MARKETING, *supra* note 49.

¹⁵⁴ *Id.*

¹⁵⁵ Animal Welfare Act 7 U.S.C. §§ 2131-2156 (1966) (amended 1990).

¹⁵⁶ § 2132(g).

¹⁵⁷ *Id.*

¹⁵⁸ AMERICAN HERITAGE DICTIONARY 110 (2d ed. 1982). Animal husbandry is "the care and breeding of domestic animals such as cattle, hogs, sheep, and horses."

¹⁵⁹ CAL. PEN. CODE § 599(c) (Gould 2002).

¹⁶⁰ *California Downer Bill May Ratify Neglect of Hurt Cattle*, (last visited Dec. 3, 2004) at <http://www.animalpeoplenews.org/94/8/agriculture.html> (on file with the San Joaquin Agricultural Law Review).

¹⁶¹ CAL. PEN. CODE § 599f(a) (Gould 2002).

¹⁶² § 599f(e). (a non-ambulatory animal is one that is, "unable to stand and walk without assistance").

¹⁶³ § 599f(b).

harness or some harness-like device be used to lift and move the animal.¹⁶⁴

California Penal Code 599f has resulted in two convictions for agricultural animal abuse. In September 1995, Turlock stockyard manager Russell Felch repeatedly hit a cow on the head with a hammer.¹⁶⁵ Felch entered a no-contest plea to violating Penal Code section 599f(b), was fined \$3,000, and given 6 months probation.¹⁶⁶

In a Bakersfield stockyard case, Jerry Hixon was convicted when his auction allowed two downed cows to be dragged onto the back of a slaughterhouse truck.¹⁶⁷ According to court records, Hixon plead guilty to 599f(c) in December of 1998.¹⁶⁸ Hixon received a \$500 fine and three years probation.¹⁶⁹ Kern County Deputy District Attorneys recalled that the office was bombarded with boxes of postcards for most of one year. Many postcards expressed gratitude, yet some complained that harsher penalties were not enforced.¹⁷⁰

VII. CONCLUSION

The USDA ban on slaughtering downed animals for human consumption does not solve all of the problems relating to downers. Downers may still be subject to abuse on the farm when they go down. The system as a whole has failed to act humanely and protect the American people from BSE infected meat. Finally, there is no guarantee that the ban on downers in the food supply will remain in place, as the ban can be lifted at any time.

A. *Continued Abuse for Downers?*

Downed animals may still be subjected to neglect and abuse. California state law protects these animals, and ranchers who abuse them can be prosecuted. The author suggests that "rural crime units" might provide added resources to prosecute abuse in California.

¹⁶⁴ § 599f(c).

¹⁶⁵ Patrick Giblin, *Man Enters No-Contest Plea in Killing of Sick Calf*, *MODESTO BEE*, March 19, 1996, at B1. (A copy of this article is on file with the law review. This copy was sent to the author from Amy White, an editor with the *MODESTO BEE*).

¹⁶⁶ *Id.*

¹⁶⁷ Interview with "Janice," Lamont Superior Court Clerk, in Lamont, Cal. (Aug. 14, 2003).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Interview with Eric McGillivary, Former Kern County District Attorney, in Bakersfield, Cal. (Aug. 12, 2003).

¹⁷¹ CAL. PEN. CODE § 14170 (a) (WAIS 2003).

Section 14170(a) of the California Penal Code provides “it is the intention of the legislature in enacting this measure to enhance crime prevention efforts... to strengthen the ability of law enforcement agencies in rural areas to detect and monitor agricultural and rural-based crimes.”¹⁷¹ Section 14170(c) of the California Penal Code states that the rural crime unit’s creation is in response to the fact that, “...there has been no concentrated effort applied to the prevention of crimes against the agricultural industry.”¹⁷² Section (c) continues, “...agricultural and rural crime in the various counties of this state is a threat to the vitality of our rich agrarian tradition.”¹⁷³ Section 14173 of the California Penal Code provides 3.5 million dollars annually to fund rural crime units in eight California counties.¹⁷⁴

B. The System Failed

Ann Veneman made repeated assurances to the American public that the food supply is safe¹⁷⁵ based on “precautions taken by federal regulators and the cattle industry.”¹⁷⁶ The USDA’s response to America’s mad cow scare was to ensure the public that the food supply is safe. Ms. Veneman stated “[that] no infected meat had entered the food supply.”¹⁷⁷ The BSE infected Washington cow was slaughtered with twenty other animals on December 9, 2003, and its carcass was put into the food supply.¹⁷⁸ An Associated Press article dated December 24, 2003, reported that all 10,410 pounds of beef from those twenty animals had been recalled.¹⁷⁹ There was no discussion on the success of the recall or if any of the beef had been consumed in the two weeks since slaughter. As of January 5, 2004, almost a month after the cow was slaughtered, the Food Safety and Inspection Service (“FSIS”) was unwilling or unable to release any information on the success of the recall.¹⁸⁰ The FSIS claims that it has distribution points for all of the potentially infected meat, yet they will not state whether any meat has actually been recovered.¹⁸¹

¹⁷² §14170 (c).

¹⁷³ *Id.*

¹⁷⁴ CAL. PEN. CODE §14173 (WAIS 2003).

¹⁷⁵ Smith, *supra* note 3, at A3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at A1.

¹⁷⁸ Dreyfuss, *supra* note 7, at 3.

¹⁷⁹ *Id.*

¹⁸⁰ FSIS Update of Recall Activities, at <http://www.fsis.gov/OA/recalls/prelease/update067-2003.htm> (January 5, 2004) (on file with the San Joaquin Agricultural Law Review).

¹⁸¹ *Id.*

Government officials claimed, "...there is no threat to the food supply because the cow's brain and spine - nerve tissue where scientists say the disease is found - were removed before it was sent on for processing."¹⁸² However, the recall itself suggests that the USDA knows an animal infected with BSE cannot be made safe for human consumption by removal of these organs.

C. The USDA Ban

On December 30, 2003, Ann Veneman announced, "[e]ffective immediately, the USDA will ban all downer cattle from the human food chain."¹⁸³ Animal rights organizations have been fighting to ban downers from the food supply since 1986.¹⁸⁴ Prior to Ms. Veneman's statement, "the USDA had consistently defended and advocated for sending downed cattle to USDA slaughterhouses."¹⁸⁵ The inevitability of a BSE crisis in the United States was easily predictable to anyone following this issue.

Before the USDA enacted the ban, Farm Sanctuary, a farm animal rights group, filed suit to enjoin the USDA from allowing downers into the food supply. It has been reported that they have considered dropping the lawsuit, but only if the current ban on downers in the food supply remains in place.¹⁸⁶ They have apparently kept their suit intact because the USDA has the power to change their stance on the downer issue at will. According to Farm Sanctuary, agribusinesses are lobbying the USDA to lift the ban on downed meat.¹⁸⁷ Based on the history of this issue, it is clearly possible that the USDA could decide to remove the ban in the near future.

VIII. CLOSING

As this review has shown, there is ample evidence that a link between downed animals and BSE exists. Before the USDA ban, diseased and

¹⁸² Sherman, *supra* note 8, at A3.

¹⁸³ Veneman, *supra* note 14.

¹⁸⁴ *FarmSanctuary Calls for Ban on Slaughter of Downed Animals to Reduce Threat of Mad Cow Disease*, *supra* note 5, at 2.

¹⁸⁵ *USDA Bans The Slaughter of Downed Cattle For Human Food*, at http://www.nodowners.org/pr_mad_cow.htm (last visited Jan. 6, 2004) (on file with the San Joaquin Agricultural Law Review).

¹⁸⁶ *Id.*

¹⁸⁷ *USDA Downed Animal Ban Under Attack by Agribusiness*, at http://www.nodowners.org/pr_mad_cow.htm (last visited Mar. 15, 2004) (on file with the San Joaquin Agricultural Law Review).

potentially deadly meat entered the food supply. This is evidenced by the USDA's attempted recall of such meat. The diseased animal in question was slaughtered on December 9, 2003.¹⁸⁸ Yet, by January 5, 2004, the USDA could not state if it had recalled any meat from the animal.¹⁸⁹ Opponents of the Ackerman-LaTourette Amendment argue that the law would prevent testing of animals. The facts suggest otherwise because the amount of animals tested for BSE in the United States is extremely minimal. Finally, the fact that it took four months to confirm that the Canadian cow was BSE positive¹⁹⁰ suggests that testing cannot keep the food supply safe. A four month window for worldwide distribution of meat renders any recall attempt impractical as the meat would likely be consumed in that time.

Minimal BSE testing and delayed recalls are ineffective and impractical methods of protecting the food supply and the health of consumers. Therefore, the Ackerman-LaTourette Amendment should be introduced to legislators again as soon as possible. The current state of the United States cattle economy indicates that the law could pass. Furthermore, it would be a powerful tool in mandating the USDA to remove downers from the food supply, should it decide that downers are once again safe for human consumption. Although the Downed Animal Amendment narrowly failed, Congressman Ackerman's words should not have gone unheeded when he suggested that, "Canada should be a lesson to us."¹⁹¹

KEVIN BRILEY

¹⁸⁸ Emily Gersema, *First U.S. Mad Cow Traced to Canada*, Associated Press, at <http://story.news.yahoo.com> (Dec. 28, 2003) (on file with the San Joaquin Agricultural Law Review).

¹⁸⁹ FSIS Update of Recall Activities, *supra* note 180.

¹⁹⁰ Thompson, *supra* note 111, at 2.

¹⁹¹ *Downed Animal Amendment: Hearings on HR. 2519 and S. 1298*, *supra* note 17, at 100.