



## **WineAmerica Newsletter – April 2010**

### **From The President's Desk**

#### **WineAmerica/ WGA Policy Conference**

This spring's annual meeting in Washington was marked by high energy and good attendance with lots of appointments with Congressional friends. The meeting featured talks by Susan Stewart Evans, TTB's Industry Liaison, who explained her role at TTB and provided a TTB policy update, and Craig Regelbrugge, from the the American Nursery & Landscape Association (ANLA), who discussed agricultural worker immigration reform (AgJobs) and ANLA's work on the Clean Plant Network. We also spent a lot of time reviewing issues affecting wineries this Congressional session, and preparing members to lobby Congress effectively. We discussed two potential WineAmerica petitions to TTB (1) to allow the term "fortified" to be used on wine labels and (2) to allow vintage dating on "American" appellation wines. There were excellent meetings at the Department of Agriculture (USDA) where key department personnel briefed us and answered questions on USDA programs covering research, value added grants, specialty crop block grants, the national clean plant network, crop insurance, pest management policy and other topics.

At the State Associations Council (SAC) meeting, a number of great ideas were offered which will lead to further review and possibly a strategic planning session at our next meeting, November 8-10 in North Carolina. Some of these ideas are listed below:

- Improving coordination and communication
- Developing SAC talking points
- Sharing approaches to prevent 2-4 D damage through state regulation and grower information campaigns
- Winery definition problems—how to license wineries that do not produce grapes or have ties to grape production in the state
- The potential for a NASA project to map vineyards throughout the country
- How to more effectively reach out to urban legislators
- Properly gauging the impact of tourism—winery visitors spend 20-30% more than other types of tourists
- The impact of wine tax increases on local wineries, especially in light of limitations imposed by consumers expectations on price points.

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### Judiciary Subcommittee Hearing on “Legal Issues Concerning State Alcohol Regulation”

The National Beer Wholesalers Association (NBWA) has been lobbying Congress for legislation that would largely give states immunity from the dormant Commerce Clause and Federal antitrust laws. Their efforts led to a Judiciary Subcommittee hearing on March 18. Underlying the effort are wholesaler and state concerns that large retailers and global brewers are preparing to crowd beer wholesalers out of the U.S. market. NBWA’s main tactic has been to argue that lawsuits following a landmark 2005 Supreme Court decision (*Granholm v. Heald*) outlawing protectionist state direct-to-consumer shipping laws could eventually strip states of their power to regulate alcohol. This was echoed by several hearing witnesses who testified that total deregulation of domestic alcohol markets would lead to alcohol abuse. The example of recent problems faced by Great Britain in the wake of regulatory changes that greatly expanded hours of sale and allowed alcohol to be sold virtually anywhere at extremely low prices was offered up repeatedly. There was also a good deal of testimony that ongoing litigation was proving distracting and expensive for states.

Nevertheless, virtually all who testified—even the author of the study on the U.K. experience—stated that the situation in the U.K., was totally different from anything happening in the United States and involved a stark and dramatic excess of deregulation.

A letter from 39 Attorneys General was submitted on March 29 strongly supporting legislation that “will bring to a stop the erosion of state alcohol laws by re-enforcing the states’ ability to regulate alcohol as it sees fit.” In that letter they somewhat excessively state: “For over a decade, major retailers and other special interests have executed a systematic legal campaign to deregulate alcohol in favor of the very ‘one size fits all’ structure that the 21st Amendment rejected. This deregulation would effectively destroy our states’ ability to control the sale and distribution of intoxicating liquor.”

We do not agree that the last decade of litigation has created the conditions for rampant deregulation. In our *amicus* brief to the Supreme Court in *Granholm*, we argued that

The founders recognized that the grant of power to Congress in the Commerce Clause “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves.” See James Madison, letter to Joseph C. Cabell, 4 *Letters and Other Writings of James Madison* 14-15 (1865) (letter dated 13 Feb. 1829). As Justice Jackson famously wrote:

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Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

*H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

On March 24, WineAmerica and Wine Institute submitted testimony concerning this issue. Some excerpts follow:

- [L]itigation . . . has been utilized by all three tiers, producers, retailers, and wholesalers, as an effort to balance state laws and regulations to the *Granholm* Supreme Court decision.
- These cases, and the many cases that have come before it, are not an assault on a state's 21st Amendment rights, but a constant evolution to clarify and more clearly define the boundaries and limits of the 21st Amendment.
- The balance struck by the body of law regulating alcohol over the last 4 decades provides flexibility in the system and permits states to use a wide selection of alternate regulatory tools to meet 21st Amendment goals.
- States have very broad rights under the 21st Amendment when it comes to alcohol beverages. Three-tier distribution is just one of several industry areas in the much larger universe of alcohol beverage control. Licenses, permits, accessibility, age of purchase and possession, excise taxes, transportation, direct sales, are all areas that have been the subject of state power under the 21st Amendment.
- Far from the fragile situation and dark demise postured by proponents for Constitutional and antitrust immunity, states are constantly and continuously regulating alcohol beverages in ways that are consistent not only with the Constitution, but also with clear state interests such as the need for temperance, curbing excessive consumption or abuse of alcohol beverages, addressing underage drinking, and punishing conduct such as driving while under the influence.

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- Extraordinary proposals such as Constitutional or antitrust immunity or the elimination of federal preemption would have equally extraordinary consequences, removing any limits on abusive control. States would, for example, be entitled to impose burdensome labeling requirements on out-of-state wineries, require costly and senseless product reformulations for in-state sales, design a protectionist distribution system that favors in-state interests or provides commercial advantages to in-state businesses, fix prices or impose consumer-unfriendly resale price maintenance schemes, or create tax preferences or exemptions for in-state products.
- While we acknowledge the issues with alcohol in the UK, it is a country confined to its own facts. The UK conditions would be impossible to reproduce in the United States because of the powers granted to the states by the 21st Amendment. Our members appreciate the benefits of an orderly yet sensible, non-discriminatory and fair distribution market for wine. The 21st Amendment, properly exercised by the states to address retail sales hours and consumer accessibility, make any comparisons between the UK and the US purely academic.
- We believe that the powers granted to the states by the 21st Amendment do not and should not in the future supercede or take precedence over other provisions of the Constitution. This is what the wholesalers desire to protect their monopoly distribution system, and it is wrong-headed.

Small producers, wineries and craft brewers are at great risk if NBWA gets its way. Powerful wholesalers will be in a position to manipulate state governments to allow discrimination and to favor the middle tier without the tempering effect of the Commerce Clause and Federal antitrust protections. A glaring example comes in the form of the monopoly protection laws—also referred by wholesalers as franchise laws—that exist in 23 states. These laws make shifting to a different wholesaler virtually impossible. Monopoly protection laws can be totally unworkable in many states for smaller wineries (including those owned by big wineries) and craft brewers. It is clear that WineAmerica will be in for a long hard battle to preserve winery rights.

### **New Jersey Wine Shipping Status**

In New Jersey, Senate Bill 766, a wineries only shipping bill that closely follows the model of wine shipping legislation passed by 37 other states and sponsored by the President of the New Jersey Senate, was passed by the New Jersey Senate on March 11 with a lopsided 29 to 5 vote. We are now waiting for Assembly action expected in early May after some budget work by the legislature. The companion bill in that body is sponsored by the NJ Assembly Deputy Speaker.



## Regulatory Tips and Tools: April 2010

By Michael Kaiser

### *Class/Type Statement*

One common mistake that a lot of wineries make with their wine labels is leaving off the class/type statement. Quite often a winery will simply have a fanciful name such as “Vintners Red” on the label and no other information. I have seen a lot of this recently and thought it would be a good time to revisit this topic.

There are four required bits of information TTB looks for on a front or brand label: Brand Name, class/type statement, alcohol content, and the appellation of origin (not always required). There are a variety of ways the class/type statement can be presented.

At the most basic level the terms “Table Wine” and “Dessert Wine” can be used for the class/type designation for grape wine. Table Wine must be 7% to 14% alc. by vol. and Dessert Wine must be 14.1% to 24% alc. by vol. These two terms alone are only allowed for grape wines. Fruit wine must be qualified with the type of fruit. For example: Peach Table Wine or Peach Dessert Wine. Dessert wines must list their alcohol content, but the term “table wine” may be used in lieu of an alcohol percentage. For wine specialty products (formula wines) a truthful and accurate “statement of composition” is required. TTB typically provides guidelines for statements of composition on approved formulas.

Red Wine, White Wine, and Rose (or Pink) Wine are also allowed for grape wines. When using these terms (without the term “table wine”), the alcohol content must be listed on the label. The terms Sparkling Wine and Carbonated Wine are allowed for wines that meet the basic criteria for these products—natural effervescence or added effervescence being the primary distinction between them. Other examples where alcohol content would need to be listed are fruit and agricultural wine—Raspberry Wine (fruit wine not described as a table wine) or Honey Wine (agricultural wine, which does not allow for table wine designation).

Varietal designations are also permitted as the class/type designation, but alcohol content must be listed where the term “table wine” is not used. When using a single varietal designation, 75% of that grape must make up the wine. When using more than one varietal designation the percentages of grape types must add up to 100%.

The class/type designation must be separate and apart from all other information.

*Next Month: We revisit appellation of origins.*



## **Economic Impact Study Update**

by Jeff Dixon

Over the last month, we've come a long way toward completing our economic survey of the wine industry. The responses have been encouraging, despite the recent economic climate. Local wine industries across the country have shown great buoyancy through a year that has witnessed significant erosion in many other industries. 2009 saw a 6% increase in the total number of U.S. wineries and many states have seen even greater growth. According to the most recent Nielsen figures, the U.S. market for domestic wine should continue to grow, as per capita consumption increases year-over-year and imports continue to lose market share.

The recent growth has benefited many state wine industries directly, but those benefits extend far beyond local wineries. National studies conducted in the last few years show that the U.S. wine and grape industries generate in excess of \$162 billion of economic impact, support more than 1.1 million full-time equivalent jobs, and pay \$17.1 billion in taxes annually. This impact is felt most directly in rural areas, where wineries preserve farmland, attract tourists, and provide good jobs. The 25 local impact studies commissioned in the last few years document similar transformative growth and provide encouragement that further public and private investment in the wine industry is warranted.

While industry growth has had an overwhelmingly positive effect on wineries and the surrounding communities, rapid growth can create problems. In many states, the increase in wine production has outpaced vineyard growth, leading to a dependence on imported grapes. Many states are taking ambitious steps to correct this imbalance—Texas, for example, has plans to double vineyard acreage. On the other hand, states facing shortages can overshoot local needs since high grape prices can encourage overinvestment in vineyards. This phenomenon explains the grape surpluses in states like Oregon and Virginia. In these cases, it may take a few years for grape production and wine sales to come back into balance. Maintaining this delicate balance requires careful monitoring on the part of states.

Despite the myriad situations facing states across the U.S., there are certain patterns that shape a successful local industry. Typically, a few large producers drive industry growth and play a crucial role in increasing a local industry's market share. One clear example is Indiana, which has captured about 10% of its own market, thanks largely to Oliver Winery, one of the biggest wineries in the Midwest. Since large producers generally have broad distribution and marketing capabilities, they can greatly increase the visibility of a state's industry, which benefits producers of all sizes.

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To be successful, states also need a large pool of boutique wineries since agritourism greatly increases a local industry's economic multiplier effects. Small wineries also play a significant role in building a state's reputation for quality where their wines perform well at competitions. Most new entrants into the wine business operate on this scale.

In the last year, certain regions have seen a slowdown in growth, but it is important to note that American wine is still growing, and that growth is sustainable. Recent market trends hold a great deal of promise for American wines. According to the most recent Nielsen statistics, the price segment with the greatest growth in the last quarter of 2009 was \$9-\$15 wines—a crucial price segment for local wine in many parts of the country. Higher end producers should note that wines priced above \$15 also increased their market share in that quarter after a period of decline. These trends suggest that many consumers are willing to trade up for high-quality local products. Given a growing market and a seemingly improving economy, we should all be feeling pretty good about the direction of our industry.

