

Case No. 06-35512

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RANCHERS CATTLEMEN ACTION LEGAL FUND  
UNITED STOCKGROWERS OF AMERICA,  
Plaintiff/Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,  
Animal and Plant Health Inspection Service, *et al.*,  
Defendants/Appellees.

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On Appeal from the United States District Court for the District of Montana,  
D.C. No. CV-05-00006-RFC

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**BRIEF *AMICUS CURIAE* OF THE CANADIAN CATTLEMEN'S  
ASSOCIATION AND ITS AFFILIATED ORGANIZATIONS  
IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE  
DISTRICT COURT ORDER**

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DATED: March 6, 2007

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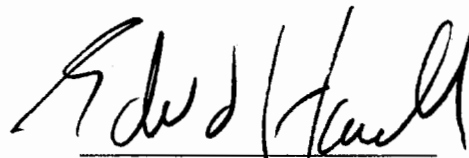
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## CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, the Canadian Cattlemen's Association ("CCA"), and its affiliated organizations – Alberta Beef Producers, B.C. Cattlemen's Association, Canadian Beef Breeds Council, Fédération des producteurs de bovins du Québec, Manitoba Cattle Producers' Association, New Brunswick Cattle Producers, Nova Scotia Cattlemen's Association, Ontario Cattlemen's Association, P.E.I. Cattlemen's Association, and Saskatchewan Stock Growers' Association – state that (1) neither the CCA nor any of the above-listed organizations has a parent corporation, and (2) no publicly held corporation owns 10 percent or more of the stock of CCA or any of the listed organizations.

DATED: March 6, 2007



Edward J. Farrell

## TABLE OF AUTHORITIES

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## INTEREST OF THE *AMICUS CURIAE*

The Canadian Cattlemen’s Association is a national federation that encompasses eight provincial organizations and represents the interests of Canada’s more than 90,000 beef producers. The Association and those who join it (collectively “CCA”) support the United States Department of Agriculture and the Animal and Plant Health Inspection Service (collectively “USDA”) in its opposition to Ranchers Cattlemen Action Legal Fund United Stockgrowers of America’s (“R-CALF”) appeal of the District Court for the District of Montana’s April 5, 2006 order entering summary judgment in favor of USDA, and denying R-CALF’s request for a permanent injunction of USDA’s Final Rule allowing U.S. importation of certain Canadian cattle under 30 months of age (“Final Rule”).<sup>1</sup> *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, No. CV-05-06-BLG-RFC (D. Mont. Apr. 5, 2006) (“April 5 Order”).

The CCA submits this *amicus curiae* brief to provide a viewpoint not otherwise before this court—the perspective of the producers of the very cattle that are the subject of R-CALF’s appeal. The CCA is joined in this submission by Alberta Beef Producers, B.C. Cattlemen’s Association, Canadian Beef Breeds

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<sup>1</sup> The Final Rule is entitled “Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities,” 70 Fed. Reg. 460 (Jan. 4, 2005). *See* ER Tab 2. Specifically, the Final Rule establishes minimal risk regions for the transmission of Bovine Spongiform Encephalopathy (“BSE”) and designates Canada as such a minimal risk region.

Council, Fédération des producteurs de bovins du Québec, Manitoba Cattle Producers' Association, New Brunswick Cattle Producers, Nova Scotia Cattlemen's Association; Ontario Cattlemen's Association, P.E.I. Cattlemen's Association, and Saskatchewan Stock Growers' Association.

The CCA has been actively involved in the development and implementation of measures in Canada to ensure the health of Canadian cattle and the high quality and safety of beef products derived from them. Among the CCA's objectives are to:

- Eradicate and prevent infection from reportable diseases and ensure regulations are based on sound, current science and do not unnecessarily impede trade.
- Assure consumer confidence in the Canadian meat inspection system and be recognized by trading partners as outstanding for providing food safety assurance.
- Ensure industry has favorable access to international markets.<sup>2</sup>

In furtherance of these objectives, the CCA has submitted comments at all stages of the development of the Final Rule issued by USDA. In addition, in earlier stages of these proceedings, the CCA was granted leave to file *amicus* briefs both by this Court and the district court. Both USDA and R-CALF have consented to CCA's filing of an *amicus* brief in this proceeding.

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<sup>2</sup> CCA, "CCA Committees and Objectives," *available at* [http://www.cattle.ca/about\\_cca/committees.htm](http://www.cattle.ca/about_cca/committees.htm) (last visited March 6, 2007).

This appeal represents R-CALF's latest effort to unjustifiably thwart resumption of normal trade in cattle and beef between Canada and the United States for its own economic benefit. If nothing else, this effort is consistent with R-CALF's institutional purpose – R-CALF was created in 1998 to “file three trade cases on behalf of the U.S. cattle industry,”<sup>3</sup> and its current mission is “to represent the U.S. cattle industry in national and international trade and marketing issues to ensure the continued profitability of and viability of U.S. cattle producers.”<sup>4</sup> R-CALF's position on this issue is not driven by sincere concern for human or animal health but by a short-sighted and unreasoned goal to keep U.S. cattle prices as high as possible. R-CALF's view is in direct contrast to USDA's support of science-based policies that will ensure human and animal health as well as promote a fair and stable world beef and cattle market. USDA's view, premised on sound science and supported by many in the U.S. beef and cattle industry, will ultimately enhance the overall position of U.S. producers in the world market as other

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<sup>3</sup> Not surprisingly, two of those cases were brought against cattle from Canada, one seeking antidumping duties, the other countervailing duties. *See Live Cattle From Canada and Mexico*, USITC Pub. 3255, Inv. Nos. 701-TA-386, 731-TA-812-813 (Final)(Nov. 1999). Ultimately both failed, as did the third case against Mexico, after the Canadian cattle industry incurred significant costs in defending them.

<sup>4</sup> R-CALF, “R-CALF USA Frequently Asked Questions,” *available at* <http://www.r-calfusa.com/News%20Releases/faq.htm> (last visited March 6, 2007).

countries adopt the same science-based approach and refrain from irrational product bans when isolated cases of BSE are identified.

Consistent with its goals and objectives, CCA seeks to prevent the establishment of trade barriers, disguised as health measures, that are motivated by parochial economic interests of organizations such as R-CALF. CCA and its members have a critical stake in the outcome of this proceeding and an equally significant interest in the continued importation by the United States of Canadian cattle and beef. CCA's members are directly impacted by how the U.S. structures and implements its BSE regulations. As the U.S. and Canadian beef and cattle markets are viewed globally as largely integrated, the policy decisions and standards established in either country have an impact on the industries of both in their ability to trade internationally. CCA's members would be seriously harmed if R-CALF was ultimately successful in its quest to rescind the Final Rule.

### **INTRODUCTION**

The CCA files this *amicus curiae* brief in support of USDA and the affirmance of the district court's April 5, 2006 Order granting summary judgment in USDA's favor.

R-CALF complains about the district court's April 5, 2006 Order, protesting that it did not offer a detailed analysis of the facts and arguments presented in the parties' motions for summary judgment and that it was based solely on this Court's

decision vacating the preliminary injunction entered by the district court. R-CALF seeks a reversal of the district court's April 5 Order and a remand of the case for application of the legal standards for judicial review of USDA's actions under the Administrative Procedures Act to the arguments and evidence available to the district court. R-CALF's Brief at 47. Based on the standard of deference that must be accorded USDA's formulation and implementation of the Final Rule, and the record evidence, all of which was before the district court at the time of its decision, this Court should affirm the district court's entry of summary judgment for USDA.

To remand this case back to the district court would be futile. As R-CALF itself notes, "[t]his Court might choose not to send this case back to the district court if it were obvious that, even after consideration of all of the evidence, the district court could reach only one conclusion." R-CALF's Brief at 28. And in fact, that is what happened. However unsatisfactory R-CALF may find the district court's opinion to be, the district court could see that nothing in the administrative record or otherwise presented in conjunction with the motions for summary judgment was sufficient to overcome the standard of deference that must be applied to judicial review of an agency's decision. As noted by the district court:

Regulations are presumed to be valid, and therefore review is deferential to the agency. *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9<sup>th</sup> Cir. 2003). All that

is required is that the agency have “considered the relevant factors and articulated a rational connection between the facts and the choices made.” *Id.* Further, “[t]he court is not empowered to substitute its judgment for that of the agency.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife*, 273 F.3d 1229, 1236 (9<sup>th</sup> Cir. 2001). Deference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency’s decision involves a high level of technical expertise. *Id.*

April 5, 2006 Order at 3. Pursuant to this standard of deference, as reinforced by this Court in its July 25, 2005 opinion reversing the preliminary injunction initially entered by the district court,<sup>5</sup> the district court concluded that USDA’s actions in development and implementation of the Final Rule were not arbitrary and capricious and must stand. In this appeal R-CALF has provided no compelling basis for the relief it seeks.

### **SUMMARY OF ARGUMENT**

In this appeal, as in R-CALF’s previous efforts to prevent implementation of the Final Rule, R-CALF ignores that this is a case based on an administrative record, and persists in attempting to introduce extra-record and post-decisional material. R-CALF’s repeated efforts to selectively add to the record should not be countenanced. The record is the record. If R-CALF believes that the facts

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<sup>5</sup> *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA.*, 415 F.3d 1078 (9<sup>th</sup> Cir. 2005).

supporting the Final Rule have changed or that current conditions warrant its modification, this proceeding is not the proper forum to make such arguments. R-CALF is free to request that USDA, through rulemaking, make suggested modifications to the rule. Indeed, that opportunity exists right now as the comment period is open until March 12, 2007 on a USDA proposed rule to modify the scope of the Final Rule which is the subject of this litigation. *See* “Bovine Spongiform Encephalopathy; Minimal Risk Regions; Importation of Live Bovines and Products Derived From Bovines,” 72 Fed. Reg. 1102 (Jan. 9, 2007) (proposed rule). This lawsuit ought not be continued simply as a sounding board for R-CALF to offer revisions to the Final Rule, particularly when USDA is currently accepting comments on proposed revisions to that very rule.

As R-CALF seeks to put before this Court extra-record information, it has focused on isolated purported anomalies and ignored the big picture. R-CALF offers incomplete and misleading information, straining to advance its case despite the support for the rule evidenced by the full record. To the extent the Court considers the extra-record information offered by R-CALF, CCA considers it essential to put that information in proper and current context. Accordingly, CCA will address certain limited issues raised in R-CALF’s Brief, in particular matters where the CCA is well-situated to offer specific insight, and provide the Court with relevant information either neglected or misconstrued by R-CALF. In particular,

the CCA will correct R-CALF's mischaracterization of the efficacy of Canada's feed ban, put into context the additional cases of BSE identified in Canadian cattle, and assess the impact to date of the Final Rule on the U.S. cattle market.

## ARGUMENT

### **I. THE CANADIAN FEED BAN IS EFFECTIVE**

Throughout proceedings in this Court, as well as in the district court, R-CALF has repeatedly failed to acknowledge that the application of a feed ban does not have to be 100 percent perfect in order for it to be effective. USDA examined the efficacy of the Canadian feed ban, as well as its enforcement, and determined that “an effective feed ban is in place in the rendering, feed manufacturing, and livestock raising industries.” 70 Fed. Reg. at 467; *see also* 70 Fed. Reg. at 476 (“Based on the information available to us, including communication with and visits to Canada, we have concluded that Canada has effectively enforced its feed ban.”).

In making its assessments, USDA observed, among other factors, that the Canadian Food Inspection Agency (“CFIA”) has identified noncompliance of “immediate concern” in fewer than two percent of feed mills inspected during 2003-2004. 70 Fed. Reg. at 468. USDA appreciated that minimal noncompliance could occur without rendering a feed ban ineffective. USDA further noted that “[t]he downward pressure exerted by a feed ban—*which the early experience of*

*the United Kingdom demonstrated to be substantial even if only partially implemented*—and the time of controls before detection of the disease indicate that it is more likely than not that the incidence of BSE is decreasing in Canada rather than increasing.” 70 Fed. Reg. at 510 (emphasis added).<sup>6</sup>

Even in its findings that the Canadian feed ban is effective, USDA does not rely on the feed ban as the only means of protection from BSE. Rather, while USDA’s risk analysis indicates that “BSE transmission occurs primarily through contaminated feed,” it also acknowledges that it has not been established with certainty that “contaminated feed is the only pathway” for transmission of the disease and that “it cannot be assumed that there is complete compliance with a feed ban.” 70 Fed. Reg. at 510. Accordingly, USDA established ways of mitigating “risk arising from alternate pathways or lack of compliance with a feed ban,” *id.*, through a series of overlapping safeguards including the removal of

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<sup>6</sup> Not only did USDA recognize the overall effectiveness of the Canadian feed ban in implementing the Final Rule, but USDA has reassessed and confirmed the integrity of the feed ban since additional BSE cases were identified in Canada and has done so again in its recent proposed rule to permit importation of cattle over 30 months of age (and their beef). *See* 72 Fed. Reg. 1102, 1106-1107.

specified risk materials (“SRM”).<sup>7</sup>

As evidenced in the preamble to the Final Rule, implementation of a feed ban can be highly effective, even when animals born after the implementation of the ban are found to have contracted BSE. In the United Kingdom, BSE has been identified in nearly 46,000 animals born after the feed ban implemented in 1988.<sup>8</sup> The peak of such “born after the ban” animals occurred in 1989, the year following implementation of the ban, when there were nearly 13,000 such cases. By 1990, the number of “born after the ban” animals dropped by more than 50 percent to below 6,000. By 1995, the number was down to 1,235 and in 2000 there were only nine (9) such cases. At the same time, the number of overall BSE cases in the United Kingdom decreased from a high of 37,280 in 1992 to 114 in 2006.<sup>9</sup>

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<sup>7</sup> SRMs are the animal parts that would most likely be infective were an animal to have BSE. potentially infective animal materials. SRMs include the brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse process of the thoracic and lumber vertebrae, and the winds of the sacrum) and dorsal root ganglia of cattle 30 months of age and older, and the tonsils and distal ileum of the small intestine of all cattle. *See* 70 Fed. Reg. at 465.

<sup>8</sup> *See* 70 Fed. Reg. at 462; *See also* U.K. Dept. for Environment, Food and Rural Affairs, “BSE: Statistics – Suspected cases born after the feed ban (as of 31 Jan. 2007),” *available at* [http://www.defra.gov.uk/animalh/bse/statistics/bse/susp\\_cases-after-feed%20ban.htm](http://www.defra.gov.uk/animalh/bse/statistics/bse/susp_cases-after-feed%20ban.htm) (site last visited March 6, 2007).

<sup>9</sup> *See* OIE, “Number of cases of BSE reported in the United Kingdom,” (Jan. 26, 2007) *available at* [http://www.oie.int/eng/info/en\\_esbru.htm](http://www.oie.int/eng/info/en_esbru.htm) (site last visited March 5, 2007).

In North America, where feed bans were instituted in mid-1997, well before the first indigenous BSE case in 2003, the numbers of cases will never reach the levels experienced in the U.K. In North America, there have been only four animals born after the feed ban known to have BSE. One of these animals was identified in January 2005, and specifically considered by this Court in its reversal of the preliminary injunction imposed by the district court. *See R-CALF v. USDA*, 415 F.3d 1090 (“One of these cows [confirmed on January 2, 2005], like the two previous Canadian cattle diagnosed with BSE, was born before Canada’s feed ban; the other [identified January 11], however, was born shortly thereafter.”). Therefore, even where there are many more cases of BSE in animals born after the feed ban (tens of thousands more in the U.K. case), a feed ban can serve to dramatically lower the incidence of BSE.

R-CALF disingenuously cites to the Final Rule (70 Fed. Reg. at 485) for the proposition that the “decision to allow imports of under-thirty-month-old cattle [was] based on [the] assumption they could not have been exposed to potentially contaminated feed because they were born after Canada’s feed ban”. R-CALF’s Brief at 36. USDA made no such unequivocal statement. Rather, the Final Rule states:

APHIS determined that cattle that are less than 30 months of age are *unlikely* to have infectious levels of the BSE agent and that animals born after the feed ban was implemented are

*unlikely* to have been exposed to the infectious agent. The combination of these factors caused us to conclude that we could safely import cattle for feeding and slaughter or for immediate slaughter that (1) were less than 30 months of age; (2) were subject to a ruminant feed ban; (3) were imported through designated ports of entry and, if moved directly to slaughter, were moved in a sealed means of conveyance; (4) were accompanied from the port of entry to a recognized slaughtering establishment by VS Form 17-33, or were accompanied by an APHIS Form VS 17-130 for movement to the feedlot designated on the import documents and by APHIS Form VS 1-27 for movement from the feedlot; (5) were moved as a group to either a designated feed lot or recognized slaughtering establishment and (6) had their intestines removed at slaughter.

70 Fed. Reg. at 485 (emphasis added). R-CALF's mischaracterization is twofold. First, USDA recognized that under-thirty-month-old cattle were *unlikely* to have been exposed to the infectious agent, not that such cattle could never be exposed to conditions that might give rise to BSE. USDA never expressed the certainty that R-CALF attributes to it, since clearly the possibility of cases born post-feed ban was present (as observed in the U.K). Second, the knowledge that cases in post-feed ban animals was unlikely to occur was by far not the only factor on which USDA based its decision to go forward with the Final Rule. The conditions detailed above are all prerequisites for the importation of under-thirty-month-old cattle under the Final Rule, and again, evidence how the Final Rule incorporates a series of complementary and interlocking safeguards, such that human and animal health are protected even in the unlikely event that one of these overlapping and

interlocking firewalls may fail. *See, e.g.* 70 Fed. Reg. at 513 (“infectivity in animals younger than 30 months has in most cases been confined to tonsils and distal ileum, both of which would be removed at slaughter in the United States and Canada”). Moreover, all of the Canadian animals diagnosed with BSE have been well over 30 months of age and would not have been eligible for importation under the Final Rule in the first place. R-CALF is in error here in the same way as this Court found the district court to be in error—“[i]nstead of evaluating the BSE safeguards as part of a larger system, the district court parsed the regulations and faulted USDA for any risk that a given step failed to remove.” *R-CALF v. USDA*, 415 F.3d at 1096.

## **II. THE OCCURRENCE OF ADDITIONAL BSE CASES WAS ANTICIPATED BY THE FINAL RULE**

R-CALF tries to make much of the additional BSE cases discovered in Canada in 2006. *See* R-CALF’s Brief at 35. All told, since the first discovery of BSE in an indigenous Canadian animal in May 2003, BSE has been identified in nine additional Canadian animals (and in two animals native to the United States).<sup>10</sup> These 12 North American cases are in no way comparable to the more

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<sup>10</sup> *See* Canadian Food Inspection Agency, [www.inspection.gc.ca/english/animal/heasan/disemala/bseesb/bseesbindex.shtml](http://www.inspection.gc.ca/english/animal/heasan/disemala/bseesb/bseesbindex.shtml) (click on “BSE Case Confirmed in Alberta” (Feb. 7, 2007) and “Completed Investigations”) (last visited March 6, 2007).

than 184,400 U.K. cases of BSE (as well as the more than 5,500 cases in other European countries).<sup>11</sup> No matter how unwelcome these cases may be, they were not unanticipated and are by no means indicia of an uncontrolled outbreak of the disease. There is absolutely no basis for R-CALF's conclusion that these few instances represent anything more than the very limited and isolated cases taken into consideration by USDA in its promulgation of the Final Rule. *See, eg.* 70 Fed. Reg. at 523 ("APHIS' assessment of the prevalence of BSE in Canada was related to the small number of cases detected through an active surveillance program, and was not contingent upon there being only one case."); at 514 ("While it is possible that additional BSE infected cattle may exist in Canada, we have confidence that if such cattle do exist the number is small.").

R-CALF also refers a number of times to a "BSE hot spot" in Alberta (*see, e.g.*, R-CALF's Brief at 5, 35), apparently attempting to draw a negative connotation from the repeated usage of the term with respect to the status of BSE in Canada. However, R-CALF fails to understand that such clustering of occurrences of the disease is indicia of a localized exposure of a non-contagious disease and not any systemic breakdown of BSE safeguards in Canada. Indeed,

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<sup>11</sup> *See* OIE, "Number of cases of BSE reported in the United Kingdom," (Jan. 26, 2007) available at [http://www.oie.int/eng/info/en\\_esbru.htm](http://www.oie.int/eng/info/en_esbru.htm); OIE, "Number of reported cases of BSE in farmed cattle worldwide (excluding the U.K.)," available at [http://www.oie.int/eng/info/en\\_esbmonde.htm](http://www.oie.int/eng/info/en_esbmonde.htm) (last visited March 6, 2007).

this “cluster effect” may well serve to impede the geographic distribution of BSE.<sup>12</sup>

Moreover, that there are more cases of BSE in Alberta is not surprising since Canada’s cattle are concentrated there.

### **III. IMPLEMENTATION OF THE FINAL RULE HAS NOT HAD ANY NEGATIVE IMPACT ON THE U.S. MARKET**

Throughout these proceedings, R-CALF has sought to have its judgments adopted in lieu of those of USDA. Not only are R-CALF’s demands not legally sustainable in light of the deference due an agency in a matter within its expertise, but R-CALF lacks credibility in its assessment of the Final Rule and its impact on the U.S. beef and cattle industry.

The passage of time itself stands as the most prominent support for USDA’s actions in this matter. This Court can see, as could the district court at the time of its decision, that USDA acted appropriately in the Final Rule’s promulgation. Even more now that the border has been open for over a year and a half, conditions reveal that USDA’s assessment of the Final Rule’s impact was correct, and R-CALF’s woefully off the mark.

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<sup>12</sup> See USDA, “U.S. Dept. of Agriculture’s Summary of the Epidemiological Findings of North American Bovine Spongiform Encephalopathy Positive Cattle” (April 2005) at 22, *available at* [http://www.aphis.usda.gov/lpa/issues/bse/bse\\_epi\\_report\\_4-29-05.doc](http://www.aphis.usda.gov/lpa/issues/bse/bse_epi_report_4-29-05.doc) (last visited March 6, 2007). See ER 5 for excerpts of this Report relied on by R-CALF.

Since the July 2005 border reopening, the U.S. cattle market has continued to thrive. R-CALF's prediction of a flood of cattle from Canada have not been borne out. Likewise, contrary to R-CALF's earlier argument, U.S. export markets have not been affected, consumer confidence has remained stable, prices have remained stable, and, if anything, the U.S. has benefited from the border reopening as a result of the positive impact on the U.S. packing industry.

Furthermore, there has never been a case of variant Creutzfeld-Jakob Disease<sup>13</sup> ("vCJD") native to North America. When R-CALF notes that "eating BSE-contaminated bovine meat and other products is believed to have resulted in the death of over 150 people in the U.K. and Europe, at least three people in the U.S. and one person in Canada," R-CALF's Brief at 3, they are once again guilty of advancing half-truths. Out of nearly 200 vCJD cases worldwide (living and deceased), 165 have been diagnosed in the U.K. and 30 in other European

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<sup>13</sup> Variant CJD is the human variant of BSE believed to be transmitted to humans through consumption of BSE-infected material. *See* 70 Fed. Reg. at 462. Variant CJD should not be confused with the classic form of CJD. Classic CJD is a rare neurological disease, similar to BSE, that occurs in humans. Classic CJD is endemic throughout the world, including the U.S. *See* Centers for Disease Control and Prevention, National Center for Infectious Diseases, "Fact Sheet: Variant Creutzfeld-Jakob Disease," *available at* [http://www.cdc.gov/ncidod/dvrd/vcjd/factsheet\\_nvcjd.htm](http://www.cdc.gov/ncidod/dvrd/vcjd/factsheet_nvcjd.htm) (last visited March 6, 2007).

countries.<sup>14</sup> The three cases diagnosed in the U.S., as well as the one in Canada, are believed to have been contracted outside of North America, in countries where BSE was prevalent. There have been no cases linked to eating North American beef. To put things in perspective, the U.S. Centers for Disease Control and Prevention has estimated that food borne diseases (*e.g.*, E. coli, Listeria and Salmonella) cause approximately 5,000 deaths each year in the U.S. alone.<sup>15</sup>

A. R-CALF's predictions of the volumes of cattle that would cross the border upon implementation of the Final Rule have not come to pass.

In previous filings R-CALF conjured up images of herds of cattle poised at the Canadian border ready to stampede into the United States, claiming that a “flood of cheap cattle and meat” would enter the United States following resumption of importation of Canadian cattle “resulting in the loss of tens of thousands of jobs.” R-CALF Memorandum of Points and Authorities in Support of Plaintiff’s Application for Preliminary Injunction (Jan. 31, 2005) at 36. After the approximately 19 months since the border has been open, no such flood has inundated the U.S. market, nor will it. To the contrary, the average level of

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<sup>14</sup> See University of Edinburgh, National Creutzfeldt-Jakob Disease Surveillance Unit, “CJD Statistics,” *available at* [www.cjd.ed.ac.uk/figures.htm](http://www.cjd.ed.ac.uk/figures.htm); “Variant Creutzfeldt-Jakob Disease Current Data (Feb. 2007)” *available at* [www.cjd.ed.ac.uk/cjdworld.htm](http://www.cjd.ed.ac.uk/cjdworld.htm) (both last visited March 6, 2007).

<sup>15</sup> See Congressional Research Service, “Bovine Spongiform Encephalopathy (BSE, or “Mad Cow Disease”): Current and Proposed Safeguards” (updated Jan. 16, 2007) at 1, n. 1.

Canadian cattle export volumes (slaughter and feeder cattle combined) for 1998-2002 was just more than 1,166,070 head; in 2006, Canadian cattle exports to the United States were just under 1,030,890 head. In other words, the number of Canadian animals that were imported in 2006 was significantly below the yearly average from 1998-2002, prior to the U.S. ban.<sup>16</sup>

B. The border reopening has not had a negative impact on U.S. cattle prices.

R-CALF has asserted in this proceeding that “[i]mports of Canadian cattle will...adversely affect prices for cattle in the U.S.” R-CALF Prelim. Inj. Memo. at

5. The facts show that the average price for U.S. fed steer was \$0.85 per pound (U.S.\$) in 2004 (during the U.S. import ban), \$0.88 per pound (U.S.\$) in 2005 and \$0.86 per pound (U.S.\$) in 2006. The average price for U.S. fed steer for 1998-2002 (prior to the ban) was \$0.67 per pound (U.S.\$).<sup>17</sup> The average price for U.S.

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<sup>16</sup> Statistics Canada; *See also* <http://www.fas.usda.gov/ustrade/> (under “IMPORTS” select “FATUS”, under “COUNTRIES” select “CANADA”, and under “FATUS COMMODITY GROUPINGS” select “CATTLE AND CALVES”, and under “SUBMIT REQUEST” select from 2006/01 to 2006/12” with a “Ten Year” Format and selected “Quantity” as the Statistic) (last visited March 6, 2007).

<sup>17</sup> *See* “Cattle-Fax U.S. Choice Fed Steer Price (\$/cwt)” *available at* [http://www.cattle-fax.com/members/cfax\\_data/spreadsheets/fedstr\\_mo.xls](http://www.cattle-fax.com/members/cfax_data/spreadsheets/fedstr_mo.xls).

feeder cattle (550 and 750 lb steer) was \$1.12 per pound (U.S.\$) in 2004, \$1.19 per pound (U.S.\$) in 2005 and \$1.17 per pound in 2006. The average price for U.S. feeder cattle in 1998-2002 was \$0.86 (U.S.\$). There has clearly been no deterioration of U.S. cattle prices.<sup>18</sup>

C. There has been no negative consumer reaction to the reopening of the border to certain Canadian cattle.

R-CALF has asserted that the intermingling of Canadian beef and beef products in the U.S. meat supply would cause fears about consumption of U.S. meat generally” (*see* R-CALF Prelim. Inj. Memo. at 37) and that USDA made unsupportable assumptions that “the importation of cattle and beef from a country with a demonstrated BSE problem will have...no effect on consumer confidence in U.S. beef,” *See* R-CALF Complaint at Para. 39. Simply put, USDA was correct. Following implementation of the Final Rule (as well as the discovery of two native U.S. BSE cases), consumer confidence in beef has remained high.<sup>19</sup>

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<sup>18</sup> *See* “Cattle-Fax Choice 550-lb Steer Price: US Avg.,” *available at* [http://www.cattle-fax.com/members/cfax\\_data/spreadsheets/550str\\_mo.xls](http://www.cattle-fax.com/members/cfax_data/spreadsheets/550str_mo.xls); “Average Choice 750-lb Steer Price,” *available at* [http://www.cattle-fax.com/members/cfax\\_data/spreadsheets/750str\\_mo.xls](http://www.cattle-fax.com/members/cfax_data/spreadsheets/750str_mo.xls).

<sup>19</sup> *See* National Cattlemen’s Beef Association, “BSE Consumer Tracking Research,” November 2005, *available at* [http://www.bseinfo.org/uDocs/11-16-2005\\_consumerconfidenceslidesforposting.ppt](http://www.bseinfo.org/uDocs/11-16-2005_consumerconfidenceslidesforposting.ppt) (last visited March 6, 2007) (showing 90 percent or greater confidence that U.S. beef is safe from “made cow disease” in September and November 2005, similar to the high confidence levels during comparable periods in 2004). *See also* R-CALF v. USDA, 415 F.3d at 1105 (“According to USDA, American demand for beef in 2004 is estimated to have

D. Export markets continued to open to U.S. beef following implementation of the Final Rule.

Contrary to R-CALF's assertions that foreign markets would negatively react to the U.S./Canada border reopening, many foreign markets lifted their bans on U.S. beef following implementation of the Final Rule. Specifically, markets in Chile, China, Japan, Taiwan, Hong Kong, the Philippines, Singapore, Korea, Thailand, Colombia and Peru all reopened their markets to U.S. beef after July 18, 2005, the date that Canadian cattle shipments to the United States resumed.<sup>20</sup> Mexico, which had reopened to certain U.S. boneless beef in March 2004,

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increased seven to eight percent over 2003 levels. Yet, Canadian beef was flowing into this country throughout 2004 under permits issued by USDA.”)

<sup>20</sup> See, USDA, “Chile Opens Borders to U.S. Beef” (Jul. 19, 2005); “Statement by Agriculture Secretary Mike Johanns Regarding the Resumption of Beef Trade with China” (June 30, 2006); “Statement by Agriculture Secretary Mike Johanns Regarding the Reopening of the Japanese Market to U.S. Beef” (Jul. 27, 2006); “Taiwan Reopens Market to U.S. Beef” (Jan. 25, 2006); “Statement by Agriculture Secretary Mike Johanns Regarding Resumption of U.S. Beef Trade with Hong Kong” (Dec. 29, 2005); “The Philippines Lifts Ban On U.S. Beef and Beef Products” (Aug. 4, 2005); “Singapore Reopens Market to U.S. Beef” (Jan. 19, 2006); “USDA’s Johanns and USTR Portman Welcome Lifting of Beef Ban By Thailand” (Oct. 20, 2005); “Statement by Agriculture Secretary Mike Johanns Regarding U.S. Beef Trade with Korea” (Sept. 7, 2006); “Columbia and Peru Open Markets to U.S. Beef” (Nov. 3, 2006). These USDA News Releases and Statements are *available at* [http://www.aphis.usda.gov/newsroom/hot\\_issues/bse/bse\\_trade.shtml](http://www.aphis.usda.gov/newsroom/hot_issues/bse/bse_trade.shtml).

determined to accept certain U.S. bone-in beef in February 2006.<sup>21</sup> The Philippine market also reopened to live U.S. breeder cattle.<sup>22</sup> Clearly, the implementation of the Final Rule is not a deterrent to U.S. progress in expanding export markets for U.S. beef.<sup>23</sup>

Japan, the U.S.'s largest market prior to the border closure in 2003, announced its reopening to U.S. and Canadian beef simultaneously in December

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<sup>21</sup> See USDA, "Mexico Opens Market to U.S. Bone-In Beef" (Feb. 1, 2006), available at [www.usda.gov/wps/portal/usdahome?contentidonly=true&contentid=2006/02/0033.xml](http://www.usda.gov/wps/portal/usdahome?contentidonly=true&contentid=2006/02/0033.xml) (last visited March 5, 2007).

<sup>22</sup> See USDA, "Statement By John Clifford, Deputy Administrator Animal and Plant Health Inspection Service Regarding the Opening of the Philippine Market to Live U.S. Breeder Cattle" (Jan. 11, 2006) available at [www.aphis.usda.gov/newsroom/content/2006/01/philcat.shtml](http://www.aphis.usda.gov/newsroom/content/2006/01/philcat.shtml) (last visited March 6, 2007).

<sup>23</sup> Also worthy of note, many countries other than the U.S. have reopened their markets to Canadian beef and cattle. By way of example, Egypt has just recently announced that it is allowing importation of Canadian breeder cattle. See Gov't of Canada, "Egypt Opens Border to Canadian Breeding Cattle" (Feb. 27, 2007), available at <http://news.gc.ca/cfmx/view/en/index.jsp?articleid=2793996> (last visited March 2, 2007). Egypt reopened its market to boneless beef from Canadian animals under 30 months of age in September 2006. *Id.*

2005.<sup>24</sup> With the first U.S. shipment in January 2006, Japan again closed to U.S. beef upon finding a prohibited vertebral column in several boxes of veal. After a lengthy process of inspecting U.S. certified beef plants, Japan again reopened to U.S. beef in July 2006.<sup>25</sup> Throughout the U.S. inspection process, Japan remained open to Canadian beef. None of the U.S. issues with respect to Japan have had anything to do with the U.S. importation of Canadian cattle and beef.

Nor is implementation of the Final Rule responsible for on-going difficulties in the trade of U.S. beef with Korea. In September 2006, after prolonged negotiations, Korea agreed to lift its ban on U.S. beef. Shortly after the first U.S. shipments, Korea reestablished the ban when bone fragments were discovered in

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<sup>24</sup> See USDA, "Statement by Agriculture Secretary Mike Johanns Regarding the Opening of the Japanese Market to U.S. Beef (Dec. 11, 2005) *available at* [http://www.usda.gov/wps/portal/!ut/p/s.7\\_0\\_A/7\\_0\\_1RD?printable=true&contentidonly=true&contentid=2005/12/0544.xml](http://www.usda.gov/wps/portal/!ut/p/s.7_0_A/7_0_1RD?printable=true&contentidonly=true&contentid=2005/12/0544.xml); CFIA, "Japanese Border Opens to Canadian Beef (Dec. 11, 2005) *available at* <http://www.inspection.gc.ca/english/corpaffr/newcom/2005/20051211e.shtml> (last visited March 6, 2007).

<sup>25</sup> See USDA, "Statement by Agriculture Secretary Mike Johanns Regarding the Reopening of the Japanese Market to U.S. Beef" (July 27, 2006) *available at* <http://www.usda.gov/wps/portal/usdhome?contentidonly=true&contentid=2006/07/0265.xml> (last visited March 6, 2007).

certain U.S. boneless beef.<sup>26</sup> This issue has nothing to do with Canadian beef and has only to do with Korea's unreasonable interpretation of the term "boneless" to reject U.S. beef that presented no threat to human health.

### **CONCLUSION**

R-CALF's appeal of the district court's denial of its request for a permanent injunction against the Final Rule is another step in R-CALF's never ending journey to impede trade in Canadian beef and cattle, even when others in the U.S. industry, as well as scientific principles support it. Not only has R-CALF predictably announced its opposition to the USDA's proposed rule to expand the range of Canadian cattle and beef products that can be imported by the U.S., but it has already begun discussions regarding the court in which it plans to institute legal action.<sup>27</sup> In having decided to sue against the implementation of a rule that has not yet been issued, R-CALF reveals in no uncertain terms that it is an organization

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<sup>26</sup> See USDA, Statement By Agriculture Secretary Mike Johanns Regarding the Rejection of U.S. Beef Shipments by South Korea (Dec. 6, 2006) *available at* [http://www.usda.gov/wps/portal/!nt/p/s.7\\_0\\_A/7\\_0\\_1RD?printable=true&contentidonly=true&contentid=2006/12/0458.xml](http://www.usda.gov/wps/portal/!nt/p/s.7_0_A/7_0_1RD?printable=true&contentidonly=true&contentid=2006/12/0458.xml) (last visited March 6, 2007).

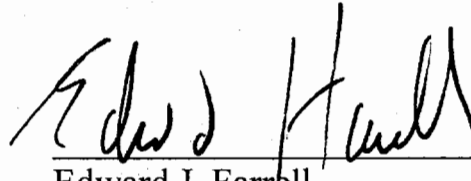
<sup>27</sup> Apparently unhappy with its choice of forum in these proceedings, R-CALF intends to consider filing any litigation regarding the rule to permit importation of Canadian "over-thirty-month" cattle and beef in Aberdeen, South Dakota. See R-CALF United Stockgrowers of America Meeting of the Board of Directors, Feb. 8, 2007, *available at* [www.r-calfusa.com](http://www.r-calfusa.com) ("Motion Made... to consider filing any OTM litigation in the Aberdeen, SD, district and to consider jointly filing with affiliated organizations in that district...Motion passed unanimously").

driven by a protectionist philosophy that has no place in the rational consideration of science based rules.

The Final Rule is a well drafted blueprint for opening export markets based on sound science, rather than see those markets remain closed based on irrational fear and economic self-interest. Both the district court, in granting USDA's motion for summary judgment, and this Court, in reversing the preliminary injunction against implementation of the Final Rule, recognized that USDA's efforts in developing the Final Rule were not arbitrary and capricious. R-CALF has presented no basis for disturbing the district court's order and its appeal should be denied.

DATED: March 6, 2007

Respectfully submitted,



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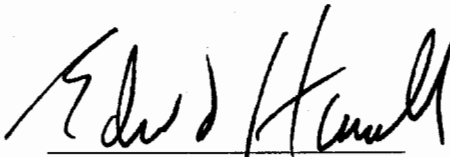
## CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for quotations, headings, and footnotes).

The undersigned further certifies that the brief complies with the type-volume limitation set of Rule 32(a)(7)(B) and Rule 29(d). The brief is proportionally spaced, containing 5,689 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance.

DATED: March 6, 2007

Respectfully submitted,



Edward J. Farrell

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure and Circuit Rule 31-1, I hereby certify that 15 true copies of the document described as:

**BRIEF *AMICUS CURIAE* OF THE CANADIAN CATTLEMEN'S ASSOCIATION AND ITS AFFILIATED ORGANIZATIONS IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT ORDER**

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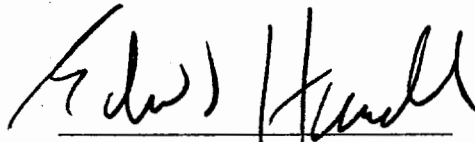
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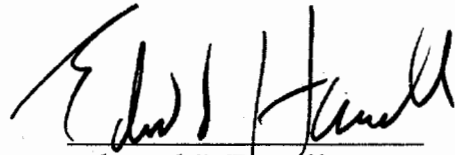
  
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**STATEMENT OF RELATED CASES**

Counsel is aware of no pending related cases within the meaning of Ninth

Circuit Rule 28-2.6.

DATED: March 6, 2007

  
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