

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION)	
LEGAL FUND UNITED)	No. 05-35264
STOCKGROWERS OF AMERICA,)	
Plaintiff/Appellee,)	D.C. No. CV-05-06-BLG-RFC
)	District of Montana, Billings
)	
v.)	
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE, Animal and Plant)	
Health Inspection Service, <i>et al.</i> ,)	
Defendants/Appellants.)	

**MOTION OF THE CANADIAN CATTLEMEN’S ASSOCIATION
AND ITS AFFILIATED ORGANIZATIONS
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF
APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DISTRICT
COURT ORDER GRANTING A PRELIMINARY INJUNCTION**

The Canadian Cattlemen’s Association (“CCA”) and its affiliated organizations—B.C. Cattlemen’s Association, Canadian Beef Breeds Council, Fédération des producteurs de bovins due 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— respectfully move for leave of court to file a brief *amicus curiae* in support of appellant United States Department of

Agriculture and the Animal and Plant Health Inspection Service (“USDA/APHIS”), challenging the preliminary injunction entered by the United States District Court for the District of Montana. A copy of the proposed *amicus* brief is attached hereto.

This Motion is necessary under Rule 29 of the Federal Rules of Appellate Procedure since Plaintiff/Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF”) does not consent to the filing of CCA’s *amicus* brief. Appellant USDA/APHIS and Proposed Intervenor-Defendant/Appellant National Meat Association (“NMA”) both provided their consent.

ARGUMENT

The Canadian Cattlemen’s Association (“CCA”) is a national federation that encompasses eight provincial organizations and represents the interests of Canada’s more than 90,000 beef producers. The affiliated co-movers comprise seven of the provincial organization members, the beef producers of Quebec, and the representatives of pure bred cattle breeders in Canada.

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.
- Assure industry has favorable access to international markets.¹

In furtherance of these objectives, the CCA has submitted comments at all stages of the development of the Final Rule issued by USDA/APHIS on January 4, 2005 concerning the establishment of Bovine Spongiform Encephalopathy (“BSE”) “minimal risk regions” and the designation of Canada as such a region (“Final Rule”).²

The CCA submitted a Motion for Leave to File a Brief *Amicus Curiae* with the district court for its consideration during deliberations on appellee’s request for a preliminary injunction in the matter below, but the district court denied the CCA’s request, along with the *Amicus* Motion of the Government of Canada (“GOC”) and the Motion to Intervene of the National Meat Association (“NMA”). The CCA and Alberta Beef Producers (“ABP”), a member organization of the

¹ “CCA Committees and Objectives,” available at http://www.cattle.ca/about_cca/committees.htm (last visited April 20, 2005).

² “Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities,” 70 Fed. Reg. 460 (Jan. 5, 2005). The CCA’s comments appear in the administrative record at AR 1116-00128, AR 7970-7971, and AR 5211-5213.

CCA, have jointly filed a motion to intervene in the proceedings on the merits in the district court. The ABP is seeking leave to file an *amicus* brief in this appeal, as is the GOC. The GOC's *amicus* brief is focused on Canadian health and safety measures related to BSE not briefed by the appellant and not the subject of this *amicus* brief. Likewise, ABP's proposed brief deals with public policy issues not addressed here or by appellant. The NMA's separate appeal of its denial of intervention is pending before this Court. *National Meat Assoc. v. U.S. Dept. of Agriculture*, Docket No. 05-35214.

The CCA is an advocate for the implementation of sound science-based policies to ensure the health of consumers and to encourage uniform standards of international trade that appropriately address the manageable risks presented by BSE. As found by USDA/APHIS, such policies require the implementation of the Final Rule as a first step in the process of normalizing the cattle and beef trade between the United States and Canada.

The CCA has both a significant economic interest in the outcome of this proceeding, and an equal and related interest in how the United States 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.

The district court's entry of a preliminary injunction prohibiting the importation of certain Canadian beef and cattle was directly contrary to USDA/APHIS's extensive and scientifically supported findings. The CCA has an interest in reversal of that injunction so that the U.S. and Canada can stand together in an effort to restore a measure of normalcy to the global beef and cattle market.

The CCA seeks to fill the classic role of *amicus curiae* by supplementing the efforts of counsel in a case of general interest. *See Miller-Wohl Co., Inc. v. Commission of Labor and Industry*, 694 F. 2d 203, 204 (9th Cir. 1982). In particular, the CCA *amicus* brief focuses on the district court's findings of irreparable harm, and how those findings do not comport with the standard required for a preliminary injunction. Here, the CCA can provide support for USDA/APHIS's position by assisting in the presentation and explanation of issues in which the CCA has specific knowledge and interest such as the global evolution of BSE, the status of international cattle and beef markets, the volume of Canadian cattle for export, and the impact of BSE on the Canadian consumer market. With respect to all of these issues, the district court overlooked or misinterpreted record evidence that the CCA is in a position of expertise to clarify.

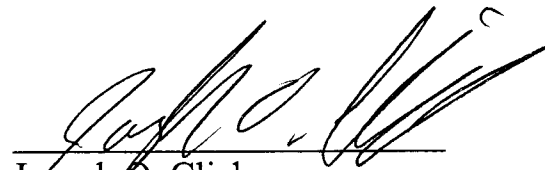
In a complex and detailed matter such as this, *amici* briefs can benefit the Court by their contributions to the Court's understanding of specific relevant issues. *See, e.g., Neonatology Associates v. Commissioner of Internal Revenue*,

collecting “background or factual references that merit judicial notice” or providing “particular expertise”). Especially in this case with international trade policy implications, the Court will likely benefit from the various perspectives and foci of the many parties and interests who will each be differently impacted by the Court’s determinations. The CCA has been involved in the development and

that the Court accept for filing the appended *amicus* brief in support of
USDA/APHIS and in support of reversal of the district court Order granting a
preliminary injunction.

DATED: April 21, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that one (1) true copy of the document described as:

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AND ITS AFFILIATED ORGANIZATIONS
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

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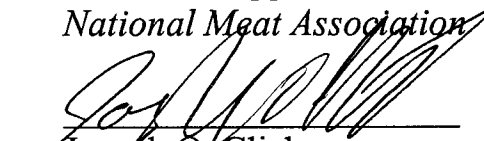
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Case No. 05-35264

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, the Canadian Cattlemen's Association ("CCA"), and its affiliated organizations – 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.

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OTHER AUTHORITY

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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 Animal and Plant Health Inspection Service (“USDA/APHIS”) in their appeal of the district court’s entry of a preliminary injunction enjoining implementation of a final rule published by USDA/APHIS that would allow U.S. importation of certain Canadian cattle and beef products (“Final Rule”).¹ *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric.*, 2005 WL 525689 (D.Mont. Mar. 2, 2005) (“Op”). The injunction was entered at the request of appellee Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (“Appellee” or “R-CALF”).

The CCA submit 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 this litigation. The CCA is joined in this submission by B.C. Cattlemen’s Association, Canadian Beef Breeds Council, Fédération des

¹ The Final Rule is entitled “Bovine Spongiform Encephalopathy: Minimal Risk Regions and Importation of Commodities,” 70 Fed. Reg. 460 (Jan. 4, 2005). *See* Administrative Record (“AR”) 8043-8136. 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.

producteurs de bovins due 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 accompanying Motion for Leave to File this *amicus* brief sets forth the CCA's interest in this case and the authority under which it files. The Motion also describes the CCA's efforts to obtain the consent of the parties for the filing of this brief.

This case is R-CALF's latest effort to create barriers to trade in Canadian cattle and beef for its own economic benefit. Indeed, R-CALF was created in 1998 to "file three trade cases on behalf of the U.S. cattle industry,"² 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."³ 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.

² 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.

CCA's members have an equal and related interest in 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 interests are seriously harmed by the district court's entry of the preliminary injunction.

INTRODUCTION

BSE presents no credible human health risk in North America. There has never been a native case of the human variant of BSE – known as variant Creutzfeld-Jakob Disease (“vCJD”) – in either Canada or the U.S., and the probability of such a native case occurring approaches zero. Appellee has conceded this point in related proceedings before this Court, stating “R-CALF never argued that there was a great risk to human health from resumed imports of cattle and beef from Canada.” Answering Brief of R-CALF at 44, *National Meat Assoc. v. U.S. Dept. of Agric.*, (9th Cir. Mar. 29, 2005) (No. 05-35214). Hence, the district court's finding that USDA/APHIS' decision “subjects the entire U.S. beef industry to potentially catastrophic damages and...presents a genuine risk of death for U.S. consumers” (Op. at *5) is particularly puzzling. Furthermore, any

³ Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, “R-CALF USA Frequently Asked Questions,” *available at* <http://www.r-calfusa.com/News%20Releases/faq.htm> (last visited April 20, 2005).

potential animal health risk that may exist by virtue of a lingering low-level of BSE infectivity in older cattle in North America has been effectively mitigated. The USDA/APHIS correctly reached these same conclusions in their exhaustive 18-month, 12,500-page rulemaking, for several reasons:

- BSE is not contagious – people do not “catch” BSE from cattle, nor do cattle “catch” it from each other. The only scientifically established mode of BSE transmission is through the ingestion of infective material.
- People are protected from infection by the removal of potentially infective material from the human food supply, which is accomplished significantly by the ban on SRMs (“Specified Risk Materials”) in food.
- Animals are protected by the removal of potentially infective material from their feed supply, which is accomplished in large part by the ruminant-to-ruminant feed ban.
- The Final Rule is limited to the importation of cattle under 30 months of age, a class of animals in which BSE is virtually never found, and in which it has never been found in countries like the U.S. and Canada, where established mitigation measures have been in place.

To support its ruling the district court drew analogies to the BSE experience in the United Kingdom and Europe. With respect to both health and economic

identified to date in just four North American cattle. Variant CJD⁴ is a neurological disease that the current scientific evidence indicates is transmitted to humans through consumption of BSE-infected material.⁵ Extensive research shows that BSE is found in certain tissues identified as Specified Risk Materials (“SRM”),⁶ but not in beef muscle meat (*i.e.*, steak, roasts, etc.). *See* USDA/APHIS Analysis of Risk – Update for the Final Rule: Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities (“Updated Risk Analysis”) (Dec. 2004) at 14-15 (AR 8332-8333)(“BSE infectivity has never been demonstrated in the muscle tissue of cattle...”). Thus, the most effective means of ensuring human health is the removal of SRMs from human food. In July 2003, Canada implemented a regulation requiring the removal of

⁴ 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: New Variant Creutzfeldt-Jakob Disease,” *available at* http://www.cdc.gov/ncidod/diseases/cjd/cjd_fact_sheet.htm (last visited April 20, 2005).

⁵ 70 Fed. Reg. at 462 (AR 8046)(Variant CJD “has been linked via scientific and epidemiological studies to exposure to the BSE agent, most likely through consumption of cattle products contaminated with the BSE agent.”).

⁶ 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 lumbar vertebrae, and the wings 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 (AR 8049).

SRMs from the human food supply, and the U.S. followed Canada's lead in January 2004. 70 Fed. Reg. at 465 (AR8049). Canada and the U.S. have virtually identical policies and procedures in place to implement this safeguards. *Id.* (describing Canada's SRM removal procedures as "equivalent safeguards"). Thus, any beef produced in either a U.S. or Canadian packing plant is safe.

Animal Health is Protected by the Ruminant-to-Ruminant Feed Ban in North America

As noted, BSE is not a contagious disease. All evidence demonstrates that its transmission from animal to animal is caused by the consumption of one animal's infected material by another. *See* 70 Fed. Reg. at 461 (AR 8045). The risk of BSE transmission via the feeding of infective material to cattle has been mitigated by banning the feeding of ruminant material to other ruminants. Canada has had such a ban in place since mid-1997, as has the U.S. *See, e.g.,* 70 Fed. Reg. at 467, 476 (AR 8051, 8060). Canada's feed ban has materially retarded, and perhaps eliminated any spread and amplification of BSE in Canada and the U.S. *See* 70 Fed. Reg. at 476, 515 (AR 8060, 8099)(Canada has "effectively enforced its feed ban"; Canada established "that the necessary...measures are in place to...eradicate the disease.").

As evidenced by the U.K.'s experience (*see infra* note 13), a feed ban does not require 100 percent compliance in order to reduce the incidence of BSE. The greater the level of compliance with the feed ban, the more quickly any BSE will

be eliminated from the herd. Thus the overall high levels of compliance achieved in both the U.S. and Canada will result in the eventual eradication of BSE in North America. *Id.* Consequently any BSE outbreak in North America that even remotely compares to that experienced in Europe a decade ago is simply not possible, as the already small risk of BSE in North America is becoming smaller and smaller. Further, as noted, both Canada and the U.S. remove SRMs from all cattle for human consumption. Therefore, if an animal with BSE were to go undetected on either side of the border, the potentially BSE infective tissue of that animal would be removed, and thus prevented from entering the human food supply.

The Final Rule Limits Importation to Cattle Under 30 Months of Age

The Final Rule only allows importation of cattle to be slaughtered at under 30 months of age, thus further reducing the already minimal risk.⁷ Scientific studies show that the risk of BSE among cattle under 30 months of age is extremely low. *See* 70 Fed. Reg. at 483 (AR 8067). While some cases of BSE may

⁷ Under the Final Rule, cattle imported from Canada must be immediately slaughtered or transported to a feedlot for slaughter. In either instance, the cattle must be less than 30 months of age when slaughtered. 70 Fed. Reg. at 548-549 (AR 8132-8133).

be found in cattle under 30 months,⁸ these very few cases have occurred in countries with high levels of circulating infectivity. *Id.* The larger the infectious dose received by an animal, the shorter the incubation period of the disease. The fact that the Canadian BSE cases have been in cattle of ages far greater than 30 months is itself evidence of a very low level of infectivity. *See Updated Risk Analysis at 17 (AR 8335)* (“[A]s feed bans became increasingly effective, the total exposure decreased and the average incubation periods lengthened.”). While the CCA believes that, with an effective feed ban and SRM removal procedures in place, this 30-month age limitation is not necessary to ensure either human or animal health, USDA/APHIS’ adoption of this conservative policy stance makes

impermissibly adopted, often verbatim, the unsupported and inaccurate conjecture offered by appellee, as a sufficient basis for denying deference to the USDA/APHIS rulemaking, and found that appellee had shown both a substantial likelihood of success on the merits and irreparable injury.

In their opening brief (at 19-22), USDA/APHIS explains the applicable standard of review for a district court's issuance of a preliminary injunction and the deference that should be given to an agency's decisionmaking in a matter of agency expertise. Only by failing to accord appropriate deference to USDA/APHIS' thorough and well-substantiated Final Rule, was the district court able to find that appellee had shown a likelihood of success on the merits as required for the imposition of a preliminary injunction.

commenced in November 2003 and included consideration of more than three thousand comments (70 Fed. Reg. at 465 (AR 8049)). When a cow in Washington State (of Canadian origin) was discovered to have BSE, USDA/APHIS reopened and extended the comment period on the rule. The comment period, initially scheduled to close on January 5, 2004, was extended until April 7, 2004. 70 Fed. Reg. at 460 (AR 8044). After another almost 8 months of further consideration, including the updating of the risk and economic analyses, the Final Rule was published by USDA/APHIS on January 5, 2005. After the discovery of the two most recent BSE cases in Canada, even though such additional cases were already taken into account by the risk analysis done for the rulemaking, USDA/APHIS undertook to delay for further review the portion of the Final Rule allowing importation of certain Canadian beef products from cattle older than 30 months. *See* Brief for Appellants' USDA/APHIS at 12-13; "Bovine Spongiform Encephalopathy; Minimal Risk Regions and Importation of Commodities; Partial Delay of Applicability," 70 Fed. Reg. 12,112 (Mar. 11, 2005).

Had the district court afforded the required deference to USDA/APHIS, it could not have found that appellee was likely to succeed on the merits, thus requiring appellee to demonstrate a particularly compelling case of irreparable injury to justify an injunction. In fact, the injuries alleged by appellee are entirely speculative and contrary to the record evidence. The arguments for, and the Court's findings of, irreparable harm are premised on flawed comparisons with the BSE experience in the U.K. and other European countries. These comparisons are not supported by the record evidence. Moreover, the Court uncritically accepted appellee's speculation about the impact that reopening the border would have on U.S. domestic consumers and international trading partners.

Finally, the district court failed to consider, let alone weigh, interests other than appellee's. No regard was given by the court to the public's interest in food safety policies based on sound scientific principles rather than scare tactics. No consideration was given by the district court to the on-going severe and irreparable injury sustained by U.S. meat packers and others in the beef industry – injury which threatens the very existence of some U.S. packers in a completely restructured North American beef market. Equally significant, the district court's preliminary injunction undercuts the Secretary of Agriculture's statutory obligation to make policies in cooperation with foreign countries, as necessary "to prevent and eliminate burdens on... foreign commerce [and] to protect the agriculture,

environment, economy, and health and welfare of the people of the United States.”
7 U.S.C. § 8301(5).

Contrary to the district court’s reasoning, appellee’s speculative claims of injury are woefully insufficient to tip the balance of hardships in its favor. Thus, clear error should be found in the district court’s wholesale adoption of appellee’s claims of injury without consideration of the record evidence to the contrary; its failure to consider the U.S. business and public policy interests severely injured by the imposition of an injunction; and, consequently, its failure to properly balance the competing hardships at issue in this matter.

ARGUMENT

I. The District Court Erred in Finding that Appellee Demonstrated Irreparable Harm

The injuries alleged by appellee are highly speculative, and under a proper application of the law, are not sufficient to support the district court’s decision. *See Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction). The district court abused its discretion in finding otherwise. In concluding that appellee will suffer irreparable injury in the absence of a preliminary injunction, the district court adopted appellee’s unsubstantiated and wildly speculative allegations and failed to consider record evidence refuting the alleged irreparable injury.

A. There is No Increased Threat to Human or Animal Health that will Cause Irreparable Harm

As demonstrated in the opening brief of USDA/APHIS and the Canadian government's *amicus* brief, the limited reopening of the border contemplated by the Final Rule does not create a health threat to consumers in the United States or to the U.S. cattle herd. The already small likelihood of BSE decreases with each passing day, and even if a BSE animal(s) is found on either side of the border, the firewalls in place will prevent any spread of BSE.

In concluding that reopening the border would “increase the potential” for human exposure to material containing the agent for BSE, the district court failed to consider that the U.S. and Canada have shared the same practices in the importation of cattle and beef, and have instituted comparable firewalls to protect against BSE. *See, e.g.*, 70 Fed. Reg. at 475-476 (AR 8059-8060). The court also ignored the conclusions of three Harvard studies relied upon by USDA/APHIS that even if there is a small number of undetected cases of BSE in either Canada or the U.S., because of the firewalls that USDA/APHIS has put in place, the coefficient of reproducibility (R_0) is so low that there is no significant risk that the disease will amplify, but instead will be self-extinguishing. *See* 70 Fed. Reg. at 508-509 (AR 8092-8093).

There have been no reported cases of infection caused by eating beef from North American cattle, and, perhaps most striking, the district court ignored the

fact that Canadian beef has been coming into the U.S. in significant quantities as boxed beef since 1996, with only a short hiatus between May and August 2003, with no adverse health consequences. With respect to animal health, Canada's feed ban is actually stricter than that in place in the U.S.,¹⁰ and Canada's BSE surveillance program tests an equivalent number of cattle to the U.S. program. *See* 70 Fed. Reg. at 476 (AR 8060). Until May 2003, large numbers of animals crossed the border in both directions. *See* Updated Risk Analysis, Appendix 1 at 6 (AR 8356) ("the U.S. and Canada traded extensively in animals that were susceptible to

B. There is No Meaningful Comparison between the BSE Experiences of Europe and North America

In support of its finding of irreparable harm, the district court found:

[T]he perception that the U.S. meat supply is not free of BSE agents, as a result of the Final Rule's reopening the border to Canadian cattle and meat, will have a serious, irreparable impact on ranchers in the U.S. and the U.S. economy. It will be similar to the discovery of BSE contamination in UK cows and meat, which triggered devastating losses to the beef production industry in Great Britain and other European countries...

See Op. at *14. This conclusion has no support in the record. To the contrary, from the record it is clear there is no reason to believe that the consequences of a possible discovery of infection in North America will “be similar to the discovery of BSE contamination in UK cows and meat.”

Frank Fillo, Assistant Chief and Supervisory Economist of the Policy Analysis and Development staff of APHIS, refuted the comparisons drawn by appellee's expert between the consumer and market reactions experienced in European countries and that which could be expected in the United States. Fillo Declaration (“Fillo Dec.”) at ¶11 (attached as Exhibit 3 to USDA/APHIS' Opposition to Plaintiff's Motion for a Preliminary Injunction, No. CV-05-06-BLG-RFC (D.Mont. Feb. 22, 2005)). Not only do the more than 180,000 BSE cases in the U.K.¹¹ and other European countries dwarf the four cases in North America,

¹¹ As of January 1, 2005, the U.K. had 180,687 confirmed cases of BSE, representing 95 percent of all BSE cases worldwide. Fillo Dec. at ¶11.

but the knowledge accumulated about the disease and its containment and prevention has since these other countries experienced their outbreaks has grown tremendously. *Id.*

To fully understand the singularity of the U.K. experience, one has to appreciate that at the time of the outbreak BSE was an unknown disease – neither its origin nor transmission was understood. It was only with the evolution of the disease in the U.K. that its transmission route came to be understood, and, with that understanding, the importance of a ruminant-to-ruminant feed ban became apparent. As the unhappy pioneer in BSE control, the U.K. instituted a feed ban in July 1988, two years after the identification in 1986 of its first BSE case. *See* 70 Fed. Reg. at 461-462 (AR 8045-8046). However, due to the long incubation period of BSE (U.K. data reflect a mean of 4.2 years (70 Fed. Reg. at 470 (AR 8054))), even after the advent of the feed ban, the numbers of identified cases of BSE continued to increase as cattle infected prior to the feed ban reached the end of their incubation periods.¹² Not until the cattle infected prior to the feed ban

¹² Following implementation of the feed ban in the United Kingdom, 12,739 cases of BSE were reported among cattle born in 1989; 2,104 in 1994; 9 in 1999; and 1 in 2000. *See* 70 Fed. Reg. at 462 (AR 8046); Updated Risk Analysis at 16-17 (AR 8334-8335).

worked their way through the system did the annual numbers of infected cattle decrease.¹³

Having observed the U.K.'s epidemic experience, the U.S. and Canada had the foresight to implement a preventive feed ban in 1997, well before the identification of any BSE case native to North America.¹⁴ The importance of this proactive implementation of the feed ban, almost six years prior to the first occurrence of a North American BSE case in May 2003, cannot be overstated – it effectively prevents the replication here of the spike in post-feed ban cases seen in the U.K. This is because the feed ban here does not have to “catch-up” with the lag created by the incubation period, as it did in the U.K. While there may be a small number of isolated cases yet to be identified in North America, the early implementation of the feed ban explains why the epidemic experienced in the U.K.

¹³ Moreover, in the early stages of BSE understanding, it was not appreciated that BSE was being contracted through cross-contamination of cattle feed with pig and poultry feed. In 1994, the issue of cross-contamination and the continuing infection that it caused was fully realized and acted on. The number of BSE cases dropped significantly as a result. *See* Committee of the BSE Inquiry, United Kingdom, “The BSE Inquiry: Inquiry Into BSE and Variant CJD in the United Kingdom (Oct. 2000) *available at* <http://www.bseinquiry.gov.uk/report/volume1/chapter35.htm> (last visited April 19, 2005). Importantly, in spite of these now-recognized early deficiencies, the feed ban dramatically decreased the incidence of BSE in the U.K. among all animals.

¹⁴ One BSE positive animal was discovered in Canada in 1993. This animal was imported from the U.K. and was not native to North America. *See* 70 Fed. Reg. at 467 (AR8051).

has not, and will not, occur here. *See* Updated Risk Analysis at 24-25 (AR 8342-8343).

Any finding of irreparable harm by the district court premised on a comparison of the U.K./European BSE experience with conditions in North America is contrary to the record evidence, and clearly erroneous.

C. The Fact that Certain Markets are Currently Closed to U.S. Beef does not Support Appellee's Claims of Injury

The district court held that the “[d]iscovery of BSE in Canadian cows has already caused Japan and Korea to demand that any exports to those countries be free of beef originating in Canada, and their markets are still largely closed to American beef.” *Op.* at *14. The closure of certain export markets to U.S. beef was in response to a finding of BSE in Washington State in December 2003. The continued closures of the export markets are due to subsequent evaluations of U.S. (not Canadian) safeguards and BSE preventive measures. *See., e.g.,* USDA Press Release No. qa0465.04, “Questions and Answers Concerning U.S.-Japan Beef Trade Agreement” (Oct. 24, 2004) *available at* <http://www.usda.gov> (discussing age verification methods and international review of BSE situation in Japan and U.S.); *see also* USDA Press Release No. 0131.04, “Statement by Agriculture Secretary Ann M. Veneman and U.S. Trade Representative Robert B. Zoellick Regarding Beef Trade with Japan,” (Apr. 1, 2004,), *available at*

<http://www.usda.gov/Newsroom/0131.04/html> (discussing USDA disagreement with Japan regarding testing of all animals).

Although some markets have since reopened to U.S. exports (and none have reinstated restrictions since the two recent BSE cases were discovered in Canada), certain markets, such as Japan and Korea remain closed to U.S. beef exports. There is no evidence to support the district court's conclusion that reopening the U.S. border to Canadian beef will have additional negative impact on U.S. export markets. Further undercutting any finding of irreparable injury, some export markets, such as Hong Kong, have reopened to Canadian beef, but not to the U.S. *See, e.g.*, Agriculture and AgriFood Canada News Release, "Hong Kong Market Opens for Canadian Beef" (Dec. 1, 2004), *available at* http://www.agr.gc.ca/cb/index_e.php?sl=n&s2=2004&page=n41201a.

USDA's view that Japan and other trading partners consider the U.S. and Canadian beef and cattle markets as integrated and will recommence trade with both at the same time, is almost certainly correct. In this regard the USDA's position is consistent with the international view that Canada and the U.S. have the same BSE risk. The European Union's BSE risk rating tool, the Geographic Risk Assessment ("GBR"), placed the U.S. and Canada in the same geographical risk assessment, both before and after the detection of BSE, and the International Review Team charged with assessing the U.S. response to the BSE case discovered

in Washington State in December 2003 stated that “the first case of BSE in the U.S. cannot be considered in isolation from the whole cattle production system in North America” or “dismissed by considering it an ‘imported case.’” “Report on the Measures Relating to Bovine Spongiform Encephalopathy (BSE) in the United States,” Feb. 2, 2004, at 4 (AR 8025).

In any event, if markets in Asia remain closed to U.S. beef, additional imports from Canada could not cause the United States to lose those markets; if markets in Asia are reopened, with knowledge that more trade with Canada is imminent, that indicates that reducing trade barriers with Canada will not cause losses in exports from the United States. There has been no evidence provided by appellee or considered by the district court that normalizing beef and cattle trade between the U.S. and Canada has had any impact on the continued restrictions placed on U.S. beef exports by countries such as Japan.

D. No Stigma will Attach to U.S. Meat in the U.S. Consumer Market

In finding potential negative consumer reaction a source of irreparable injury, the district court again was clearly in error. Specifically, the Court found that:

Once the Canadian meat products are in the U.S., the stigma will attach to all U.S. meat, unless the Canadian meat can be distinguished from U.S. meat. Once the Canadian beef is allowed to intermingle with U.S. meats it will open a flood of speculation and neither the contaminated meat nor the stigma associated with contaminated meat could be removed from the U.S. cattle industry and the substantial, irreparable injury will have occurred.

Op. at *14. These findings by the Court are not supported by the record, but rather are the result of the Court's near-wholesale adoption of R-CALF's self-interested conjecture.

Indeed the record shows that "USDA data indicate that consumer demand for beef has remained strong in both Canada and the United States since the 2003 discovery of BSE in North America. Canadian per capita beef consumption increased by 1.1 kg in 2003 and U.S. demand in 2004 is estimated to have increased 7-8% over 2003 levels." Fillo Dec. at ¶4. In reaching its conclusion to the contrary, the district court relied solely on appellee's economic expert, Dr. John VanSickle, whose characterizations of consumer reaction to findings of BSE in the U.S., Canada and other countries are inaccurate, inconsistent and/or misleading. For example, Dr. VanSickle argues that USDA/APHIS' projection that any reduction in domestic demand as a result of the Final Rule will be minimal are "inconsistent with real-world experience." VanSickle Affidavit ("VanSickle Aff."), ¶15 (attached as Exhibit 6 to R-CALF's Application for Preliminary Injunction (D.Mont. Feb. 1, 2005) (No. CV-05-06-BLG-RFC)). However, to evaluate the potential impact of BSE on consumer demand, Dr. VanSickle inexplicably overlooks the "real-world experience" in North America in favor of hypotheticals premised on Poland, where the BSE experience and subsequent

market reactions have been very different than in North America.¹⁵ VanSickle Aff. at ¶16. In fact the “real-world experience” of North American consumers’ reaction to BSE is found in Canada, as the consumption of beef rose in 2003, even after the May 2003 discovery of BSE in a cow in Alberta. Fillo Dec. at ¶4.

Dr. VanSickle also attributes the decline in cattle prices in Canada following the discovery of BSE in Canadian cattle to “fears about the effects of [Canada’s] BSE discovery.” VanSickle Aff. at ¶15. However, the decline in cattle prices in Canada was due to responses by foreign governments and their bans on cattle and beef trade, not, as we have seen, to the response of Canadian consumers.

The Court also apparently ignored USDA/APHIS’s revelation that Dr. VanSickle, in his zeal to buttress his argument that appellee’s members were injured, somehow “forgot” to consider the positive economic effects that the

¹⁵ Poland’s experience with BSE cannot be meaningfully compared to that of North America. First, Poland reported 4 BSE cases in 2002, 5 in 2003, 11 in 2004, and 11 already in 2005 (as of April 14, 2005)(active surveillance in Poland began in 2001). *See* Office International des Epizooties, “OIE Number of Reported BSE Cases Worldwide”, *available at* http://www.oie.int/eng/info/en_esbmonde.htm (last modified April 20, 2005); Fillo Dec. at ¶11. Second, Poland’s BSE safeguards have not been as stringent or effective as in the U.S. and Canada for as long a period of time. The Scientific Steering Committee of the European Union concluded that the “BSE/cattle system of Poland was and is very unstable since 1980.” Further, the “efficiency of [Poland’s] feed ban cannot be assessed, as feed controls were apparently not carried out....There is no SRM ban. Cross contamination is most probable...”. European Union, Scientific Steering Committee “Opinion of the Scientific Steering Committee on the Geographical Risk of BSE in Poland” (Mar. 3, 2001), *available at* http://europa.eu.int/comm./food/fs/sc/out185_en.pdf (last visited April 20, 2005).

border reopening would impart. USDA/APHIS brought this failing, among others, to the district court's attention, but to no avail. *See* Fillo Dec. at ¶8.

Furthermore, that no stigma will attach to U.S. cattle or beef products as a result of implementation of the Final Rule is also made clear by the record. As stated by Dr. Fillo, and never addressed by the Court: "It is important to note that USDA began issuing permits to allow the importation of certain beef products, including boneless beef derived from cattle less than 30 months of age, from Canada in August, 2003. ...[T]he United States has continued to import nearly as much Canadian beef (emphasis added) since the discovery of BSE in North America as it did prior to this discovery, and this importation has not resulted in a loss of consumer confidence in the safety of the U.S. meat supply or a decline in domestic beef consumption." *Id.* Moreover, the Canadian beef that is currently imported is not segregated or otherwise labeled with its country of origin, with no observable negative reactions by American consumers. Thus, concrete ongoing experience in the United States unequivocally demonstrates the inaccuracy of this purported source of injury.

The district court also failed to take into account the fact that the U.S. cattle industry is enjoying record prices and profits and is not in the weakened state alleged by appellee and its economic expert. Dr. Fillo refuted Dr. VanSickle's statements regarding the "already-weakened" U.S. producers who "have already

suffered from a prolonged period of inadequate returns” by submitting for the record that “U.S. cow-calf producers have benefited from the on-going strong demand for beef, despite the North American BSE occurrences” and that “annual estimates of per-cow cash returns over all cash costs (including interest, some hired labor, etc.,) plus pasture rent (often producers own the pasture) for U.S. cow-calf producers from 1974 to 2004 have been positive for the last six years, reaching their highest level for the 30 year period of \$150 per cow in 2004.” Fillo Dec. at ¶5. Clearly there has been no injury to appellee by the continued importation of Canadian beef.

Finally, because of the decision to delay the importation of live cattle over 30 months of age, the number of cattle expected to be imported into the U.S from Canada in 2005 will be less than that initially projected by USDA/APHIS. Fillo Dec. at ¶6. Not only did the court fail to take this changed circumstance into account by adjusting USDA’s projected import numbers down, it inexplicably inflated those numbers. Specifically, without any apparent basis, the district court’s opinion states that the record demonstrates an import number of 2-3 million head of cattle from Canada during the remainder of 2005. Op. at *6.¹⁶ This

¹⁶ In denying the CCA’s Motion for Leave to File a Brief *Amicus Curiae*, the Court chose not to avail itself of likely trade flow estimates offered by the CCA, clearly in the best position to know existing cattle volumes and conditions of competition in Canada. Information offered in that brief indicates that USDA’s estimates are likely overstated.

projection of cattle volumes by the district court is contrary to the USDA/APHIS estimate that 1.5 to 2.0 million head of Canadian cattle would be exported to the U.S. in 2005. *See, e.g.*, USDA/APHIS, Economic Analysis - Final Rule: Bovine Spongiform Encephalopathies: Minimal Risk Regions and Importation of Commodities (Dec. 20, 2004), at xvii, 29 (AR 8155, 8196).

E. Appellee's NEPA Claims do not Provide a Basis for Irreparable Harm

As demonstrated by the U.S. Government's brief, the district court's finding of irreparable harm based on appellee's claims under the National Environmental Policy Act ("NEPA") was reversible error. *See* Brief for Appellants USDA/APHIS at 45-57.

II. The District Court Erred by Failing to Take Other Interests into Account in Weighing Hardships

Even though the district court found that appellee had demonstrated a likelihood of success on the merits and irreparable injury, it went the extra step to state that alternatively, an injunction was warranted in this case since "very serious questions on the merits have been raised and the balance of the hardship tips in favor of the Plaintiff." *Op.* at *14. In conclusory fashion, the district court stated that "there will not be any significant harm to the Defendant or any other party in maintaining the status quo ante" and:

the well being of the public is clearly favored in an action that prevents any additional exposure to potentially contaminated

beef. Further it will prevent any potential stigma that the meat supply in the U.S. is tainted. Moreover, there is a clear public interest in minimizing the risk of humans contracting vCJD and that weighs heavily against a decision to allow importation of potentially contaminated meat.

Op. at *14. The district court's repetition of these unsupported and clearly erroneous conclusions does not somehow render them a proper basis for the preliminary injunction, particularly when the court failed to address other public interests and other hardships.

“The public interest inquiry primarily addresses impact on non-parties rather than parties.” *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002). However, the district court considered the interests of no party other than the appellee. The district court did not weigh the public interest in rational science-based food safety regulations, in uniform and fair international trade practices, and in preserving jobs in the meat packing industry with the unsupported allegations of injury offered by the appellee.

The district court did not take into account that implementation of the Final Rule would result in a net positive effect on the U.S. economy. *See* 70 Fed. Reg. at 521 (AR 8105) (“the net effect of the resumption of cattle imports from Canada would be positive for both feeder cattle and slaughter cattle – that is, the action would benefit U.S. buyers more than it would harm U.S. sellers.”). Not once in its

balance of hardships analysis did the Court acknowledge USDA/APHIS' finding of an overall positive economic effect.

Appellee represents only one view in one segment of the U.S. beef and cattle industry. Other organizations of cattle producers support reopening the border, *see Amicus* Brief of National Cattlemen's Beef Association, et al., as do certain consumer groups. *See, e.g.*, Center for Science in the Public Interest, "Name That Cow: U.S. BSE Precautions and Trade with Canada" (March 2005), *available at* http://cspinet.org/new/pdf/bse_final_report.pdf.

Yet the district court systematically denied interested parties supporting the Final Rule any opportunity to be heard. It rejected an *amicus* brief filed by the Government of Canada. It rejected an *amicus* brief filed by the CCA. And the district court denied the National Meat Association's Motion to Intervene, thereby refusing to consider the concerns of the U.S. beef packing industry and the significant injury that that industry suffers each day that the border remains closed. The longer the Canadian/U.S. border remains closed, the less reliant Canada will become on U.S. meat packing facilities. The integrated, competitive nature of the North American beef and cattle markets will be divided into two separate, less efficient national markets. U.S. meat packers that had depended on Canadian cattle may well find themselves out of business. The court never addressed these and many other key issues in finding irreparable injury. Its failure to weigh these

hardships and critically evaluate appellee's allegations constitutes a reversible abuse of discretion.

CONCLUSION

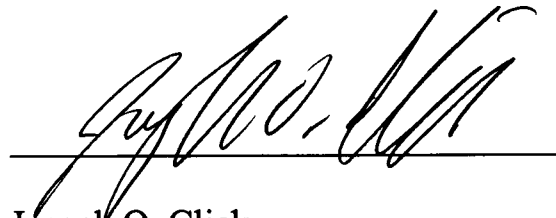
In the penultimate paragraph of its "Report on Measures Relating to Bovine Spongiform Encephalopathy (BSE) in the United States," (Feb. 2, 2004) at 10 (AR 8031)), the International Review Panel recommended "that the U.S. should demonstrate leadership in trade matters by adopting import/export policy in accordance with international standards, and thus encourage the discontinuation of international trade barriers when countries identify their first case of BSE."

USDA/APHIS has demonstrated precisely this type of leadership in promulgating the rule enjoined by the district court. In so doing, USDA/APHIS created the template necessary to open export markets based on sound science, rather than to see those markets remain closed based on irrational fear and economic self-interest. The United States and Canada have been working together to successfully construct a North American system governed by science so that in the event that any further BSE cases are discovered in any part of North America, decision-making can be based on science, not baseless speculation. Both the United States and Canada have been working with Japan and other countries that impose trade restrictions, masquerading as safety standards, well beyond anything recommended by the OIE or having a basis in sound science, to achieve a rational and sustainable

trade policy for cattle and beef. The district court's preliminary injunction undermines this process by adopting one speculative leap after another offered by the appellee. In so doing, the district court has committed reversible error.

DATED: April 21, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph O. Click", is written over a horizontal line.

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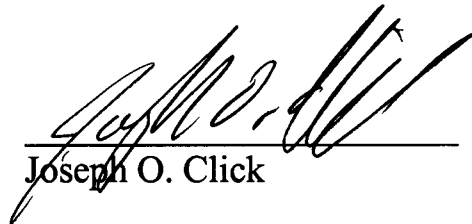
CERTIFICATE OF COMPLIANCE

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 5,679 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance.

DATED: April 21, 2005

Respectfully submitted,



Joseph O. Click

STATEMENT OF RELATED CASES

Counsel is aware of one pending related case: *National Meat Assoc. v. U.S. Dept. of Agric.*, Case No. 05-35214 (9th Cir.). That matter is an appeal by the National Meat Association of the preliminary injunction and the district court's denial of its Motion to Intervene.

CERTIFICATE OF SERVICE

Pursuant to Rule 31(b) of the Federal Rules of Appellate Procedure, I hereby certify that two (2) true copies of the document described as:

BRIEF *AMICUS CURIAE* OF THE CANADIAN CATTLEMEN'S ASSOCIATION IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DISTRICT COURT ORDER GRANTING A PRELIMINARY INJUNCTION

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