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National Meat Association, American Meat Institute,
North American Meat Processors, Southwest Meat Association,
and Eastern Meat Packers Association*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

RANCHERS CATTLEMEN ACTION LEGAL)
FUND UNITED STOCKGROWERS OF)
AMERICA,)

Plaintiff,)

vs.)

UNITED STATES DEPARTMENT OF)
AGRICULTURE, et al.,)

Defendants.)

Cause No. 05-CV-06-BLG-RFC

**BRIEF OF *AMICI CURIAE*
NATIONAL MEAT ASSOCIATION,
AMERICAN MEAT INSTITUTE,
NORTH AMERICAN MEAT
PROCESSORS, SOUTHWEST MEAT
ASSOCIATION, AND EASTERN
MEAT PACKERS ASSOCIATION**

The National Meat Association, American Meat Institute, North American Meat Processors, Southwest Meat Association, and Eastern Meat Packers Association (collectively “*amici*”) submit this *amici curiae* brief in opposition to the plaintiff Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) motion for summary judgment, and R-CALF’s January 6, 2006 motion to set its motion for summary judgment for argument.

1. IDENTITY AND INTERESTS OF THE PROPOSED *AMICI*

Each of the *amici* is a not for profit trade association representing packers and or processors of beef for domestic consumption in the United States and/or for export.

National Meat Association (NMA) is a non-profit industry organization with its principal office in Oakland, California. NMA has served the interests of the meat packing industry since 1946. The over 500 members of NMA include meat packers and processors, equipment manufacturers and suppliers throughout the United States. NMA is a well-recognized voice on the important issues of meat policy, processing, and safety in the United States. NMA provides regulatory assistance to its members, participates in the legislative process and administrative rulemakings, and represents member interests in judicial proceedings affecting the health and well-being of consumers and the meat industry.

American Meat Institute (AMI) is non-profit national trade association headquartered in Washington, D.C. AMI represents its members, the producers, packers, and processors of meat and poultry products marketed in the United States for purposes of furthering and protecting their interests, general welfare, and prosperity, and to foster improvements in the production of meat and allied products. AMI member companies account for more than 75 percent of the United States output of beef products.

The North American Meat Processors (NAMPP) is a nonprofit corporation with its offices in Reston, Virginia. Its members are meat processing companies and associates who share a continuing commitment to providing their customers with safe, reliable, consistent meat, poultry, seafood, game, and other products.

Southwest Meat Association's (SMA) members are meat processors, packers and purveyors, meat and meat product suppliers and service providers, livestock producers, financial institutions, and retail establishments. The primary focus of SMA's member companies is to produce products that meet or exceed consumer expectations with regard to product safety, nutrition and value. On behalf of its members, SMA initiates opportunities and resolves problems, thus helping to allow its member companies to earn a reasonable return on investment.

Eastern Meat Packers Association (EMPA) is a non-profit organization that has represented the interests of its members since 1927. Its membership consists primarily of small to medium-sized meat and poultry processing firms located in the northeastern United States. EMPA represents its members on a wide variety of public policy issues at the state and federal level and conducts various educational programs. Virtually all of its processing members utilize beef as a major ingredient in their processing operations.

Collectively, *amici* represent nearly all of the United States packers and processors of beef for domestic consumption and for export. No one has a greater stake in the safety and integrity of the United States beef supply than the members of these *amici*, whose success and survival in business depends each day on providing the safest possible product to consumers in the United States and overseas.

2. THIS MATTER HAS BEEN EXHAUSTIVELY REVIEWED AND SHOULD BE DECIDED IN FAVOR OF DEFENDANTS

As has been well argued before this Court previously, this case arises from a legal challenge R-CALF brings against defendants alleging that they violated various laws in promulgating a rule allowing limited ruminant imports from Canada. 70 Fed. Reg. 460 (Jan. 4, 2005) (Final Rule). In the Final Rule, USDA set up procedures and standards to allow limited imports of live ruminants even though Bovine Spongiform Encephalopathy (BSE) was known to have occurred in Canada. After extensive rulemaking activities that spanned several years and thousands of pages, in the Final Rule USDA established a scheme for the admission of some ruminants and ruminant products into the United States from Canada that would allow this economically important activity to resume, while still protecting American consumers and livestock.

Plaintiff obtained a preliminary injunction from this court enjoining USDA from implementing the Final Rule. Subsequently, the parties fully briefed cross-motions for summary judgment. Defendants also initiated an expedited review of the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. On July 14, 2005, a three judge panel of the Ninth Circuit, issued an order staying the preliminary injunction, which allowed the Final Rule to take effect and thus allowing the importation of live cattle from Canada. On July 25, 2005, the Ninth Circuit issued a 28-page decision vacating the preliminary injunction. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America [R-CALF] v. USDA*, 415 F.3d 1078 (9th Cir. 2005). Therefore, relying on the record compiled in this proceeding and the Ninth Circuit's decision, this Court should render its final decision in this case by granting defendants' motion for summary judgment, denying plaintiff's motion for summary judgment and motion to set its motion for summary judgment for argument, and dismissing plaintiff's complaint.

3. THE RULE OPENING THE CANADIAN BORDER IS WORKING WELL

In the event the Court does consider this matter further, *amici* address two issues. First, since July 2005 when the Ninth Circuit United States Court of Appeals vacated the preliminary injunction that had barred implementation of USDA's Final Rule, the beef market in the United States has become more stable and remains secure. *Amici* offer for the Court an explanation of how well the Final Rule has worked for United States consumers and the beef industry. Second, plaintiff states that argument on the cross-motions for summary judgment is appropriate because of many "recent developments." *Amici* present how admitting such additional evidence in this matter is contrary to the Administrative Procedure Act and established Ninth Circuit law, including the law of this case, and would likely be reversible error.

4. IMPLEMENTATION OF THE FINAL RULE HAS NOT HARMED UNITED STATES CATTLE PRODUCERS

Concerns expressed by plaintiff that implementation of the Final Rule would undercut consumer confidence in U.S. beef and that the influx of Canadian cattle would adversely affect domestic cattle prices are not borne out by USDA economic data. Indeed, the USDA reported price of live cattle, the economic component most directly affecting plaintiff's members, has increased from \$79.10/cwt in the third week of July, 2005 to \$97.36/cwt in the most recent week.¹

Plaintiff's earlier arguments also included dire predictions about the adverse impact that implementation of the Final Rule would have regarding the opening of foreign markets. Significantly, however, not only has the price of cattle risen dramatically since last July, but the

¹ See USDA Cattle Reports (dated July 24, 2005 and January 23, 2006), USDA Market News Service (available at: http://www.ams.usda.gov/mnreports/lm_ct163.txt).

following foreign markets have opened to receive beef from the United States: Japan,² Hong Kong, Singapore, Chile, Egypt, St. Lucia, the Philippines, Cuba, and most recently Taiwan.³

In short, allowing the final rule to go into effect has not had the cataclysmic effect advanced in plaintiff's arguments. It has not resulted in lower cattle prices and has not precluded the opening of several important foreign markets. Allowing Canadian cattle to enter the U.S., however, has brought increased stability to the meatpacking industry. Accordingly, it is appropriate for this court to move ahead with the pending cross-motions for summary judgment and resolve any lingering uncertainty they create.

5. ORAL ARGUMENT WOULD NOT BE BENEFICIAL WHERE, R-CALF APPARENTLY INTENDS TO SUBMIT ADDITIONAL EVIDENCE AND TESTIMONY NOT IN THE ADMINISTRATIVE RECORD

Amici believe that an oral hearing is not necessary to resolve the issues in the present case. This case is before the court on cross-motions for summary judgment. Those cross-motions are fully briefed and ready for decision. While it was within the context of a review of the preliminary injunction, the Ninth Circuit has already reviewed the merits of this suit and articulated the basis for its conclusion that R-CALF is unlikely to be able to demonstrate that USDA acted arbitrarily and capriciously in issuing the Final Rule. *R-CALF*, 415 F.3d at 1078. Specifically, the Ninth Circuit

² On January 20, 2006, Japan suspended further U.S. beef shipments due to a non-conforming shipment of veal.

³ See Food Safety and Inspection Service website: "Export Requirements for Countries with an Approved USDA Export Verification Program" (available at: http://www.fsis.usda.gov/regulations_&_policies/Export_Information/index.asp); see also Agricultural Marketing Service Website for USDA Bovine Export Verification Program: "Specified Product Requirements" (available at: <http://www.ams.usda.gov/lsg/arc/bevlisting.htm>).

held that “the district court’s finding that R-CALF had a strong likelihood of success on the merits was premised on legal error.” 415 F.3d at 1093.

Indeed, as this case is predicated upon review of an agency action based upon the record that was before the agency at the time it made its decision (*see* 415 F.3d at 1093; *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), there are no disputed issues of material fact that preclude summary judgment. The Ninth Circuit has already come to significant legal conclusions that warrant entry of judgment for USDA and denial of plaintiff’s motion without additional argument or briefing:

- “Our own review of the Final Rule leads us to conclude that the Secretary had a firm basis for determining that the resumption of ruminant imports from Canada would not significantly increase the risk of BSE to the American population.” 415 F.3d at 1095.
- “[S]ubstantial evidence supports USDA’s conclusion that these protections will effectively achieve [the] goal [of minimizing risk of BSE to American consumers and livestock].” *Id.* at 1096.
- “Our review of the record leads us to conclude that the risks inherent in the Final Rule are small, and that the rule likely is supported by an adequate administrative record.” *Id.* at 1100.

Legally, no issues remain to be decided that cannot be decided upon the Ninth Circuit opinion, the briefs filed by the parties, and the administrative record already before the Court.

Nothing in the Federal Rules for Civil Procedure or the rules of this Court require the Court to hold a hearing on cross-motions for summary judgment. FED. R. CIV. P. 56 does not require a judge to hold a hearing on a motion for summary judgment, but merely implies that a hearing is available. A hearing should be held only if there are material facts of issue that are unresolved. FED. R. CIV. P. 56(e) requires that the party opposing the motion for summary judgment must “set forth specific facts showing that there is a genuine issue for trial.” R-CALF’s memorandum fails to do this, and instead seeks to introduce a wide range of new factual matters beyond what has already been briefed, such as the status of exports to and imports from Japan and the status of a pending

Food and Drug Administration proposed regulation. The kind of information which the plaintiff wishes to present is outside the scope of the cross-motions which are before the Court and will not assist the Court with its decision on those motions.

Indeed, what R-CALF seeks to introduce is not appropriately before this Court at all. As the Ninth Circuit stated, in reviewing an agency regulation under the Administrative Procedure Act, “the court is not allowed to uphold a regulation on grounds other than those relied on by the agency.” *R-CALF*, 415 F.3d at 1093. “The reviewing court may not substitute reasons for agency action that are not in the record.” *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1236 (9th Cir. 2001). *See also Camp v. Pitts*, 411 U.S. at 142 (“the focal point of judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”); 5 U.S.C. § 706.

To allow, as R-CALF proposes, introduction of “recent developments” that have occurred since promulgation of the Rule is to invite reversible error. Such information, obviously, was not before USDA when it considered and promulgated the Final Rule. If new evidence has arisen regarding BSE that effect the Final Rule, R-CALF’s petition must, in the first instance, be directed to USDA, not to this Court. Consideration of this evidence now, in this Court, over a year after promulgation of the Final Rule is improper under the law of this Circuit.

CONCLUSION

Amici urge that the Court move forward with its decision on the cross-motions as promptly as possible. This Court should deny plaintiff’s motion for oral argument and proceed to decide the cross-motions for summary judgment and in conjunction therewith dismiss the plaintiff’s complaint. The Court need not and should not hold an oral hearing prior to its decision on these fully briefed motions. If the Court nevertheless does permit oral argument, such argument should be limited to

counsel's discussion of applicable case law and the administrative record that was before the USDA
at the time it issued the Final Rule

Dated: January 27, 2006

Respectfully submitted,

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By 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21 day of January, 2006, a true and accurate copy of the foregoing was served by United States mail, postage prepaid on the following:

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