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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, ANIMAL AND PLANT
HEALTH INSPECTION SERVICE, *et al.*,
Defendants.

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

**MOTION OF THE GOVERNMENT OF
CANADA FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN RESPONSE TO
PLAINTIFF'S MOTION TO SET
MOTIONS FOR SUMMARY JUDGMENT
FOR ARGUMENT, AND BRIEF IN
SUPPORT THEREOF**

INTRODUCTION

The Government of Canada (“Canada” or the “Canadian Government”) respectfully moves for leave to file a brief *amicus curiae* in response to Plaintiff Ranchers Cattlemen Action Legal Fund United Stockgrowers of America’s (“R-CALF”) Motion to Set Motions for Summary Judgment for Argument (“Motion”) and Memorandum in Support Thereof (“Memorandum”), filed on January 6, 2006, and submits this brief in support of this motion. A copy of the proposed *amicus* brief, which, pursuant to Local Rule 7.1(e) does not exceed 20 pages in length, is attached as Exhibit 1 hereto.

Canada requests leave to file a short *amicus* brief for the limited purpose of addressing R-CALF’s arguments on pages 15 and 16 of its Memorandum relating to a shipment of Canadian cattle that occurred in early August 2005, only two weeks after Canada resumed shipments of live cattle to the United States on July 18, 2005.¹ R-CALF contends that this shipment, which included one over-30-month (or “OTM”) cow and eight pregnant heifers ineligible for importation under Defendant United States Department of Agriculture’s (“USDA”) Final Rule, undermines the validity of the Rule and the precedential force of the Ninth Circuit’s

¹ The Final Rule at issue here is entitled “Bovine Spongiform Encephalopathy [“BSE”]; Minimal-Risk Regions and Importation of Commodities; Final Rule and Notice,” 70 Fed. Reg. 460 (Jan. 4, 2005). See Administrative Record (“AR”), 8043-8137A. After this Court preliminarily enjoined the Final Rule, the United States Court of Appeals for the Ninth Circuit reversed the injunction, thus allowing the Final Rule to take effect. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078 (9th Cir. 2005) (“R-CALF”). On July 18, 2005, Canada resumed exporting live cattle under 30 months of age to the United States, pursuant to the regulations promulgated in the Final Rule. See Canadian Food Inspection Agency (“CFIA”), “Canadian Livestock Shipments Moving Across Canadian Border” (July 18, 2005), available at <http://www.inspection.gc.ca/english/corpaffr/newcom/2005/20050718e.shtml> (last viewed Jan. 27, 2006).

ruling. *See* R-CALF Mem. at 2, 15-16. Canada takes no position on R-CALF's request for oral argument on the pending cross-motions for summary judgment, but seeks to file this brief to ensure that the Court has accurate information concerning the August shipment and why the nine ineligible animals did not pose a risk to human or animal health and safety in the United States.

In the proposed amicus brief, Canada (1) describes its BSE risk mitigation measures, which USDA relied upon in designating Canada a BSE minimal-risk region, AR8051-53; AR8075; AR8089-90, and which R-CALF argues are inadequate to eliminate the risk of BSE in Canadian cattle, *see* R-CALF Mem. at 15-16; and (2) provides a fuller description of the circumstances of the August shipment to correct R-CALF's misleading characterization of Canadian beef as unsafe in light of this incident, *see id.* at 16. Because Canada has a significant sovereign interest in ensuring that this Court, as well as the public at home and abroad, has an accurate understanding of the August shipment and related issues discussed by R-CALF in its Memorandum and the overall safety of Canadian beef, it respectfully requests leave to respond to R-CALF's statements on these discrete issues.²

The undersigned counsel for Canada has conferred with counsel for R-CALF, USDA, and Intervenor National Bison Association regarding this motion. USDA and the National Bison Association consent to this motion. R-CALF takes no position until it has an opportunity to review it.

² Canada recognizes that, in this "record review" case, this Court is "a reviewing body, not an independent decision maker." *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985). Because Canada seeks only to address allegations made by R-CALF about the August shipment and related issues, its request to file an *amicus* brief respects that role.

ARGUMENT

This Court has broad discretion to permit parties, including foreign governments, to file an amicus brief when they have significant interests that may be affected by the outcome of the litigation or when their perspective would be helpful to the Court. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (upholding district court's appointment of amici to investigate facts and advise the Court on public interests at issue); *see also Cmty. Ass'n for Restoration of the Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (noting court's discretion to accept amicus briefs when "the proffered information [is] timely [or] useful"). Specifically, "[a]n amicus brief *should ... be allowed* when ... the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of the Env't (CARE)*, 54 F. Supp. 2d at 975 (emphasis added) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). That standard is satisfied here: the Canadian Government has a unique and important perspective on the BSE risk mitigation measures it implements to ensure the safety of cattle and beef exported to the United States and, more specifically, on the OTM cow and pregnant heifers referenced by R-CALF that were shipped to the United States through trade channels regulated by the Canadian Government.

R-CALF's Motion is based, in relevant part, on its inaccurate and misleading suggestions that the August shipment exposes a systematic failure of the overlapping BSE risk mitigation measures implemented by the United States and Canada *and* that consumers of beef in the United States were at risk of exposure to BSE due to the importation of the OTM cow and the eight pregnant heifers. *See, e.g.*, R-CALF Mem. at 15-16. This Court should grant Canada leave to file an amicus brief in response to R-CALF's statements on these issues for three reasons.

First, the information provided by the Canadian Government in its brief will assist this Court in considering whether the August shipment presented a meaningful risk to public health or otherwise undermined USDA's actions in the Final Rule. *See, e.g., In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1149 (N.D. Ill. 1979) (acknowledging the benefit of an amicus brief filed by the Government of Canada concerning a national policy). The overriding concern of the Canadian Government is to protect the safety of its citizens, as well as the safety of citizens in the United States and other countries, who eat Canadian beef. The public interest is *not* served by unsubstantiated allegations about imports of Canadian cattle or the risk of BSE to humans or animals in Canada and abroad. Canada's brief accordingly addresses factual errors and/or omissions in R-CALF's filing and highlights public information demonstrating why the August shipment does not alter USDA's rationale for determining that Canada qualifies as a BSE minimal-risk region.

Second, Canada has significant national interests at stake in the implementation of the Final Rule. As noted above, this case *only* involves Canada's status under United States law in the trade of Canadian cattle and other animals and related products. Furthermore, Canada is committed to continuing to export live cattle and beef products into the United States under the provisions of the Final Rule, while working with the United States to harmonize risk mitigation measures to prevent the spread of BSE in North America. No party can speak with as much authority as the Canadian Government on the Canadian shipment and BSE mitigation measures implicated by R-CALF in its Motion. *See Order, Case No. 05-35264* (9th Cir. June 6, 2005), at 2

(Ninth Circuit recognizing the value of Canada’s perspective in this proceeding by accepting Canada’s amicus brief over R-CALF’s objection).³

Third, R-CALF would not be prejudiced if this Court allows Canada to file the proposed amicus brief. Canada seeks to file the amicus brief solely to address R-CALF’s statements relating to the shipment of the OTM cow and pregnant heifers – an incident that R-CALF claims cast doubt on USDA’s actions in the Final Rule. *See* R-CALF Mem. at 15-16. Given past experience in this case, R-CALF had to assume that these statements would be disputed. More significantly, R-CALF cannot be harmed by a brief responding to issues that it single-handedly put into contention. In addition, because Canada is filing this motion and accompanying brief on the same date that USDA is filing its opposition to R-CALF’s Motion, this motion is timely. R-CALF will have the opportunity to respond to Canada’s brief in conjunction with its reply to USDA’s opposition, should it choose to do so.

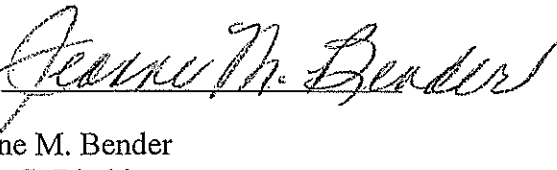
³ Indeed, courts routinely allow foreign governments to file amicus briefs in cases where the foreign government’s practices are at issue, as they are here. *See, e.g., Credit Suisse v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 130 F.3d 1342 (9th Cir. 1997) (accepting amicus brief of the Swiss Government in case involving Swiss banking practices); *Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987) (granting amicus status to Mexican Consul because it is a “proper exercise of [this Court’s] discretion” to “promote[] comity”); *Natural Res. Def. Council v. Nuclear Regulatory Comm’n*, 647 F.2d 1345, 1348 (D.C. Cir. 1981) (discussing the “cross-jurisdictional” issues addressed in the amicus brief of the Philippines Government, including the “nuclear regulatory and review procedures mandated by Philippines law”).

CONCLUSION

For the foregoing reasons, Canada respectfully asks this Court to grant this motion and accept the attached amicus brief responding to the arguments of R-CALF discussed above.

DATED: January 27, 2006

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that on the 27th Day of January, 2006, a true and correct copy of the foregoing documents entitled "Motion of the Government of Canada for Leave to File Brief *Amicus Curiae* in Response to Plaintiff's Motion to Set Motions for Summary Judgment for Argument, and Brief in Support Thereof" were served by placing a copy in the United States mail, postage prepaid and addressed to the following:

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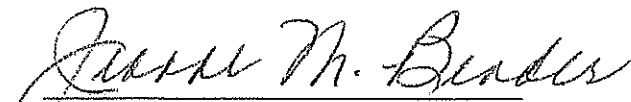
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**BRIEF *AMICUS CURIAE* OF THE
GOVERNMENT OF CANADA IN
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INTRODUCTION

In its recent filing, Plaintiff Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF”) concedes that the only issue left for this Court to resolve is whether Defendant United States Department of Agriculture (“USDA”) acted arbitrarily and capriciously, in violation of the Administrative Procedures Act (“APA”), 5 U.S.C. § 706, in promulgating the Final Rule.¹ *See* R-CALF Memorandum in Support of Motion to Set Motions for Summary Judgment for Argument (Jan. 6, 2006) (“R-CALF Mem.”), at 20 (informing this Court that it is continuing to pursue only its APA claims). The United States Court of Appeals for the Ninth Circuit exhaustively considered this issue in connection with USDA’s appeal of this Court’s preliminary injunction, concluding that “the risks inherent in the Final Rule are small, and ... the rule likely is supported by an adequate administrative record.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1100 (9th Cir. 2005) (“R-CALF”); *see also id.* at 1094 (noting that “USDA’s determinations ... had a sound basis in the administrative record”). Because there is no new evidence in the parties’ cross-motions for summary judgment and supporting materials that would alter the Ninth Circuit’s analysis, all of the evidence this Court needs to rule on R-CALF’s claims is contained in the administrative record and discussed in the parties’ summary judgment papers.

R-CALF argues, however, that this Court should consider certain other “developments” that have occurred since the Ninth Circuit issued its decision, including a shipment of Canadian cattle that occurred in early August 2005, only two weeks after Canada

¹ USDA’s Final Rule is entitled “Bovine Spongiform Encephalopathy [“BSE”]: Minimal-Risk Regions and Importation of Commodities; Final Rule and Notice,” 70 Fed. Reg. 460 (Jan. 4, 2005), Administrative Record (“AR”) 8043-8137A.

resumed shipments of live cattle to the United States on July 18, 2005.² *See* R-CALF Mem. at 2. R-CALF contends that this shipment, which included one over-30-month (or “OTM”) cow and eight pregnant heifers ineligible for importation under the Final Rule, undermines the Rule’s validity and the precedential force of the Ninth Circuit’s ruling.³ *See* R-CALF Mem. at 2, 15-16. Yet R-CALF’s discussion of this shipment omits or distorts important facts, and its conclusions overstate and mischaracterize the risk of introduction of BSE from imported Canadian cattle. Furthermore, R-CALF’s suggestion that this shipment exposes a systematic failure of the overlapping BSE risk mitigation measures implemented by the United States and Canada is belied by the volume of Canadian cattle under 30 months of age that have been shipped to the United States without any adverse consequences in the more than six months since the Final Rule took effect. Without taking a position on R-CALF’s request for oral argument, Canada explains below that the August shipment provides no basis for this Court to disregard the Ninth Circuit’s analysis of R-CALF’s APA claims or to resolve this case on facts outside of the administrative record.

² *See* Canadian Food Inspection Agency (“CFIA”), “Canadian Livestock Shipments Moving Across United States Border” (July 18, 2005), *available at* <http://www.inspection.gc.ca/english/corpaffr/newcom/2005/20050718e.shtml> (last viewed Jan. 27, 2006).

³ The OTM cow was slaughtered in the United States on August 3, 2005. *See* CFIA “Latest Information (as of September 1, 2005 – 10:00 EDST),” *available at* <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml> (last viewed Jan. 27, 2006) (“CFIA Latest Information”); *see also infra* at 8-9 (discussing voluntary recall of beef products from the OTM cow). The pregnant heifers were processed for distribution and their calves were destroyed. *See* Associated Press, “Beef banned under mad cow rules recalled” (Aug. 22, 2005), *available at* http://www.sunherald.com/mld/sunherald/news/breaking_news/12447370.htm (last viewed Jan. 27, 2006)

ARGUMENT

I. **USDA RELIES ON “NUMEROUS OVERLAPPING AND COMPLEMENTARY” RISK MITIGATION MEASURES TO PROTECT THE PUBLIC FROM EXPOSURE TO BSE⁴**

R-CALF argues that the August shipment demonstrates that “the BSE risk mitigation measures [considered] in the Final Rule” – which include Canada’s measures, among other protections, AR8051-53 – are inadequate to eliminate the risk of BSE in Canadian cattle. R-CALF Mem. at 15. To the contrary, this comprehensive regulatory system virtually eliminates any risk that imported Canadian cattle will introduce or spread BSE to humans or other animals in the United States. AR8343-45; AR8070; AR8089-90; AR8098-99; *see also R-CALF*, 415 F.3d at 1095 (stating that the interlocking Canadian and USDA mitigation measures provided a “firm basis” for the USDA Secretary to determine that “the resumption of ruminant imports from Canada would not significantly increase the risk of BSE to the American population”). Briefly summarized, Canada’s mitigation measures include the following:

1. *Restrictions on imports from high-risk BSE countries, established 13 years before the first indigenous case of BSE was detected in Canada.* In July 1989 and February 1990, respectively, the United States and Canada imposed a ban on imports of cattle from the United Kingdom and Ireland, where the incidence rate of BSE was skyrocketing in the absence of scientific understanding about how BSE was spread. AR8324; AR8051. In 1994, Canada imposed an import ban on all countries where BSE had been detected in native cattle, and then, in 1996, made this policy “even more restrictive” by prohibiting the importation of live ruminants from any country that had not been recognized as free of BSE. AR8051. The import

⁴ *R-CALF*, 415 F.3d at 1096 (noting that these measures include Canada’s risk mitigation measures, as well as complementary measures used in the United States).

restrictions effectively halted the entry of BSE into both Canada and the United States from high-risk BSE countries. *Id.*

2. *A ruminant-to-ruminant feed ban, implemented as a preemptive safeguard, limits recycling and prevents amplification of BSE.* Acting on the recommendation of the World Health Organization, Canada introduced a feed ban simultaneously with the United States in August 1997 to prevent BSE from entering the food chain and to control the “recycling” of BSE.⁵ AR8096; AR8051; AR8075; AR8060 (noting that “[t]he Canadian feed ban is essentially the same as the feed ban in place in the United States”). Canada’s implementation of the feed ban, almost six years *before* it detected the first case of BSE in a Canadian-born cow in 2003, has been credited with dramatically reducing the exposure of BSE among Canadian animals by limiting the spread and preventing the amplification of BSE. AR8051-52; AR8098; *see also R-CALF*, 415 F.3d at 1095, 1098-99 (discussing Canada’s feed ban). Moreover, the feed bans in place in Canada and the United States eventually will eradicate the already low level of the disease in the North American cattle herd. AR8099; AR8096.

3. *A national BSE surveillance program that exceeds OIE guidelines.* Since 1992, Canada has surveyed the Canadian herd for high risk cattle showing clinical symptoms of BSE. AR8060 (“BSE surveillance and diagnostic capabilities in Canada” are “equivalent to and as effective as those in the United States”); AR8096; AR8098. Since 1996, Canada has exceeded the level of annual surveillance recommended by OIE. AR8099; AR8325.

⁵ Of the small number of potentially BSE-infected animals that were imported into the United States and Canada before 1990, some may have been rendered and processed into animal feed, which in turn could have led to the development of additional cases (or the “recycling”) of BSE. AR8051. Coordinated implementation of the feed bans by Canada and the United States was critical in preventing the unrecognized amplification of BSE. *Id.*

Furthermore, Canada is in the second year of an enhanced program to significantly broaden surveillance in accordance with revised international surveillance guidelines. AR8099; AR8053; AR8060.

4. *Slaughter practices that detect and eliminate potential BSE cases before they enter the human food system.* Because the majority of Canadian cattle slaughtered for human consumption are between 18-22 months of age, and because the average incubation period of BSE is at least 4-5 years (48-60 months), AR8058, Canadian cattle taken to slaughter are extremely unlikely to have developed infective levels of the disease. AR8096; AR8069; AR8330 (even during the United Kingdom's epidemic, when BSE controls had not been fully implemented, only 0.01% of cattle that developed BSE were under 30 months of age). Similarly, the Final Rule "permits the importation of only a subset of those animals that are extremely unlikely to have BSE – those under 30 months of age," and thus "reduces the risk of introduction of BSE from Canada's herd." *Id.* at 1095-96 (noting that "USDA's scientific evidence suggests that Canadian cattle under 30 months of age will be far less likely to be in the advanced stages of BSE").

5. *The removal of specified risk materials ("SRMs") to protect humans from BSE.* Canada (as well as the United States) implements a safeguard internationally recognized as the most effective way to protect consumers from exposure to the BSE agent: the removal of SRMs from all animals slaughtered for human consumption. AR8049 (the United States followed Canada's lead in banning SRMs); AR8052. Removing SRMs ensures that, in the unlikely event that an infected animal enters the slaughter system during the period of infectivity when BSE is not clinically detectable, the meat and meat products from the animal will be free of the tissues where BSE is concentrated. AR8049; AR8097-98.

6. *Epidemiological investigations to evaluate and respond to any suspected case of BSE.* On the rare occasion that BSE has been detected in Canadian-born cattle, Canada has conducted an exhaustive epidemiological investigation to confirm the adequacy of its existing risk mitigation measures. AR8052-53; AR8061; AR8328. The rigor and transparency of Canada's post-detection investigations reflects yet another layer of protection in Canada's efforts to control BSE. AR8075; AR8099; *see also R-CALF*, 415 F.3d at 1095 (stating that Canada's "BSE testing and epidemiological investigations ... help it further minimize the prevalence of BSE in its herd").

II. THE AUGUST 2005 SHIPMENT FAILS TO CONFIRM R-CALF'S CLAIM THAT IMPORTS OF CANADIAN CATTLE PRESENT AN UNACCEPTABLE RISK OF BSE IN THE UNITED STATES

The presence of nine ineligible Canadian cattle in the August shipment, or even an additional handful of ineligible cattle in any other shipments, does *not* demonstrate that the BSE mitigation measures considered by USDA in the Final Rule have failed or are otherwise ineffective, as R-CALF contends. *See* R-CALF Mem. at 15. While the importation of these animals may have violated certain import requirements established under the Final Rule, the animals posed *no* risk of exposing humans or animals to BSE. Yet, to continue to foster its "concerns of potential for BSE exposure" from Canadian cattle (*id.* at 16), R-CALF distorts or completely omits several key facts about the circumstances of the shipment.

First, R-CALF conspicuously omits that the OTM cow was a mere 31-months old, and thus "just over" (by only a week) the 30-month age limit in USDA's regulations. USDA Food Safety and Inspection Service ("FSIS") Press Release, "Wisconsin Firm Recalls Beef Products," *available at* http://www.fsis.usda.gov/News_&_Events/Recall_032_2005_Release/index.asp ("FSIS Recall Release") (last viewed Jan. 27, 2006); *see also* CFIA Latest Information. A 31-month cow is at

the lowest end of the “OTM” age range, and thus presents the lowest possible risk for BSE infectivity of all OTM cattle. *See supra* at 6 (discussing purpose of age restriction in protecting human health); *cf.* AR8067 (USDA noting that, because SRM removal is now “standard operating procedure,” it is evaluating whether OTM cattle from minimal-risk regions even present a risk of BSE).⁶

Second, R-CALF fails to acknowledge both Canada’s role in identifying the ineligible animals and in taking action to prevent such violations in the future – even though the articles cited by R-CALF discuss Canada’s actions. The Canadian Food Inspection Agency (“CFIA”) discovered the improper shipment through an audit of the health certificate that accompanied the OTM cow. *See* FSIS Recall Release (explaining that the health certificate was found to be inaccurate). As the article cited by R-CALF explains, CFIA officials alerted USDA about the shipment so that USDA could take appropriate action. *See id.* CFIA also conducted an investigation into the cause of the errors that led to the shipment. This investigation resulted in CFIA suspending the accreditation of the private veterinarian who inspected the OTM cow and the export activities of the exporter who shipped the cow, pending a full investigation and the assessment of appropriate remedial action. *See* CFIA Latest Information. CFIA also reiterated

⁶ R-CALF did not – because it could not – claim that the pregnant heifers posed a threat to human or animal safety. *See supra* 3 n.3 (Associated Press reporting that the heifers were processed for distribution). R-CALF instead argues that the shipment of these pregnant heifers shows that “[t]he Final Rule ... does not prohibit importation of pregnant cattle, despite the statement in the preamble of the Final Rule [to that effect].” R-CALF Mem. at 16. This argument defies explanation. The Rule leaves no doubt that only Canadian cattle under 30 months of age intended for “immediate slaughter, or for feeding and then slaughter,” may be imported. AR 8069 (explaining that “[s]pecial circumstances that might relate to breeding animals were not addressed [in the Final Rule],” but that they would be addressed in a “separate proposed rule”); *see also R-CALF*, 415 F.3d at 1099 (noting that USDA is “abundantly clear” on this point). R-CALF’s suggestion that USDA has a *de facto* policy to accept imports of pregnant Canadian cattle is completely unfounded.

to CFIA-accredited veterinarians and exporters that “there will be zero tolerance ... for any non-compliance with U.S. import requirements.” *Id.*

Third, R-CALF suggests that the beef products containing meat processed from the OTM cow posed a significant human health risk until they were voluntarily recalled by the distributor. *See* R-CALF Mem. at 16. In fact, USDA determined, on the basis of ante-mortem and post-mortem inspections, that the animal was “healthy and *fit for human food*.” FSIS Recall Release (emphasis added). USDA designated the recall as “Class II” because the beef products presented only a “remote probability of adverse health consequences.” *Id.* Thus, contrary to R-CALF’s allegations, at no point did the OTM cow ever pose an actual risk to human health.

Undeterred by these facts, R-CALF argues that the August shipment “demonstrate[s] empirically” the “legitimacy” of its concerns about the potential for BSE exposure from imported Canadian cattle. R-CALF Mem. at 16. Again, the overwhelming real-life evidence proves that R-CALF’s concerns are baseless. In the time since the Ninth Circuit issued its decision and the Rule took effect, Canada has shipped well over 463,000 head of cattle to the United States without incident, in accordance with the regulations promulgated in the Final Rule. *See* USDA Economic Research Brief of Cattle and Beef Trade, *available at* <http://www.ers.usda.gov/Briefing/Cattle/Trade.htm> (last viewed Jan. 27, 2006) (providing link to USDA’s “monthly” and “year-to-date” data on imports of live Canadian cattle, with imports from July through November 2005 alone totaling more than 463,000 animals). The nine cattle in the August 2005 shipment thus amount to less than 0.002% of *all* live cattle exported from Canada to the United States since this trade resumed. Or, put differently, fewer than 1 in 50,000 cattle exported by Canada to the United States since July were shipped in violation of USDA’s

requirements under the Final Rule. Furthermore, of the ineligible cattle, *none* posed a risk to human or animal health, as explained above.

Lastly, the August shipment, or even the occurrence of similar isolated incidents, does not mean *ipso facto* that USDA has been deficient in implementing the Final Rule or that the resulting trade has presented any risk to human health, as R-CALF suggests. The Ninth Circuit has made clear that the statute governing USDA's actions – the Animal Health Protection Act (“AHPA”), 7 U.S.C. § 8301 *et seq.* – does *not* require USDA to “remove all risk of BSE entering the United States.” *R-CALF*, 415 F.3d at 1095 (stating that “open borders are a default under the AHPA, and the Secretary can close them *only if* ‘*necessary*’ to prevent livestock disease”) (emphasis added). Against this legal background and in light of the body of record evidence demonstrating the efficacy of the BSE risk mitigation measures considered by USDA, the August shipment does nothing to bolster R-CALF's claim that USDA issued the Final Rule in violation of the APA.

* * *

In sum, although R-CALF discusses the August shipment to assert the “legitimacy” of its arguments (R-CALF Mem. at 16), that incident – when viewed in the appropriate context – shows that the BSE mitigation measures implemented on both sides of the

border are succeeding in “minimiz[ing] the risk of BSE to American livestock and consumers.”

R-CALF, 415 F.3d at 1096.⁷

CONCLUSION

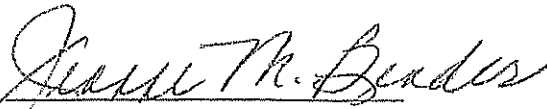
For the foregoing reasons, Canada respectfully submits that R-CALF’s statements concerning the OTM cow and pregnant heifers should have no bearing on R-CALF’s request for oral argument. R-CALF has raised no new facts or argument with respect to these issues that were not foreseen or accounted for by USDA in the administrative record.⁸

⁷ R-CALF claims that USDA gave “assurances to the Court that there was an ‘*impenetrable barrier*’ to BSE from imports,” but it fails to cite any USDA document to support this statement. R-CALF Mem. at 15 (emphasis added). In fact, USDA has informed this Court that, “[i]ndividually, [Canada’s and the United States’] mitigation measures are highly effective, but taken together, they are *virtually impenetrable*.” Def.’s Summ. J. Mem. at 1 (July 10, 2005) (emphasis added). The past six months of trade in live Canadian cattle (as well as the on-going trade in certain Canadian beef products) has confirmed the truth of this statement.

⁸ For the benefit of this Court, Canada notes that, on January 22, 2006, CFIA confirmed one new case of BSE in Alberta, Canada. See CFIA, “BSE Detected in Alberta,” available at <http://www.inspection.gc.ca/english/corpaffr/newcom/2006/20060123e.shtml> (last viewed Jan. 27, 2006). Although CFIA is currently investigating this case, it has confirmed that the infected cow was approximately six years old and that no part of it entered the human food or animal feed systems. See *id*; see also CFIA Questions and Answers on BSE Case #4, available at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/ab2006/queste.shtml> (last viewed Jan. 27, 2006). In a statement on this new case, the USDA Secretary reaffirmed the regulatory framework established under the Final Rule and said that USDA “anticipate[s] no change in the status of beef or live cattle imports ... from Canada.” USDA, “Statement by Agriculture Secretary Mike Johanns Regarding BSE Finding,” available at <http://www.fas.usda.gov/dlp/BSE/bse.html> (last viewed Jan. 27, 2006). Likewise, the Government of Japan, which had only recently reopened its border to Canadian beef and certain beef products from cattle 20 months of age and younger, stated that Japan’s border will remain open to beef from Canada. See “Japan will still take Canadian beef despite latest BSE test,” available at <http://www.crisscross.com/jp/news/362162> (Jan. 25, 2006) (last viewed Jan. 27, 2006); see also CBC News, “Border shouldn’t be affected by new mad cow case: CFIA” (Jan. 23, 2006), available at <http://www.cbc.ca/story/canada/national/2006/01/23/mad-cow060123.html> (last viewed Jan. 27, 2006) (CFIA’s Chief Veterinary Officer explaining that Canada’s market access agreements account for the fact that “the finding of [a small

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Respectfully submitted,

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number of] additional cases of BSE ... is entirely predictable and falls within th[e] range of acceptable limits”).