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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,	)	Cause No. CV-05-06-BLG-RFC
)	
)	
Plaintiff,)	
v.	)	MOTION OF CANADIAN
	)	CATTLEMEN'S ASSOCIATION AND
UNITED STATES DEPARTMENT OF	)	ALBERTA BEEF PRODUCERS FOR
AGRICULTURE, ANIMAL AND PLANT	)	LEAVE TO FILE BRIEF <i>AMICI CURIAE</i>
HEALTH INSPECTION SERVICE, et al.,	)	OPPOSING PLAINTIFF'S MOTION TO
	)	SET MOTIONS FOR SUMMARY
Defendants.	)	JUDGMENT FOR ARGUMENT
)	

INTRODUCTION

The Canadian Cattlemen's Association and Alberta Beef Producers (collectively, "CCA/ABP") respectfully move for leave to file the attached brief *amici curiae* opposing the motion of plaintiff Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF") to set the pending motions for summary judgment for argument ("the Motion").

R-CALF devotes most of its Memorandum in support of the Motion to the argument that "[d]evelopments since briefing on the cross-motions for summary judgment was concluded have only increased the support for R-CALF's positions." R-CALF Mem. at 20; *see id.* at 9. Yet R-CALF omits to mention a number of important developments since the implementation in July 2005 of the Final Rule of the U.S. Department of Agriculture ("USDA"), "Bovine Spongiform Encephalopathy [("BSE")]; Minimal-Risk Regions and Importation of Commodities," 70 Fed. Reg. 460 (Jan. 4, 2005) ("Final Rule"). These developments demonstrate that, despite R-CALF's criticism of USDA for having "preconceived outcomes" in its development of BSE

mitigation measures for Canada, it has actually been R-CALF's preconceived outcomes that have proven to be erroneous and USDA's assessments that have proven to be correct.

CCA/ABP request this leave to file their *amici* brief to show that the dire consequences predicted by R-CALF to support the issuance of preliminary and permanent injunctive relief have not come to pass with the implementation of the Final Rule. To the contrary, as the brief explains, over the past six months, following the decision of the Ninth Circuit to lift the preliminary injunction against the Final Rule, the quantities of Canadian cattle that have been imported into the United States have been below recent historical levels rather than at excessive levels, U.S. cattle prices have increased rather than decreased, U.S. consumer confidence in the safety of the beef supply has remained high rather than collapsed, and export markets for U.S. beef have become more open rather than more closed. CCA/ABP's members have a substantial interest in presenting the Court with an accurate picture of the current effect of the Final Rule, as R-CALF continues to try to persuade this Court to adjudicate based on speculative fears rather than on evidence.

Counsel for CCA/ABP have conferred with counsel for plaintiff R-CALF and counsel for defendants USDA and USDA's Animal and Plant Health Inspection Service ("APHIS") (collectively, "USDA"). USDA consents to the filing of this motion. R-CALF takes no position until it has had an opportunity to review the motion.

ARGUMENT

This Court has broad discretion to permit parties to file *amicus* briefs 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 acceptance of *amici* to advise the Court on the public interest

issues at stake in the case); *Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (*amici* fulfill “the classic role of *amicus curiae* by assisting in a case of general public interest [and] supplementing the efforts of counsel”). The instant case is certainly one of general public interest, and CCA/ABP’s proposed brief is precisely directed at “supplementing the efforts of counsel.”

The Court has previously permitted both CCA and ABP to appear as *amici curiae* in response to R-CALF’s pending motion for summary judgment. *See* Order (June 14, 2005) (granting CCA’s and ABP’s motions for leave to file *amicus curiae* briefs). Through the attached *amici* brief, CCA/ABP would again play a constructive role in this Court’s adjudication of the issues before it.

CCA/ABP’s proposed brief would be helpful to this Court in understanding the state of the cattle and beef market, the unreliability of R-CALF’s factual claims, and the current effect of the Final Rule. No other party may be able to present the information available to CCA/ABP, and their perspective will bring to the Court’s attention facts relevant to the adjudication of R-CALF’s motion.

CCA/ABP members have a substantial interest in the resolution of this litigation. The CCA is a national federation that encompasses eight provincial organizations and represents the interests of Canada’s more than 90,000 cattle producers. CCA’s affiliates include provincial organization members, the beef producers of Quebec, and the representatives of purebred cattle breeders in Canada. 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 North American

country have an impact on the ability of cattle producers in both countries to trade internationally. CCA has an interest in the implementation of the Final Rule 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. 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. CCA submitted comments at all stages of the development of the Final Rule.

ABP represents the tens of thousands of men and women most directly affected by the relief requested by R-CALF: the cattle producers of Alberta, Canada. Alberta is Canada's largest beef-producing province, and ABP's 28,000 members account for about half of all the Canadian beef cattle that R-CALF seeks to bar from the United States.

Thus, CCA/ABP move for leave to file an *amici curiae* brief to advance specific and significant protectable interests in the imports of Canadian cattle, interests that would be grievously affected if the Court were to grant summary judgment for R-CALF.

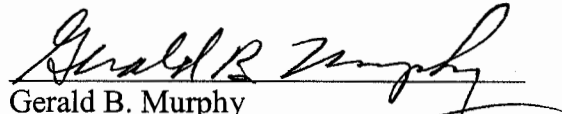
R-CALF would not be prejudiced if this Court permitted CCA/ABP to file the proposed *amici curiae* brief. This motion is timely in that R-CALF has only this month filed its motion to set motions for summary judgment for argument, and R-CALF has the opportunity to respond to the *amici* brief when it responds to the brief being filed today by USDA.

CONCLUSION

For the foregoing reasons, CCA/ABP respectfully asks this Court to grant them leave to file the attached *amici* brief.

DATED this 27th day of January, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and accurate copy of the foregoing Canadian Cattlemen's Association's and Alberta Beef Producers' Motion for Leave to File Brief *Amici Curiae* Opposing Plaintiff's Motion to Set Motions for Summary Judgment for Argument, and the proposed Brief *Amici Curiae* and form of Order, to be served by first-class mail, postage prepaid, on:

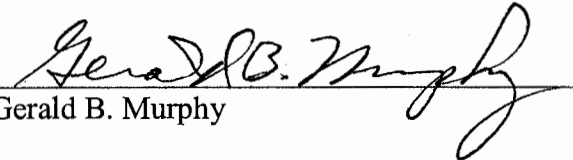
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RANCHERS CATTLEMEN ACTION LEGAL FUND)	
UNITED STOCKGROWERS OF AMERICA,)	Cause No. CV-05-06-BLG-RFC
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Plaintiff,)	BRIEF AMICI CURIAE OF
)	THE CANADIAN CATTLEMEN'S
v.)	ASSOCIATION AND ALBERTA
	)	BEEF PRODUCERS OPPOSING
UNITED STATES DEPARTMENT OF AGRICULTURE,	)	PLAINTIFF'S MOTION TO
ANIMAL AND PLANT HEALTH INSPECTION	)	SET MOTIONS FOR SUMMARY
SERVICE, et al.,	)	JUDGMENT FOR ARGUMENT
)	
Defendants)	
_____)	

INTRODUCTION AND BACKGROUND

The Canadian Cattlemen's Association ("CCA") and Alberta Beef Producers ("ABP") (collectively "CCA/ABP") jointly file this *amici curiae* brief opposing the Plaintiff Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America's ("R-CALF") Motion to Set Motion for Summary Judgment for Argument ("R-CALF's Motion"). CCA/ABP urge this Court to deny R-CALF's Motion and decide this case on the papers already submitted by the parties. CCA/ABP further urge this Court to reject R-CALF's attempts, in the guise of a motion for hearing, to supplement its filings in support of its Motion for Summary Judgment with extra-record and post-record information.

CCA/ABP submit this brief only because of R-CALF's improper attempts to supplement its Motion for Summary Judgment, as well as the record evidence. R-CALF's Memorandum in support of its Motion ("R-CALF Mem.") dedicates page after page to the notion that "[d]evelopments since briefing on the cross-motions for summary judgment was concluded have only increased the support for R-CALF's positions." R-CALF Mem. at 20. Consistent with its prior filings, R-CALF once again fails to provide a complete and accurate assessment of the facts. To the extent the Court considers the supplemental information provided by R-CALF, CCA/ABP consider it essential to put R-CALF's last minute efforts in a proper and current context, especially as to matters on which CCA/ABP are well situated to offer specific insight.¹

Cross-motions for summary judgment filed by R-CALF and the United States Department of Agriculture ("USDA") relating to R-CALF's request for a permanent injunction of the final rule published by USDA that allows U.S. importation of certain Canadian cattle and beef products ("Final Rule")² have been fully briefed and pending before this Court since July 13, 2005. A hearing for argument on the cross-motions was scheduled for July 27, 2005 and then vacated by the Court pending the outcome of USDA's appeal to the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") of this Court's entry of a preliminary injunction halting implementation of the Final Rule. On July 14, 2005, the Ninth Circuit issued a stay of this

¹ CCA/ABP have focused this submission on trade and commercial issues only; comments concerning R-CALF's recent assertions about human and animal health, and the safeguards in place to protect them, are addressed in filings submitted by USDA and the Government of Canada.

² 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.

Court's preliminary injunction order and on July 18, shipments of certain Canadian cattle resumed. On July 25, the Ninth Circuit issued a comprehensive opinion reversing the preliminary injunction. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078 (9th Cir. 2005). The Final Rule has been implemented and trade resumed without meaningful incident³ or negative impact to U.S. consumers, cattle producers or cattle.

The Ninth Circuit's opinion clearly and thoroughly addressed each of R-CALF's claims in support of enjoining the Final Rule. In this case, based on the administrative record, nothing remains to be said or debated. The parties' cross-motions are ripe for consideration and the Ninth Circuit has provided definitive guidance on the deference to be accorded USDA's rulemaking; the matter need only be concluded by this Court on the record now before it.

ARGUMENT

The passage of time itself stands as the most prominent support for the Court's conclusion of this matter without a hearing. Misled once by R-CALF, the Court can now see through actual implementation of the Final Rule that USDA acted appropriately in the Rule's

³ R-CALF attempts to make much of a single shipment in August 2005 that included nine ineligible Canadian animals. The nine included one 31 month old animal (just one month over the 30 month limit) and eight pregnant heifers. These nine animals represent a very small percentage of the Canadian cattle shipped to the U.S. since implementation of the Final Rule (less than 0.002% of the more than 463,000 Canadian cattle that have entered the U.S. since the border reopening (*see* Point 1 below)), and none of them presented any risk to human or animal health. *See* USDA Food Safety and Inspection Service Recall Release, "Wisconsin Firm Recalls Beef Products," Aug. 19, 2005, *available at* http://www.fsis.usda.gov/News_&_Events/Recall_032_2005_Release/index.asp (last viewed Jan. 26, 2006). As a result of this incident, the Canadian Food Inspection Agency ("CFIA") suspended the accreditation of the responsible private veterinarian and has determined not to issue any more export certificates to the Canadian exporter who shipped the OTM animal until further notice. *See* CFIA, "Latest Information (as of Sept. 1, 2005)," *available at* <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/situatione.shtml> (last viewed Jan. 27, 2006).

promulgation. Further, the Court now has the ability to evaluate four predictions adamantly offered by R-CALF as to what would occur should the U.S. border be reopened to certain Canadian cattle and beef.

1. **R-CALF's predictions regarding the volume of cattle that would cross the border upon implementation of the Final Rule have not come to pass.** In previous filings R-CALF conjured up images of herds of cattle poised at the Canadian border ready to stampede into the U.S., claiming that a "flood of cheap cattle and meat" would enter the United States following resumption of importation of Canadian cattle "resulting in the loss of tens of thousands of jobs." R-CALF Memorandum of Points and Authorities in Support of Plaintiff's Application for Preliminary Injunction (Jan. 31, 2005) ("R-CALF Preliminary Injunction Mem.") at 36. After the approximately six months since the border has been open, no such flood has inundated the U.S. market, nor will it. To the contrary, levels of Canadian cattle exports are below comparable periods prior to the border closing in 2003. The average cattle export volumes (slaughter and feeder cattle combined) for August-November 1998-2002 was just more than 530,000 head; in the same months of 2005, Canadian cattle exports to the United States were just under 463,000 head.⁴ Accordingly, R-CALF's claims regarding excess cattle volume and the ensuing injury to U.S. producers are without merit.

2. **The border reopening has not had a negative impact on U.S. cattle prices.** R-CALF has asserted in this proceeding that "[i]mports of Canadian cattle will...adversely affect prices for

⁴ Statistics Canada. See also <http://www.fas.usda.gov/ustrade/> (under "IMPORTS" select "FATUS", under "COUNTRIES" select "CANADA", and under "FATUS COMMODITY GROUPINGS" select "CATTLE AND CALVES", and under "SUBMIT REQUEST" select from "2005/08 to 2005/11" with a "Ten Year" Format and select "Quantity" as the Statistic) (last visited January 26, 2006).

cattle in the U.S.” R-CALF Preliminary Injunction Mem. at 5.⁵ The facts show that the average price for U.S. fed steer was \$0.85 per pound (US\$) for the period October through December 2004 (during the U.S. import ban) and \$0.91 per pound (US\$) in the same months of 2005 (following implementation of the Final Rule).⁶ The average price of a U.S. 550 pound steer was \$1.21 per pound (US\$) for the period October through December 2004 and \$1.28 per pound (US\$) for the same period in 2005.⁷ There has clearly been no deterioration of U.S. cattle prices.

3. **There has been no negative consumer reaction to the reopening of the border to certain Canadian cattle.** R-CALF has asserted that the intermingling of Canadian beef and beef products in the U.S. meat supply would cause “fears about consumption of U.S. meat generally” (see R-CALF Preliminary Injunction Mem. at 37) and that USDA made unsupportable assumptions that “the importation of cattle and beef from a country with a demonstrated BSE problem will have...no effect on consumer confidence in U.S. beef.” See R-CALF Complaint ¶ 39. Simply put, USDA was correct. Following implementation of the Final

⁵ See also R-CALF’s Complaint ¶ 39 (USDA failed to give adequate consideration to “the adverse economic impact from stigma of Canadian beef; the multiple effects on total economic output; and the already weakened state of U.S. cow/calf producers.”); R-CALF’s Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment at 26 n.15 (R-CALF’s economic expert predicted that “the discovery of additional cases of BSE after Canadian cattle and beef had been co-mingled with U.S. cattle and meat supply would severely cripple the cattle and ranching industry with lower returns that would be difficult to recover.”).

⁶ See “Cattle Fax U.S. Choice Fed Steer Price (\$/cwt),” available at http://www.cattle-fax.com/members/cfax_data/spreadsheets/fedstr_mo.xls.

⁷ See “Cattle Fax Choice 550-LB Steer Price: US Avg.,” available at http://www.cattle-fax.com/members/cfax_data/spreadsheets/550str_mo.xls.

Rule (as well as the discovery of a native U.S. BSE case in June 2005), consumer confidence in beef has remained high.⁸

4. Export markets continued to open to U.S. beef following implementation of the

Final Rule. Contrary to R-CALF's assertions that foreign markets would negatively react to the U.S./Canada border reopening,⁹ many foreign markets lifted their bans on U.S. beef following implementation of the Final Rule. Specifically, markets in Chile, Japan, Hong Kong, the Philippines, Singapore, and most recently Taiwan,¹⁰ all reopened their markets to U.S. beef after July 18, 2005, the date that Canadian cattle shipments to the U.S. resumed.¹¹ Some markets, such as Hong Kong, opened to Canada (as of November 30, 2004) long before reopening to the

⁸ See National Cattlemen's Beef Association, "BSE Consumer Tracking Research", November 2005, *available at* http://www.bseinfo.org/uDocs/11-16-2005_consumerconfidenceslidesforposting.ppt (last viewed January 27, 2006) (showing 90 percent or greater confidence that U.S. beef is safe from "mad cow disease" in September and November 2005, similar to the high confidence levels during comparable periods in 2004).

⁹ See e.g., R-CALF's Memorandum of Points and Authorities In Support of Summary Judgment at 27 ("Subsequent experience with Taiwan and Egypt has confirmed the logical proposition that importing cattle and additional beef products from Canada, which is known to have a BSE problem will complicate, rather than ease, concerns of our trading partners with BSE."); R-CALF Preliminary Injunction Memo at 5 ("Imports of Canadian cattle may result in further constraints on exports of U.S. beef."); *id.* at 37 ("The 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 R-CALF USA's members and on the U.S. economy.").

¹⁰ Taiwan had previously lifted its ban on U.S. beef in April 2005, but reinstated it in late June following the identification of a BSE positive animal in the United States. See USDA News Release, "Taiwan Reopens Market to U.S. Beef," Jan. 25, 2006, *available at* <http://www.usda.gov/wps/portal/usdahome?contentidonly=true&contentid=2006/01/0023.xml> (last viewed Jan. 26, 2006).

¹¹ See USDA/APHIS, "BSE Trade Ban Status as of 1/25/06," *available at* http://www.aphis.usda.gov/lpa/issues/bse/trade/bse_trade_ban_status.html (last viewed Jan. 26, 2006).

U.S. (December 29, 2005).¹² Other markets, like Japan, reopened simultaneously to both countries.¹³ Some markets open to the United States remain closed to Canada (e.g., Egypt, Oman and Kuwait).¹⁴ Clearly, the implementation of the Final Rule is not a deterrent to U.S. progress in expanding export markets for U.S. beef.

CONCLUSION

The dire consequences predicted by R-CALF to justify this action have not been borne out by events. The Final Rule has been implemented without negative impact on U.S. human or

¹² See Canada Beef Export Federation News Release, "Hong Kong Opens to Canadian Beef," Nov. 30, 2004, *available at* http://www.cbef.com/PDF/NewsRelease_HongKongOpens_30-11-04.pdf; USDA, "Statement by Agriculture Secretary Mike Johanns Regarding Resumption of U.S. Beef Trade with Hong Kong," Dec. 29, 2005, *available at* http://www.usda.gov/wps/portal/!ut/p/s.7.0.A/7.0.1OB/.cmd/ad/ar/sa.retrievecontent/c/6.2.1UH/.ce/7.2.5JM/.p/5.2.4TQ/.d/5/th/J.2.9D/s.7.0.A/7.0.1OB?PC.7.2.5JM.contentid=2005%2F12%2F0564.xml&PC.7.2.5JM.navtype=RT&PC.7.2.5JM.parentnav=LATEST_RELEASES&PC.7.2.5JM.navid=NEWS_RELEASE#7.2.5JM (last viewed Jan. 26, 2006).

¹³ See USDA/APHIS, "BSE Trade Ban Status as of 1/25/06"; Canada Beef Export Federation News Release, "Canadian Beef On its Way to Japan," Dec. 22, 2005, *available at* http://www.cbef.com/PDF/NewsRelease_CanadianBeefJapan.pdf (last viewed Jan. 26, 2006).

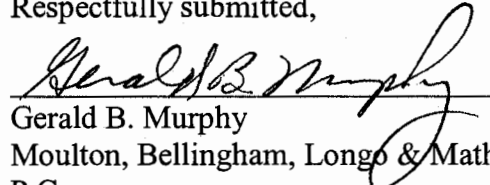
Two aspects of the current access situation in Japan are significant. First, Japan is now closed to U.S. beef because of the U.S. export of certain beef products prohibited by the recent Japan/U.S. agreement permitting U.S. beef into Japan. See USDA/APHIS, "Trade Ban Status as of 1/25/06." Despite this ban on U.S. beef, Japan is continuing to accept Canadian beef. This differentiation between Canadian and U.S. beef shows that issues that the United States has with Japan and its acceptance of U.S. beef are separate and distinct from implementation of the Final Rule. Second, if the past is prologue, we expect that R-CALF will attempt to make much of the recent discovery of a fourth BSE positive animal in Canada, in spite of the fact that such additional cases were anticipated by USDA in the minimal risk rule. See USDA/APHIS, Statement by Chief Veterinary Officer John Clifford, Animal and Plant Health Inspection Service Regarding BSE Find in Canada, Jan. 23, 2006, *available at* http://www.aphis.usda.gov/newsroom/content/2006/01/bsecan_statement.shtml ("In the extensive risk analysis conducted as part of the rulemaking, we considered the possibility of additional cases of BSE in Canada."). The simple fact is that neither Japan nor any other export market has closed to Canadian beef because of this discovery.

¹⁴ See USDA/APHIS, "BSE Trade Ban Status as of 1/25/06".

animal health or injury to U.S. economic interests. For all of these reasons, and principally because no further hearing is required, R-CALF's Motion to Set Motions for Summary Judgment for Argument should be denied.

DATED: January 27, 2006

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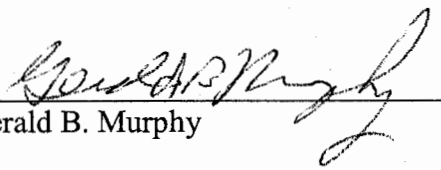
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