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WY Federal District Judge Confirms USDA Cannot Impose RFID on Livestock Producers, NCLA Files New Motion to Keep the Agencies Accountable

R-CALF USA, Tracy and Donna Hunt, and Kenny and Roxy Fox v. USDA et al.

Washington, DC (February 19, 2020) – A [court order](#) issued late last week by Nancy D. Freudenthal, U.S. District Judge for the District of Wyoming, dismissed the case of [R-CALF et al. v. USDA et al.](#) as moot because the U.S. Department of Agriculture (USDA) and the Animal and Plant Health Inspection Service (APHIS) withdrew the offending guidance “Factsheet” from its website that led to the lawsuit. In her order Judge Freudenthal made it clear that USDA’s unlawful Factsheet has been fully and completely withdrawn and stated that it “is not recognized as agency policy,” she also emphasized that “[the agencies have] unambiguously stated that the requirements of the 2019 Factsheet **will not be implemented**”. The Factsheet had sought to impose radio frequency identification (RFID) tracking technology on livestock producers.

The result marks a win for the New Civil Liberties Alliance, a nonpartisan nonprofit public interest law firm and its clients by (1) preventing USDA from using guidance to supersede a formal rule; and (2) preventing the requirements contained in the unlawful RFID guidance from being reissued. The agencies had targeted livestock producers who move or sell bison or cattle across state lines with a mandate via the Factsheet posted on their website. That Factsheet created substantial uncertainty in the industry, in large part because it was entirely contrary to the 2013 final rule on identification and traceability of certain livestock. USDA and APHIS withdrew it from their website last October, shortly after NCLA sued them on behalf of R-CALF USA (Ranchers Cattlemen Action Legal Fund United Stockgrowers of America) and several ranchers. The agencies recently argued to the Court that there is no longer any “case or controversy,” since they have withdrawn the RFID policy.

Yesterday evening, NCLA filed a [motion](#) with the court to keep open another portion of the original [complaint](#) that Judge Freudenthal appears to have overlooked. In addition to seeking repeal of the unlawful guidance, NCLA claimed that USDA and APHIS violated the Federal Advisory Committee Act (FACA) in formulating the RFID guidance. Even though the guidance has been withdrawn, NCLA argues that the process that led to the unlawful guidance being issued may still be probed.

While NCLA applauds the judge’s order confirming that the requirements of the Factsheet will not be implemented, that order does not negate the agencies’ shady behavior in adopting it in the first place. In seeking to expose the underlying actions, NCLA is asking the court to allow it to pursue the claim that the agencies violated the FACA. This move is based on the fact that the agencies improperly established “advisory committees” staffed with “pro-RFID” individuals to develop the unlawful 2019 Factsheet while excluding livestock producers who opposed the RFID requirements. Those advisory committees violated the FACA, which imposes formal requirements on how an agency must involve the public in the rulemaking process.

NCLA’s motion asks the Court to allow R-CALF and the ranchers affected by this unlawful act to proceed with discovery. NCLA will seek to block USDA and APHIS from using any work product, reports, and materials generated by the unlawful federal advisory committee(s) in any future regulatory action around RFID tracking technology.

NCLA released the following statements:

“While we are thankful that the court understood the magnitude of what the agencies did, and we are happy that they withdrew the RFID mandate, we still need to find out how we got here. We must find out the sordid details of why the agencies proceeded as they did to avoid any future nasty and destabilizing surprises.”

– **Harriet Hageman, Senior Litigation Counsel, NCLA**

“USDA and APHIS acted unlawfully when they issued the RFID guidance. They also appear to have acted unlawfully when they convened one-sided advisory committees in violation of the Federal Advisory Committee Act. NCLA is delighted to have forced withdrawal of the guidance, and we look forward to getting to the bottom of the flawed process that generated it.”

– **Mark Chenoweth, Executive Director and General Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan nonprofit civil rights organization founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other *pro bono* advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.