

Harriet M. Hageman (Wyo. Bar. # 5-2656)	
New Civil Liberties Alliance	
1225 19 th Street NW, Suite 450	222 East 21 st Street
Washington, DC 20036	Cheyenne, Wyoming 82001
Telephone: 202-869-5210	Cell Phone: 307-631-3476
Harriet.Hageman@ncla.legal	

ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL)	
FUND UNITED STOCKGROWERS)	
OF AMERICA; <i>et al.</i>)	
Petitioners/Plaintiffs,)	No. 19-CV-205-F
vs.)	
)	
UNITED STATES DEPARTMENT OF)	
AGRICULTURE; <i>et al.</i>)	
Respondents/Defendants.)	

**PLAINTIFFS’ MOTION FOR COMPLETION OF RECORD
OR FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE**

Plaintiffs Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* (collectively, “R-CALF”) file this motion pursuant to Local Rule 83.6(b)(3), and in response to the Court’s November 16, 2020 order (the “Order”), which provided R-CALF with “fourteen (14) days from the date of entry of this Order to submit any request under Local Rule 83.6(b)(3) for completion of the record or for consideration of extra-record evidence.”

Although Defendants U.S. Department of Agriculture, *et al.* (collectively, “USDA”) have not yet answered or otherwise responded to the detailed allegations of the Complaint, the briefs filed to date suggest that USDA will defend against R-CALF’s claims under the Federal Advisory Committee Act (FACA) by asserting that FACA is inapplicable to USDA’s interactions with the two advisory committees at issue in this case—the Cattle Traceability

Working Group (CTWG) and the Producer Traceability Council (PTC). Considering the fact that the Administrative Record is entirely devoid of any relevant reference to FACA, USDA will have no choice but to concede that it did not undertake any of the procedures specified by FACA in interacting and working with these two groups. USDA will instead contend (contrary to R-CALF's allegations) that it neither "established" nor "utilized" those committees. If, as Plaintiffs allege, USDA either "established" or "utilized" those committees, however, then it was required to comply with FACA's procedural requirements.

The focus here is on whether USDA correctly determined that FACA did not apply to its work with the CTWG and the PTC. The ultimate question to be decided by this Court is whether USDA "established" or "utilized" these committees. Because the Court has ruled that this case is to be adjudged solely on the basis of an "Administrative Record," such record must, at a minimum, include all of the documents that are relevant to the "established" and "utilized" issues. Any such documents that describe meetings held, that represent instructions or advice provided by USDA, that identify USDA priorities in relation to RFID requirements, or that lay out USDA's strategy for "advancement and direction of the USDA's Animal Disease Traceability (ADT) program..." (*see* Attachment 4, discussed in greater detail below), are relevant to that issue and should have been included in the Administrative Record. *See* Administrative Procedure Act (APA), 5 U.S.C. § 706 (APA cases should be determined on the basis of the "whole record"). But all such documents were not included, and Plaintiffs have been able to identify several documents that USDA either intentionally or unintentionally excluded. The "Administrative Record" submitted by USDA, in other words, does not accurately reflect all of the evidence regarding how and why USDA interacted with the two

committees, and the AR does not disclose the basis for USDA's conclusion that it was not required to comply with FACA's procedural requirements in establishing and utilizing the committees.

According to the Court in *Cherokee Nation v. Jewell*, No. 12-CV-493-GKF-TLW, 2013 WL 5329787, at *3–4 (N.D. Okla. Sept. 20, 2013):

The APA governs judicial review of a final agency action and requires a reviewing court to 'hold unlawful and set aside agency action[s], findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' 5 U.S.C. § 706(2)(A) (2013). In making such a determination, the court shall review the whole record or those parts of it cited by a party' *Id.* 'The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.' *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir.1993) (citations omitted).

The administrative record includes documents beyond those that 'literally pass[ed] before the eyes of the final agency decisionmaker[s].' *Ctr. for Native Ecosystems v. Salazar*, 711 F.Supp.2d 1267, 1275–76 (D.Colo.2010) (Citations omitted). 'If the agency decision maker based his decision on the work and recommendations of subordinates, those materials should be included in the record.' *Ctr. for Native Ecosystems*, 711 F.Supp.2d at 1275.

The administrative record must include not only the documents and materials the agency ultimately credits when reaching its decision, but also those that the agency considered and rejected in reaching its final conclusion. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir.1989); *see also Wildearth Guardians v. U.S. Forest Serv.*, 713 F.Supp.2d 1243, 1256 (D.Colo.2010) (citing *Wilderness Soc'y v. Wisely*, 524 F.Supp.2d 1285, 1295 (D.Colo.2007) (holding that documents which were "considered" are "not simply those that the agency relied upon in reaching its decision"))).

The 'designation of the [a]dministrative [r]ecord, like any established agency procedure, is entitled to a presumption of administrative regularity[;][t]he court assumes the agency properly designated the [a]dministrative [r]ecord absent clear evidence to the contrary.' *Citizens for Alt. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir.2007) (quoting *Bar MK Ranches*, 994 F.2d at 740). Thus, the burden to rebut the presumption of a complete record rests with plaintiffs. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823 (1971), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984 (1977). ***Plaintiffs must meet this burden by establishing with clear evidence that the administrative record fails to include***

documents or materials considered by defendants in reaching the challenged decision. *Citizens for Alt. to Radioactive Dumping*, 485 F.3d at 1097. Yet, this presumption is not to shield the agency from a ‘thorough, probing, [and] in-depth review.’ *Citizens to Pres. Overton Park*, 401 U.S. at 415.

Additionally, in very limited circumstances, plaintiffs may seek to supplement the administrative record with extra-record evidence, if sufficient justifications exist. *Am. Mineral Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir.1985). Such legal justifications may include: (1) ***that the agency action is not adequately explained and cannot be reviewed properly without the cited materials***; (2) ***that the agency ignored relevant factors it should have considered***; (3) ***that the agency considered factors left out of the formal record***; (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) that evidence came into existence after the agency acted that now demonstrates the agency's actions were right or wrong. *Id.* (citations omitted). However, courts must review such requests carefully, as the ‘focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.’ *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244 (1973). (Emphasis added).

In responding to the Court’s invitation for a request “for completion of the record or for consideration of extra-record evidence,” R-CALF has identified nine additional documents that clearly are (or should be) part of the “whole record.” Eight of these documents were either drafted or considered by USDA and are highly relevant to the “established” or “utilized” issues. They confirm that USDA was instrumental in establishing and utilizing the CTWG to assist with implementing USDA’s proposed requirement that cattle and bison moved in interstate commerce must have radio frequency identification (RFID) eartags. The ninth document is a declaration from Plaintiff Kenny Fox, who served as a member of the CTWG and is providing first-hand knowledge of USDA’s decision to establish both advisory committees and its utilization of the CTWG.

To assist with the Court’s consideration of this Rule 83.6 motion, R-CALF provides the

following description of the nine documents to be added to the record (with each being attached to this motion):

1. A list of attendees at the September 26-27, 2017 “Strategy Forum on Livestock Traceability,” held at a hotel at the airport in Denver, Colorado (hereinafter, the “Strategy Forum”). It was at this forum that the CTWG was established. The list, which was distributed to (and may have been prepared by) USDA officials, demonstrates that a significant percentage of attendees at the forum were senior USDA officials. *See* Attachment 1.

2. The official program for the 2017 Strategy Forum. The very first page of this program confirms that USDA played a major role in organizing the Strategy Forum—three of the ten members of the “Planning Committee” were senior USDA officials. *See* Attachment 2.

3. A comprehensive September 25, 2017 slide show prepared by USDA and presented at the Strategy Forum. The document lists “Preliminary Recommendations on Key Issues” by the 2017 Animal Disease Traceability 2017 State-Federal Working Group. Among the recommendations: USDA should adopt a mandatory RFID regime (Page 2) and an Industry Task Force should be created to assist USDA in determining the timing for adoption of such a system and in developing standards for RFID devices (Pages 2-3). *See* Attachment 3.

4. A “White Paper” prepared in the aftermath of the Strategy Forum; it summarizes activities and discussions at the Strategy Forum. Other documents included in the record indicate that USDA prepared the White Paper. The document confirms USDA’s desire that the CTWG be formed to provide advice to USDA. Page 9: “A group of industry stakeholders needs to be assembled to drive the ADT [Animal Disease Traceability] movement forward. Representatives of several producer groups attending the forum expressed their commitment to

this model and expressed a desire to be part of the solution.” Page 27 of the White Paper indicates that USDA was a major funder of the Strategy Forum. *See* Attachment 4.

5. An undated document entitled, “Priority for Discussion and Input; USDA Summary of Feedback Topics.” This document was prepared in mid-2018 by the “Opportunities and Responsibilities Task Group,” one of the subgroups formed by the CTWG. This document was distributed to USDA officials who participated actively in the subgroup’s proceedings. The document is a ballot; it asks members of the subgroup to prioritize the discussion topics that USDA had asked the CTWG and its various subgroups to address. The discussion topics are referred to as “USDA Summary of Feedback Topics for Discussion & Input by the Opportunities and Responsibilities Task Group.” The document supports R-CALF’s contention that CTWG members were following USDA’s directions and were considering the precise issues that USDA requested them to consider. *See* Attachment 5.

6. Minutes of the April 5, 2018 meeting of the “Collection Technology Task Group,” yet another of the CTWG subgroups. Minutes of other CTWG meetings are already included in the record submitted to the Court by USDA. This document shows that a senior USDA official, Neil Hammerschmidt, attended the meeting. The minutes quote Hammerschmidt as stating that USDA was looking to CTWG for advice on animal disease-traceability issues. Page 2: In response to an inquiry regarding whether a particular group within USDA still existed, “Neil shared that this group continues mostly to hear/listen to the feedback from this group of stakeholders [*i.e.*, CTWG].” *See* Attachment 6.

7. Minutes (perhaps unofficial) of the June 28, 2018 meeting of the CTWG. The document, entitled, “USDA Summary of Feedback Topics for Discussion & Input by the

Opportunities and Responsibilities Task Group” (a title identical to the heading of the “ballot” (Document #4 above)), indicates that the CTWG’s discussions proceeded precisely as USDA suggested. *See* Attachment 7.

8. A slide presentation, prepared and narrated by USDA personnel in the late summer of 2017, regarding the then-upcoming Strategy Forum. The USDA employee and document refer to the Strategy Forum as “Our National Forum.” *See* www.youtube.com/watch?v=DP5ZGP3x370 at 33:50 (last visited on 11/30/2020). This discussion/document is highly relevant to R-CALF’s claim that the CTWG, which was established at the Strategy Forum, should be deemed to have been “established” by USDA for purposes of FACA. (Please note: there will be no “Attachment 8” as this slideshow with the narrative is only available on youtube).

9. A declaration from Plaintiff Kenny Fox dated November 30, 2020 (the “Fox Declaration”), providing Mr. Fox’s first-hand account of the operations of the CTWG and of USDA’s establishment of the PTC (the second advisory committee at issue in this case). The “whole record” in this case includes not only the documents that USDA has supplied to the Court to date, and all of the documents identified in this motion, but also what USDA officials actually did and said with respect to the CTWG and the PTC. Documents supplied to the Court by USDA suggest that USDA sought to camouflage much of its involvement with the CTWG and the PTC by declining to memorialize much of that involvement in written documents. The Fox Declaration, by providing first-hand evidence of steps taken by USDA to establish and utilize the two committees, is an extremely valuable portion of the “whole record.” Among other things, the Fox Declaration recounts the USDA’s active role in shaping the CTWG’s agenda, its expressed desire for advice from the CTWG regarding how best to implement adoption of a

mandatory RFID program, and its role in ending the CTWG and replacing the CTWG with the PTC after it became apparent that (due to internal dissension) the CTWG would not be providing USDA with all the advice it was looking for. *See* Attachment 9.

All of the foregoing documents are not only relevant to, but are critically important for resolution of the issue at hand—whether USDA “established” and/or “utilized” the CTWG and/or the PTC in its development of the 2019 Factsheet and policy to move forward with mandating cattle and bison producers to use RFID eartags in order to be able to move their livestock across state lines. These documents (other than the Fox Declaration) should have been included in the “Administrative Record” produced by the Defendants, but they were not. These documents should now be added to the Administrative Record, and be considered by this Court when evaluating the ultimate question of whether Defendants violated FACA when establishing and working with these two groups, while also failing to comply with the procedural requirements of that Act.

WHEREFORE, Plaintiffs R-CALF, *et al.*, respectfully request that the Court grant their Motion for Completion of the Record or for Consideration of Extra-Record Evidence and order that Plaintiffs’ nine proffered documents be made part of the Administrative Record in this case.

Dated this 30th day of November 2020.

Attorneys for Petitioners/Plaintiffs

/s/ Harriet M. Hageman
Harriet M. Hageman (Wyo. Bar #5-2656)
Senior Litigation Counsel
New Civil Liberties Alliance
1225 19th St., NW, Suite 450
Washington, DC 20036
Harriet.Hageman@NCLA.legal
Office Phone: 202-869-5210
Cell Phone: 307-631-3476

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on November 30, 2020, a copy of **PLAINTIFFS' MOTION FOR COMPLETION OF RECORD OR FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE**, was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman
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