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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

PLAINTIFFS’ SUPPLEMENTAL MOTION FOR COMPLETION OF RECORD

Plaintiffs Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.*, (collectively, “R-CALF”) are filing this motion under Local Rule 83.6(b)(3) to supplement the Administrative Record produced to the Court by Defendants United States Department of Agriculture, *et al.*, (collectively “USDA”). The motion is made necessary by Defendants’ continued failure to disclose relevant documents in a timely fashion. Just last month (January, 2021), for example, government employees delinquently provided a *fifth* response to the *March 23, 2020* FOIA request, directed to the USDA subagency Animal and Plant Health Inspection Service (“APHIS”),

by releasing more than 100 pages of documents related to APHIS's plans to require the cattle industry to use Radio Frequency Identification ("RFID") eartag technology by January 1, 2023. R-CALF has now determined that several of the just-released documents are highly relevant to its pending claims against USDA under the Federal Advisory Committee Act ("FACA"). To date, however, Defendants have made no effort to supplement their "Administrative Record" by providing these documents to the Court (despite having possession of these documents since *before* Plaintiffs filed their FACA claims).

WHO "ESTABLISHED" THE CATTLE TRACEABILITY WORKING GROUP?

Defendants' arguments to date indicate that they will defend against Plaintiffs' FACA claims by asserting that FACA is inapplicable to their interactions with the two advisory committees at issue in this case—the Cattle Traceability Working Group ("CTWG") and the Producer Traceability Council ("PTC"). Defendants will contend (contrary to R-CALF's allegations) that they neither "established" nor "utilized" those committees. This issue is critically important here, for if Defendants in fact either "established" or "utilized" those committees, then they were required to comply with FACA's procedural requirements; Defendants concede that they did not.

Accordingly, a key issue in this case is how the two committees came into existence. Defendants would have the Court believe that they played no role in establishing the committees; by their reckoning, the committees came into existence because participants in the cattle industry decided on their own to band together for the purpose of providing technical advice to USDA/APHIS regarding how to implement an RFID mandate (a mandate to be enforced by the full weight and power of the federal government). R-CALF contends, on the other hand (in its Opening Brief filed on February 8, 2021), that Defendants not only played the dominant role in establishing the CTWG

in September 2017, but also repeatedly urged in the preceding months that an industry-led task force be formed for the purpose of providing technical advice to APHIS on RFID-related issues.

R-CALF does not know how Defendants will respond to the latter allegation—that in the months before creation of the CTWG in September 2017 they lobbied hard for creation of just such an advisory group. If Defendants choose to contest that allegation, then several of the documents released by the government in its latest FOIA response are highly relevant and should be added to the Administrative Record. They provide additional evidence that in the relevant time period, Defendants were pushing for creation of the exact type of committee that eventually became the CTWG.

DOCUMENTS TO BE ADDED TO THE ADMINISTRATIVE RECORD

R-CALF contends that Defendants’ “Administrative Record” does not accurately reflect or contain all evidence regarding how they interacted with the two committees. Such “Administrative Record” also fails to include relevant evidence regarding Defendants’ alleged affirmative determination that they were not required to comply with FACA’s procedural requirements. If this case is to be decided solely on the basis of an “Administrative Record,” then that record must, at a minimum, include all evidence relevant to the “established” and “utilized” issues. *See* Administrative Procedure Act (APA), 5 U.S.C. § 706 (APA cases should be determined on the basis of the “whole record”).

R-CALF proffers three additional documents that are (or should have been) part of the “whole record.” Each was drafted by APHIS and is highly relevant to the “established” issue. They support R-CALF’s claim that, in the months preceding establishment of the CTWG (at a September 2017 meeting in Denver co-sponsored and co-financed by APHIS), APHIS advocated for creation

of an industry-led advisory committee to provide technical advice to APHIS on RFID-related issues. APHIS created all three documents in connection with a June 27, 2017 meeting of the APHIS-led State-Federal ADT Working Group.¹

To assist with the Court's consideration of this Rule 83.6 motion, R-CALF provides the following description of the three documents (being filed with the Court along with this Motion):

Document #1 Supp. A five-page document dated June 27, 2017, with an email cover page and main document being entitled "ADT 2017 WG [Working Group] Meeting Summary." The meeting summary reflects that the working group (which met via conference call) considered at length an APHIS proposal to "Consider Industry and State/Federal Task Force." Page 2. The tasks that would be assigned to this "Industry and State/Federal Task Force" were, "Develop a 'path forward' proposal for implementation of electronic ID for cattle"; "Define (propose) technology standards" (including "Establish[ing] technical and communication standards (communications of readers with the transponders) to ensure compatibility across manufacturers"); and "Stakeholder review/consideration of proposal." *Ibid.* In connection with the "Stakeholder review" task, APHIS's meeting summary noted, "Broad support of industry is critical." *Ibid.* The summary reflects that much of the meeting's discussion focused on the advantages of establishing an industry task force.

Document #2 Supp. A two-page email from APHIS's Sunny Geiser Novotny to APHIS's Neil Hammerschmidt, entitled "ADT 2017 WG conference call notes and follow-up poll." The

¹ The State-Federal ADT Working Group was not itself subject to FACA's procedural requirements because all of its members were full-time government employees. The group, whose members were either APHIS officials or officials in counterpart agencies in state governments, issued a report in 2017 (presented at the September 26-27, 2017 forum in Denver) that recommended imposing an RFID mandate for cattle. The acronym "ADT" in its title stands for "Animal Disease Traceability."

email was sent on June 27, 2017, after the conclusion of the Working Group's June 27 meeting. Summarizing the meeting, Dr. Geiser Novotny said that in response to some comments made during the meeting, "we [APHIS] wanted to clarify that it is not the intent to have the [State-Federal] working group define what electronic ID and records should be utilized or how implementation should occur but rather does the working group consider that formation of a joint industry, State and federal task force is needed to..." Page 1. Dr. Geiser Novotny's email went on to list the important tasks this "joint industry, State and federal task force" could address, a list that largely mirrored those set out in Document #1 Supp. The purpose and goal of the email is clear: while APHIS/Dr. Geiser Novotny was "asking" the State/Federal Working Group to decide whether to recommend creation of an industry-led task force, her detailed description of the important tasks that such committee *other than* the State/Federal ADT Working Group would be assigned leaves no doubt that she was pushing the Working Group to endorse creation of an industry-led task force. The CTWG and the PTC were the exact "industry-led task forces" that were ultimately put together for that purpose.

Document #3 Supp. A two-page document, consisting of a one-page June 30, 2017 email from APHIS's Neil Hammerschmidt to APHIS's Daisy Witherspoon, asking Witherspoon to email a one-page attachment (written by Hammerschmidt) to all attendees at the June 27 meeting. Among Hammerschmidt's statements on Page 2 was the following:

Based on some of the comments made last Wednesday [at the State/Federal ADT Working Group meeting] we wanted to clarify that it is not the intent to have our ADT 2017 Working Group define how implementation should occur or attempt to define the technology solution (LF versus UHF). Rather, if the WG is going to support and recommend movement to an electronic ID system for cattle, does this working group consider that formation of a joint industry, State and federal task force is a practical option? Our concern is that we will continue to "talk about it (implementation of electronic ID) forever without a process or approach to address the significant issues we have all identified.

The purpose and goal of Hammerschmidt's statement is clear. By stating to the Working Group that the time had come to move beyond simply "talk[ing] about it (implementation of electronic ID)" and to find some group (other than the State/Federal ADT Working Group itself) to develop an implementation plan—and at the same time offering only one potential solution—APHIS's Hammerschmidt was pushing the Working Group to support creation of "a joint industry, State and federal task force" to address how electronic ID should be implemented.

And that is exactly what the State-Federal ADT Working Group did. In response to APHIS's insistence, the Working Group presented its recommendations at the September 2017 "Traceability Forum" in Denver, including "encouraging formation of an industry-led task force with input from animal health officials as needed. The task force would represent a broad spectrum of industry organizations to thoroughly assess alternatives and gather input from industry sectors." AR139. That task force (the CTWG) was formed at the September 2017 Denver meeting.

The three proffered documents are 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 Defendants for purposes of FACA. These documents provide additional confirmation that the concept of an industry-led task force originated with Defendants, was publicly endorsed by Defendants, and was implemented and carried to fruition by Defendants.

These documents only came to light in recent weeks when USDA FOIA officials belatedly supplied them to R-CALF—something counsel for Defendants should have done months ago when they produced their putative "Administrative Record."

WHEREFORE, Plaintiffs R-CALF, *et al.*, respectfully request that the Court grant their Supplemental Motion for Completion of the Record or for Consideration of Extra-Record Evidence

and order that Plaintiffs' three (3) additional documents be made part of the record in this case.

Dated this 12th day of February 2021.

Attorneys for Petitioners/Plaintiffs

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on February 12, 2021, a copy of PLAINTIFFS' SUPPLEMENTAL MOTION FOR COMPLETION OF RECORD, 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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