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NCLA's Suit Forces USDA to Abandon Efforts to Use Guidance to Mandate RFID Eartags for Livestock

R-CALF USA, et al. v. U.S. Department of Agriculture, et al.

Washington, DC (March 23, 2021) – Victory! The New Civil Liberties Alliance is celebrating an important win for America's ranchers today after the U.S. Department of Agriculture (USDA) and its subagency, the Animal and Plant Health Inspection Service (APHIS) announced that they will go through a full rule-making process pursuant to the Administrative Procedure Act (APA) to make any changes to the 2013 Final Rule governing animal identification and traceability. They will thus abandon their prior attempt to replace the rule with guidance, which has been at the root of NCLA's lawsuit against the agencies.

NCLA represents the trade association Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA), and four ranchers—Tracy and Donna Hunt from Wyoming, and Kenny and Roxy Fox from South Dakota—in *R-CALF USA, et al. v. U.S. Department of Agriculture, et al.*

In July 2020 USDA/APHIS published a notice in the Federal Register proposing to define an "official eartag" under the 2013 Final Rule governing animal identification and traceability as being limited to radio frequency identification (RFID) eartags, thereby barring the use of traditional eartags used by most livestock producers. Today's announcement means that the original notice will not be finalized, and that all current APHIS-approved methods of identification may be used as official identification until a new formal rule dictates otherwise. This is an important concession, and one that would never have been made without NCLA's challenging the agencies' previous effort to nullify the 2013 Final Rule through the use of a guidance document (the April 2019 Factsheet mandating RFID use on cattle and bison).

For far too long and far too often, administrative agencies have been "legislating by guidance," thereby avoiding the strictures of the APA, while imposing ever increasing mandates and requirements on the regulated public. That is exactly what USDA and APHIS tried to do in imposing an RFID mandate on cattle and bison producers via guidance. NCLA has been aggressive in challenging such extra-legal actions. The announcement today shows that NCLA is making progress in placing constitutional guardrails on executive branch agencies.

NCLA also filed comments in October of last year pointing out the illegality of what the agencies were attempting to do by circumventing the

Federal Advisory Committee Act (FACA) by excluding opponents of RFID eartags from USDA's advisory committee. If NCLA's ongoing FACA lawsuit succeeds, USDA will not be able to use any of the recommendations or information obtained from the advisory committee in proposing a new RFID rule.

NCLA released the following statements:

“We are pleased that USDA and APHIS have finally recognized that they cannot cut corners and ignore the APA when it comes to something as important as defining which type of identification will be considered “official” for purposes of moving livestock interstate. Our livestock producers are entitled to the certainty and protections afforded by the 2013 Final Rule, and any effort to change that Rule should be subjected to a robust legal review and analysis. Using unenforceable “guidance” documents is no way to govern.”

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

“For the past two years the USDA and APHIS have tried to run roughshod over the rights of America's cattle producers. We're cautiously hopeful today's announcement signals an end to their regulatory overreach and the beginning of respecting both the law and the cattle producers these agencies are charged with supporting.”

— **Bill Bullard, CEO, R-CALF USA**

For more information about this case visit [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group 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.

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