

Hand Delivered

March 15, 2005

Patrick E. Duffy
Clerk of Court
United States District Court for the District of Montana
316 N. 26th Street, Room 5405
Billings, MT 59101

Re.: *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U. S. Dept. of Agriculture, et al.*, No. CV-05-06-BLG-RFC – Notice of Supplemental Authority

Dear Mr. Duffy:

The purpose of this letter is to inform the Court of an action taken by Defendant United States Department of Agriculture (USDA) that concerns the regulation that is the subject of this case and that bears upon arguments made in this case. Yesterday USDA published in the Federal Register, at 71 Fed. Reg. 12,994 (copy attached), “technical amendments” to the final rule titled “Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities” and published at 70 Fed. Reg. 460 (Jan. 4, 2005) (the “Final Rule”), which is the subject of this litigation.

One of the reasons for the “technical amendments” published on March 14, 2006 is “to prohibit explicitly the importation of pregnant bovines from BSE minimal-risk regions” and “to prohibit the importation of pregnant sheep and goats from Canada,” as well as to require by rule that “certificates accompanying bovines, sheep, and goats imported from Canada must state that the animals covered by the certificate are not pregnant.” 71 Fed. Reg. at 12,996, col. 1. Although USDA asserts that it always intended to prohibit importation of pregnant cattle, sheep, and goats, “the regulatory text of the final rule does not explicitly address whether pregnant bovines, sheep, or goats may be imported for immediate slaughter or for movement to a feedlot for subsequent movement to slaughter.”*

* 71 Fed. Reg. at 12,995, col. 3. USDA grasps at straws to imply that, although the Final Rule did not contain the prohibition on import of pregnant ruminants that is imposed by these technical amendments, USDA’s intent was clear because of a statement in the preamble to the Final Rule that importation of cattle *for breeding purposes* was not allowed and because offspring *born in the United States* somehow “would not have been imported in compliance with the final rule.” *See id.*

This new rulemaking is relevant to the instant case because it demonstrates USDA's intentional misrepresentation of the Final Rule to this Court. Less than two months ago, USDA filed an opposition to Plaintiff's motion to have this case set for argument on the cross-motions for summary judgment, in which USDA stated:

...the fact that an older animal or a few pregnant heifers were imported *in violation of regulations* does not warrant invalidating the rule. See 9 C.F.R. § 93.436 (prohibiting the import of over-30-month cattle); 9 C.F.R. §§ 93.436, 95.4(d) (*prohibiting import of pregnant heifers*)....

Defendants' Opposition to Plaintiff's Motion to Set Motions for Summary Judgment for Argument at 15 (emphasis added; footnote omitted). USDA's statement, in an opposition filed with this Court, that the Final Rule prohibited import of pregnant heifers, when it was clear to USDA that the Final Rule contained no such prohibition (as reflected in the fact that USDA was in the process of writing a rule to impose such a prohibition), is a serious misrepresentation to the Court.

It is not, however, unique. *See, e.g.*, Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction, at 16 ("The Regulations Do Not Allow the Import of Pregnant Cows"). USDA also told the Ninth Circuit that this Court incorrectly viewed importation of pregnant heifers as a vector for BSE infection (*see* Brief for Appellants in Ninth Cir. No. 05-35264, at 40-41), asserting that the Final Rule "affords *no opportunity* to divert heifers for breeding or *for births from pregnant cows*." Reply Brief for Appellants in Ninth Circuit No. 05-35264, at 14-15 (emphasis added). The Ninth Circuit then accepted USDA's inaccurate description of the Final Rule. *See* 415 F.3d 1078, 1099.

The March 14, 2006 "technical amendments" thus bear directly on a contested issue in this case. They also demonstrate the need for a hearing on the pending cross-motions for summary judgment, so that the Court can better understand these and other inconsistent statements USDA has made in the underlying rulemaking and in this case.

Sincerely,

Russell S. Frye
Counsel for Ranchers Cattlemen
Action Legal Fund United
Stockgrowers of America
(admitted *pro hac vice*)

cc: Counsel of Record
Enclosure