

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,  
  
Defendant-Intervenor – Appellant

v.

UNITED STATES DEPARTMENT OF  
AGRICULTURE, Animal And Plant  
Health Inspection Service, et al.

Defendants – Appellees,

and

RANCHERS CATTLEMEN ACTION  
LEGAL FUND UNITED  
STOCKGROWERS OF AMERICA,

Plaintiff – Appellee.

Appeal from D.C. No.  
CV-05-06-BLG,  
District of Montana, Billings

**ANSWERING BRIEF OF  
RANCHERS CATTLEMEN  
ACTION LEGAL FUND  
UNITED STOCKGROWERS  
OF AMERICA**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Ninth Circuit Rule 26.1, Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”) hereby states that it is a non-profit corporation organized under the laws of the State of Montana. R-CALF USA has no parent corporation, and no publicly traded company owns 10 percent or more of the stock of R-CALF USA.

Dated: March 28, 2005

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## **JURISDICTIONAL STATEMENT**

Plaintiff-Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”) agrees that this Court has jurisdiction over the National Meat Association’s (“NMA’s”) appeal of the denial of its motion to intervene, under 28 U.S.C. § 1291. R-CALF USA does not agree that this Court has jurisdiction to review the District Court's grant of a preliminary injunction on an interlocutory basis under 28 U.S.C. § 1292(a)(1), because this Court has jurisdiction to hear an interlocutory appeal by a party, not by any interested entity. NMA has made no attempt to demonstrate, nor could it, that it presents exceptional circumstances that might justify an appeal by a non-party. Additionally, as discussed below, NMA lacks standing under Article III of the United States Constitution to challenge the District Court's omission of a requirement for R-CALF USA to post security for the preliminary injunction, because NMA alleges no injury that would be redressable by this Court requiring R-CALF USA to post security pursuant to Fed. R. Civ. P. 65(c). Accordingly, this Court lacks jurisdiction to consider, and should ignore, all of NMA's brief except for the portion that addresses the District Court's denial of NMA's motion to intervene in the proceedings below.

## STATEMENT OF THE CASE

While R-CALF USA agrees with portions of the Statement of the Case in NMA's opening brief, it leaves out key aspects of the case that are necessary for understanding the District Court's action. NMA complains that there currently is an “unfair imbalance in the marketplace.” It falsely asserts that this situation is the result of the preliminary injunction issued by the District Court on March 2, 2005 (the “Preliminary Injunction”). In fact, the situation NMA describes is the result of USDA's decision to create widespread exceptions to its general policy of prohibiting imports of cattle and beef from any country where bovine spongiform encephalopathy (“BSE”) is known to exist, a policy it has had since 1989. *See* 70 Fed. Reg. at 462. That policy initially was applied to Canada on May 29, 2003, 68 Fed. Reg. 31,939, after the discovery of BSE in Canada. NMA challenged neither the May 29, 2003 rule nor the exceptions.

The USDA regulations provide that USDA may issue permits for ruminants or ruminant products to be brought into the United States in specific cases, where the Administrator determines in the specific case that the action will not endanger livestock or poultry in the United States. 68 Fed. Reg. at 39,140. Under intense pressure from the Canadian government

and some U.S.-based meat packers (who also operate packing plants in Canada), on August 8, 2003, then-Secretary of Agriculture Ann M. Veneman announced that USDA would grant blanket permits for the importation of a limited number of meat products from Canada, including boneless bovine meat from cattle under 30 months of age at the time of slaughter, boneless veal from calves under 36 weeks, and fresh or frozen bovine liver. *See* 70 Fed. Reg. 460, 536 (January 4, 2005) (the “Final Rule”); District Court’s March 2, 2005 opinion supporting its preliminary injunction order (“Opinion”) at 3, ER 158. In the spring of 2004, R-CALF USA learned that, although USDA had told the public that importation of other, higher-risk bovine products from Canada would have to await completion of the rulemaking USDA was undertaking, in fact USDA had, without notice and comment, authorized imports of those other higher-risk products.

R-CALF USA filed an action in Federal District Court in Montana, seeking to enjoin imports of these additional products until the rulemaking had been completed. On April 26, 2004, the District Court issued a Temporary Restraining Order, prohibiting importation from Canada of all edible bovine meat products beyond those authorized by USDA's action of August 8, 2003. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Dept. of Agriculture, et. al.*, No.

CV-04-51-BLG-RFC, Supplemental Excerpts of Record (“SER”) at 1-13.

On May 5, 2004, with the stipulation of the parties, that Temporary Restraining Order was converted into a preliminary injunction, which expired after the Final Rule was issued. (R-CALF USA’s arguments in that litigation that USDA had acted in response to pressure from meat packers and others to reopen trade with Canada without completing or, in some cases, ignoring its assessment of the risks of those imports was recently confirmed by a report of the USDA Inspector General, SER 14-22.)

Much later, NMA moved to intervene in that action, claiming that it needed to be a party to protect its interests against the possibility that that action could be used to enjoin the Final Rule once it was issued, resulting in financial harm to NMA's members because they would not be able to import Canadian cattle. The District Court rejected NMA's motion to intervene in that case, because there were no ongoing proceedings and R-CALF USA's claims in that case would become moot once the Final Rule was issued. D. Mont. No. CV-04-51-BLG-RFC, Order of December 1, 2004.

NMA’s Statement of the Case also omits key aspects of the timing of the proceedings below: The Final Rule was scheduled to go into effect March 7, 2005 (70 Fed. Reg. at 460) and, as NMA's Brief indicates, its members and others were ready to begin importing Canadian cattle and meat

at that time. The scheduling order issued January 28, 2004, in response to a joint proposal, gave R-CALF USA just three days to file its application for preliminary injunction and supporting memorandum, and just three days to respond to USDA's brief in opposition due on February 22, 2005. Docket Entry 11. NMA filed a lengthy brief and supporting documents just three days before R-CALF had to respond to over 100 pages of briefing and declarations filed by USDA at the same time.

NMA's February 1, 2005 Motion to Intervene opposed not only by R-CALF USA, but also by the defendants below ("USDA").

Prior to the March 2, 2005 hearing on R-CALF USA's application for a preliminary injunction, seven states, Connecticut, New Mexico, North Dakota, Montana, Nevada, South Dakota, and West Virginia filed an *amicus curiae* brief supporting the grant of a preliminary injunction.

The District Court has now a set schedule for briefing and hearing on the merits, consistent with a joint briefing proposal by the parties. A hearing on cross-motions for summary judgment is scheduled for July 27, 2005.

NMA also includes a description of the purported effect of the Preliminary Injunction that is argumentative and inaccurate. The Preliminary Injunction has not caused the situation that NMA complains

of—it has existed since the summer of 2003 as a result of USDA actions that NMA did not challenge.

## **STATEMENT OF FACTS**

The Statement of Facts in NMA's opening brief omits numerous crucial facts.

In its description of the development of the BSE problem in Canada, NMA omits the fact that, once BSE was discovered in Canada, the United States' largest beef export trading partner, Japan, threatened to ban imports of US beef unless that beef was positively identified as not having come from Canadian-origin cattle. *See* 70 Fed. Reg. at 524. Then, after the December 2003 discovery of BSE in a Canadian-raised cow that had been imported to Washington State, Japan, Korea, Taiwan, and most of the other countries to which the U.S. exports beef banned imports of US beef because of fears that BSE had entered the United States from Canada. This had a devastating effect on U.S. exports of beef, reducing that market by billions of dollars per year. 70 Fed. Reg. at 521. Those markets remained largely closed to U.S. exports of beef even now. 70 Fed. Reg. at 524-25.

Remarkably, NMA neglects to mention that additional cases of BSE were found in Canada just before and just after publication of the Final Rule,

one of which was born after the Canadian ban on feeding ruminant protein to ruminants which supposedly created a “firewall” preventing the spread of BSE. Transcript at 25, SER 137. This prompted USDA's counsel to acknowledge in the preliminary injunction hearing that cattle in the Province of Alberta constitute a “high risk population” for BSE (Transcript at 57, SER 163). It also caused USDA to decide to reconsider that portion of the just-issued Final Rule that would have allowed imports of beef products from cattle that were slaughtered in Canada at 30 months of age or older, suspending that part of the Final Rule on March 11, 2005, 70 Fed. Reg. 12,112.

### **SUMMARY OF ARGUMENT**

NMA has failed to demonstrate that it is entitled to intervene in the action below. NMA had the exact same objective in this litigation as USDA did: to ensure that USDA's new regulation, relaxing restrictions on importation of Canadian cattle and meat, would go into effect as planned on March 7, 2005. NMA offered no new defenses in its proposed complaint, nor did it make any new arguments (at least ones that have any relevance to this proceeding). NMA is not in as good a position as USDA to defend USDA's action based on the administrative record, and certainly it has not

presented arguments that would overcome the presumption that USDA can properly represent its interests in having the Final Rule upheld.

NMA's members believe that they have a legal entitlement to import “cheap Canadian cattle” (or, alternatively, to be protected from imports of cheap Canadian beef), without regard to the implications of those imports for the health of U.S. cattle and consumers. That is not a legally protected interest justifying intervention in this case, which concerns whether USDA's regulation relaxing BSE-related protections for Canadian cattle and beef was arbitrary and capricious or not in accordance with applicable statutes. NMA is in no different position than many other businesses and organizations that would benefit from USDA's decision to resume imports of Canadian cattle and increase imports of Canadian beef.

If NMA's undifferentiated financial interest in having USDA's Final Rule go into effect were sufficient to entitle NMA to intervene as of right, then just about any case concerning judicial review of just about any government regulation would present the opportunity for multiple interests to claim that they have a mandatory right to intervene in order to “help” the agency explain why its action was not arbitrary and capricious based on the administrative record. The District Court correctly decided that the interest

NMA described was insufficient to satisfy the criteria for intervention as of right.

NMA also failed to carry its heavy burden of demonstrating that the District Court abused its discretion when it concluded that it would be untimely to allow NMA to intervene and file a brief only days before the hearing on the preliminary injunction. NMA also failed to make any persuasive arguments showing that the District Court abused its discretion in refusing to grant NMA permissive intervention.

NMA lacks standing to challenge the District Court's March 2, 2005 Order granting the Preliminary Injunction. NMA makes no attempt to demonstrate that it presents the “exceptional circumstances” that this Court has said are required before a non-party may be allowed to appeal an action by the trial court. In fact, if NMA has the right to appeal the Preliminary Injunction, then any person that can claim it is suffering financial losses because an injunction was issued against someone else in a lawsuit to which that person was not a party would have the right to appeal that injunction. In light of NMA's lack of standing to challenge the Preliminary Injunction (which this Court *does* have jurisdiction to review in the pending appeal by USDA, No. 05-35264), this Court must dismiss NMA's appeal of the Preliminary Injunction and ignore its brief.

If the Court entertains NMA's appeal of the Preliminary Injunction, despite NMA's lack of standing, then the Court should reject NMA's attempt to turn another basic legal principle on its head: that of the limited appellate review of a district court's decision to grant a preliminary injunction. In an attempt to avoid that legal principle, NMA claims that the District Court applied the wrong legal standards, and therefore its decision should be reviewed by this Court *de novo*. In fact, however, the record shows that the District Court applied the correct legal standards and conducted a careful inquiry into the arguments for and against issuance of a preliminary injunction. NMA merely disagrees with the District Court's factual determinations of whether USDA's actions and conclusions were consistent with USDA's explanations and with other information in the administrative record.

Certainly NMA's disagreements with the District Court's conclusions are a far cry from a showing that the District Court abused its discretion. NMA's brief largely restates arguments that the District Court considered, questioned the parties about at the preliminary injunction hearing, and ultimately rejected. R-CALF USA demonstrated it had a substantial likelihood of showing that USDA's actions were inconsistent with the Administrative Procedure Act, the National Environmental Policy Act, and

the Regulatory Flexibility Act. NMA's incomplete quotations and partial explanations are an insufficient basis for this Court to substitute its judgment for the District Court's and conclude that R-CALF USA was unlikely to succeed on any of the claims that it set forth. In fact, NMA's deliberate use of inaccurate quotations and characterizations warrants ignoring NMA's arguments in total.

NMA also disagrees with the conclusions the District Court reached when it weighed the short-term financial disadvantage to NMA's members and others seeking access to cheap Canadian cattle and beef prior to the District Court's review of the USDA Final Rule, versus the threatened and anticipated risks to the health and financial well-being of the United States' cattle-producing industry and to U.S. consumers once the USDA Final Rule allowed imports of cattle and beef from a country known to have Mad Cow disease. The fact that NMA disagrees with the District Court's conclusion that preservation of the status quo best balances the harms, however, does not constitute a demonstration that there was an abuse of discretion by the District Court. (Under the limited review provided to grants of preliminary injunctions, even if this Court disagreed with the District Court's conclusions, that alone would not justify substituting this Court's assessment

of the facts for that of the District Court and overturning the preliminary injunction.)

NMA offers one other ground upon which it claims the Preliminary Injunction should be vacated: the fact that the Preliminary Injunction Order does not mention posting of security pursuant to Fed. R. Civ. P. 65(a). Since NMA was not a party and was not enjoined, it was not entitled to security, and NMA lacks standing to raise this issue. In any event, if this Court decides NMA's appeal of the Preliminary Injunction, that decision will moot NMA's claim concerning the lack of security.

## **ARGUMENT**

### **I. NMA's Motion To Intervene Was Properly Denied.**

The Ninth Circuit has set out four criteria that all must be met for an applicant to be entitled to intervene as of right: “(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application was timely; and (4) the existing parties may not adequately represent the applicant's interest.” *United States v. Alisal Water Corp.*, 370

F.3d 915, 919 (9<sup>th</sup> Cir. 2004), *quoting United States v. City of Los Angeles*, 288 F.3d 391, 397 (9<sup>th</sup> Cir. 2002). NMA fails to demonstrate that it met each of those criteria, and therefore the District Court's denial of NMA's motion to intervene must be upheld.

**A. The District Court did not abuse its discretion in finding NMA's intervention untimely.**

The District Court's determination with respect to the timeliness of the motion to intervene is reviewed for abuse of discretion. *Southern Calif. Edison Co. v. Lynch*, 307 F.2d 794, 802 (9<sup>th</sup> Cir. 2002). If the district court in its discretion determines that the timeliness criterion has not been met, it need not consider the other criteria for intervention. *United States v. Oregon*, 745 F.2d 550, 558 (9<sup>th</sup> Cir. 1984). Timeliness is a flexible concept that depends upon the particular circumstances. *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1156 (9<sup>th</sup> Cir. 1981).

In this case, NMA was well aware of R-CALF USA's intentions and timing from at least January 10, 2005 when R-CALF USA filed a complaint seeking to enjoin the Final Rule and asking the District Court to expedite the proceedings so that its claims could be addressed before the Final Rule's March 7, 2005 effective date. *See Verified Complaint* at 34. NMA also was or should have been aware of the parties' January 25, 2005 request that the

Court establish a schedule requiring defendants' opposition to R-CALF USA's Application for Preliminary Injunction to be filed February 22, 2005, with R-CALF USA's reply due February 25, 2005 and a hearing on March 2, 2005, a schedule which the Court adopted in its January 28, 2005 scheduling order.

Nevertheless, NMA waited to move to intervene in the case until February 1, 2005, and it proposed that it file a brief in opposition to R-CALF USA's Application for Preliminary Injunction at the same time as USDA, on February 22, 2005, just three days before R-CALF USA's reply to both USDA's and NMA's briefs would be due. NMA's Motion to Intervene, etc., Docket entry 17, at 2.

In considering whether a motion to intervene meets the requirement of timeliness, courts look to three factors, *inter alia*, 1) the stage of the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay. *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9<sup>th</sup> Cir. 2002).

NMA was represented by the same counsel that had moved to intervene in the preceding case filed by R-CALF USA, D. Mont. No. CV-04-51-BLG-RFC, a few months earlier, and in fact its motion to intervene in the

instant case was similar. It knew the implications of R-CALF USA's new complaint and the highly expedited schedule necessary and established for the preliminary injunction hearing. Under these circumstances, the District Court reasonably concluded that NMA did not meet the requirement that a party act "as soon as he knows *or has reason to know* that his interests might be adversely affected by the outcome of the litigation." *United States v. Oregon*, 745 F.2d at 559 (emphasis supplied).

The District Court properly concluded that it would have greatly prejudiced R-CALF USA to require it to respond not only to over 100 pages of briefs and argumentative statement of facts and declarations from USDA, but also to the 26 pages of briefing and declarations and attachments that NMA filed, all within three days. Certainly NMA has not carried the heavy burden of showing that the District Court abused its discretion when it determined that allowing NMA to intervene at that stage of the proceedings, which were moving very quickly in advance of the March 7, 2005 deadline, would have greatly prejudiced the parties, especially R-CALF USA. Additionally, NMA's interests did not create a strong need for intervention at the preliminary injunction state that would have justified granting NMA intervention to the detriment of the parties.

NMA's claim is that its members will benefit if imports of Canadian cattle, which have been banned almost two years, are allowed again. NMA Brief in Support of its Motion to Intervene at 2, 8-9, 10-11. R-CALF USA sought a preliminary injunction to maintain the status quo briefly, while the harms that NMA fears are more long-term: "outsourcing so that slaughter houses and slaughter jobs are moved to Canada" and Canada "taking over traditional US export markets for beef." *Id.* at 8. These alleged anticipated harms if the Final Rule does not go into effect are cumulative rather than precipitous. In contrast, R-CALF USA provided evidence in connection with its Application for Preliminary Injunction that, once the border is reopened and Canadian cattle and beef become intermingled with U.S. beef, the risk to U.S. cattle and consumers and the loss of domestic and foreign consumer confidence would be essentially immediate and irreparable.

**B. NMA did not show a particular, legally protectable interest.**

NMA claims an interest in assuring that the Final Rule goes into effect, because the Final Rule will allow its members to slaughter and process inexpensive Canadian cattle, cattle that have been banned since May 2003 because of the presence of BSE in Canada. NMA Brief at 8-11. But a mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. *Alisal*, 370 F.3d at 920. "To hold

otherwise would create a slippery slope where anyone with an interest in the property of a party to a lawsuit could bootstrap that stake into an interest in the litigation itself.” *Id.* NMA’s interest is no different from that of many other entities (including other trade associations, such as the American Meat Institute) that would benefit from the final rule.

Allowing NMA to intervene based on the simple assertion that its members will be better off financially if the Final Rule goes into effect would open up this litigation to many other potential intervenors and start this case down the slippery slope the Ninth Circuit eschewed in *Alisal*. This is confirmed by the fact that at least five other organizations have contacted R-CALF USA's counsel in the last few days, seeking R-CALF USA's consent to either their filing an *amicus curiae* brief with this Court in support of NMA's appeal of the denial of its motion to intervene or their filing a motion to intervene in the ongoing case below. Certainly the District Court was justified in concluding that NMA had failed to show a differentiated, legally protectable interest that justified intervention.<sup>1</sup>

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<sup>1</sup> In its opposition to NMA's motion to intervene, USDA offered that it would not object if USDA expressed its concerns in an *amicus curiae* brief, but NMA chose not to follow that approach.

**C. NMA failed to show USDA would not protect its interests.**

**1. NMA stated the same ultimate objective as USDA.**

In its initial brief supporting its motion to intervene, NMA failed to explain *at all* why USDA could not protect its interests in having the Final Rule go forward, but only why USDA could not protect its interests (obviously) in NMA's cross-claim against USDA, a claim NMA has now dropped. NMA's Excerpts of Record ("ER" at 55-56). In its Supplement to Motion to Intervene, NMA merely stated that its interests are different, because its members will be harmed financially if the Final Rule does not go into effect, and that it can show that harm "in a manner not presented by USDA." Supplement to Motion To Intervene at 2. At that time, NMA restated that its purpose for seeking to participate as an intervenor is "to support the timely implementation of the remainder of USDA's Final Rule, particularly the resumption of imports of live cattle under 30 months of age from Canada, on the scheduled effective date of March 7, 2005." *Id.*

Obviously, USDA has the very same purpose in this litigation—to see that the Final Rule becomes effective and is implemented. In fact, Secretary Johanns on February 9 reaffirmed USDA's confidence in the remaining portions of the Final Rule. *See* SER 68.

“Under well-settled precedent in this circuit, where an applicant for intervention and an existing party have the same *ultimate objective*, a presumption of adequacy of representation arises.” *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305 (9<sup>th</sup> Cir. 1997) (internal quotations and citations omitted) (group that had sponsored California Proposition 187 and had the ultimate objective of ensuring that Proposition 187 was upheld as constitutional was adequately represented by California Governor and Attorney General). “If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9<sup>th</sup> Cir. 2003), *citing* 7C Wright, Miller & Kane, § 1909, at 318-19.

Just because NMA feels it can better describe the economic harm to its members if the Final Rule is enjoined does not change the fact that its objective is exactly the same as USDA's. “Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.” *Id.*, *quoting* *United States v. City of Los Angeles*, 288 F.3d 391, 402 (9<sup>th</sup> Cir. 2002).

Both R-CALF USA and USDA opposed NMA's motion to intervene in part because NMA made no showing why its interests as an intervenor-

defendant would not be represented adequately by USDA. NMA wanted the Final Rule to go into effect on March 7, 2005, just as USDA did. As USDA argued in opposing NMA's intervention and the District Court agreed, NMA had no special advantage in demonstrating to the district court why USDA's action was supported by the administrative record than USDA had; to the contrary, USDA obviously was best able to argue why its actions were not arbitrary and capricious or contrary to law. *See* Feb. 24, 2005 Order denying NMA's motion to intervene, at 5. Moreover, in the upcoming hearing before the district court on R-CALF USA's application for a permanent injunction, NMA's claims that its members would be benefited economically by the Final Rule and are being adversely affected economically by the *status quo* are irrelevant to the question before the District Court: whether USDA's action was arbitrary and capricious or not according to law, based on the administrative record.

The fact that continuing the U.S. policy of banning imports from countries where BSE is known to exist will have adverse financial consequences for NMA's members would not justify a rule that otherwise is arbitrary and capricious and not according to law in any event. But to the extent that the economic benefits of the Final Rule for slaughter facilities and meat processors like NMA's members is relevant at all, USDA has

shown every intention to recognize those economic benefits, describing them extensively in an economic impact analysis accompanying the Final Rule and emphasizing these supposed benefits as part of the rationale for the Final Rule at 70 Fed. Reg. 536-43. Nothing here comes even close to the “compelling showing” that USDA will not adequately represent NMA’s interests in having the Final Rule upheld and go into effect. *See Arakaki*, 324 F.3d at 1086.

**2. NMA failed to overcome the presumption that USDA would represent its interests.**

There is a presumption of adequacy when the United States government and the applicant for intervention are on the same side. *City of Los Angeles*, 288 F.3d at 401-02. *See also Arakaki*, 324 F.3d at 1086 (“In the absence of a ‘very compelling showing to the contrary,’ it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.” *quoting* 7C Wright, Miller & Kane, § 1909, at 332). That presumption is even stronger where the governmental body defending the rule is the body charged by law with representing the interests of the applicant, as in this case. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489 (9<sup>th</sup> Cir. 1995). NMA’s proposed complaint, in Paragraph 3,

acknowledges that USDA “is responsible for implementing statutes enacted for the promotion of domestic agriculture....”

NMA simply has offered no arguments as to why that is not true in this case or why USDA therefore cannot be expected to defend vigorously NMA’s interests in having USDA’s Final Rule remain in effect. At the same time, NMA’s proposed complaint offers no affirmative defenses at all, but rather just denies R-CALF USA’s allegations that the Final Rule violates the Administrative Procedure Act, the National Environmental Policy Act (“NEPA”),<sup>2</sup> and the Regulatory Flexibility Act. USDA certainly can be expected to deny those allegations regardless of whether NMA is allowed to intervene.

**3. In fact, USDA advocated NMA’s interests in the preliminary injunction proceedings.**

In this instance, the Court need not speculate about whether the presumption that USDA would represent NMA’s interests is accurate. We already know that in the case below USDA has been advancing the financial concerns that NMA wrongly claims were not represented to nor considered

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<sup>2</sup> Additionally, since only the federal government is a proper defendant in an action under NEPA, it would be improper to allow NMA to intervene as a defendant with respect to the NEPA claim. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9<sup>th</sup> Cir. 2002); *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105, 1114 (9<sup>th</sup> Cir. 2000).

by the District Court. USDA's economic impact analysis supporting the Final Rule projected substantial financial benefits to meat packers if imports of Canadian cattle were allowed (and export markets were unaffected by those imports). *See* 70 Fed. Reg. at 520. During the hearing on the preliminary injunction, counsel for USDA claimed that the Final Rule would protect economic interests other than those of the cattle producers represented by R-CALF USA, arguing: "Slaughter houses in this country are closing. Meat processing companies have laid off employees. They have suffered concrete, devastating harm compared to the plaintiffs, ..." Transcript at 89, SER 184.<sup>3</sup> This is precisely the type of argument that NMA asserts could only be considered if it had been allowed to intervene in the preliminary injunction proceeding.

NMA's stated concerns about job losses in the meat processing sector were specifically advocated by USDA, which asserted that R-CALF USA had "fail[ed] to factor in the employment gains from processing additional Canadian cattle at U.S. slaughter plants." USDA Opposition to Preliminary

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<sup>3</sup> In fact, USDA even referenced NMA's (proposed) Opposition to R-CALF USA's Application for Preliminary Injunction in support of its assertion that: "The Act does not authorize animal regulation to maximize profits or erect trade barriers for any sector....The rule protects animal health and benefits not only private consumers, but also all sectors of the livestock and beef industry." USDA Opposition to R-CALF USA's Application for Preliminary Injunction at 32.

Injunction at 20. USDA declarant Frank Fillo elaborated even further, presenting the interests of one of NMA's most prominent members: "Also, Mr. VanSickle [Plaintiff's expert] did not take into consideration employment gains from processing the additional cattle in U.S. slaughter plants. Currently, a number of U.S. meat processing plants have excess capacity. For instance, Tyson [an NMA member] has suspended one or more shifts in five of its beef slaughtering plants due to lack of cattle to slaughter. We anticipate that the importation of Canadian cattle under this rule could help meet industry demand for additional cattle." Declaration of Frank Fillo at ¶ 9. This, of course, is precisely the point that NMA claims would not be represented adequately in the district court proceedings by USDA. *See* NMA Brief at 21, 27.

Counsel for R-CALF USA also discussed these issues at the hearing on the preliminary injunction, arguing that the net benefit to meat packers and others was small compared to the risks of further loss of export markets and adverse effects on the financial health of the cow/calf producing industry. Transcript at 19. Judge Cebull considered these arguments and concluded that the balance of hardships tips in favor of R-CALF USA, that the public interest is benefited by a preliminary injunction, and that neither Defendants nor anyone else would suffer significant harm by maintaining

the *status quo ante* until the hearing on the merits. Opinion at 26-27, ER 180-81. This Court must reject NMA's assertion that its interests were not represented and considered in the preliminary injunction proceeding.

NMA offers two other unusual arguments: that USDA does not represent its interests because USDA failed to request a bond under Fed. R. Civ. P. 65(a) and USDA has not "argued the border should be closed to Canadian boxed beef if Canadian cattle are kept out." NMA Brief at 26, 30. As to the former, first, as explained at pp. 64-66, *infra*, security under Rule 65(a) is available only to protect USDA's interests as the party enjoined, not to protect NMA's members. Secondly, USDA has not really had an opportunity yet to object to the absence of a requirement for R-CALF USA to post a bond in the District Court's March 2, 2005 Order.

As to the latter NMA argument, that USDA has not advocated banning imports of Canadian boneless beef if Canadian cattle are banned from importation, while that is true, that argument has nothing to do with the validity of the USDA rule being challenged here. R-CALF USA's Verified Complaint seeks a declaration that USDA should not have allowed imports of Canadian cattle *or* beef. It would be nonsensical for USDA (or anyone supporting USDA as an intervenor-defendant) to defend the case by arguing

that both cattle and boxed beef should be banned from importation.<sup>4</sup>

Moreover, if NMA wanted to argue that USDA should not allow importation of boxed, boneless beef if it is at the same time prohibiting importation of Canadian cattle, then NMA should have challenged USDA's May 29, 2003, regulations, 68 Fed. Reg. 31,939, which banned imports of Canadian cattle and beef except for beef products allowed by permit, and USDA's August 8, 2003 decision to allowed imports by permit of Canadian boxed, boneless beef.

**D. NMA fails completely to show why the District Court abused its discretion in denying it permissive intervention.**

The District Court's denial of permissive intervention is reviewed for abuse of discretion. *Southern Calif. Edison*, 307 F.2d at 802. NMA has demonstrated no abuse of discretion, merely restating the arguments it made below. In fact, NMA failed to meet the criterion of timeliness, for the reasons discussed above. It also failed to present an independent ground of jurisdiction. Of the three statutory bases for jurisdiction offered in NMA's

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<sup>4</sup> This assertion also demonstrates that NMA's real purpose is to promote the narrow interests of its members, rather than any interests of the public. Its goal is to assure that USDA's BSE regulations, which are supposed to be aimed at protecting the health of U.S. cattle and U.S. consumers, will maximize NMA's members' competitive position. To NMA, a BSE policy that allows imports of all Canadian cattle and all Canadian beef is just as good as a policy that prohibits all imports of Canadian cattle and Canadian beef.

Brief (at 30), all of them would appear to apply only if NMA sought to intervene as a plaintiff against USDA, a position that NMA included in its original proposed complaint but later dropped in its Supplement to Motion. NMA has no independent grounds for jurisdiction, as it has no claim at all against R-CALF USA, or against USDA for that matter. *See, e.g. Blake v. Pallan*, 554 F.2d 947, 955-56 (9<sup>th</sup> Cir. 1977). Moreover, the fact that NMA's interests describe those of many other potential intervenors as well argues for the Court to exercise its discretion to deny NMA's motion.

Additionally, in considering whether to grant permissive intervention, a court may consider factors such as whether the intervenor-applicant's interests are adequately represented by other parties to the litigation and whether intervention will prolong or unduly delay the litigation. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9<sup>th</sup> Cir. 1977). For the reasons described above, NMA's interests clearly were adequately represented by USDA, and allowing NMA to intervene just a few days before the preliminary injunction hearing would have prolonged or delayed that hearing.

## **II. NMA Lacks Standing to Challenge the District Court's Grant of a Preliminary Injunction.**

NMA filed a Notice of Appeal and an Emergency Motion with respect to both the District Court's denial of its motion to intervene and the District Court's issuance of a preliminary injunction, preventing the Final Rule from going into effect on March 7, 2005. In a "Notice of Extension of Time to Respond to NMA's Motion," NMA later proposed briefing of the appeal of the Preliminary Injunction on a more extended schedule, which the Court declined to do. R-CALF USA opposed NMA's Emergency Motion in part on the grounds that NMA had failed to allege any basis for jurisdiction over an appeal by NMA of the Preliminary Injunction, since NMA was not a party to the case in which that injunction was issued.

It is not entirely clear whether the Court intends for the parties to brief NMA's challenge to the issuance of the Preliminary Injunction. In any event, the Court should dismiss that portion of NMA's appeal, because NMA lacks standing to challenge the Preliminary Injunction.

Despite the fact that R-CALF USA's opposition to NMA's Emergency Motion in this action pointed out that NMA lacks standing to challenge the Preliminary Injunction, NMA's Brief nevertheless provides no explanation for why this Court has jurisdiction over its challenge, save for NMA's

citation of 28 U.S.C. § 1292(a)(1), which authorizes the courts of appeals to hear interlocutory appeals such as from the grant of a preliminary injunction. NMA Brief at 2.

In responding to an individual's notice of appeal seeking review of both the district court's denial of its motion for intervention and the district court's granting of summary judgment in favor of the government, this Court rejected the individual's "erroneous assumption that he may challenge the district court's order granting summary judgment." *United States v. \$129,374 in United States Currency*, 769 F.2d 583, 590 (1985). "The general rule is that one who was not a party of record before the trial court may not appeal that court's judgment unless extraordinary circumstances are present." *Id.* (quotation and citations omitted). *See also, e.g., Citibank International v. Collier-Traino, Inc.*, 809 F.2d 1438 (9<sup>th</sup> Cir. 1987); *Hendricks v. Bank of America, N.A.*, 2005 WL 433600 (9<sup>th</sup> Cir. Feb. 25, 2005) (citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988)); *Southern Calif. Edison Co. v. Lynch*, 307 F.2d 794, 804 (9<sup>th</sup> Cir. 2002).

NMA has not even argued that it presents "extraordinary circumstances" that would allow it to appeal the preliminary injunction, and indeed it could not. This Court has found extraordinary circumstances where, for example, the nonparty "had been haled into court over his

objections” and had been treated by the district court “throughout by accepting his briefs and giving him an opportunity to cross-examine witnesses.” *Citibank*, 809 F.2d at 1441. In other cases, extraordinary circumstances have been found where the order being appealed was specifically directed to the nonparty seeking to appeal or was for the disclosure of testimony and materials that the nonparty had provided to a grand jury. *Brown v. Board of Bar Examiners of State of Nevada*, 623 F.2d 605, 608 (9<sup>th</sup> Cir. 1980); *Petrol Stops Northwest v. United States*, 571 F.2d 1127, 1128-29 (9<sup>th</sup> Cir. 1978), *rev’d on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest*, 441 US 211 (1979).

Nothing approaching those kinds of special circumstances exists in this case. In fact, if NMA’s simple assertion of an economic interest in the proceeding below is sufficient to create exceptional circumstances, then almost any nonparty believing itself adversely affected by an order in a district court case could bring an appeal of that order in this Court.<sup>5</sup> This Court should emphatically reject that unsupported expansion of appellate jurisdiction.

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<sup>5</sup> NMA’s hyperbolic claims that the Preliminary Injunction, which has been in effect a few weeks and merely continues a situation that has existed almost two years, is devastating its members constitutes an ongoing financial interest shared by others, and not an “exceptional circumstance.”

### **III. In any Event, the Preliminary Injunction Should Be Upheld.**

#### **A. The District Court's action should be reviewed for abuse of discretion, rather than *de novo*.**

This Court's review of the issuance of a preliminary injunction "is limited and deferential." *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 760 (9<sup>th</sup> Cir. 2004) (quotations and citations omitted). NMA attempts to argue that, instead of the abuse of discretion standard which it acknowledges this Court "customarily" applies to the review of a district court's grant of a preliminary injunction, in this case this Court should review the District Court's decision on the preliminary injunction *de novo*. NMA Brief at 31-32. Its asserted basis for this is a bootstrap argument: since NMA disagrees with the District Court's conclusions about whether the Final Rule may not have been supported by the administrative record or may have been arbitrary and capricious, NMA asserts that the District Court applied the wrong standard of review and that its decision therefore should be reviewed *de novo*.

There is no basis, however, for NMA's assertion that the District Court applied the wrong standard of review either for granting a preliminary injunction or for judging whether R-CALF USA had a possibility of

succeeding on the merits.<sup>6</sup> In fact, the District Court stated the general standards for both in similar terms to NMA, even citing to some of the same cases.<sup>7</sup> Cf. Order at 6-8, ER 161-163 *with* NMA Brief at 19-20, 32-35. The District Court correctly stated the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard of review that would apply in judging R-CALF USA’s likelihood of success on the merits, acknowledging that this standard is a narrow one and that the reviewing court may not merely substitute its judgment for that of the agency. Opinion at 7, ER 162. This is not a case where there was an “erroneous legal premise.” *See Harris*, 366 F.3d at 760. Once this Court determines that “the district court employed the appropriate legal standards which govern the issuance of a preliminary injunction, and ...correctly apprehended the law with respect to the underlying issues in the litigation,” its review is completed. *Id.*

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<sup>6</sup> As the District Court correctly noted, case law in the Ninth Circuit provides for the issuance of a preliminary injunction, where the potential for harm if the *status quo* is not preserved is great, even if there is less than a likelihood of success on the merits. Opinion at 6, ER 161.

<sup>7</sup> The District Court wisely did not cite to some of the cases cited by NMA, such as *United States v. Mead Corporation*, 533 U.S. 218 (2001), that deal with a court's review of an agency's interpretation of a statute that the agency implements, a question that was not raised in this case.

The fact that the District Court reached conclusions about USDA's rulemaking that NMA believes were not sufficiently deferential to USDA does not change NMA's critiques of the District Court's judgments into a question of law that requires or permits this Court's *de novo* review of those judgments.<sup>8</sup> The District Court's assessment of the probability of R-CALF USA's success on the merits must be reviewed for abuse of discretion, without getting into “the underlying merits of the case.” *Harris* 366 F.3d at 760 (quotations and citations omitted); *Brown v. California Dept. of Transportation*, 321 F.3d 1217, 1221 (9<sup>th</sup> Cir. 2003).

**B. The District Court applied the appropriate standards for granting a preliminary injunction.**

As noted above, the District Court correctly stated (and applied) the criteria for issuance of a preliminary injunction under this Court's jurisprudence. Opinion at 6, 25-26, ER 161, 179-180. The District Court also correctly stated (and applied) the standard of review applicable to its determination of the probability of R-CALF USA's success on the merits of its claims under the Administrative Procedure Act, National Environmental Policy Act, and Regulatory Flexibility Act, which is one of the criteria for

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<sup>8</sup> These conclusions were factual ones. *See, e.g.*, Opinion at 11, 12-13, SER 166-168.

granting a preliminary injunction. Opinion at 7-8, 13-14, 17, 18-19, 21, 22, ER 162-163,168-169, 172, 173-174, 175, 176.

NMA argues that the District Court was required to apply a highly deferential standard when reviewing USDA's judgments inherent in the Final Rule. But the District Court correctly pointed out that this still means that the reviewing court must “carefully review” the record and whether the agency decision reflects “a recent evaluation of the relevant factors.” The deferential standard of review does not mean that a court should “rubber stamp” and agency decision, especially with respect to a decision that might result in increased risk to human health. Opinion at 7-8, ER 162-63.

An agency acts arbitrarily and capriciously when it does not articulate a “rational basis” for its conclusions. *NAHB v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). The reviewing court must determine whether USDA's investigatory procedures, compilation of data, and scientific analysis were reasonable, competent, informed, and properly applied to support the decision to resume of potentially harmful imports. *See Cactus Corners v. United States Dept. of Agriculture*, 346 F. Supp.2d 1075, 1095 (E.D. Cal. 2004).

R-CALF USA described to the District Court numerous statements in USDA's brief and supporting papers that simply did not make sense or were

contradicted by the facts. *See, e.g.,* R-CALF USA’s Reply Memorandum in Support of its Application for Preliminary Injunction, at 6-9. In *Sierra Club v. EPA*, 346 F.3d 955 (9<sup>th</sup> Cir. 2003) this Court explained: “While our deference to the agency is significant, we may not defer to an agency decision that “is without substantial basis in fact.” *Id.* at 961, *quoting Fed. Power Comm’n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). *See also, e.g.,* *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Service*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (court need not forgive a clear error of judgment); *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2005) (Court did not defer to agency judgment where agency offered an explanation that ran counter to the evidence).

Judicial review begins with a presumption against the relaxation of safety standards. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual*, 463 U.S. 29, 42 (1983) (reviewing proposed relaxation of passive restraint requirements in cars).<sup>9</sup> *Accord, Int’l Brotherhood of Teamsters v. United*

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<sup>9</sup> NMA makes the disingenuous claim that the Final Rule is not a relaxation of safety standards, because the “current policy,” by which NMA means the policy prior to USDA’s May 29, 2003 regulations identifying Canada as a country where BSE is known to exist, 68 Fed. Reg. 31,939, was to allow importation of Canadian cattle. In fact, USDA policy has been to prohibit imports of live cattle from countries where BSE is known to exist since 1989. 70 Fed. Reg. at 462. The Final Rule relaxes that long-standing policy

*States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984). Moreover, where, as here, an agency provides no data to support its assumptions and its conclusions, its decision is not entitled to deference. *Ober v. Whitman*, 243 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2001). Where increased risk to human health is at issue, as it clearly is with respect to USDA's decisions concerning imports from a country known to have BSE, it is particularly critical that USDA be required to provide not only its conclusion that its action carries an acceptable risk to public health, but also the specific basis for that conclusion and the data on which each of the agency's critical assumptions is based. *See Harlan Land Co. v. U.S. Dept. of Agriculture*, 186 F. Supp. 2d 1076, 1094-95 (E.D. Calif. 2001).

USDA had a special obligation here to explain why it chose to abandon its prior decision to ban imports of cattle and bovine products from Canada once BSE was discovered in Canada, which reflected USDA policy since 1989 of excluding cattle from countries where BSE is known to exist (70 Fed. Reg. at 462), especially in light of the discovery of several more cases of BSE in Canadian cattle in the interim. *See Nat'l Conservative*

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with respect to Canadian cattle, a policy that USDA as recently as January 2003 identified to Congress as one of the three key strategies protecting the United States from BSE. *See* AR1510-11 and p. 5 of R-CALF's Reply Memorandum in Support of Its Application for Preliminary Injunction.

*Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert denied* 403 U.S. 923 (1971).

In addition, the District Court had before it an audit report recently published by USDA's Office of Inspector General ("OIG"), "Animal and Plant Health Inspection Service Oversight of the Importation of Beef Products from Canada," ("Audit Report"), SER 69-118, describing the OIG's audit of USDA's oversight of the importation of beef products from Canada after the May 2003 detection of BSE in a native Canadian cow. *See* Audit Report at i, SER 71.<sup>10</sup> This Audit Report indicates numerous instances where USDA expanded imports from Canada based on a desire to respond to industry requests to expand trade, rather than on scientific principles that showed the products or Canadian establishments presented minimal risk. Based on the conclusions and recommendations in this Audit Report, it is clear that the presumption of deference to the agency has been overcome because the agency simply decided the borders should be reopened while providing little support for its decision.

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<sup>10</sup> The District Court could take judicial notice of this official document. *See, e.g., Blair v. City of Pamona*, 223 F.3d 1074 (2000) (taking judicial notice of Christopher Commission report on police misconduct in Los Angeles); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (report of an administrative body is clearly something court can take judicial notice of).

For instance, the Audit Report explains that in October 2003 USDA listed certain edible bovine products as part of a chart of eligible “low-risk” Canadian product, without explaining . USDA did not explain why these products were considered to be low-risk, especially when a TSE Working Group had concluded that one of the products, bovine tongues, was a “moderate risk” product. *See* Audit Report at 10, 11, SER 88-89.

The Audit Report indicate that USDA officials desired to satisfy “industry concerns,” (i.e. the meat packers) and increase trade with Canada instead of using careful, reasoned scientific judgments to conclude that certain products presented minimal risks. *See id.* at 10, SER 88. USDA did not take the issue seriously even after the agency was admonished and subject to a temporary restraining order on April 26, 2004, continuing for months to authorize imports of prohibited products that had previously been classified as higher risk and issue or maintain permits that should have been cancelled. *See id.* at 10, 23, SER 88, 101.

The Audit Report found that from August 2003 through April 2004, USDA allowed the expansion of the types of Canadian beef products approved for import into the United States, which conflicted with public announcements by USDA, and, furthermore, failed to seek public comments on these changes. *See id.* at 6. It points out that many of the decisions to

continue to allow the expansion of the import of products “addressed industry concerns that permit policies were too restrictive for trade.” *Id.* at 7 & 8. It is apparent from this report that USDA personnel were paying more attention to resumption of trade than any underlying risk issues relevant to their protection of human and animal health under the Animal Health Protection Act, 7 U.S.C. §§ 8301 *et seq.* *See id.* at 7.

This Audit Report, showing both improper procedures and apparent disregard for conclusions of risk assessment work groups, demonstrates that the presumption of deference to agency action need not be applied to USDA decisions concerning imports from Canada. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) (improprieties in process overcame presumption that administrative record was complete); *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1236 (court need not rubber-stamp agency action inconsistent with statutory mandate and congressional policy).

**C. The District Court’s decision to grant the preliminary injunction must be upheld.**

Far from demonstrating an abuse of discretion or clear error by the trial court in granting the Preliminary Injunction, NMA's brief for the most part simply restates arguments that USDA made to the District Court, without noting R-CALF USA's refutation of those arguments in its briefs

and at the preliminary injunction hearing. In fact, much of NMA's argument relies on the unsupported and unjustified assertion that the District Court was arbitrary and capricious and abused its discretion in issuing the Preliminary Injunction simply because its March 2, 2005 Opinion uses substantial portions of R-CALF USA's opening and reply briefs. Given that the hearing was held on Wednesday, March 2, 2005, just a few days after completion of briefing and just three business days before the Final Rule R-CALF USA sought to preliminarily enjoin was scheduled to go into effect on March 7, 2005, Judge Cebull should be praised, rather than ridiculed, for acting quickly to get an opinion out. Far from being a *per se* abuse of discretion, it is perfectly understandable that the District Court used language from portions of the successful party's briefs in putting together its Opinion so that it would be timely.<sup>11</sup>

NMA offers no authority for its assertion that the District Court's decision should be overturned because the Preliminary Injunction Order lifted passages from R-CALF USA's briefs. Indeed, *Wardley Int'l Bank, Inc.*

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<sup>11</sup> Judge Cebull also presumably was motivated to quickly issue a substantive opinion in anticipation that USDA might want to appeal a preliminary injunction before the Final Rule was scheduled to go into effect on March 7, 2005. He recognized this possibility in discussions with counsel in chambers prior to the hearing and mentioned a possible appeal near the conclusion of the hearing, as well. Transcript at 97-98.

*v. Nasipit Bay Vessel*, 841 F.2d 259 (9<sup>th</sup> Cir. 1988), squarely rejected the kind of inference that NMA argues for in this case:

We will not vacate findings of fact unless they are clearly erroneous. Fed. R. Civ. P. 52(a). As long as findings are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if convinced it would have reached a different result. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)... Although the parties agree that the appropriate standard of review is clearly erroneous, Wardley urges that we “closely scrutinize” the facts because they were prepared by the prevailing party after the court had rendered its decision. The Supreme Court, however, has rejected any stricter review. *Anderson*, 470 U.S. at 571-73 (“Even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.”).

*Id.* at 261 n.1. *See also Unt v. Aerospace Corp*, 765 F.2d 1440, 1445 (9<sup>th</sup> Cir 1985) (“The verbatim adoption of findings suggested by a party is not automatically objectionable, ...so long as those findings are supported by the record.”).

There certainly was support in the record for the District Court's conclusions that R-CALF USA was likely to succeed on the merits of its claims. R-CALF USA's claims were supported by extensive briefing, with reference to declarations of a number of experts, numerous articles from peer-reviewed scientific journals, and, to a great extent, statements in USDA's own documents. Judge Cebull admonished counsel, both before and during the hearing, that he had read every word of the briefs filed in the

case. Transcript at 4. The transcript of the hearing confirms that, far from accepting R-CALF USA's assertions uncritically, Judge Cebull probed the positions of both R-CALF USA and USDA carefully during the course of a hearing that lasted half a day. *See, e.g.*, excerpts of Transcript provided at SER 127-184. Under these circumstances, just because the District Court's findings were adopted in part from R-CALF USA's briefs "there is no reason to subject those findings to a more stringent appellate review than called for by the applicable rules." *Clady v. Cty. of Los Angeles*, 770 F.2d 1421, 1427 (9<sup>th</sup> Cir. 1985), citing *Anderson* at 1511. And there is **absolutely** no basis for NMA's disrespectful and wholly unsupported suggestion that the District Court's conduct of the preliminary injunction hearing "raises the question whether any future proceedings in this matter should be returned to this District Court." NMA Brief at 31.

NMA offers many criticisms of the District Court's Opinion. Many of NMA's arguments mis-state or incompletely state the facts in the arguments made below. In the space available here, and with the limited time for briefing provided in the expedited schedule for this appeal, R-CALF USA cannot refute all of those allegations word-for-word. None of them, however, demonstrates an abuse of discretion by the District Court in assessing the probability of R-CALF USA's success on the merits. R-CALF

USA will respond to just a few of NMA's arguments here. Note that R-CALF USA need not demonstrate that every one of the District Court's conclusions was justified; so long as R-CALF USA was likely to succeed on any of its claims, it was entitled to a preliminary injunction in this case.

**1. NMA mis-states the position of R-CALF USA and its expert on the risks associated with the Final Rule.**

The centerpiece of NMA's challenge to the Preliminary Injunction is its claim that “the Plaintiff’s own expert, Dr. Cox, admits...that, ‘I do not consider a widespread health threat in the U.S. to be a highly likely consequence of reintroducing Canadian imports as proposed.’” NMA brief at 17. That is an inaccurate quotation. What Dr. Cox said is: “While I do not consider a widespread health threat in the US to be a highly likely consequence of re-introducing Canadian imports as proposed, it is not sufficiently unlikely to be dismissed or ignored. Simple calculations suggest to me that the probability of catastrophic economic and animal health consequences -- with a smaller risk of human health consequences -- from relaxing standards for Canadian imports of cattle may be far too high to be acceptable if the risks were quantified, published, and publicly known.” SER 58. Reviewing Dr. Cox's entire declaration, which NMA failed to include in its Excerpts of Record, as well as Dr. Cox's Supplemental Declaration, SER 119-126, it is clear that NMA not only misquoted Dr. Cox

but also mis-stated his conclusions. *See, e.g.*, NMA Brief at 3 (“... and Plaintiff’s own expert concluded that the public would not be put at risk from such live cattle imports...”).

These blatant misstatements by NMA justify this Court rejecting NMA’s arguments altogether. R-CALF USA never argued that there was a great risk to human health from resumed imports of cattle and beef from Canada. Rather, R-CALF USA argued that USDA’s failure to quantify that risk and to explain to the public why that risk is acceptable renders the Final Rule arbitrary and capricious. *See, e.g.*, R-CALF USA’s Memorandum in Support of its Application for Preliminary Injunction at 10, 16, 28. *See also* Transcript at 23, SER 135 (“...USDA can’t tell us how great the risk is that someone will be infected from that. We do know what the risk is, if someone is infected, of dying. It’s 100 percent.”)

USDA admitted in the preamble to the Final Rule that it “has set no specific thresholds for an acceptable number of cases in humans or animals.” 70 Fed. Reg. at 473. Consistent with applicable case law on review of agency action, the District Court properly concluded that: “Presented with the USDA’s conclusions that the risks to U.S. cattle and consumers are “low” without any definition as to what that means and why the risks

presented by the Final Rule are acceptable, this Court has no way of assessing the merits of USDA's actions." Opinion at 9, ER 164.

During the hearing on the Preliminary Injunction, counsel for USDA acknowledged that the cattle population in Alberta Province "is a high-risk population," compared to other parts of Canada where she alleged "there is no BSE." Transcript at 57, SER 163. When Judge Cebull asked about the significance of the fact that two animals in Canada were discovered with BSE just before and just after the Final Rule was announced, USDA's counsel responded frankly: "These are a cluster. They have been investigated rigorously." Transcript at 85, SER 180.

In fact, as a result of those additional discoveries, USDA suspended a portion of the Final Rule. *See* SER 68 and 70 Fed. Reg. 12,112 (March 11, 2005), despite the fact that only weeks earlier USDA has announced confidence in its conclusion that Canadian cattle presented a "low" risk.<sup>12</sup>

These and other facts justify the District Court's conclusion that USDA failed adequately to assess the risks associated with importing Canadian cattle and beef products before it issued the Final Rule and failed

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<sup>12</sup> NMA misrepresents what USDA has said about the risk associated with Canadian cattle and meat, as well. USDA has said (without adequate justification, as R-CALF USA and its experts have demonstrated) that the risk is a low, not that there is "no risk to human or animal health" as NMA falsely claims. NMA Brief at 15.

to explain to the public why those risks were acceptable. As R-CALF USA argued during the hearing on the Preliminary Injunction, by USDA's own estimates the Final Rule would only provide a net benefit of \$11 million per year, hardly a rational basis for reversing 16-year-old protections against importation of BSE, and risking severe impacts on the U.S. cattle injury. Transcript at 19, SER 133; *see, e.g.*, Fox article, SER 31-36.

**2. USDA's explanation of its assumption that Canada's feed ban minimizes the risk of BSE was internally inconsistent.**

R-CALF USA explained, in its briefs and at the hearing, that USDA acted irrationally when it rejected international consensus that a feed ban should be in place at least eight years, and that USDA had provided inconsistent explanations of the "incubation time" for BSE and its implications for USDA's conclusions about the adequacy of Canada's feed ban. R-CALF USA Memorandum in Support at 15-16; Reply Memorandum at 13; Transcript at 29-31, SER 141-43. R-CALF USA pointed out that USDA's assumption that Canada's feed ban has been in place long enough to protect against a BSE was inconsistent with the fact that one of the cows found to have BSE in Alberta was born after the feed ban, and all of the native cattle found with BSE in Canada, if they were infected before the 1997 feed ban, first showed signs of BSE long after the 4.2 years that USDA

asserts is the average incubation period for BSE in Canada (which short incubation time supposedly excuses the fact that Canada's feed ban has not been in place for eight years). 70 Fed. Reg. at 470; Cox Declaration at 7, SER 53.

To get around this, USDA asserted that, despite what it had said previously, the incubation period in Canada is likely much longer than 4.2 years (7-8 years). USDA Opposition at 13; *cf.* R-CALF USA Memorandum in Support at 15-16, Reply Memorandum at 13, Transcript at 29-31, SER 141-43. That is precisely the kind of double-talk that renders an agency action arbitrary and capricious, and the District Court properly recognized that R-CALF USA had a substantial likelihood of prevailing on the merits.

**3. R-CALF USA showed it was arbitrary and capricious for USDA to rely on the Canadian feed ban, since it does not ban bovine blood or poultry waste from cattle feed.**

Both Canada and the United States allow bovine blood to be used in cattle feed. 70 Fed. Reg. at 491. USDA has acknowledged the possibility of transmission of BSE through blood and has refused to allow importation of blood products from Canada (*see e.g.*, 70 Fed. Reg. at 502), and there is growing recognition that BSE can be transmitted in humans and other animals through blood. *See* AR1560, SER 26. The Food and Drug

Administration (FDA) has recognized a need to upgrade current feed regulations to eliminate use of mammalian blood, but it has not yet taken that action. *See* 69 Fed. Reg. 42,288, 42,292-93 (July 14, 2004).

Similarly, USDA and FDA have acknowledged a need to keep poultry waste out of cattle feed, since rendered bovine protein is used in poultry feed, allowing a path for recycling contaminated bovine proteins into cattle feed. But USDA's response to comments that the feed ban is inadequate was simply to acknowledge that these gaps in the feed ban exist and that USDA and FDA are considering what improvements to the feed ban are needed. 70 Fed. Reg. at 466, 504. As the District Court correctly recognized, there is a substantial likelihood that R-CALF USA will succeed on its claim that it was arbitrary and capricious for USDA nevertheless to assume that the Canadian feed ban is effective and sufficient.<sup>13</sup>

**4. R-CALF USA demonstrated a likelihood of success on its National Environmental Policy Act claim.**

R-CALF USA demonstrated that USDA had failed entirely to consider significant adverse environmental impacts that would result from the Final

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<sup>13</sup> Similarly, the District Court correctly apprehended the irrationality of USDA's refusal to even consider prohibiting imports of or requiring testing of cattle under 30 months of age, in light of the facts that, *inter alia*, of the relatively few cattle found in Japan with BSE, at least two were substantially younger than 30 months and would not have been discovered but for testing. *See* AR1563, SER 29.

Rule in terms of increased truck traffic and increased environmental releases at feedlots. R-CALF USA showed that, even by USDA's estimation, the Final Rule would result in a flood of close to 2 million head of cattle from Canada into the U.S. in 2005, which would translate into about 35,000 truck round-trips between Canadian ranches and feedlots to feedlots and slaughter facilities in the U.S.<sup>14</sup> 70 Fed. Reg. at 540; Memorandum in Support of Application for Preliminary Injunction at 31 and Exhibit 5 pp. 8-9. R-CALF USA also pointed out that this Court recently concluded that allowing 34,000 Mexican trucks to cross the border would have a significant environmental impact. *Public Citizen v. United States Dep't Transp.*, 316 F.3d 1002, 1021 (9<sup>th</sup> Cir. 2003), *rev'd on other grounds*, *United States Dep't Transp. v. Public Citizen*, 124 S.Ct. 2204 (June 7, 2004). Consistent with the Ninth Circuit's decision on that issue, the impact of transporting 2 million head of cattle from farms in Canada to feedlots and slaughterhouse in the United States should have been assessed.

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<sup>14</sup> There is no support for NMA's novel proposition that the environmental impact of USDA's issuance of the Final Rule should be judged not in comparison to the May 29, 2003 rule which it replaced, but rather by the situation before that. NMA Brief at 52 n.12. In any event, USDA predicts a large "backlog" of Canadian cattle will come streaming in to the United States once the import ban is lifted. 70 Fed. Reg. at 537-40.

In this instance, there is no question of deference to agency expertise, since USDA did not even claim to have considered these environmental impacts at all, much less to have taken the required “hard look” at the impacts. *See, e.g., The Lands Council v. Powell*, 379 F.3d 738, 744 (9<sup>th</sup> Cir. 2004); *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1177 (9<sup>th</sup> Cir. 2000). In this case, because of that failure, the USDA decisionmakers did not have at their disposal all of the relevant information about the environmental impacts of the final rule. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9<sup>th</sup> Cir. 1994). NMA has wholly failed to demonstrate that the District Court committed an abuse of discretion when it determined that USDA's failure to consider these significant environmental impacts was a violation of NEPA.<sup>15</sup>

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<sup>15</sup> R-CALF USA also demonstrated that USDA had failed to provide for public comment as required by NEPA and the Administrative Procedure Act. USDA revised its environmental assessment in December 2004, almost doubling its length, but offered it for public comment only after the Final Rule had been signed. 70 Fed. Reg. 554 (Jan. 4, 2005). After the Final Rule was published, USDA made even further revisions. 70 Fed. Reg. 3183 (Jan. 21, 2005). The (extended) deadline for comment on the revised Environmental Assessment was only 18 days before the Final Rule was to become effective, and this comment period clearly was a sham – not only was it after the rule had been signed, but the Secretary of Agriculture and other USDA officials made numerous public statements, before the comment period closed, that the rule would indeed go into effect on March 7, 2005. *See, e.g., SER 68*. Just going through the motions to make it appear that it has provided adequate comment does not suffice. *Lanthan v. Brinegar*, 506

NMA also argues that R-CALF USA has failed to demonstrate that its injuries fall within the “zone of interests” that NEPA was designed to protect. NMA Brief at 49-50. Initially, it should be noted that NMA relies almost entirely on cases that predate *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997), in which the Supreme Court restricted broad applications of the zone of interests test (holding that a group of ranchers could pursue Endangered Species Act claim that would be to their financial benefit). Additionally, the zone of interests argument is irrelevant because R-CALF USA has adequately alleged environmental harm in addition to economic harm. *See* Complaint at 3, ¶2 (clearly explaining that R-CALF USA members will suffer injury to human health and the environment). The fact that R-CALF USA members also suffer an economic injury does not preclude it from asserting a NEPA challenge. The types of injury that R-CALF USA members alleged, in the Complaint and the Bullard declaration, are the same types of injury that USDA discusses in the Final Environmental Assessment, AR8528.

Finally, NMA argues that an injunction was not automatically required even if USDA violated NEPA. NMA Brief at 52-53. This is hardly a

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F.2d 677, 693 (9<sup>th</sup> Cir. 1974) (“grudging, pro forma compliance will not do”).

demonstration that the District Court abused its discretion in issuing an injunction. *See Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 569 (9<sup>th</sup> Cir. 2000) (likelihood of environmental harm was sufficient to tip the balance in favor of injunctive relief).

**5. The District Court properly determined that USDA failed to give serious consideration to regulatory options that would have lessened the impact of the Final Rule on small businesses.**

The Regulatory Flexibility Act (“RFA”) requires an agency to carefully consider the economic impact a rule will have on small entities by conducting a final regulatory flexibility analysis. 5 U.S.C. § 604(a). This analysis must address the steps the agency has taken to minimize the significant economic impact on small entities, and explain why it rejected significant alternatives that would reduce the impact on small businesses. 5 U.S.C. § 604(a)(5). Section 604 does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options. *Associated Fisheries, Inc. v. Daley*, 127 F.3d 104, 114 (1<sup>st</sup> Cir. 1997). A court should determine whether an agency made “a reasonable, good-faith effort to canvass major options and weigh their probable effect.” *Associated Fisheries, Inc.*, 127 F.3d at 114.

USDA admits that the Final Rule will primarily affect small businesses. 70 Fed. Reg. at 543. Many ranchers, including most R-CALF USA members, are small businesses within the meaning of the RFA, 5 U.S.C. §§ 601-612. *See* Bullard Declaration at 2, SER 15. USDA estimates that the Final Rule has a present value cost of close to \$3 billion for U.S. cattle producers like R-CALF USA's members. 70 Fed. Reg. at 539.

USDA failed to comply with the requirements of the RFA because it did not consider significant alternatives that would have mitigated this severe impact on small businesses. USDA did not consider the mitigation of adverse effects of the Final Rule on small businesses that could have been achieved through a requirement that edible bovine products derived from Canadian cattle or imported from Canada be labeled so that consumers could choose not to purchase those products. 70 Fed. Reg. at 543. Nor did USDA's regulatory flexibility analysis assess the extent to which allowing slaughter facilities to voluntarily test cattle for BSE would mitigate the adverse effects on small businesses of diminished consumer confidence as a result of co-mingling of Canadian and U.S. meat supplies. Either of those options might have substantially mitigated the adverse economic effects of the Final Rule. VanSickle Declaration at 7-8, SER 66-67. USDA neglected to consider whether these alternatives, or possibly any other alternative,

would have less of an adverse impact on small entities. By offering only two alternatives, USDA did not make a good-faith effort to assess all significant alternatives.

Far from showing that the District Court abused its discretion in determining that USDA failed to comply with the RFA, NMA simply repeats USDA's non-responsive responses to R-CALF USA's arguments. NMA Brief at 54-55. USDA did not dispute that it had an obligation under the Regulatory Flexibility Act to consider alternatives to the Final Rule that would mitigate the economic impact of the Final Rule on small businesses, such as R-CALF USA's members. Instead, USDA offers illogical or unsupported reasons for not considering obvious mitigation measures, suggested to the agency in comments, as required by the Regulatory Flexibility Act.

USDA's basis for asserting that a requirement for labeling of Canadian-origin meat would not mitigate economic impacts of resuming Canadian imports is unsupported and illogical. USDA gives two responses to the obvious fact that labeling would allow consumers to assure themselves, if they chose, that they were not being exposed to meat products from a country where BSE is known to exist, thereby mitigating the adverse effect on domestic and foreign consumer demand for U.S. beef that even

USDA acknowledges is likely to result from resuming Canadian imports.<sup>16</sup> First, USDA says that it will be issuing a country-of-origin labeling program in September 2006, and USDA did not want to delay implementation of the Canadian BSE rule until then. Opposition at 19. USDA does not contest R-CALF USA's assertion that USDA has authority now to impose a country-of-origin labeling requirement with respect to Canadian beef, and so saying that it plans to do so two years in the future is hardly a reasoned consideration of alternatives as the Regulatory Flexibility Act requires.

Then USDA offers a curious rationale for not seriously considering the labeling option: it is not a food safety or an animal health measure, but rather a measure "to provide consumers with additional information on which to base their purchasing decisions." Fillo Declaration ¶12. That statement is no reason at all why USDA did not consider providing consumers with "additional information" on which to base their decision whether to purchase Canadian-origin meat in light of the discoveries of BSE in the Canadian herd, especially when doing so could blunt the impact of allowing imports from a country with BSE, especially if additional cases of

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<sup>16</sup> It makes no difference, by the way, whether severe restrictions on foreign demand occur as a result of decisions by foreign governments or reflect some measure of consumer preferences. *Cf.* Fillo Declaration ¶11. The effect on U.S. producers is the same.

BSE are found in Canada or in Canadian cattle that have entered the United States.

With respect to the potential value of voluntary testing for BSE as a means to mitigate the adverse financial impacts of the Final Rule, USDA claims that the benefits are speculative. Opposition at 19. The notion that consumer demand will be adversely affected by imports from a country known to have BSE, and especially by the discovery of additional cases of BSE, which are likely in the Canadian herd, is not simply speculation on the part of Dr. VanSickle. There is no need to speculate: the discovery of a BSE-infected cow of Canadian origin in the United States caused dozens of countries to close their borders to U.S. meat and imposed many millions of dollars of losses on the U.S. livestock industry. VanSickle Declaration SER 61, 64; Bullard Declaration SER 16-17; Fox, *et al.*, “Risks and Implications of Bovine Spongiform Encephalopathy for the United States: Insights from other Countries,” 29 *Food Policy* 45 (2004) (AR1565) (“A single case of BSE would have serious consequences for the US beef industry.”). This is not speculation, but rather is based on experience in the United States and in other countries.<sup>17</sup>

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<sup>17</sup> Most countries in Europe as well as Japan test virtually all of the cattle they slaughter for BSE. AR1508; AR1619.

USDA's adamant refusal to consider voluntary testing as an option under the Regulatory Flexibility Act that might reduce adverse impacts of the Final Rule on small businesses has not been justified in light of these facts. An agency decision that is not, at a minimum, based on “reasonable extrapolations from some available evidence” is arbitrary and capricious. *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 432 (D.C. Cir. 1986).

**6. NMA lacks standing to challenge the lack of security for the preliminary injunction.**

Even if NMA had standing to challenge the District Court's issuance of the Preliminary Injunction, it would not have standing under Article III of the Constitution to complain of the fact that the District Court's Order does not mention a requirement for R-CALF USA to post security under Fed. R. Civ. P. 65(c).

To satisfy requirements for Article III standing, a litigant must show that its alleged injuries are “redressable”; that is, that the Court could resolve the litigation in a way that would prevent the injury that the litigant alleges. *See e.g., Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 185-86 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 571 (1992). In this case, even if the Court were to agree with NMA that the

District Court erred by failing to require R-CALF USA to post a bond pursuant to Fed. R. Civ. P. 65(c), that rule only allows the District Court to require security against potential injury from the preliminary injunction to the party enjoined or restrained, in this case, USDA.<sup>18</sup>

Fed. R. Civ. P. 65(c) states: “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages *as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.* (Emphasis supplied.) NMA makes no attempt to address the obvious fact that it is not a party and has not been enjoined by the Preliminary Injunction. Not surprisingly, R-CALF USA has found only one case that even considers a claim that someone not enjoined by a preliminary injunction is entitled to security under Rule 65(c). In the unpublished opinion *McGregor Printing Corp. v. Kemp*, 1992 U.S. Dist. LEXIS 6717; 38 Cont. Cas. Fed (CCH) P76 (D.D.C. 1992), Defendant National Industries for the Blind (NIB), a nonprofit representing six

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<sup>18</sup> To state the obvious, NMA's claim that "NMA's members are suffering [damages] by being wrongfully restrained from importing healthy live cattle from Canada" (NMA Brief at 18) is simply false. NMA's members cannot import Canadian cattle because of current USDA regulations, and the Preliminary Injunction prevents USDA from modifying those regulations for the time-being. It is not directed to NMA or its members at all.

workshops for the blind, requested a security bond against plaintiff McGregor. The court denied the bond because while it had enjoined a codefendant, it had not enjoined NIB or the six workshops it represented. The court cited Wright & Miller's treatise *Federal Practice and Procedure* in agreeing that "someone not a party to the case or restrained or enjoined by order of the Court is without standing to demand security for possible damages incurred as a result of such restraint or enjoinder." *McGregor* at 22, *citing* 11 Wright & Miller § 2954.<sup>19</sup>

The injury NMA claims -- that its members have no security against losses that its members may incur while the Final Rule is preliminarily enjoined -- thus would not be remedied in any way even if this Court agreed with NMA's claim that the District Court erred by not requiring security under Rule 65(c). Since neither this Court nor the District Court can order the bond to protect NMA's members against financial losses that NMA is seeking, NMA has failed to meet its burden of establishing its constitutional

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<sup>19</sup> See also Justice Stevens' concurring opinion in *Edgar v. Mite Corp.*, 457 U.S. 624, 629 (1982), noting that "since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to *protect his adversary* from loss in the event that future proceedings prove that the injunction issued wrongfully." *Id.* at 649 (emphasis added).

standing to seek review of the security aspect of the Preliminary Injunction Order. *See Lujan*, 504 U.S. at 561.

**7. The fact that the District Court did not require R-CALF USA to post a bond was, at best, harmless error as to both USDA and NMA.**

If the District Court had explicitly addressed provision of surety under Rule 65(c) in its Order or Opinion, the District Court would have been justified in imposing a minimal or no bond. Because R-CALF USA is a non-profit organization attempting to further the public interest and the goals of the Animal Health Protection Act, it would not be appropriate to impose other than a minimal bond requirement on R-CALF USA. Doing otherwise would effectively preclude review of USDA's actions and would not be in the public interest. *See, e.g., Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9<sup>th</sup> Cir. 1975); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9<sup>th</sup> Cir. 1985); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10<sup>th</sup> Cir. 2002). Moreover, because the defendants are government authorities that were not at risk of financial harm as a result of the preliminary injunction, there is little or no need to provide for possible compensation of an incorrectly enjoined defendant, the purpose of Rule 65(c). *See Heather v. City of Mallard*, 887 F. Supp. 1249, 1268 (N.D. Iowa). Indeed, in R-CALF USA's related action last year, challenging USDA's

authorization of imports of various kinds of meat without completing the rulemaking on the Final Rule, the District Court required R-CALF USA to post only a \$500 bond in connection with its order temporarily restraining those imports, and USDA did not object to that.

NMA's claim concerning the bond also arguably is moot. NMA notes that the purpose for such a bond is too protect the restrained party against losses occasioned by a preliminary injunction that was “wrongfully issued.” NMA Brief at 59-60. Here, this Court, if it determines it has jurisdiction to review NMA's challenge to the Preliminary Injunction, will be deciding whether that the injunction was wrongfully issued. If not, there is no need to protect the enjoined party nor NMA from the may possibly wrongfully issued injunction. If so, this Court will dissolve the injunction, and there will be no need for a bond, either. *See Ikon Office Solutions, Inc. v. Dale*, 22 Fed. Appx. 647, 649, 2001 U.S. App. LEXIS 22855 (8<sup>th</sup> Cir. 2001) (unreported) (since court of appeals determined preliminary injunction was properly issued as to defendants, their claim that the district court required an insufficient bond under Rule 65(c) was moot).

## CONCLUSION

For the reasons set forth above, R-CALF USA respectfully requests that this Court deny NMA's appeal of the District Court's decision not to allow NMA to intervene in the case below at the preliminary injunction stage. R-CALF USA also respectfully requests that this Court dismiss NMA's appeal of the District Court's issuance of the Preliminary Injunction for lack of jurisdiction.

Dated: March 29, 2005

Respectfully submitted,

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RANCHERS CATTLEMEN ACTION  
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STOCKGROWERS OF AMERICA

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1**

I certify that:

  X   1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

  X   Proportionately spaced, has a typeface of 14 points or more and contains  13,979  words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

**Or is**

       Monospaced, has 10.5 or fewer characters per inch and contains            words or            lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

DATED this 29<sup>th</sup> day of March 2005.

Respectfully Submitted,

\_\_\_\_\_  
Russell S. Frye

## **STATEMENT OF RELATED CASES**

R-CALF USA is aware of one pending case that is related to the instant case: Ninth Circuit Docket No. 05-35264, which is USDA's interlocutory appeal of the District Court's March 2, 2005 issuance of a preliminary injunction in Ranchers Cattlemen Legal Action Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, D. Mont. No. CV-05-06-BLG-RFC.

## **ADDENDUM OF REGULATIONS**

## CERTIFICATE OF SERVICE

I hereby certify that, on the 29<sup>th</sup> day of March 2005, I have caused two copies of the Answering Brief of Ranchers Cattlemen Action Legal Fund United Stockgrowers of America and one copy of its Supplemental Excerpts of Record, along with its Motion for a One-Day Enlargement of Time, to be served by hand delivery or Federal Express upon:

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