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Via Express Delivery

Ms. Cathy Catterson  
Clerk of the Court  
United States Court of Appeals for the Ninth Circuit  
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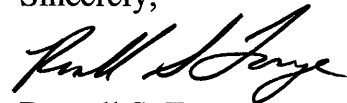
September 7, 2005

Re: *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture, et al.*, Docket No. 05-35264

Dear Ms. Catterson:

Enclosed for filing please find the original and 50 copies of Appellee/Plaintiff's Petition for Rehearing, with Suggestion for Rehearing *En Banc*, in the above-captioned appeal. Thank you.

Sincerely,



Russell S. Frye  
Counsel for Appellee/Plaintiff  
Ranchers Cattlemen Action  
Legal Fund United  
Stockgrowers of America

cc: Counsel for all parties

No. 05-35264

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RANCHERS CATTLEMEN ACTION LEGAL FUND  
UNITED STOCKGROWERS OF AMERICA  
*Plaintiff-Appellee,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE *et al.*,  
*Defendants-Appellants,*

---

**PETITION FOR REHEARING, WITH SUGGESTION FOR  
REHEARING *EN BANC***

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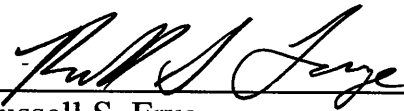
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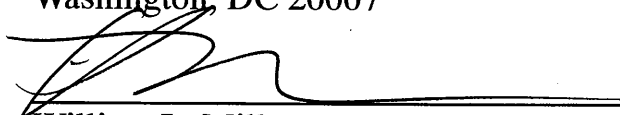
## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

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

Dated: September 7, 2005



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## **I. Introduction.**

The panel's decision in this case, reported at 415 F.3d 1078, vacates a preliminary injunction that was preserving long-standing U.S. import protections against a dangerous disease, bovine spongiform encephalopathy ("BSE"), or "Mad Cow" disease, that has already cost the U.S. cattle industry billions of dollars.

In addition, the panel's conclusion that the Secretary of Agriculture has a vast amount of discretion to allow imports of pest-infested or diseased animals and animal products, and the panel's proffered findings about the underlying facts in the case, create a precedent that is highly prejudicial to the public's right to judicial review of critical decisions affecting U.S. agriculture and consumers. Moreover, since the statutory authority at issue here is very similar to other statutes giving the Secretary of Agriculture responsibility for preventing imports of pests and diseases affecting plants and unsafe food<sup>1</sup>, the decision creates a precedent that also could be applied to limit judicial review of critical USDA actions under those other statutes.

The parties agree that billions of dollars are at stake. Moreover, because this matter concerns an inevitably fatal disease that has proven

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<sup>1</sup> See, e.g., Plant Protection Act, 7 U.S.C. § 7711(c)(1); Meat Inspection Act, 21 U.S.C. § 620(g).

difficult to control as it spread around the world, this case has important potential effects on human health, U.S. livestock, and export markets.

Rehearing is appropriate here because the decision is inconsistent with several other decisions of this Circuit and because it overlooks or misstates a number of important points of law and fact. Contrary to the admonishments of other opinions, the panel, while reviewing a preliminary injunction, attempted a detailed review of facts not even fully developed below nor presented fully on appeal. Not surprisingly, the panel missed or misunderstood key aspects of the administrative record. The panel also considered a statutory interpretation not argued below, and in so-doing overlooked important indications of congressional intent.

Rehearing *en banc* is appropriate because this case involves questions of exceptional importance and because consideration by the full Court is critical to maintain consistency among the Court's decisions. The exceptional national importance of the case is described above; it is apparent as well from the great public interest in the case, reflected in the 11 *amicus curiae* briefs, including those of six state attorneys general and a broad coalition of national consumer groups and state and local agriculture groups supporting Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF").

**II. The decision is inconsistent with other decisions of this Circuit requiring an agency to justify departures from prior factual and policy determinations.**

For many years, the U.S. Department of Agriculture (“USDA”) has had a strict policy of prohibiting imports of cattle and beef from any country where BSE is known to exist. *See* 70 Fed. Reg. at 462, Excerpts of Record (“ER”) at 183. The purpose of this strict prohibition was to minimize the potential for introduction of BSE into the U.S. cattle herd and the potential for U.S. beef consumers to be afflicted with the human version of BSE, variant Creutzfeldt-Jakob disease (vCJD). That policy was applied to Canada on May 29, 2003, after the discovery of BSE in a native-born Canadian cow. 68 Fed. Reg. 31,939. Under intense pressure from the Canadian government and some U.S.-based meat packers, USDA subsequently authorized imports of Canadian cattle and beef, subject to some restrictions, in the regulation under review in this case, 70 Fed. Reg. 460 (January 4, 2005) (the “Final Rule”).

R-CALF pointed out that USDA repeatedly concluded that banning imports of cattle and meat from any country where BSE is discovered was “necessary” because BSE could become established in the United States if cattle with BSE were imported into United States. *See, e.g.*, 66 Fed. Reg. 52,483 (Oct. 16, 2001), affirmed 67 Fed. Reg. 8181 (Feb. 22, 2002). USDA

policy derived from the nature of BSE: “We believe that due to the drastic consequences of BSE introduction, *strict import requirements are justified to control even very low-probability risks* of introducing BSE. In addition, due to the long incubation period of BSE and the lack of long-term comprehensive studies of its spread in countries with only a few reported cases, *we cannot accurately estimate the extent of BSE in countries with any reported cases.*” 56 Fed. Reg. 63,865, 63,867 (April 30, 1991) (emphasis added). *See also* 62 Fed. Reg. 65,747, 65,748 (Dec. 16, 1997) (given the lack of a vaccine or a test to detect the disease in live animals, banning imports of cattle and beef is “the most effective means available for ensuring that BSE does not enter the United States....”).

As recently as 2003, an inter-agency working group convened by the Secretary of Agriculture explained to Congress the critical importance of the ban on imports, “the primary firewall at the borders,” in U.S. efforts to avoid BSE. PL 107-9 Final Report (“Report to Congress”), SER20. It described importing “live cattle that are already incubating the disease and then are slaughtered, rendered, and incorporated into domestic meat and bone meal that is mistakenly fed to cattle” as one of two “most likely routes of introduction of BSE into the U.S. national herd.” *Id.* at SER26.

USDA failed to meet its special obligation adequately to explain why it chose to abandon its prior decision to ban imports of cattle and bovine products from all countries with BSE, once BSE was discovered in Canada. *See California v. FCC*, 905 F.2d 1217, 1234 (9th Cir. 1990); *Lynch v. Dawson*, 820 F.2d 1014, 1021 (9th Cir. 1987). USDA failed to explain how the Final Rule is consistent with 7 U.S.C. § 8303(a)(1), given that it abandons prior policies that prevent “even very low-probability risks of introducing” BSE into the U.S., now attempting only to “minimize” the risk of “dissemination” once the disease has entered the country.

The panel failed entirely to address the fact that USDA reversed its judgment about measures necessary to prevent the introduction of BSE into the United States without providing adequate justification and without referencing new information that could justify reversing its position. The principal device that USDA now claims will provide adequate protection to U.S. cattle if BSE-infected cattle are imported from Canada, the prohibition on feeding ruminant protein to other ruminants, has been in place since 1997, ER190, yet, as noted above, USDA has said repeatedly since then that importation and rendering of BSE-infected cattle, followed by mis-feeding to U.S. cattle, is one of the primary risks for introduction of BSE into the United States. The “Harvard Study” on which USDA principally relies for

support in its relaxation of BSE protections for Canada, was first completed in 2001 and relies on scientific studies reported primarily in the 1990s.

ER180-81, 190-91. Clearly, USDA is not now relying on new information that was unavailable when USDA in recent years repeatedly reaffirmed the importance of the ban on imports of cattle from BSE-afflicted countries.

Rehearing is justified by the panel's failure to address and apply precedent requiring an agency to justify its departure from its previous position.

**III. The panel erred in imposing a very narrow standard of review of USDA's action.**

In a single page of its opening brief in this appeal, USDA raised an argument it had not raised at the District Court, claiming that the language and legislative history of one of the statutory provisions under which the Final Rule was issued provide no standards by which to measure the Secretary's exercise of discretion and render the decision to allow imports of potentially BSE-contaminated cattle and meat virtually exempt from judicial review. USDA Br. at 20-21. The decision adopts and expands upon this reasoning. *See* 415 F.3d at 1094-95.

Numerous cases in this Circuit establish the principal that this Court must not consider legal arguments on appeal that were not presented to the District Court. *See, e.g., Brown v. City of Tucson*, 336 F.3d 1181, 1187 n.11

(9th Cir. 2003); *Swift v. California*, 384 F.3d 1184, 1193 (9<sup>th</sup> Cir. 2004) (refusing to consider legal arguments “which should be addressed by the district court in the first instance”); *United States v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004). The panel’s failure to follow that precedent warrants rehearing.

Moreover, without the benefit of the briefing that would have occurred below had USDA presented this argument in the preliminary injunction proceeding, the panel understandably misapprehended some aspects of the legislative history. The panel focused on a discussion of the definition of “disease” in the Conference Report for the Animal Health Protection Act, 7 U.S.C. §§ 8301 *et seq.* (the only reference to the legislative history in USDA’s brief), but overlooked other language in the Conference Report, emphasizing the very high priority Congress placed on preventing diseases like BSE<sup>2</sup>: “Ensuring proper screening and testing, and, where necessary, the eradication of animal diseases, is of paramount importance to American Agriculture, USDA, the Congress, and the American people. With the stakes to animal health and the farm economy so high, the U.S. government should use the very best methods available to detect animal

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<sup>2</sup> The quoted language relates to testing for scrapie, a disease related to BSE. *See* 70 Fed. Reg. at 461, ER185.

diseases.” H.R. Conf. Rep. 107-424, *reprinted in* 2002 U.S.C.C.A.N. 141, 389.

The panel also may not have been aware that the Animal Health Protection Act, although only enacted in 2002, replaced almost identical language in a 1962 statute (P.L. 87-518, 76 Stat. 129, sec. 4). *Cf.* 415 F.3d at 1094. Far from “indicat[ing] a congressional intent to give the Secretary wide discretion in dealing with the importation of plant and animal products” (*id.*), the legislative history of that 1962 predecessor statute evidences congressional intent to “*provide greater protection against the introduction and dissemination of diseases of livestock*” and to “charge the Secretary of Agriculture with the general duty and responsibility of *preventing* the entry or dissemination of communicable diseases of livestock...” H.R. Rep. 1516, *reprinted in* 1962 U.S.C.C.A.N. 1822 (emphasis added); *see also id.* at 1823, 1825, 1827.<sup>3</sup>

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<sup>3</sup> Even the passage from the legislative history that the panel did focus on, explaining that the Conference Committee wanted to give the Secretary discretion to define “disease,” indicates that the reason for doing so was so that USDA could be more effective in focusing on real threats of disease, rather than indicating an intent to give the Secretary discretion to decide to allow imports of diseased animals that present a risk to U.S. livestock. *See* 2002 U.S.C.C.A.N. at 389; *see also* 7 U.S.C. § 8302(1) Moreover, the panel apparently missed the fact that the AHPA defines the prions believed to cause BSE as a “pest” rather than a “disease.” *Id.* at § 8302(13)(I).

The panel also did not refer to another statute that bears directly on congressional intent that USDA take steps to reduce, not increase, the risk of BSE, and fully characterize for the public the risk of BSE and vCJD from USDA actions. In the Animal Disease Risk Assessment, Prevention, and Control Act of 2001, PL 107-9, Congress found that the potential introduction of BSE into the United States would cause “devastating financial losses to – the agriculture industry and other economic sectors; and United States trade in the affected animals and animal products.” PL 107-9 § 2(a)(3). One of the express goals of PL 107-9 was “to make certain that the Congress and the American public are fully informed as to the reliability of our nation’s animal health inspection system, its ability to protect our domestic herds and the American public from the potential introduction into the United States of” BSE. 147 Cong. Rec. S3709 (April 6, 2001). Congress directed the Secretary to provide “recommendations to *reduce* and manage the risks of . . . bovine spongiform encephalopathy, and related diseases.” *Id.* at § 3(b)(2)(B) (emphasis added). These clear statements of congressional policy are contravened by the panel’s conclusion in this case that USDA need not minimize the risk of BSE from imports nor tell the public how much risk is associated with imports allowed by the Final Rule. *Cf.* 415 F.3d at 1094.

The standard of review for actions under the AHPA set out in footnote 15 of the decision, that the action should not be overturned “[a]bsent a strong showing that the Secretary is not exercising [his ‘considerable’] discretion consistent with the statutory requirements,” is inconsistent with other decisions of this Circuit interpreting judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). Under those decisions, an agency action is arbitrary and capricious or an abuse of discretion under the APA if, for example, it frustrates a congressional policy underlying the statute, and not only when it is inconsistent with a specific statutory directive. *See, e.g., Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Service*, 273 F.3d 1229, 1236 (9th Cir. 2001). An agency also acts in a way prohibited by the APA if it acts without considering the appropriate factors or after considering inappropriate ones, *id.*, lacks data to support its assumptions, *Ober v. Whitman*, 243 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2001), fails adequately to explain its assumptions and conclusions, *California v. FCC*, 905 F.2d at 1244, or fails to justify its departure from prior policy decisions, *see p. 5, supra*.

The standard of review adopted in the decision appears not to allow for all these other ways in which an action can be found to violate the APA, focusing solely on the “not in accordance with law” portion of 5 U.S.C. §

706(2). This is not merely semantics. The decision dismissed or ignored numerous findings by the District Court that USDA failed to provide a reasoned explanation for part of the basis for its conclusions or had provided an explanation that was internally inconsistent or not supported by the record. The decision criticizes the District Court for using a “divide and conquer” approach, analyzing USDA’s support for its assertions about each of the factors it claims will virtually eliminate BSE risk from Canadian imports, implying that if USDA relies on a number of mitigation measures, it does not matter if some of those measures were not adequately explained or supported in rulemaking. *See* 415 F.3d at 1095. There is no basis for such an approach in the APA, and in fact it does not even have a factual basis: some of the mitigation measures address risks to U.S. cattle from live cattle imports, while others address risks to humans. USDA was obligated to justify its assumptions about the effectiveness of each of its BSE mitigation measures.

**IV. The decision conflicts with *Ober v. Whitman* and ignores USDA’s own policy statements on risk assessment.**

The decision rejected the District Court’s conclusions that USDA had failed adequately to assess the risk to animal and human health presented by the Final Rule. *See* 415 F.3d at 1096-97. The District Court, aided by the

declaration of an expert in risk assessment, found that USDA's failure to attempt to quantify the risk presented by resuming Canadian imports, and indeed its statement that it had not even determined what level of cattle and human deaths would be acceptable as a result of the Final Rule, made it impossible for the public and the reviewing court meaningfully to assess USDA's policy choices in the Final Rule and its assurances that the risk was acceptable and "very low." 359 F. Supp.2d at 1065, 1074. The panel declared that "the AHPA does not require the Secretary to quantify a permissible level of risk or to conduct a risk assessment." 415 F.3d at 1097. But, as this Circuit concluded in *Ober v. Whitman*, 243 F.3d 1190, 1195, an agency cannot conclude that something presents minimal risk without describing the standard by which it judges the risk to be minimal.

In *Ober*, the Environmental Protection Agency had decided to exclude certain sources of air pollution from a pollution control regulation because they were "de minimis." This Circuit held that "unless" EPA has "provided a full explanation of" the levels it considers de minimis, "supported by a plausible explanation, we have no basis for exercising our responsibility to determine whether" EPA's judgment that certain pollution sources are de minimis complies with the APA. *Id.* The panel's willingness in the instant case to accept USDA's assurances that the risks associated with the Final

Rule are acceptable, where USDA provided no standard for judging the acceptability of such risks, and where its own experts said it did not yet have enough information to predict the likelihood of introduction of BSE as a result of resuming imports, SER317-18, is inconsistent with this Circuit's insistence that an agency set forth the criteria it applied in judging the acceptability of the risks of its action.

Additionally, the panel apparently overlooked the fact that preexisting USDA policies confirm the need for quantitative risk assessments for actions such as the Final Rule. USDA's own procedures for evaluating whether to allow imports from a region that potentially carry a pest or disease, AR009519-29, state that, while a qualitative risk analysis is generally adequate for regions considered free of certain diseases, regions in which the disease is known to exist due to recent outbreaks are deemed to pose a higher level of risk and have historically been approached quantitatively. AR009525. This is because "[q]uantitative modeling allows assessment of specific risk concerns, testing of assumptions, analysis of attendant uncertainty, and evaluation of the effectiveness of proposed mitigation measures." *Id.*; *accord*, SER186-190, 194; SER32. The decision also contains no recognition that, as noted at p. 9, *supra*, PL 107-9 demonstrates congressional intent that the public be fully informed of the risks of BSE and

the effectiveness of BSE mitigation measures. In light of these USDA and congressional pronouncements, the District Court's conclusion that USDA should have provided more than its assurance that the risk of the Final Rule is very low certainly was not an abuse of discretion.

**V. The panel improperly substituted its factual conclusions for those of the District Court, contrary to other decisions of this Circuit.**

This Circuit has stated repeatedly that, when reviewing the issuance of a preliminary injunction, the district court's assessment of the likelihood of success on the merits must be reviewed for abuse of discretion, without getting into "the underlying merits of the case." *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754, 760 (9th Cir. 2004) (quotations and citations omitted). The Court "will not second-guess whether the court correctly applied the law to the facts of the case, which may be largely undeveloped at the early stages of litigation." *Earth Island Inst. v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003) (quotations omitted); *see also, e.g., Stuhlberg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 (9<sup>th</sup> Cir. 2001).

In the instant case, however, that is precisely what the panel did. It delved deeply into the merits of the case, substituting its judgment for the District Court's on a variety of issues and concluding that "the risks inherent

in the Final Rule are small” and that it “likely is supported by an adequate administrative record.” 415 F.3d at 1100. The decision’s failure to follow extensive precedent in this Circuit about the appropriate scope of appellate review of a preliminary injunction warrants rehearing.<sup>4</sup>

Not surprisingly, when the panel attempted to apply the law to the facts in the context of a preliminary injunction appeal, it missed or misstated numerous key facts.<sup>5</sup> The panel did not even address directly a critical factual finding by the District Court, that USDA management entered the rulemaking with a preconceived notion that it was important to reopen trade with Canada as soon as possible, before having evaluated the risks and impacts of doing so, and thereafter attempted to develop a justification for

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<sup>4</sup> The decision claims that the District Court erroneously concluded that the AHPA requires USDA to eliminate all risk of BSE from imports, and this illegal error infected the District Court’s review of the facts. 415 F.3d at 1094-95. This is a “straw man” argument, though-- the decision recognizes that the District Court never said that USDA was required to assure that Canadian imports present no additional risk of BSE. *Id.* at n.14; *see also* Transcript of preliminary injunction hearing at, *e.g.*, SER289-91. Rather, the District Court appropriately evaluated the likelihood that R-CALF could show USDA’s conclusions that the BSE risk was “virtually eliminated” by various mitigation measures in the Final Rule were not adequately supported. This is not “imposing...a ‘zero-risk’ requirement” (*id.*), it is applying the APA requirement that USDA have a factual basis for its assertions that there is little or no risk from the circumstances allowed under the Final Rule. *See, e.g.*, 359 F. Supp.2d at 1068.

<sup>5</sup> The panel even did its own analysis of Switzerland’s BSE experience not presented in the briefs or, apparently, the record. *See* 415 F.2d at 1097.

this policy decision. R-CALF provided numerous examples of statements by USDA management about the need to move quickly to resume trade in cattle and beef with Canada in advance of an assessment of the risks of doing so (or before the facts of additional cases of BSE discovered in Canada had been determined), as well as a report of USDA's Inspector General that supported the same conclusion (SER220-25). Thus, there was clear support for the District Court's factual conclusion that:

The facts strongly suggest that the USDA, ignoring its statutory mandate to protect the health and welfare of the people of the United States, established its goal of re-opening the border to the importation of live beef from Canada and thereafter attempted to work backwards to support and justify this goal.

359 F. Supp.2d at 1066; *see also id.* at 1074 (USDA "evidenced a preconceived intention, based upon inappropriate considerations, to rush to reopen the border....").

The decision on appeal does not contradict the District Court's factual conclusions about USDA's preconceived intention to resume trade with Canada, much less show that those conclusions were clearly erroneous. *Cf. Actors Equity Ass'n v. Am. Dinner Theater Inst.*, 802 F.2d 1038, 1042 (8<sup>th</sup> Cir. 1986). Those factual conclusions justify not applying the presumption of deference to USDA decisions concerning imports from Canada. *See, e.g., 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); *Entergy Ark., Inc. v. Nebraska*, 210 F.3d 887 (8<sup>th</sup> Cir. 2000) (where state reached political conclusion before facts were available, no deference given to its factual conclusions); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 52-56 (1983) (no deference when agency emphasized cost of automatic seatbelts in contrast to congressional intent that passenger safety be primary concern). The decision's failure to abide by the uncontroverted factual findings of the District Court warrants rehearing.

**VI. The panel's conclusion on irreparable harm contained errors of fact and law.**

The decision states “we disagree with the district court’s assessment of the irreparable harm threatened by the Final Rule” and says the District Court’s concern about the threatened harm “appears to be overstated.” 415 F.3d at 1093, 1105. But a district court’s findings in preliminary injunction proceedings may only be overturned if the reviewing court finds an abuse of discretion, not just because the panel “disagrees with” the District Court’s assessment of the harms. This is the kind of second-guessing of the district court’s findings that this Circuit has rejected many times. *See, e.g., Rucker v. Davis*, 237 F.3d 1113, 1118 (2001) (*en banc*).

The panel also missed important aspects of the substantial irreparable harm that the preliminary injunction addressed. *Cf.* 415 F.3d at 1104-1105. It ignored the fact that USDA estimated that the Final Rule would cost U.S. cattle producers, mostly small businesses, close to *\$3 billion dollars*. 70 Fed. Reg. at 539, 543, ER263, 267.

The panel apparently also missed the fact that the “stigma” damages to which the District Court referred were not just damages to “American demand for beef.” 415 F.3d at 1105. The District Court was aware that fears about the safety of beef from the U.S. after the discovery of a single BSE-infected cow (born in Canada) in the United States caused most countries to ban imports of U.S. beef, costing the cattle industry billions of dollars (359 F. Supp.2d at 1061, 1073) and that the earlier discovery of BSE in Canada led Japan to demand that all beef from the U.S. be raised and slaughtered in the U.S. ER248. The District Court thus rationally concluded that importing cattle from Canada (which identified four cases of BSE in less than two years) presented a risk of significant irreparable harm to U.S. exports of beef.

Thus, not only did the panel not make the requisite finding that the District Court's assessment of irreparable harm from cost to U.S. producers and impact on foreign demand was clearly erroneous, it could not have.<sup>6</sup>

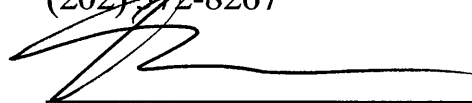
Dated: September 7, 2005

Respectfully submitted,



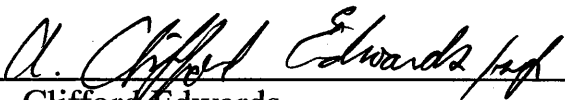
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<sup>6</sup> In contrast, the alleged harm from the preliminary injunction actually arises from circumstances that predate the Preliminary Injunction by almost two years, *see Stuhlberg*, 240 F.3d at 841, and involves less than 1% of the U.S. cattle herd, *cf. ER91 with SER160*.

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Attorneys for Plaintiff  
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LEGAL FUND UNITED  
STOCKGROWERS OF AMERICA

**Form 11. Certificate of Compliance Pursuant to  
Circuit Rules 35-4 and 40-1**

**Form Must be Signed by Attorney or Unrepresented Litigant  
and Attached to the Back of Each Copy of the Petition or Answer  
(signature block below)**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

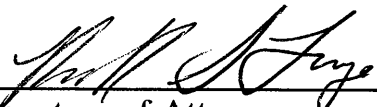
  X   Proportionately spaced, has a typeface of 14 points or more and contains 4199 words (petitions and answers must not exceed 4,200 words).

**or**

       Monospaced, has 10.5 or fewer characters per inch and contains        words or        lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

**or**

       In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

  
\_\_\_\_\_  
Signature of Attorney or  
Unrepresented Litigant

(New Form 7/1/2000)

## CERTIFICATE OF SERVICE

I hereby certify that, on the 7<sup>th</sup> day of September 2005, I have caused a copy of the foregoing Petition for Rehearing, with Suggestion for Rehearing *En Banc*, to be served by placing it in the U.S. mail or consigning it to an express delivery service, addressed to:

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