

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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| _____                                | ) |              |
| RANCHERS CATTLEMEN ACTION LEGAL FUND | ) |              |
|                                      | ) |              |
| Appellant,                           | ) |              |
|                                      | ) |              |
| v.                                   | ) |              |
|                                      | ) | No. 06-35512 |
| U.S. DEPARTMENT OF AGRICULTURE,      | ) |              |
| et al.                               | ) |              |
|                                      | ) |              |
| Appellees.                           | ) |              |
| _____                                | ) |              |

**MOTION FOR SUMMARY AFFIRMANCE**

One year ago, this Court issued a 56-page opinion rejecting plaintiff's challenge to a Department of Agriculture rule that permits the importation of certain Canadian cattle and beef products. On remand, plaintiff asserted the precise arguments that this Court had already rejected. Recognizing that this Court's decision was dispositive, the district court entered summary judgment in favor of the government. For the reasons explained below, summary affirmance of the district court's judgment is warranted. All of the issues presented by plaintiff's summary judgment motion have already been considered and rejected by this Court. The rule at issue is unchanged, as are the relevant facts and law. Plenary briefing and argument are therefore unnecessary.

**FACTS AND PRIOR PROCEEDINGS**

The Department of Agriculture ("USDA") rule at issue concerns the importation of cattle and beef products from Canada

and the prevention of bovine spongiform encephalopathy ("BSE"), commonly known as "mad cow disease." The specifics of the rule, as well as the scientific basis for it, are set forth in detail in this Court's prior opinion in Ranchers Cattlemen Action Legal Fund v. USDA, 415 F.3d 1078 (9th Cir. 2005) (copy attached), and are briefly summarized here.

1. After BSE was discovered, the USDA began restricting the importation of live ruminants and most ruminant products from regions affected with BSE or presenting a risk of it. See 56 Fed. Reg. 63865 (Dec. 6, 1991).<sup>1</sup> When a cow in Alberta, Canada was diagnosed with BSE in 2003, the USDA added Canada to the list of areas affected by BSE and subject to the import ban. Opinion at 12-13.

2. In recent years, the USDA has learned a great deal about BSE, how it spreads, and how it can be prevented. Responding to this new information, both the Federal Government and Canada have implemented numerous mitigation measures designed to prevent the spread of the disease. Based on those mitigation measures, as well as an independent study commissioned by USDA to determine whether BSE from Canada posed a risk of spreading in the U.S., the agency determined that Canada presents only a "minimal risk" of spreading BSE in this country. Accordingly, on January 4,

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<sup>1</sup> Ruminants are hoofed mammals, including cattle, sheep, goats, deer, and other animals. See Op. at 2 n.1.

2005, USDA issued a new rule that permits cattle under 30 months old and beef products from cattle under 30 months old to be imported from Canada. See 70 Fed. Reg. 460.

3. In December 2003, after the proposed rule had been published, a cow in Washington State was diagnosed with BSE. And in January 2005, shortly after the final rule was promulgated, two other BSE-infected cows were discovered in Canada. Opinion at 14-16. These discoveries did not change the agency's view, however, because investigations revealed that the cows were born in Canada either before or shortly after that country instituted its feed ban (which is one of its principal mitigation measures against the spread of BSE). See 69 Fed. Reg. 10,633 (Mar. 8, 2004); 70 Fed. Reg. 18,252, 19,258 (Apr. 8, 2005). More importantly, USDA's final rule had acknowledged and accounted for the possibility that additional animals with BSE born at or near the time of Canada's feed ban would be identified, and still concluded that the risk that Canadian cattle and beef products would spread BSE was minimal. See 70 Fed. Reg. at 514.

4. The plaintiff, a non-profit association representing cattle producers (see Opinion at 17 n.12), challenged nearly every aspect of the USDA's rule under the Administrative Procedure Act ("APA"), the Regulatory Flexibility Act ("RFA"), and the National Environmental Policy Act ("NEPA"). The district court ruled in plaintiff's favor on every issue and granted a

preliminary injunction.

5. This Court reversed in a comprehensive opinion that rejected each of plaintiff's arguments and vacated the preliminary injunction. Ranchers Cattlemen Action Legal Fund v. USDA, 415 F.3d 1078 (9th Cir. 2005).

6. On remand, the plaintiff re-asserted the same arguments considered and rejected by this Court. In granting summary judgment for the government, the district court rejected those arguments, explaining that "[t]he Ninth Circuit has reviewed the Final Rule and has concluded that 'the Secretary [of Agriculture] had a firm basis for determining that the resumption of ruminant imports from Canada would not significantly increase the risk of BSE to the American population.'" District Court Op. at 5 (Attachment 2). The district court accordingly concluded that its "hands are tied," ibid., and entered summary judgment in favor of USDA.

#### DISCUSSION

Summary affirmance is appropriate for "appeals obviously controlled by precedent." United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam). "Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned." Ibid.

That standard is plainly met here. As the district court recognized, this Court has resolved all of the issues that

plaintiff seeks to raise. Plaintiff presented no new arguments, law, or facts on remand in the district court and none can properly be presented for the first time in this appeal.

That the prior appeal was in the context of a preliminary injunction in no way undermines the propriety of summary affirmance. See Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003) (treating prior ruling on a preliminary injunction as law of the case). As the district court's summary judgment reflects, the Court's earlier decision included legal rulings that did not turn on the procedural posture of the case. Indeed, this Court held that its preliminary injunction decision in R-Calf foreclosed arguments made in a subsequent case that had been resolved on summary judgment. See Cactus Corner, LLC v. U.S. Dep't of Agriculture, 450 F.3d 428, 433-34 (9th Cir. 2006) ("[W]e follow our holding in *Ranchers Cattlemen*" that a rule is not arbitrary because it lacks quantitative standards.) (involving analogous provision of Plant Protection Act).<sup>2</sup>

Because the questions to be presented in this appeal duplicate those in the prior appeal, because this Court has

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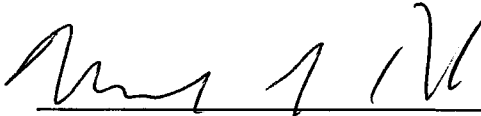
<sup>2</sup> The discovery of additional cattle diagnosed with BSE in no way undermines the controlling weight of the Court's earlier decision. As explained above, USDA's analysis predicted and anticipated that additional infected cattle would be discovered, and still concluded that the risk of BSE in this country would be minimal. Moreover, the discovery of infected cows that were born before or shortly after the Canadian feed ban began casts no doubt on the classification of Canada as a "minimal risk" region for BSE. See supra at 3.

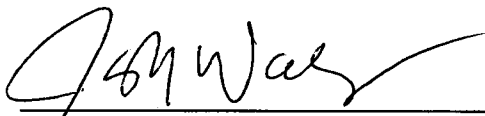
already resolved those issues in the government's favor, and because those holdings are binding Circuit precedent and the law of the case, plaintiff's appeal is meritless. Accordingly, summary affirmance is warranted.

**CONCLUSION**

For the reasons stated above, this Court should summarily affirm the district court's judgment.

Respectfully submitted,

  
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