

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN  
ACTION LEGAL FUND UNITED  
STOCKGROWERS OF AMERICA,

Plaintiff – Appellant,

v.

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

Defendants – Appellees

No. 06-35512

D.C. No. CV-05-00006-RFC

**RANCHERS CATTLEMEN  
ACTION LEGAL FUND  
UNITED STOCKGROWERS  
OF AMERICA’S  
OPPOSITION TO  
MOTION FOR  
SUMMARY AFFIRMANCE**

Plaintiff-Appellant Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”) respectfully requests that this Court deny Appellees’ Motion for Summary Affirmance (“Motion”) and re-set the briefing schedule.

The Motion misrepresents the nature of the present appeal, the cited and applicable case law, and the facts of the occurrence of bovine spongiform encephalopathy (“BSE”) in Canada. It is devoid of record citations for the “facts” it asserts about the nature of this appeal and the summary judgment proceedings

below. It asks the Court to act based on its unsupported assertions, rather than having briefing and argument on the issue raised by the notice of appeal. The Motion therefore “unduly burdens the parties and the court...” and should be denied. *See United States v. Hooton*, 693 F.2d 857, 858 (9<sup>th</sup> Cir. 1982).

## **I. Summary of Previous Proceedings**

On January 4, 2005, USDA published a regulation reversing long-standing USDA policy and allowing imports of cattle and beef, subject to certain restrictions, from a country known to have BSE in its cattle herd—Canada. “Bovine Spongiform Encephalopathy, Minimal Risk Regions and Importation of Commodities; Final Rule and Notice,” 70 Fed. Reg. 460 (the “Final Rule”). That regulation was scheduled to go into effect on March 7, 2005. *Id.* On January 11, 2005, R-CALF USA filed an action in the District Court for the District of Montana, seeking to enjoin the rule’s implementation. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Dept. of Agriculture*, 415 F.3d 1078, 1090 (9<sup>th</sup> Cir. 2005) (“*R-CALF II*”).

R-CALF USA filed an application for a preliminary injunction on February 1, 2005, and the District Court issued a preliminary injunction at the end of a hearing held March 2, 2005. *Id.* The District Court’s opinion supporting the issuance of a preliminary injunction was published at *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Dept. of Agriculture*,

359 F. Supp. 1058 (“*R-CALF I*”). USDA appealed the issuance of the preliminary injunction.

Pursuant to a Joint Proposed Scheduling Order that R-CALF USA and USDA filed on March 16, 2005, the District Court issued an order dated March 17, 2005, establishing a schedule for the filing of cross-motions for summary judgment and supporting briefs and declarations, and setting July 27, 2005 as the date for oral argument on those motions. Pursuant to that Scheduling Order, as modified, the parties filed approximately 100 pages of briefs and hundreds of pages of declarations and attachments thereto from USDA officials and outside experts. *See* D. Ct. Docket Nos. 103, 118, 140, and 150. USDA also filed a supplement to the administrative record, consisting of three binders of documents and two CDs, on June 15, 2005. *Id.* No. 132. USDA’s final filing in the Summary Judgment proceedings, its reply in support of its cross-motion for summary judgment, was filed in the District Court on July 13, 2005, the same day that oral argument was heard on its appeal of the preliminary injunction. *Id.* No. 150.

On July 14, 2005, this Court issued an order stating that the panel in *R-CALF II* had decided that the preliminary injunction order should be vacated, and staying the Preliminary Injunction Order pending an opinion setting forth the reasons for the Court’s reversal of the Preliminary Injunction Order. That opinion was issued on July 25, 2005 and amended August 17, 2005, 415 F.3d 1078. In the

meantime, with the argument on the pending cross-motions for summary judgment scheduled for July 27, 2005, the District Court issued an order on July 20, 2005, canceling the scheduled argument on the cross-motions for summary judgment in light of this Court's July 14, 2004 order, and stating that the District Court would "determine whether further hearings are necessary" after receipt of the Ninth Circuit's opinion. D. Ct. Docket No. 157.

Following denial of its petition for rehearing in the preliminary injunction appeal on October 13, 2005, R-CALF USA asked the District Court, on January 6, 2006, to re-schedule the hearing on the cross-motions for summary judgment that had been postponed by the District Court's order of July 20, 2005, and to give full consideration to and decide its motion for summary judgment. See *id.* Nos. 163, 164, and 174. Instead, the District Court issued a four-page order dated April 5, 2006, denying R-CALF USA's motion for summary judgment and granting USDA's cross-motion for summary judgment ("*R-CALF III*") (attached to Appellees' Motion for Summary Affirmance).

The District Court opinion in *R-CALF III* contains no analysis of, nor any indication that the District Court considered, the arguments and declarations presented during briefing on the summary judgment motions. Instead, the only basis for the District Court's grant of summary judgment to USDA was its

understanding of the effect of the Ninth Circuit's decision on the preliminary injunction appeal in *R-CALF II*:

The 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." [Citing *R-CALF II*, 415 F.3d at 1095.] Based upon this, the District Court's hands are tied. The Ninth Circuit has instructed this Court to "abide by this deferential standard," and "respect the agency's judgment and expertise."

*R-CALF III*, slip op. at 4. *R-CALF USA* filed a timely notice of appeal of the District Court's decision.

## **II. *R-CALF II* did not address the issue raised by this appeal.**

USDA asserts, without citation, that "the questions to be presented in this appeal duplicate those in the prior appeal" (referring to its appeal of the grant of a preliminary injunction) and that "this Court has already resolved those issues in the government's favor." Motion at 5-6. That is simply wrong.

*R-CALF USA*'s Civil Appeals Docketing Statement, filed with its Notice of Appeal and served on Appellees on June 2, 2006, lists as the "Principal Issues Proposed To Be Raised on Appeal":

Whether it was proper for the District Court to deny plaintiff's motion for summary judgment and grant defendants' motion for summary judgment without considering the merits of those motions and supporting documents, based on the Court of Appeals' ruling overturning the preliminary injunction previously issued by the District Court.

Indeed, there really could be no other issue for appeal, since the District Court's April 5, 2006 opinion did not consider the arguments made in and the evidence submitted with the briefs at the summary judgment stage and did not contain any new finding of fact or conclusion of law.

This Court's opinion in *R-CALF II* of course says nothing about the issue that R-CALF USA is raising in the current appeal, since the District Court had not yet dismissed R-CALF USA's complaint without consideration of the arguments and evidence presented in briefing of the cross-motions for summary judgment at the time the *R-CALF II* opinion was issued. The issue in *R-CALF II* was simply "whether the district court erred in issuing a preliminary injunction...." 415 F.3d at 1085. This Court reversed the grant of a preliminary injunction "[b]ecause we conclude that the District Court applied an incorrect legal standard...." *Id.* The *R-CALF II* opinion contains no conclusions, nor even *dicta*, indicating how the District Court must resolve R-CALF USA's claims on the merits upon remand, and especially about whether the opinion in *R-CALF II* rendered further proceedings before the District Court moot. The premise for USDA's Motion for Summary Affirmance, that "the questions to be presented in this appeal duplicate those in the prior appeal" (Motion at 5), is thus demonstrably false, and for that reason the Motion should be denied.

### **III. The outcome of the issue raised by this appeal is not beyond dispute.**

As explained in the previous section, the Motion should be denied because it incorrectly asserts that the issue R-CALF USA is raising in the current appeal was already considered by and decided in USDA's previous appeal of the preliminary injunction. An additional grounds for denial of the Motion, however, is that it incorrectly asserts that this Court already resolved the merits of the claims, in R-CALF USA's motion for summary judgment, that the Final Rule should be struck down under the Administrative Procedure Act. *Cf.* Motion at 1, 4-6.

The *R-CALF II* opinion rests on two legal conclusions: “that the Final Rule will likely survive judicial scrutiny under the correct legal standard; thus, R-CALF has not shown a likelihood of success on the merits of its action” and “that R-CALF has failed to make the requisite showing of irreparable harm.” *Id.* at 1105. The second of these conclusions was irrelevant for the District Court's resolution of R-CALF USA's claims on the merits—the Administrative Procedure Act does not require a showing of irreparable harm before a court strikes down an agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not according to law. *Cf.* 5 U.S.C. § 706(2). The first of the two conclusions on its face does not dispose of R-CALF USA's claims on the merits, merely observing that the Final Rule would “likely” be upheld by the District Court once “the correct legal standard” for review of the Final Rule was applied. 415 F.3d at 1105.

The only case cited by Appellees in support of their claim that summary affirmance is appropriate in this case emphasizes that summary affirmance is only appropriate “where the outcome of a case is beyond dispute...” *United States v. Hooton*, 693 F.2d at 858. A motion for summary affirmance “should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant’s brief.” *Id.* USDA offers no analysis or argument as to why the issue presented by R-CALF USA’s appeal must “beyond dispute” be resolved in USDA’s favor.

Fed. R. Civ. P. 56(c) contemplates that a hearing will be held on a motion for summary judgment. *Id.* (motion for summary judgment must be served at least 10 days “before the time fixed for the hearing”). The fact that a preliminary injunction was issued in this case and then vacated by the Court of Appeals does not eliminate the need for that hearing, nor the need for the District Court to resolve the summary judgment motion on the merits. (In this case, since no witnesses were to be called, the parties and the Court anticipated that the hearing would consist of oral argument by counsel.) Obviously, the Court of Appeals was reviewing an interlocutory order that did not purport to resolve the merits of the case and that was entered before the merits of the case had been fully briefed.

Actions related to a preliminary injunction do not bind the district court with respect to a decision on the merits. Wright and Miller, *Federal Practice and*

*Procedure*, Section 2962, 437-438 (2004), observes that the decision of both the trial and appellate court on whether to grant or deny a preliminary injunction does not preclude the parties in any way from litigating the merits of the case. The Ninth Circuit has reiterated that self-evident proposition, stating that “we have not departed from the general rule that a decision on a preliminary injunction does not constitute the law of the case and the parties are free to litigate the merits.” *City of Anaheim, Calif. v. Duncan*, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981) (citing *Ross-Whitney Corp. v. Smith, Kline and French Labs*, 207 F.2d 190, 194 (9th Cir. 1953) (a “ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case”)). *See also, e.g., S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004).

In *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830 (9th Cir. 1985), *rev'd on other grounds*, 475 U.S. 608 (1986), for example, this Court flatly rejected an argument almost identical to the one the Appellees make here: “The City argues that our prior decision on the preliminary injunction is law of the case and reconsideration of it is barred. This assertion is wrong. As a general rule, decisions on preliminary injunctions do not constitute law of the case and ‘parties are free to litigate the merits.’” 754 F.2d at 832 n.3 (quoting *City of Anaheim*, 658 F.2d at 1328 n.2). (In *Golden State Transit*, the Ninth Circuit had reversed the grant of a preliminary injunction, based on a holding that taxi cab franchise

renewal was a matter of such local interest that it could only be preempted by federal law if there was a “compelling congressional direction” (which the Ninth Circuit could not find). *Id.* at 832-33. When the case came back on appeal on the merits, though, the Ninth Circuit looked at the issues again and determined that its earlier conclusion was wrong. *Id.*)

This Court’s opinion in *R-CALF II* concluded that the District Court should not have granted R-CALF USA a preliminary injunction, because R-CALF USA had not shown a substantial likelihood of prevailing on the merits and because R-CALF USA had not proved it would be irreparably harmed in the absence of a preliminary injunction. 415 F.3d at 1105. The opinion did not by its terms decide the claims presented in R-CALF USA’s complaint, nor could it have. Indeed, if USDA’s position in its Motion for Summary Affirmance were correct, then in most cases where a preliminary injunction was appealed and overturned, no remand to the district court to consider the merits would be necessary, since in USDA’s view the appellate court’s decision that no likelihood of success on the merits was demonstrated by the arguments and evidence presented at the preliminary injunction stage would preclude full consideration of the merits in subsequent district court proceedings.<sup>1</sup>

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<sup>1</sup> Under Fed. R. Civ. P. 65(a)(2), a district court judge may order the trial on the merits accelerated and consolidated with the preliminary injunction hearing, but

USDA claims that the Court has nothing to decide in the present appeal, because its decision in *R-CALF II* is “binding Circuit precedent and the law of the case” (USDA Motion at 6). The only case that USDA cites for this proposition, *Humanitarian Law Project v. U.S. Department of Justice*, 352 F.3d 382 (9<sup>th</sup> Cir. 2003), (a) was vacated by a later decision of this Court, *Humanitarian Law Project v. U.S. Department of Justice*, 393 F.3d 902 n.1 (9<sup>th</sup> Cir. 2004), and (b) states explicitly that “the law of the case is a discretionary doctrine” which does not limit the Court’s power to address an issue. 352 F.3d at 393 (citing *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9<sup>th</sup> Cir.), *cert. denied* 516 U.S. 955 (1995)). *See also Golden State Transit*, 754 F.2d at 832 n.3 (the Court may exercise its discretion to hear contrary authority on applicable issues of law decided in previous appeal). Clearly, this Court would not be bound to follow a previous decision on the merits of the case in *R-CALF II*, if indeed there had been one, since it is within the Court’s discretion to decide whether to treat matters resolved on a prior appeal as the law of the case. *See Humanitarian Law Project*, 352 F.3d at 393; *see also City of Los Angeles Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9<sup>th</sup> Cir. 2001) (law of the case doctrine “‘is discretionary, not mandatory,’ and is in no way a ‘limit on [a court’s] power.’” (quoting *United States v. Houser*,

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that did not happen in this case, and indeed, as noted at p. 3 *supra* and pp. 16-17 *infra*, extensive briefing on the merits occurred after the preliminary injunction hearing at the joint request of the parties.

804 F.2d 565, 567 (9<sup>th</sup> Cir. 1986)). Thus, it certainly cannot be said that the outcome of this appeal is “beyond dispute.” See *United States v. Hooton*, 693 F.2d at 858.

Significantly, in *Humanitarian Law Project*, this Court noted that “[r]ulings-predictions-as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily apply as the law of the case....” *Id.* (quoting 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478.5 (2002)). This, of course, was precisely the type of ruling contained in *R-CALF II*: that R-CALF USA had not demonstrated the likelihood of success on the merits necessary for a preliminary injunction because the Final Rule would “likely survive judicial scrutiny under the correct legal standard.” 415 F.3d at 1105. Thus, the very opinion on which the Motion rests in fact confirms that the law of the case doctrine should not apply here.

Also, a critical factor in *Humanitarian Law Project* was that “the plaintiffs presented no evidence in addition to that submitted in their earlier motion for a preliminary injunction to support their later motion for a permanent injunction.” 352 F.3d at 393. That certainly is not the case here, as explained in the following section. In contrast, because the defendant in *Humanitarian Law Project* asserted that it had submitted additional evidence in the subsequent district court proceedings, the Court of Appeals could not apply the law of the case doctrine and

did consider, in the appeal of the permanent injunction, whether the district court had properly addressed that additional evidence. *Id.*

**IV. The facts and arguments presented in briefing the summary judgment motions were not all previously considered by this Court in *R-CALF II*.**

The Motion claims that “[a]ll of the issues presented by plaintiff’s summary judgment motion have already been considered and rejected by this Court.” *Id.* at 1. It also implies that no new arguments or facts were presented in briefing of the cross-motions for summary judgment: “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.”<sup>2</sup> The Motion relies solely on Appellees’ *ipse dixit*, with no comparison of the arguments and evidence submitted in the two proceedings.

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<sup>2</sup> Motion at 5. Presumably USDA meant that no new arguments, law, or facts were presented in the summary judgment proceedings that had not been offered in the preliminary injunction proceedings or USDA’s appeal of the preliminary injunction, since the remand to the District Court occurred after the cross-motions for summary judgment already had been fully briefed and were awaiting a hearing. The statement in the Motion is not even correct literally, however: R-CALF USA’s January 6, 2006 Memorandum in Support of Plaintiff’s Motion To Set Motions for Summary Judgment for Argument (D. Ct. Docket No. 164, attached as Exhibit 1) and its February 7, 2006 Reply Memorandum in Support of Plaintiff’s Motion To Set Motions for Summary Judgment for Argument (D. Ct. Docket No. 174, attached as Exhibit 2) asked the District Court to take judicial notice of numerous government statements subsequent to the opinion in *R-CALF II* that are inconsistent with the explanations offered for the Final Rule. R-CALF USA submitted those government documents as exhibits to that motion and reply. *See, e.g.*, Exhibit 1 at 11-15; Exhibit 2 at 8. Such inconsistent explanations are grounds for overturning a rule. *See, e.g., Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946, 959 (9<sup>th</sup> Cir. 2005).

Indeed, that type of comparison is something that should be contained in briefing that had been scheduled on the instant appeal, rather than in a motion for summary affirmance. *Cf. United States v. Hooton*, 693 F.2d at 858 (“We will not...ordinarily entertain a motion to affirm where an extensive review of the record of the district court proceedings is required.”). Accordingly, a full refutation of Appellees’ unsupported assertions should await briefing of this appeal, but R-CALF USA will provide just a brief indication of how the record of the proceedings below belies Appellees’ assertions.

In the summary judgment proceedings, the parties submitted approximately 100 pages of argument to the District Court. (The Tables of Contents of R-CALF USA’s and USDA’s initial memoranda supporting summary judgment and reply memoranda, D. Ct. Docket Nos. 103, 118, 140, and 150, are attached as Exhibits 3-6 to this opposition.) Except for R-CALF USA’s initial memorandum in support of its motion for summary judgment, all of the other memoranda were filed after the USDA filed its reply brief in *R-CALF USA II* on June 9, 2005. Both R-CALF USA and USDA submitted hundreds of pages of exhibits in support of their motions for summary judgment. *See* Exhibits 3-6. These included numerous declarations of USDA witnesses and outside experts that were not part of the preliminary injunction proceedings and appeal. USDA, for example, submitted two declarations each from outside consultants, Philip B. Stark and William D.

Hueston, who had not previously submitted a declaration nor otherwise been mentioned in the case. R-CALF USA also submitted new declarations, including a 10-page declaration by Stanley B. Prusiner, M.D., winner of the 1997 Nobel Prize for Medicine for his discovery of the infectious protein agents (which he named “prions”) that cause fatal neurodegenerative diseases, such as BSE in cattle.

USDA and R-CALF USA alike made reference in the summary judgment proceedings to the Supplemental Administrative Record, which USDA did not even file until after the preliminary injunction had been issued, *see* p. 3, *supra*, and to amendments to the Final Rule that were published April 8, 2005, 70 Fed. Reg. 18,252, more than a month after the preliminary injunction hearing. R-CALF USA also directed the District Court’s attention to “technical amendments” to the Final Rule published March 14, 2006, 71 Fed. Reg. 12,994, which R-CALF USA argued demonstrate that USDA inaccurately characterized the Final Rule to the District Court in briefing on the application for a preliminary injunction and in briefing before this Court in *R-CALF II*. *See* Exhibit 7 to this opposition.

R-CALF USA asked the District Court to take judicial notice of, *e.g.*, a press conference involving Appellee Secretary Johanns and other USDA officials that took place after briefing in *R-CALF II* was complete and scientific articles and commentary published after the preliminary injunction proceedings in the District Court (Exhibits 1, 6, and 7 to Reply Memorandum in Support of Plaintiff’s Motion

for Summary Judgment and Opposition to Defendants' Cross-Motion) and to a USDA analysis of BSE in cattle in North America published in April 2005 that concluded there is a BSE "hot spot" in the province of Alberta (Exhibit 11 to Memorandum of Points and Authorities in the Support of Plaintiff's Motion for Summary Judgment, at 25).

New legal arguments were advanced in the briefing of the cross-motions for summary judgment that were not discussed in the preliminary injunction proceedings or appeal, as well. For example, R-CALF USA argued for the first time in its Memorandum in Support of Summary Judgment that USDA's assumption that the Canadian feed bans was "highly effective" was inconsistent with record evidence about the practical difficulties of enforcing a feed ban, experience in other countries, USDA's own published assessment of the effectiveness of the Canadian feed ban, and a Government Accountability Office study showing incomplete effectiveness of the similar U.S. feed ban. *Cf.* Exhibit 8 (excerpt of Memorandum in Support) *with* 415 F.3d at 1098. R-CALF USA also argued that the explanation USDA provided for the Final Rule was inconsistent with the Animal Disease Risk Assessment, Prevention, and Control Act of 2001, P.L. 107-9, and its legislative history. *See* Exhibit 1 at 5 n.2.

Thus, USDA's assertion that "[a]ll of the issues presented by plaintiff's summary judgment motion have already been considered and rejected by this

Court” (Motion at 1) and there were no new facts or arguments presented at the summary judgment stage (Motion at 5) is not only lacking any citation to the record, it is directly at odds with the record. Certainly USDA has not made the overwhelming showing necessary for the Court to grant summary affirmance before R-CALF USA has even filed its first brief.

USDA’s only apparent attempt to address facts that were not considered at the preliminary injunction stage, in footnote 2 on page 5 of the Motion, is extremely misleading. The events since the preliminary injunction proceedings do not just represent “the discovery of infected cows that were born before or shortly after the Canadian feed ban began....” *Id.* Canada has now found eight cases of BSE in Canadian-born cattle that died in Canada, in addition to the one case of BSE in a cow that had been imported from Alberta Province to Washington State at over four years of age. *See* Canadian Food Inspection Agency statements at <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/comenqe.shtml> and <http://www.inspection.gc.ca/english/corpaffr/newcom/2006/20060823e.shtml>. In just the past year, three cases have been found in Alberta Province, confirming the BSE hot spot there. *Id.*; *cf.* p. 16, *supra*.

Most significantly, and directly contrary to the Motion, three of the latest BSE cases were in cattle not even born until years after the Canadian feed ban went into effect in July 1997. A cow in Alberta determined to have BSE in

January 2006 was born almost three years after the Canadian feed ban, as was a cow in British Columbia diagnosed in April 2006.<sup>3</sup> And another Alberta cow with BSE discovered this summer was born almost *five years* after the Canadian feed ban.<sup>4</sup> These facts directly contradict USDA's assumption that the Canadian feed ban had been effective to prevent exposure of cattle to the BSE infective agent in cattle feed for almost eight years at the time it promulgated the Final Rule. *See, e.g.,* 70 Fed. Reg. at 485 (decision to allow imports of under-thirty-month-old cattle based on assumption they could not have been exposed to potentially contaminated feed because they were born after Canada's feed ban), 513-14, 516; *cf. R-CALF II*, 415 F.3d at 1097 (accepting USDA's assertion that the Canadian feed ban has been effective and will result in decreasing prevalence of BSE in Canada). Rather than supporting USDA's key assumptions about the low and declining prevalence of BSE in Canada, data not available during the preliminary injunction proceedings and appeal indicate, if anything, an increasing prevalence of BSE, with five of the nine cases in Canadian-born cattle having been diagnosed

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<sup>3</sup> *See* <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/ab2006/4investe.shtml> and <http://www.inspection.gc.ca/english/anima/heasan/disemala/bseesb/bccb2006/5investe.shtml>.

<sup>4</sup> *See* <http://www.inspection.gc.ca/english/corpaffr/newcom/2006/20060713e.shtml>.

in just the past year. *Cf.* citations on p. 17, *supra*, with *R-CALF II*, 415 F.3d at 1097 (adopting USDA’s claim that the rate of BSE in Canada is decreasing).<sup>5</sup>

The fact that the Court in *R-CALF II* decided that R-CALF USA had not shown a likelihood of success on the merits to support a preliminary injunction in no way means that the *R-CALF II* decision addressed, much less disposed of and prevented the District Court’s consideration of, facts and arguments that were not even presented in connection with the application for preliminary injunction or USDA’s appeal of the preliminary injunction. As this Court has explained:

Decisions on preliminary injunctions require the District Court to assess the plaintiff’s likelihood of success on the merits, not whether the plaintiff has actually succeeded on the merits. *See City of Anaheim v. Kleppe*, 590 F.2d 285, 289-90 (9<sup>th</sup> Cir. 1978); *Beal v. Stern*, 184 F.3d 117, 129-30 (2d Cir. 1999). Additionally, decisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record. *University of Texas v. Camenisch*, 451 U.S. 390, 395...(1981). Thus, even though the facial challenge presented to the District Court here involved primarily issues of law, we see no reason why the court should have deviated from the general rule that decisions on preliminary injunctions “are not binding at trial on the merits,” *id.*, and do not constitute law of the case,...

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<sup>5</sup> Note also that USDA’s statement that the discovery of additional cases of BSE in Canada had no effect on USDA’s conclusions about the risk of BSE from Canada (Motion at 3 and 5 n.2) is also false. As a direct result of the two cases reported in early January 2005, USDA promptly suspended imports of beef from cattle over 30 months of age at the time of slaughter that had been authorized by the Final Rule. *See* “Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Partial Delay of Applicability,” 70 Fed. Reg. 12,112 (March 11, 2005).

*Southern Ore. Barter Fair*, 372 F.3d at 1136 (citing *Golden State Transit*, 754 F.2d at 832 n.3). See also *Pitt News v. Pappert*, 379 F.3d 96, 104 (3d Cir. 2004) (law of the case doctrine does not require “a panel hearing an appeal from the entry of a final judgment to follow the legal analysis contained in a prior panel decision addressing the question whether a party that moved for preliminary injunctive relief showed a likelihood of success on the merits”); *Royal Ins. Co. of America v. Quinn-Capital Corp.*, 3 F.3d 877, 881 (5<sup>th</sup> Cir. 1993) (factual determinations made during an interlocutory appeal of a preliminary injunction are not law of the case).

## **V. Conclusion**

For the reasons set forth above, Appellee’s Motion for Summary Affirmance is unsupported, inconsistent with the facts of the prior proceedings in this case, and contrary to applicable case law (even those cases cited in the Motion). The Motion should therefore be denied and the briefing schedule re-set. R-CALF USA respectfully requests that its opening brief be due at least 30 days after the Court’s order denying Appellees’ Motion for Summary Affirmance.

Dated: August 26, 2006

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that, on the 26<sup>th</sup> day of August, 2006, I have caused a true and accurate copy of the Plaintiff-Appellant's Opposition to Motion for Summary Affirmance to be served by U.S. Mail upon:

Michael S. Raab  
Joshua Waldman  
Appellate Litigation Counsel  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Room 7232  
Washington, D.C. 20530-0001

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Russell S. Frye