Harriet M. Hageman (Wyo. Bar. # 5-2656)
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Telephone: 202-869-5210
Harriet.Hageman@ncla.legal

222 East 21st Street
Cheyenne, Wyoming 82001
Telephone: 307-635-4888

ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; TRACY and DONNA HUNT, d/b/a THE MW CATTLE COMPANY, LLC; and KENNY and ROXY FOX,	)
Petitioners/Plaintiffs,	)
vs.	)
UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; SONNY PERDUE, in his official capacity as the Secretary of Agriculture; and KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,	)
Respondents/Defendants.	)

PETITION FOR REVIEW OF AGENCY ACTION AND COMPLAINT
FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Petitioners/Plaintiffs, Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF USA"); Tracy and Donna Hunt, d/b/a The MW Cattle Company, LLC; and Kenny and Roxy Fox, (referred to collectively below as "Petitioners") by and through their attorneys, Harriet M. Hageman and the New Civil Liberties Alliance, hereby bring this Petition for Review and Complaint against the named Respondents seeking Declaratory Judgment and Injunctive Relief, as well as to recover those attorneys' fees and costs incurred in bringing this action.

Petitioners challenge the April 2019 Agency action designated as a "Factsheet" (attached as Exhibit 1) entitled "Advanced Animal Disease Traceability: A Plan to Achieve Electronic Identification of Cattle and Bison" ("2019 RFID Plan") as issued by the United States Department of Agriculture ("USDA" or "Department") and the Animal and Plant Health Inspection Service ("APHIS"). USDA and APHIS, along with Secretary Perdue and Administrator Shea, are collectively referred to below as "Respondents."

The 2019 RFID Plan unlawfully mandates the use of "radio frequency identification" ("RFID") eartags and technology for certain categories of livestock, and quickly phases out the use of other types of animal identification, including those methods specifically approved by final rule issued in 2013 (branding, official non-RFID eartags, tattoos, group/lot identification numbers, and backtags). According to the 2019 RFID Plan, "[b]eginning January 1, 2023, animals that move interstate and fall into specific categories will need official, individual RFID ear tags." Respondents have no legal authority to mandate such RFID use.

INTRODUCTION

2013 Final Rule

1. On January 9, 2013 APHIS (a division of USDA), published the regulation entitled "Traceability of Livestock Moving Interstate," 78 Fed. Reg. 2040 (attached as Exhibit 2), with an effective date of March 11, 2013 (referred to below as the "2013 Final Rule"). The 2013 Final Rule (set forth in the newly-created 9 C.F.R. Part 86) established requirements for the official identification and documentation necessary for the interstate movement of certain types of livestock. The Petitioners are primarily concerned with the 2013 Final Rule as it relates to the identification and interstate movement and sale of cattle.

2. APHIS issued a variety of summaries related to the 2013 Final Rule, describing such things as purpose, species covered, requirements and standards of compliance. APHIS's summaries were designed to minimize confusion by also describing what is *not covered or required* by the 2013 Final Rule. According to APHIS (and as relevant here):

a. The 2013 Final Rule established minimum national identification and documentation requirements for the traceability of livestock moving interstate. *Summary of General Requirements by Species* at 1 (attached as Exhibit 3). The rule applies only to "sexually intact" cattle 18 months of age or over (*e.g.*, it does not apply to feeder/stocker livestock). *Id.* at 2-3. The requirements do not apply to livestock moving within Tribal lands that straddle a State line (so long as the Tribe has a separate traceability system from the States in which such lands are located), or to certain custom slaughter facilities. *Id.* at 1.

b. "Official Identification Devices and Methods" include an "official eartag," properly registered brands accompanied by an official brand inspection certificate, tattoos and

other identification methods acceptable to breed associations (accompanied by a breed registration certificate), "group/lot" identification numbers, backtags, *or* other forms of identification as agreed to by the shipping and receiving states. *Id.* at 2.

c. Exemptions from the identification rule include certain commuter herds, livestock moved directly from a location in one state through a second state to a second location in the original state, livestock moved interstate directly to an approved tagging site and officially identified, and livestock moved directly to slaughter (if harvested within three days). *Id.*

d. The 2013 Final Rule was designed to allow for "maximum flexibility for States, Tribal Nations, and producers to work together to find identification solutions that meet their local needs...." *APHIS Factsheet, Questions and Answers* (December 2012) at 1 (attached as Exhibit 4). It was also designed to "[e]ncourage[] the use of low-cost technology...." *Id.* In keeping with the use of "maximum flexibility" and "low-cost technology," the 2013 Final Rule accepted the use of brands, tattoos, and breed registrations as official identification, as well as "permanently" maintaining the use of backtags as an alternative to eartags for livestock moved directly to slaughter. *Id.*

e. The 2013 Final Rule allowed producers to use a variety of "official identification numbers" and "official eartags," based upon the "National Uniform Eartagging System ("NUES"), an "Animal Identification Number" ("AIN"), *or* a "location-based number system." *Id.* at 2-3.

f. The 2013 Final Rule supported the use of "low-cost technology" for cattle identification by allowing for the use of the NUES (metal eartags). "To encourage its use USDA plans to provide these eartags at no cost to producers to the extent funds are available."

Id. at 3. The 2013 Final Rule also *prohibited* States and Tribes from requiring the use of radio frequency identification technology:

> While other producers may elect to use official eartags with radio frequency (RF), *no state or tribe may require official RF eartags for cattle moving into their jurisdiction.* This ensures that all producers using the low cost official eartags may move their cattle to any other State or Tribal land using that method of official identification. This is a change to existing regulations in that a State or Tribe could currently require a specific method of official identification for livestock entering their jurisdiction.

Id. (Emphasis added).

g. Flexibility and minimizing the cost to producers were driving forces underlying the 2013 Final Rule:

> One of the USDA's priorities when it designed the framework for animal disease traceability was to ensure that producers were not adversely impacted by the cost of the program by focusing on low-cost technologies. USDA plans to provide the NUES tags (metal eartags) available at no cost to producers to the extent funds are available. The final rule also allows for a variety of official identification methods that have been approved by APHIS [such as official eartags, group/lot identification, brands, tattoos, and backtags], so the producer can choose a format that works best for their operation. Some of the choices can be used both for identification and herd management, minimizing the need to buy multiple tags.

Id. at 5. *See also APHIS Factsheet, Animal Disease Traceability Requirements for Cattle and Bison Moving Interstate* (December 2012) (attached as Exhibit 5) for further discussion regarding the 2013 Final Rule related to requirements, type of livestock covered, exemptions, approved official identification methods and devices, and record retention requirements.

h. USDA enforces the 2013 Final Rule through the issuance of penalties to livestock producers who repeatedly violate it. *Animal Disease Traceability (ADT) Monitoring and Compliance Review* at 1 (attached as Exhibit 6).

2019 "Rulemaking" by Another Name

3. APHIS/USDA issued the 2019 RFID Plan in April of this year without following the notice-and-comment process and without publishing it in the Federal Register.

4. The 2019 RFID Plan mandates that livestock producers use RFID eartags and technology and discontinues the use of all other types of animal identification, including those methods approved in the 2013 Final Rule. The 2019 RFID Plan mandates that certain categories of animals must be affixed with an official RFID eartag to be eligible for interstate movement. *See* 2019 RFID Plan.

5. The 2019 RFID Plan prohibits livestock producers from using the array of eartags and other livestock identification methods approved in the 2013 Final Rule. "Beginning January 1, 2023, all cattle and bison that are required to have official identification under current regulations must have official RFID ear tags. The tags should be applied at the time of birth or before the animal moves off the farm in interstate commerce." *Id.*

6. The 2019 RFID Plan establishes the specifications for the newly-required RFID eartags. "Tags must be approved by USDA and meet standards for quality and performance, be tamper proof, contain a unique ID, and display the U.S. official ear tag shield." *Id.*

7. The 2019 RFID Plan states that "[a] premises identification number (PIN) is required to purchase official ID tags[]" (*id.*), a requirement that was rejected in the 2013 Final Rule.

8. The 2019 RFID Plan was not adopted pursuant to a formal notice-and-comment rulemaking procedure under the Administrative Procedure Act ("APA"). Regardless of the procedure used, however, there is no question that it is intended as a "substantive" or "legislative" rule that is designed to impose legally binding obligations on livestock producers.

9. The 2019 RFID Plan requirements are in fact intended to repeal and replace critically important aspects of the 2013 Final Rule, including in relation to approved livestock identification methods as well as the types of livestock covered.

10. Perhaps most egregiously, the 2013 Final Rule *prohibits* States and Tribes from requiring livestock producers to use RFID for the interstate movement of livestock; the 2019 RFID Plan, on the other hand, mandates the use of RFID.

11. The 2019 RFID Plan imposes substantial managerial and financial burdens on livestock producers in terms of livestock handling and identification.

12. This lawsuit requests judicial review of the 2019 RFID Plan and the Respondents' decision, issued in violation of the 2013 Final Rule, to force certain livestock producers to adopt and use RFID technology and tags on their animals.

13. More specifically, Petitioners have brought this action to challenge the unlawful and surreptitious effort by APHIS and USDA to engage in rulemaking by adopting and imposing an across-the-board RFID program on certain livestock producers who seek the interstate movement and/or sale of their cattle. Petitioners seek an Order from this Court declaring the 2019 RFID Plan to be invalid and to have no force and effect of law, and enjoining Respondents from implementing an RFID program as stated therein.

NATURE OF ACTION

14. This is an action for a declaratory judgment and injunctive relief. Petitioners request the Court to declare unlawful, enjoin implementation of, and set aside the Respondents' 2019 RFID Plan and any related efforts to impose additional identification requirements on livestock producers.

15. Petitioners seek an Order from this Court declaring that the Respondents' actions violate the following:

a. the "Traceability of Livestock Moving Interstate" final rule found at 9 C.F.R. Part 86;

b. the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.

c. the Congressional Review Act ("CRA"), 5 U.S.C. §§ 801-808;

d. the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. (1972); and

e. the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601 *et seq*. (1980).

16. Petitioners seek an injunction barring Respondents from implementing, imposing, or otherwise requiring compliance with the 2019 RFID Plan.

17. Petitioners seek an Order from this Court mandating Respondents to comply with the statutory and regulatory provisions referenced above with regard to animal identification.

18. Petitioners seek an Order from this Court mandating Respondents to ensure State and Tribal compliance with the Animal Disease Traceability Rule, 9 C.F.R. Part 86, most specifically in prohibiting any State or Tribe from mandating that livestock producers use RFID.

19. Finally, Petitioners seek to recover their costs and reasonable attorneys' fees pursuant to applicable statutes and rules.

JURISDICTION AND VENUE

20. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question).

21. This Court also has jurisdiction pursuant to 28 U.S.C. § 2201 (declaratory relief), and §2202 (injunctive relief). The former authorizes this Court to "declare rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could

be sought. Any such declaration shall have the force and effect of a final judgment or decree...." The latter provides that this Court may grant "[f]urther necessary or proper relief based on a declaratory judgment or decree...."

22. Judicial review is also sought pursuant to the APA, 5 U.S.C. §§ 701-706.

23. This action arises under 9 C.F.R. Part 86, the APA, the CRA, the FACA, and the RFA, as well as the implementing regulations related to each.

24. United States District Court Local Rule 83.6 does not apply to the entirety of these proceedings as this is not solely a petition for review as contemplated thereby, relief is sought under authority outside the purview of the APA, and facts are alleged for actions of Respondents beyond those contained within any particular administrative record.

25. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and (e) and 1402.

PARTIES AND STANDING

Petitioners

26. Petitioner R-CALF USA was formally organized in 1999 as a public benefit corporation pursuant to the Montana Nonprofit Corporation Act, Montana Statutes §§ 35-2-113 *et seq.* R-CALF USA is the country's largest producer-only membership-based organization representing cattle producers on domestic and international trade and marketing issues. The purpose of R-CALF USA is to address and protect the market interests of cattle producers in the United States, primarily focusing upon the threats posed to the domestic live cattle industry by unfair and illegal trade practices and imports, and other economic factors (including regulatory burdens that increase production costs). R-CALF USA addresses both national and international issues that affect the profitability of domestic cattle producers.

27. R-CALF USA represents the educational, economic, business, and social interests of over 250 cattle producers within the State of Wyoming, and over 5,000 livestock producers around the United States. Its members are located in forty-three (43) states. R-CALF USA's membership is made up of a broad spectrum of cattle producers, including but not limited to cow-calf producers, cattle backgrounders, and feeders.

28. R-CALF USA was an active participant in the administrative proceedings related to the development of the 2013 "Traceability of Livestock Moving Interstate" Final Rule. R-CALF USA submitted comments (attached as Exhibit 7 (without exhibits)) on the proposed rule that resulted in the 2013 Final Rule.

29. R-CALF USA has continued to monitor, participate in, and work with Respondents in relation to the protection and promotion of livestock health, and the prevention of livestock disease. R-CALF USA has continued to monitor, participate in, and work with Respondents in relation to issues associated with the identification and traceability of livestock.

30. R-CALF USA and its members have significant and legally protectable interests in regulations or other administrative actions taken by Respondents in relation to livestock health and the prevention of disease.

31. R-CALF USA and its members have significant and legally protectable interests in regulations or other administrative actions taken by Respondents in relation to the identification, movement and traceability of livestock in interstate commerce, including but not limited to the 2013 Final Rule and the most recent RFID Plan issued in April, 2019.

32. R-CALF USA and its members have significant and legally protectable interests in Respondents' compliance with and enforcement of the 2013 Final Rule and other statutory and regulatory requirements.

33. Respondents' efforts to impose the 2019 RFID Plan on certain livestock producers, including R-CALF USA members, have caused and will cause substantial injury to R-CALF USA and such producers.

34. R-CALF USA has standing to bring the current lawsuit. R-CALF USA's member have standing to bring suit in their own right. *See Western Watersheds Project v. Christiansen*, 348 F.Supp.3d 1204, 1214 (D.Wyo. 2018). The interests at stake in this lawsuit are germane to R-CALF USA's purpose as described above. Neither the claims asserted nor the relief requested herein *require* the participation of R-CALF USA's individual members (although four members are named Petitioners as well).

35. Petitioners Tracy and Donna Hunt are cow-calf operators in northeastern Wyoming near Newcastle. They do business as The MW Cattle Company, LLC, which is organized under the laws of the State of Wyoming. Mr. and Mrs. Hunt are members of that entity. Ms. Hunt is a third-generation rancher, with her grandfather first purchasing land in this area in 1926.

36. Ms. Hunt was the first female County Commissioner for Weston County, Wyoming. She also served a six-year term on the Wyoming Livestock Board, which is responsible for regulating animal health issues and livestock theft. Mr. Hunt has been an elected official in Weston County for over 20 years, serving as the Prosecuting Attorney for 8 ½ years, as the County Coroner for 8 years, and is a current County Commissioner. He also served 6 years on

the Wyoming Game and Fish Commission. Their son Hans Hunt, who is also involved with their cattle operation, is serving his fifth term in the Wyoming State House of Representatives.

37. The Hunts are members of R-CALF USA and the Wyoming Stock Growers Association.

38. The Hunts run livestock in both Wyoming and South Dakota and move their cattle across the state line in the spring/summer and in the fall of each year. They run on deeded and leased lands. Their summer pastures are mile long and encompass thousands of acres.

39. They obtain a "commuter herd" (which crosses state lines) permit each year. Such permit is reviewed and approved by the State Veterinarian for South Dakota.

40. Because they do much of their work on horseback when sorting and trailing their livestock, they cannot use scanning equipment as they move them from state to state. It would in fact be a practical impossibility to scan RFID tags in the size of pastures used by the Hunts.

41. Considering the nature of the terrain, the size of the pastures, the manner in which the livestock are managed and moved, and the lack of available corrals, it is not operationally or economically feasible for the Hunts to use RFID eartags.

42. The Hunts use brands to identify and trace their cattle and have been doing so since they began ranching (as Ms. Hunt's father and grandfather did before her). They purchase bred heifers and cows for replacement, with such heifers and cows having already been vaccinated for brucellosis, and identified with a tattoo and a permanent metal eartag.

43. Pursuant to and in reliance upon the 2013 Final Rule the Hunts have relied exclusively on branding, as well as the metal eartags and tattoos, in order to comply with the identification and traceability requirements for the interstate movement of their cattle.

44. The Hunts primarily sell their livestock through the sale barn located in Torrington, Wyoming (situated approximately eight miles west of the Wyoming/Nebraska state line). It is common for their cattle to be shipped across state lines after such sale and, in fact, many of the buyers who purchase out of Torrington are from out of state. The Hunts also sell cattle from time-to-time in South Dakota. They have relied upon a combination of the brands, metal eartags, and tattoos to comply with the 2013 Final Rule.

45. Wyoming does not have a commercial packing plant within its borders. It is for that reason that the vast majority of livestock born and raised in Wyoming, including the cattle owned by the Hunts, will be transported across state lines at some point during their life cycle.

46. The 2019 RFID Plan places Wyoming ranchers such as the Hunts at a significant competitive, financial, managerial, and operational disadvantage as it prohibits them from using the common and standard identification techniques approved in the 2013 Final Rule. In comparison, those livestock producers who live in states with packing plants will be allowed to continue to use the common and standard identification techniques provided for in the 2013 Final Rule as they will not be required to transport their cattle across state lines to access the market.

47. Petitioners Kenny and Roxy Fox are third-generation ranchers. They have owned and operated a cow-calf ranching enterprise near Belvidere, South Dakota since 1988. Mr. Fox is also the chairman of R-CALF USA Animal Identification Committee and is past president of the South Dakota Stockgrowers Association.

48. The Foxes use brands to identify and trace their cattle and have been doing so since they began ranching (and as their fathers and grandfathers did before them). They also vaccinate

their replacement heifers for brucellosis, at which time they are identified with a tattoo and a permanent metal eartag (applied by their veterinarian).

49. Pursuant to and in reliance upon the 2013 Final Rule the Foxes have relied exclusively on branding, as well as the metal eartags and tattoos, in order to comply with the identification and traceability requirements for the interstate movement of their cattle.

50. The Foxes sell calves, cows and slaughter bulls from time-to-time across the state line in Valentine, Nebraska, and their calves have been purchased by out-of-state buyers in the past. They have relied upon a combination of the brands, metal eartags and tattoos to comply each time with the 2013 Final Rule.

51. Over the past decade Mr. Fox has participated in numerous USDA-sponsored meetings both in his area and at distant locations where the issue of animal identification and RFID eartags was discussed. He has had numerous conversations with high ranking USDA/APHIS personnel over many years regarding the problems associated with RFID requirements. He has persistently and consistently objected to the USDA's proposal to require RFID eartags and premises registration (*e.g.*, PINs) and believes that adopting such proposals would be cost-prohibitive for his ranching operation.

52. Requiring the Hunts and the Foxes to adopt and implement an RFID program would cause substantial hardship and injury to their respective cattle operations. The time and expense associated with converting to an RFID program would be substantial, with the time-line set forth in the 2019 RFID Plan being entirely unreasonable, unworkable and unrealistic.

53. R-CALF USA and its members, as well as the Hunts and Foxes, have suffered an injury in fact by the actions of Respondents. Such injury is concrete and particularized to the

organization and individual livestock producers. Such injury is actual and imminent. Such injury is directly traceable to the Respondents' actions in attempting to substitute the 2019 RFID Plan for the 2013 Final Rule. *Id.* More specifically:

a. The 2019 RFID Plan to prohibit livestock producers from using identification technology and methods *other than* RFID substantially impacts the management and operation of every single cattle producer who currently uses those identification methods approved by the 2013 Final Plan, including brands, eartags, tattoos, group/lot identification numbers, and backtags.

b. The 2019 RFID Plan substantially increases the costs associated with animal identification and traceability. According to Respondents, the cost of implementing and complying with the 2013 Final Rule is in the range of tens of millions of dollars. Implementing and compliance with the 2019 RFID Plan, however, is estimated to cost billions of dollars. Standing is established where the governmental action imposes sufficiently significant and costly compliance measures. *See Western Watersheds Project v. Michael*, 353 F.Supp.3d 1176, 1184 (D. Wyo. 2018).

c. The 2019 RFID Plan places those livestock producers within States that do not have packing facilities at a substantial economic and operational disadvantage to those producers who raise livestock in States with such facilities. This is so because only those animals that are moved *interstate* must comply with the 2019 RFID Plan; whereas those animals that are moved solely *intrastate* are not required to comply with the 2019 RFID Plan. This situation raises serious equal protection issues.

d. Livestock producers have relied upon the certainty provided by the 2013 Final Rule and have planned and managed their operations accordingly. The 2019 RFID Plan disrupts the livestock industry, creating uncertainty and confusion in terms of compliance obligations and as to whether livestock that do not meet the RFID requirements can be moved and/or sold interstate, despite the fact that the 2013 Final Rule protects such producers.

e. The 2013 Final Rule was designed to maximize flexibility for States, Tribes and livestock producers in terms of animal identification and traceability. The 2013 Final Rule was designed to protect producers' right to use low-cost technology related to animal identification and traceability. Yet the 2019 RFID Plan's RFID requirement is the least flexible and the most costly identification methodology available. Implementation of the 2019 RFID Plan therefore causes irreparable and immediate injury to livestock producers.

f. APHIS/USDA have asserted that they have the authority to penalize livestock producers if they fail to comply with animal identification requirements set forth in the 2013 Final Rule. Considering the substance of the RFID-only identification plan, it is expected that they will seek to pursue enforcement actions against livestock producers based on those provisions as well. The threatened injury of severe penalties is sufficiently imminent to establish standing. *See American Petroleum Institute v. United States Department of the Interior*, 366 F.Supp.3d 1292, 1300 (D.Wyo. 2018). In fact, the phase-in of the 2019 RFID Plan begins in December of this year, with the USDA discontinuing the issuance of free metal eartags at that time.

g. The 2013 Final Rule prohibits States and Tribes from adopting and imposing an RFID-only identification program. The 2019 RFID Plan contradicts and violates the 2013 Final Rule, thereby nullifying the protections provided by that prohibition.

h. The 2013 Final Rule provided substantial protections to those producers who use certain identification methods. The 2019 RFID Plan seeks to abolish those protections.

i. The 2013 Final Rule was properly adopted pursuant to the requirements of the APA; the 2019 RFID Plan was not.

54. Petitioners have suffered a deprivation of their procedural rights by the Respondents' violation of the notice-and-comment requirements of the APA.

55. A judicial decision in favor of R-CALF USA and its members will prevent or redress the injury described herein. *See Western Watersheds Project*, 348 F.Supp.3d at 1214. An injunction forbidding Respondents from enforcing the 2019 RFID Plan would safeguard and protect Petitioners' interests and rights.

56. There is a real need to exercise the power of judicial review in order to protect the interests of the Petitioners.

Respondents

57. USDA is an executive branch agency of the United States of America.

58. Respondent Sonny Purdue is the Secretary of Agriculture. He has the statutory duty to comply with the agency's own regulations (*i.e.*, the 2013 Final Rule), the APA, the CRA, the FACA, and the RFA. He is sued in his official capacity.

59. APHIS is a sub-agency of the USDA and is subject to the direction and control of Respondent Purdue in his official capacity as Secretary of the Department.

60. Respondent Kevin Shea is the Administrator of APHIS. He has the statutory duty to comply with the agency's own regulations *(i.e.,* the 2013 Final Rule), the APA, the CRA, the FACA, and the RFA. He is sued in his official capacity.

61. Respondents are responsible for implementing, complying with, and enforcing the 2013 Final Rule. They cannot void the 2013 Final Rule by adoption and enforcement of the 2019 RFID Plan.

62. It was Respondents who created, drafted, and adopted the 2019 RFID Plan, and it is Respondents who seek to impose it against the Petitioners and those livestock producers who come within its mandates.

FACTS COMMON TO ALL CLAIMS: HISTORY OF 2013 FINAL RULE AND 2019 RFID PLAN

2013 Final Rule

63. The 2013 Final Rule was adopted and published pursuant to and in compliance with the rule making requirements of the APA, specifically 5 U.S.C. § 553.

64. The 2013 Final Rule governs the identification and traceability of certain types of livestock. *See* 78 Fed. Reg. 2040. The stated purpose of the 2013 Final Rule was to "improve our ability to trace livestock in the event that disease is found"; "to prevent, control, and eradicate disease"; and to establish "minimum national official identification and documentation requirements for traceability of livestock movement interstate." *Id.*

65. The 2013 Final Rule identified a variety of devices and methods that could be used for identifying and tracing livestock, including brands, tattoos, eartags, group/lot identification and backtags.

66. The 2013 Final Rule made clear that RFID eartags would not be required for livestock

producers. The 2013 Final Rule in fact prohibited States and Tribes from adopting or implementing an RFID-only program.

67. The 2013 Final Rule established that Respondents would continue to recognize brands (when accompanied by an official brand inspection certificate) as a means of official cattle identification when the shipping and receiving States or Tribes are in agreement. *Id.* at 2041.

68. The 2013 Final Rule established that Respondents would continue to allow backtags to be used in lieu of official identification on direct-to-slaughter cattle *(i.e.*, those slaughtered within three (3) days of their movement to the plant). *Id.*

69. According to Respondents, "... under the provisions of this [2013] final rule, brands, tattoos, and breed registry certificates may be recognized as official by shipping and receiving States and Tribes." *Id.* at 2050.

70. The 2013 Final Rule applied exclusively to breeding cattle over 18 months of age. Respondents excluded feeder cattle (those under 18 months of age) from the 2013 Final Rule, noting that any future identification requirements for such animals would need to be adopted pursuant to "a separate rulemaking than in this one." *Id.*

71. Respondents reiterated their decision to focus the 2013 Final Rule on livestock over 18 months of age: "After reviewing these comments [regarding the burden of compliance and limited utility], we have concluded that the inclusion of feeder cattle [those under 18 months of age] within the traceability framework can best be achieved through a separate future rulemaking...." *Id.* at 2047, 2052.

72. Respondents thus recognized in 2013 that they must follow the official APA rulemaking process (5 U.S.C. § 553) in order to impose identification/traceability requirements (such as

RFID) on livestock producers. Respondents know that they cannot adopt and impose national identification and traceability requirements other than pursuant to an official APA rulemaking.

73. Respondents knew at the time of adopting the 2013 Final Rule that they could mandate that livestock producers comply with the "official identification requirements" only through an official rulemaking, and that issuing a fact sheet or other informal "guidance" would not work.

74. The 2013 Final Rule does not require that cattle moved interstate to an approved tagging site be officially identified at the site prior to commingling with cattle or bison from other premises. The 2013 Final Rule allows commingling to occur prior to official identification provided that other practices are used that will ensure that the identity of the animal's consignor is accurately maintained until the animal is tagged with an official ear tag. *Id.*

75. The 2013 Final Rule provided that multiple "official identification methods" may be used on the same animal under certain defined circumstances. *Id.*

76. The 2013 Final Rule allowed for the use of other types of interstate movement documentation in lieu of an "interstate certificate of veterinary inspection" ("ICVI") "as agreed to by the shipping and receiving States or Tribes." *Id.*

77. The 2013 Final Rule assessed the costs and benefits of the traceability requirements being imposed on the livestock industry. According to Respondents, the annual cost of complying with the 2013 Final Rule ranged from $10.9 million (assuming that any identification eartagging would be done in conjunction with other routine livestock management practices) to $34.3 million (assuming that any identification eartagging would be undertaken separately from other routine livestock management practices). *Id.*

78. Because the 2013 Final Rule does not require the use of RFID, Respondents did not

precisely calculate the cost of compliance to implement such a radio frequency program. Those costs, however, will be exponentially higher than for other types of identification methods.

79. Respondents acknowledged in 2013 that the costs associated with adopting a full RFID system would be astronomical. According to Respondents:

> One commenter, citing a study on the cost of tagging, asserted the likely cost of the proposed rule to producers would range from $1.2 billion to $1.9 billion.
>
> The commenter cited testimony before the U.S. International Trade Commission (ITC). We believe that the costs described in that testimony included activities not associated with the provisions of the proposed rule [including costs for data management, feedlot and chute fees, and shrinkage (among others)]. ... "*The U.S. ITC testimony was also based on an electronic animal identification system involving data management and verification activities at the producer level.*
>
> *We are not disputing the cost factors for the practices referenced in the U.S. ITC report.* However, we do not believe they reflect the management practices necessary for producers to comply with the identification requirements of the traceability rule and, therefore, do not believe those cost factors are applicable in our economic analysis.
>
> Commenters stated that we ignored the cost to distribute official identification *devices and collect and maintain data on people receiving them and animals moved with them.* It was stated that we also ignored the costs of official tags bearing the required emblem, the costs of replacing existing tag systems with official tags, the costs of configuring corrals and handling facilities to allow for collection of identification information, and the costs associated with technology problems when tags are not read.

Id. at 2058. (Emphasis added).

80. The Respondents countered the comments received by declaring that the 2013 Final Rule was "*designed to allow producers to use tags that do not require any electronic or special equipment to read the official eartags.*" *Id.* (Emphasis added). The 2013 Final Rule, in other words, has no mandated RFID component.

81. Because the 2013 Final Rule does not require the use of RFID, Respondents did not

identify the benefits of implementing such a radio frequency program.

82. Respondents' effort to impose the RFID system pursuant to the 2019 RFID Plan violates their obligations under Executive Orders 12866 and 13563, as well the Regulatory Flexibility Act, all of which require the agencies to provide an economic analysis of the rule, and to maximize net benefits in relation to costs.

83. Respondents seek to avoid quantifying the costs and benefits of the 2019 RFID Plan by refusing to comply with 5 U.S.C. § 553 of the APA.

84. According to Respondents, "[t]he Secretary's approach [to the 2013 Final Rule], which called for the establishment of *minimum uniform national traceability standards*, was nevertheless intended to be sufficiently *flexible* to allow State and Tribal animal health officials to implement, with the cooperation of industry, the traceability systems that worked best for them; *it was not intended to be a top-down system under Federal control.*" 78 Fed. Reg. at 2042. (Emphasis added).

85. According to Respondents, "... it was not the intent behind the [2013] proposed rule to provide for a full-scale farm-to-plate traceability system, which *would be beyond the scope of our statutory authority.*" *Id.* (Emphasis added).

86. According to Respondents,

> ... we do agree that the identification provided by purebred registries may be adequate for disease traceability of heritage livestock. Nothing in these [2013] regulations would preclude the use of means of identification commonly employed on such animals. Our definition of *official identification device or method* is broad enough to allow for the use of tattoos and identification methods acceptable to a breed association for registration purposes when accompanied by a breed registration certificate, provided that those methods are determined to be official by the receiving State or Tribal animal health authorities.

Id. (Italics in original).

87. According to Respondents, "[t]he proposed definition [in the 2013 Final Rule] allowed for the use of brands or tattoos or other methods in lieu of official identification devices when agreed to by the States or Tribes involved in the movement." *Id.* at 2046. Respondents changed the wording of the 2013 Final Rule to affirmatively "recognize brands, tattoos, and other methods as means of official identification for cattle and bison." *Id.*

88. According to Respondents, "... in keeping with our goal of having a flexible traceability system, we will allow for the use of other options deemed adequate at the local level by retaining in this [2013] final rule the provision that the shipping and receiving States or Tribes may agree to accept any other form of identification in lieu of official identification." *Id.*

89. According to Respondents,

> APHIS appreciates and supports the suggested text revisions, and in this [2013] final rule, we are modifying § 86.4(a)(1) to add to the list of official identification devices and methods for cattle brands registered with a recognized brand inspection authority and accompanied by an official brand inspection certificate if the shipping and receiving State or Tribal animal health authorities agree to recognize them as such. We are also amending the paragraph to recognize as official identification tattoos and other identification methods acceptable to a breed association for registration purposes, provided that the animals are accompanied by a breed registration certificate and that the shipping and receiving States or Tribes agree to recognize them as such.

Id. at 2048.

90. According to Respondents, "...when they are properly placed, carefully collected, and recorded, backtags are an economically efficient, easily readable, and recordable form of identification for slaughter cattle." *Id.* at 2049.

91. According to Respondents, "[a]fter reviewing these comments, we have decided to amend § 86.4(b)(1) in this [2013] final rule *to allow permanently the use of backtags* in lieu of official identification, albeit with some new stipulations." *Id.* (Emphasis added).

92. Respondents in 2013 exempted from the requirement for official identification those animals going directly to slaughter and harvested within three (3) days of their movement to the slaughter plant. "This exemption is intended to apply only to cattle that are moving directly to a slaughter plant to be slaughtered shortly after arrival." *Id.*

93. Respondents also made an exemption from the requirement for official identification for "commuter herds"—those herds owned by the same producer who may move them between properties that he/she owns or leases in two separate states. *Id.*

94. Respondents received substantial opposition to requiring the use of "premises identification numbers" ("PIN"). *Id.* at 2051. "The option of allowing a State or Tribe to issue a location identifier resulted from the strong negative feedback we received from livestock owners opposed to the premises registration component of the [National Animal Identification System ("NAIS")]." *Id.* at 2055.

95. Respondents responded to the strong opposition of mandating the use of PINs by refusing to adopt such a requirement in 2013: "In this rulemaking, while continuing to allow for the use of the PIN, we also provide for the use of a *location identification (LID) number*, which we define as a nationally unique number issued by a State, Tribal, and/or Federal animal health authority to a location as determined by the State or Tribe in which it is issued." *Id.* at 2051. (Emphasis added).

96. It is necessary to have a PIN in order for the Respondents' 2019 RFID Plan to work. Without a PIN no particular animal could be traced back to its place of origin. The 2019 RFID Plan thus mandates producers to obtain a PIN, despite the fact that the 2013 Final Rule specifically eschewed such a requirement.

97. According to Respondents, "[t]hese traceability regulations [in the 2013 Final Rule] do allow for the use of group identification numbers [('GINs')] when the animals move through the preharvest production chain as one group." *Id.* at 2052. Further, "[a] location-based GIN, particularly when associated with a registered brand, would provide a level of traceability that is cost-effective for the producer, and would likely yield the level of granularity that animal health officials seek when conducting a disease traceback investigation." *Id.* at 2053.

98. Respondents recognized in 2013 that *"[r]equiring there to be individual identification on each animal that moved through the preharvest production chain would not improve the traceability of those animals.* Thus, group/lot identification is a justified option in those situations, regardless of the size of the group." *Id.* at 2055. (Emphasis added).

99. Respondents did not mandate in the 2013 Final Rule any particular type of eartag for purposes of tracing livestock; they specifically rejected mandating RFID eartags. "In keeping with the vision for the animal disease traceability system … we have elected not to specify which eartag is required for any sector of the cattle population, as it is our thinking that this decision is best made by the producers and animal owners." *Id.* at 2052. "Additionally, with an array of official eartags, producers may choose a single eartag that meets both management and official identification needs." *Id.* at 2058.

100. The 2019 RFID Plan, in contrast, mandates that livestock producers use only official individual RFID eartags.

101. Respondents' 2013 Final Rule was designed, structured, and implemented to maximize flexibility:

> These traceability regulations list official identification devices and methods for each species of covered livestock. The diversification of animal agriculture across the United States is tremendous and, taking into account all the feedback

> we received over the last few years, we recognize that 'one size does not fit all.' Thus we designed these regulations to support the efforts of States and Tribes to work with producers at the local level to implement traceability solutions that work best for all concerned.

Id. at 2055.

102. Respondents refused in 2013 to adopt a regulation requiring all livestock to be individually officially identified (such as is required by the 2019 RFID Plan): "A commenter stated that there should be a uniform requirement, with no exemptions, that all livestock in interstate commerce be individually officially identified before moving interstate.... We do not agree with this comment." *Id* at 2055.

103. Respondents recognized in the 2013 Final Rule:

> ... there are circumstances where official identification and/or ICVIs for interstate movement of animals are not warranted from a disease-risk perspective or that the traceability of animals moving interstate may be possible without requiring official identification of individual animals. For example, livestock moved interstate to a custom slaughter facility are already identified to the person responsible for bringing the animal to the facility. An official eartag would not make the animal more traceable; thus, we exempted such livestock from the traceability requirements.

Id.

104. Respondents acknowledged in the 2013 Final Rule that States and Tribes were generally in the best position to determine identification types: "State [sic] and Tribes may use the forms of identification they prefer in lieu of official identification when the receiving States or Tribes agree to accept that method of identification for animals moving into its jurisdiction. Likewise, the level of traceability States or Tribes establish within their jurisdictions is at their discretion."

Id.

105. Respondents refused in 2013 to dictate the type of documentation that could be used:

> We recognize that there may be situations where the issuance of an ICVI is an

> economic burden. For that reason, we allow States or Tribes to issue alternative movement documentation in lieu of ICVIs when agreed to by the States or Tribes involved in the interstate movement. In this final rule, we are extending this exemption to include breeding cattle over 18 months of age, which would have been required to be accompanied by an ICVI under the proposed rule.

Id.

106. Respondents explained their rationale for refusing to use the 2013 Final Rule to impose particular types of paperwork for animal traceability:

> We agree with the commenters on the need for flexibility and alternatives in areas of the country where obtaining an ICVI would impose an economic hardship on producers. We are, therefore amending § 86.5(c)(6) in this final rule to allow for the use of alternative movement documentation for all ages of cattle and bison when agreed to by the animal health officials in the shipping and receiving States or Tribes.

Id. at 2056.

107. While they generally concluded that States and Tribes are better situated to determine animal identification requirements, there was one area where they concluded that preemption was necessary—on the question of whether States and Tribes could *mandate* the use of RFID.

108. Respondents in fact made clear in the 2013 Final Rule that States and Tribes would be prohibited from mandating that livestock producers use RFID:

> It is our view that the minimal preemption provisions provided in these regulations are necessary to ensure that no one State or Tribe can establish certain requirement [sic] for having livestock moved into their State or Tribe. *For example, we do not believe a State should be able to require that all cattle entering its jurisdiction have an RFID eartag*, nor should a receiving State be able to require a method of identification that is not listed as official in our regulations unless agreed to by the shipping State.

Id. at 2060. (Emphasis added).

109. Respondents emphasized that States and Tribes are not allowed to mandate an RFID system, actually going so far as to "preempt" this particular area of regulation:

> These regulations only preempt the specific items noted in the preemption clause in § 86.8. A State or Tribe may require official identification for livestock to enter its jurisdiction when these regulations do not, *so long as that State or Tribe does not specify a particular official identification device or method to be used if multiple ones are allowed under these regulations, or to impose requirements that would otherwise cause the shipping State or Tribe to have to develop a particular kind of traceability system or modify its existing one.*

Id. (Emphasis added).

110. Respondents reiterated this area of preemption later in the Federal Register Notice associated with the 2013 Final Rule:

> This rulemaking does not prohibit the use of RFID technology and electronic records. No State can deny entry to animals identified with electronic eartags and accompanied by electronic records if they meet the standards provided for in these regulations. *The regulations do, however, prohibit a State or Tribe from mandating the use of RFID or electronic records, or any other specific technology, for animals moving into their jurisdiction.*

Id. at 2062. (Emphasis added).

111. The text of the Final Rule (contained in 9 C.F.R. Part 86) prohibits the Respondents' efforts to force RFID on livestock producers. Section 86.4 of the new rules, for example, describes the "Official Identification" requirements. It provides for the use of a variety of identification devices and methods, none of which mandate RFID. The rule instead provides for substantial flexibility in terms of animal identification (*e.g.*, the use of brands, eartags, tattoos and backtags), with States and Tribes tasked with setting specific standards. The following quotations from Section 86.4 confirms this fact:

> (a) *Official identification device and methods.* The Administrator has approved the following official identification devices or methods for the species listed. The Administrator may authorize the use of additional devices or methods for a specific species if he or she determines that such additional devices or methods will provide for adequate traceability.
>
> (1) *Cattle and bison.* Cattle and bison that are required to be officially identified for interstate movement under this part must be identified by means of:
>
> (i) An official eartag; or

(ii) Brands registered with the recognized brand inspection authority and accompanied by an official brand inspection certificate, when agreed to by the shipping and receiving State or Tribal animal health authorities; or

(iii) Tattoos and other identification methods acceptable to a breed association for registration purposes, accompanied by a breed registration certificate, when agreed to by the shipping and receiving State or Tribal animal health authorities; or

(iv) Group/lot identification when a group/lot identification number (GIN) may be used.

(b) *Official identification requirements for interstate movement*

(1) *Cattle and bison.* All cattle and bison listed [in particular paragraphs of the rule] must be officially identified prior to the interstate movement, using an official identification device or method listed in paragraph (a)(1) of this section unless:

(A) The cattle and bison are moved as a commuter herd....

(B) The cattle and bison are moved directly from a location in one State through another State to a second location in the original State.

(C) The cattle and bison are moved interstate directly to an approved tagging site and are officially identified before commingling with cattle and bison from other premises or identified by the use of backtags or other methods that will ensure that the identity of the animal is accurately maintained....

(D) The cattle and bison are moved between shipping and receiving States or Tribes with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes.

(ii) Cattle and bison may also be moved interstate without official identification if they are moved directly to a recognized slaughtering establishment ....

A. They are moved interstate with a USDA-approved backtag; or

B. A USDA-approved backtag is applied ... at the recognized slaughtering establishment....

112. Section 86.8 confirms that Respondents "preempted" the States and Tribes from adopting RFID requirements:

> State, Tribal, and local laws and regulations may not specify an official identification device or method that would have to be used if multiple devices or methods may be used under this part for a particular species, nor may the State or Tribe of destination impose requirements that would otherwise cause the State or Tribe from which the shipments originate to have to develop a particular kind of traceability system or change its existing system in order to meet the requirements of the State or Tribe of destination.

113. In April, 2017 USDA/APHIS issued its "Animal Disease Traceability Assessment Report" evaluating the implementation and effectiveness of the 2013 Final Rule. According to the Executive Summary of that Assessment Report (portions attached as Exhibit 8):

> The [Animal Disease Traceability (ADT)] framework relies on the use of basic, cost-effective identification methods used in APHIS' disease eradication programs and are widely accepted by producers. However, the challenges and limitations resulting from visual-only low cost identification eartags are evident. Yet the implementation of radio frequency identification (RFID) technology, while preferred by many, also has obstacles. The implementation of a RFID solution for traceability, if undertaken, *would be a significant challenge and would require a lengthy implementation period and a well thought out and detailed plan.*

Id. at 5. (Emphasis added).

114. The approximate eight-month implementation period provided for in the 2019 RFID Plan (from April to December 31, 2019) is, by Respondents' own admission, woefully inadequate. The 2019 RFID Plan cannot be considered to be either "well thought out" or a "detailed plan."

2019 RFID Plan

115. In April of this year Respondents announced a dramatic shift in terms of livestock identification and traceability, thereby nullifying the very heart and soul of the 2013 Final Rule.

116. Respondents made this announcement through a benign-sounding "Factsheet," apparently hoping that the innocuousness of the name would counteract its import.

117. The 2019 RFID Plan, however, is anything but a mere "factsheet," or a simple statement of "guidance."

118. The 2019 RFID Plan instead represents a dramatic shift in agency policy regarding animal identification.

119. The 2019 RFID Plan is designed to have a profound impact on livestock production, management, movement and sale.

120. The 2019 RFID Plan is nothing short of a nullification of the most important and substantive aspects of the 2013 Final Rule by, among other things, mandating the use of the most inflexible animal identification technology available, by imposing what is the most costly type of identification system in use, and by reversing the prohibition on mandated RFID.

121. Respondents are seeking to do through a so-called Factsheet what they not only previously outright rejected, but actually forbade the States and Tribes from doing, which is to require a substantial percentage of our country's livestock producers to implement an RFID system.

122. According to the 2019 RFID Plan (the "April 2019 Factsheet"):

a. "Beginning January 1, 2023, animals that move interstate and fall into specific categories will need official, individual [radio frequency identification ("RFID")] ear tags." *Id.*

b. Respondents will discontinue providing free metal identification tags on December 31, 2019. As of January 1, 2021, "USDA will no longer approve vendor production of metal ear tags with the official USDA shield." *Id.* "Accredited veterinarians and/or producers can no longer apply metal ear tags for official identification and must start using only Official RFID tags." *Id.*

c. Beginning January 1, 2023, "RFID ear tags will be required for beef and dairy cattle and bison moving interstate.... Animals previously tagged with metal ear tags will have to be retagged with RFID ear tags in order to move interstate. Feeder cattle and animals moving directly to slaughter are not subject to RFID requirements." *Id.*

d. "Beginning January 1, 2023, all cattle and bison that are required to have official identification under current regulations must have official RFID ear tags." *Id.* at 2. Such tags are to be applied at the time of birth, but in no event later than when the animal moves into interstate commerce. *Id.*

e. "Tags must be approved by USDA and meet standards for quality and performance, be tamper proof, contain a unique ID, and display the U.S. official ear tag shield." *Id.*

f. "A premises identification number (PIN) is required to purchase official ID tags." *Id.*

g. "States will approve and allocate discounted tags, managing the process through the current infrastructure." *Id.*

123. The purpose of the 2013 Final Rule was to establish "minimum national official identification and documentation requirements for traceability of livestock movement interstate." 78 Fed.Reg. 2040.

124. The 2019 RFID Plan represents the most onerous, burdensome, expensive, disruptive, and complicated method of animal identification and traceability currently available.

125. The 2013 Final Rule prohibited States and Tribes from requiring RFID for livestock. The RFID Plan not only allows States and Tribes to require RFID for livestock, but mandates that they do so as the use of alternatives will be prohibited.

126. The 2019 RFID Plan violates the rights and interests of the Petitioners, thereby causing injury to their mission, businesses, operations and livelihood.

CLAIMS FOR RELIEF

127. The 2019 RFID Plan imposes a dramatically new framework for livestock identification and traceability and is contrary to the plain language of the 2013 Final Rule.

128. The 2019 RFID Plan is a final rule as defined and contemplated by the APA. It has been designed and implemented to circumvent the APA rule-making process.

129. Respondents have intentionally blocked livestock producers from participating in the development of the 2019 RFID Plan, and have avoided each and every agency obligation as found in Executive Order No. 12866 and Executive Order No. 13563.

130. Respondents' 2019 RFID Plan is not only poorly constructed, but is well in excess of the agencies' authority, would be impossible to implement, violates federal law and violates the rights of the Petitioners.

131. Respondents simply do not have the authority to adopt, implement or enforce the 2019 RFID Plan.

COUNT I: Violation of 9 C.F.R. Part 86

132. Petitioners repeat and incorporate by reference the allegations of Paragraphs 1 through 131 of this Petition/Complaint.

133. 9 C.F.R. Part 86 (the 2013 Final Rule) established the minimum national official identification and documentation requirements for the traceability of livestock moving interstate.

134. For all of the reasons described above, the 2019 RFID Plan violates and is contrary to the requirements of 9 C.F.R. Part 86.

135. For all of the reasons described above, Respondents must be required to ensure that States and Tribes do not implement an RFID-only identification program.

136. The Petitioners qualify for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 as against the Respondents' implementation and enforcement of the 2019 RFID Plan.

COUNT II: Violation of the Administrative Procedure Act

137. Petitioners repeat and incorporate by reference the allegations of Paragraphs 1 through 136 of this Petition/Complaint.

138. The APA describes the process that federal agencies must follow when engaged in rulemaking. Specifically, 5 U.S.C. § 553(b) requires that the "[g]eneral notice of proposed rule making shall be published in the Federal Register…."

139. The APA also lays out the contents of such notice, including (1) a statement of the time, place, and nature of the proceedings; (2) a reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id.*

140. The APA requires federal agencies to give interested persons an opportunity to participate in the rulemaking. 5 U.S.C. § 553(c). Agencies must then consider and respond to the significant comments received.

141. When an agency promulgates a final rule it must include in the rule's text "a concise general statement of [its] basis and purpose." *Id.*

142. The APA distinguishes between two types of rules: "legislative rules" and "interpretive rules."

143. "Legislative rules" are issued through the formal notice-and-comment procedure described above and have the force and effect of law. The APA mandates that agencies follow the same formal rulemaking process when they amend or repeal a "legislative rule."

144. "Interpretive rules," in contrast, are issued to advise the public of an agency's construction of the statutes and rules which it administers. "Interpretive rules" are general statements of policy or rules of agency organization, procedure or practice. "Interpretive rules" are not subject to the notice-and-comment requirements of the APA and do not have the force and effect of law.

145. An agency cannot force compliance with an "interpretive rule."

146. Agencies are prohibited from amending or repealing a "legislative rule" through the adoption of an "interpretive rule."

147. The APA purpose and framework are not complicated. Congress intended that those types of agency action that would have a substantial impact on citizens and/or governmental entities would go through and be subject to a more rigorous and robust review; hence the rulemaking process was created.

148. The 2013 Final Rule complies with the rulemaking requirements of the APA and is a "legislative rule."

149. The 2019 RFID Plan as issued through a "Factsheet" did not comply with the rulemaking requirements of the APA.

150. The 2013 Final Rule is clear and unambiguous in terms of allowing for the use of a variety of methods to identify and trace livestock, including brands, different types of eartags, tattoos, group/lot identification, and backtags.

151. The 2013 Final Rule is clear and unambiguous in terms of rejecting a requirement that livestock producers use an RFID system.

152. The 2013 Final Rule is clear and unambiguous in terms of rejecting a requirement that livestock producers obtain PINs.

153. The 2013 Final Rule is clear and unambiguous in terms of prohibiting States and Tribes from mandating an RFID system.

154. The 2013 Final Rule is clear and unambiguous in terms of providing for maximum flexibility and the use of low-cost technology for livestock identification and traceability.

155. The 2013 Final Rule does not call out for "clarification," "interpretation," or "explanation." It is neither uncertain nor ambiguous. To quote the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law."

156. Respondents' 2019 RFID Plan conflicts with the 2013 Final Rule and is therefore substantively invalid; to find otherwise would allow Respondents to create *de facto* a new regulation without going through the necessary process.

157. The 2019 RFID Plan is not simply a "reasonable construction" of the 2013 Final Rule.

158. The 2019 RFID Plan represents an effort by Respondents to create a new regulation under the guise of interpreting the 2013 Final Rule.

159. The 2019 RFID Plan directly contradicts the 2013 Final Rule in numerous respects, including being the least flexible, most burdensome, and most costly in relation to livestock identification, in requiring the use of RFID, in requiring producers to obtain PINs, and in phasing out the use of alternative forms of identification.

160. The RFID Plan violates every substantive aspect of the 2013 Final Rule with regard to what livestock producers are required to do in relation to identification and traceability of their cattle.

161. Respondents are seeking to use the RFID Plan to not only amend the 2013 Final Rule, but to actually repeal and replace it, all without going through the necessary APA rulemaking process.

162. Considering the import, significance, and substance of the 2019 RFID Plan—forcing a substantial majority of livestock producers to convert to an RFID program—there can be no question that it must be considered a "legislative" rule, despite the Respondents' efforts to sidestep compliance with the APA's rulemaking requirements.

163. The 2019 RFID Plan is "final agency action" for purposes of the APA. The 2019 RFID Plan marks the consummation of Respondents' decision-making process with regard to the types of identification producers will be allowed to use when moving cattle and bison into interstate commerce. The 2019 RFID Plan is neither tentative nor interlocutory in nature.

164. The 2019 RFID Plan is one from which rights and obligations have been determined, and from which legal consequences will flow.

165. The 2019 RFID Plan provides a timeline for full implementation and mandates that "all cattle and bison that are required to have official identification under current regulations *must* have official RFID ear tags." (Emphasis added). It also specifies tag particulars: "Tags must be approved by USDA and meet standards for quality and performance, be tamper proof, contain a unique ID, and display the U.S. official ear tag shield." It also forces livestock producers to obtain a PIN, as such a PIN "is required to purchase official ID tags."

166. Respondents have indicated that they believe they have the authority to penalize livestock producers who do not comply with animal identification requirements. Considering the substance of the 2019 RFID Plan, it is reasonable to assume that they will seek to extend that enforcement authority to the RFID program.

167. All livestock producers who fail or refuse to implement an RFID system risk being barred from selling their livestock in interstate commerce.

168. The 2013 Final Rule bars States and Tribes from adopting and implementing an RFID-only system; the 2019 RFID Plan essentially forces States and Tribes to adopt such a system, which in turn forces producers to comply or forgo the interstate movement or sale of their livestock.

169. The 2013 Final Rule provides for the use of a variety of eartags for identification and traceability. Pursuant to the 2019 RFID Plan, however, vendors will be prohibited from producing any non-RFID eartags for official identification. Veterinarians and producers will also be prohibited from applying non-RFID eartags for cattle and bison moved interstate, and "must" start using only the RFID eartags.

170. The 2019 RFID Plan speaks in mandatory language, making clear that it is intended to be a legislative rule.

171. The 2019 RFID Plan withdraws the discretion inherent in the 2013 Final Rule (related to the use of a variety of identification methods), which withdrawal alters the legal regime, and binds livestock producers, States, Tribes, veterinarians, and eartag vendors. The 2019 RFID Plan therefore qualifies as final agency action.

172. The 2019 RFID Plan binds Respondents as well, narrowing to exactly "one" the type of identification that they will accept for the covered livestock—RFID eartags. The Plan binds agency staff and, by definition and in practice, bars them from approving the use of non-RFID identification methods for a huge segment of the livestock industry.

173. The 2019 RFID Plan creates "safe harbors," with those producers who comply with the mandate being able to move their livestock interstate, while those producers who choose to rely upon the 2013 Final Rule are at risk for being denied access to interstate markets. That "safe harbor" aspect is further evidence of its being a final rule. Private parties, States and Tribes, in other words, can rely on the 2019 RFID Plan as a norm or safe harbor by which to shape their actions.

174. The 2019 RFID Plan has a practical binding effect such that private parties (livestock producers, veterinarians, and eartag vendors), as well as States and Tribes, are reasonably led to believe that failure to conform will bring adverse consequences.

175. The 2019 RFID Plan commits Respondents to a view of the law that allows them to mandate the use of RFID for identification and traceability, to ban the use of other types of

identification, and to force the Petitioners and other producers to alter their conduct or expose themselves to being penalized and/or prohibited from moving their livestock interstate.

176. The Respondents have requested an appropriation of a substantial amount of money (upwards of $4,000,000 according to their FY 2020 Budget Justification submitted to Congress) to implement the 2019 RFID Plan.

177. The 2019 RFID Plan constitutes an unlawfully promulgated substantive rule issued without notice and an opportunity for comment.

178. The 2019 RFID Plan violates the APA.

179. The APA requires that an agency action be held unlawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "in excess of statutory jurisdiction, authority, or limitations;" or "without observance of procedure required by law...." 5 U.S.C. §§ 706(2)(A), (C), and (D).

180. Respondents' action in issuing the RFID Plan is, by definition, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Such action violates the 2013 Final Rule.

181. Respondents' action in issuing the RFID Plan is, by definition, in excess of statutory jurisdiction, authority, and limitations.

182. Respondents' action in issuing the RFID Plan is, by definition, without observance of procedure required by law.

183. Petitioners will suffer immediate, direct, adverse, and irreparable injury if Respondents are allowed to implement the RFID Plan.

184. Petitioners qualify for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 as against the Respondents' implementation and enforcement of the 2019 RFID Plan.

COUNT III: Violation of the Congressional Review Act

185. Petitioners repeat and incorporate by reference the allegations of Paragraphs 1 through 184 of this Petition/Complaint.

186. The CRA establishes the mechanism by which Congress may review and overturn agency rules. *See* 5 U.S.C. §§ 801-808. The CRA is designed to restore a measure of accountability in that before an agency rule may take effect, the agency must submit a report to both houses of Congress and the Comptroller General, along with a copy of the rule, for review. Once submitted, Congress has a set timeframe within which to review the information and, if desired, pass a joint resolution voiding the rule.

187. An agency's failure to submit a particular rule under the CRA is subject to judicial review.

188. Respondents were required to submit the 2019 RFID Plan pursuant to the CRA. Respondents, however, failed to do so.

189. Petitioners qualify for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 as against the Respondents' implementation and enforcement of the 2019 RFID Plan.

COUNT IV: Violation of the Federal Advisory Committee Act

190. Petitioners repeat and incorporate by reference the allegations of Paragraphs 1 through 189 of this Petition/Complaint.

191. Enacted in 1972 to combat secrecy, wastefulness, and unbalanced representation, the Federal Advisory Committee Act (5 U.S.C. App. 2 (1972)) imposes formal requirements on how an agency must involve the public in the rule making process.

192. According to Section 2 of the FACA, "standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees[,]" and "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees[.]" 5 U.S.C. App. 2 §§ (2)(b)(4) and (5).

193. According to the definitions section of the FACA, "[t]he term 'advisory committee' means any committee, board, commission, council, conference, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. . . ." 5 U.S.C. App. 2 §3 (2)(C).

194. The FACA requires any agency that establishes an advisory committee to file a formal charter; publish notice of all meetings in the Federal Register; ensure that all meetings are open to the public; keep minutes of each meeting; make publicly available records, drafts, studies, and other documents; designate a Federal officer to attend each meeting; and ensure that membership of the committee is balanced and represents a cross-section of groups interested in the subject.

195. Upon information and belief, and in direct violation of the FACA, Respondents established on or more "advisory committees." Respondents have referred to these committees at various times as the "State-Federal Animal Disease Traceability Working Group," "State Federal ADT 2017 working Group," "State-Federal ADT Working Group," "ADT 2017

Working Group," "State-Tribal-Federal Working Group," and "State-Federal Working Group." We refer to these groups collectively below as the "RFID Advisory Committees."

196. Respondents formed the RFID Advisory Committees to assist them in formulating and developing the 2019 RFID Plan. In establishing these RFID Advisory Committees, however, Respondents failed and refused to comply with the requirements of the FACA.

197. Upon information and belief, Respondents held a number of meetings and conference calls with the members of the RFID Advisory Committees.

198. Upon information and belief, these RFID Advisory Committees provided Respondents with written materials that the members of the Committees had prepared.

199. Upon information and belief, these RFID Advisory Committees provided Respondents with advice and recommendations with regard to the 2019 RFID Plan.

200. Upon information and belief, Respondents acted upon the written materials, advice and recommendations and adopted the 2019 RFID Plan.

201. Respondents failed to notify Petitioners or other interested parties that the purpose of the meetings, calls and written materials was to help Respondents develop the 2019 RFID Plan in violation of the 2013 Final Rule

202. Respondents did not involve other groups or interested parties, including Petitioners, who are opposed to the RFID Plan. Respondents did not properly and legally advise the Petitioners or other interested parties that such meetings or conference calls with these ADT Advisory Committees were occurring. Respondents failed and refused to include any groups or individuals on these RFID Advisory Committees who did not support the 2019 RFID Plan.

211. Petitioners are entitled to obtain copies of all documents related to the activities of the advisory committee(s) and associated with development of the 2019 RFID Plan.

212. Petitioners will suffer immediate, direct, adverse, and irreparable injury if Respondents are allowed to implement the 2019 RFID Plan.

213. Petitioners qualify for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 as against the Respondents' implementation and enforcement of the 2019 RFID Plan.

COUNT V: Violation of the Regulatory Flexibility Act

214. Petitioners repeat and incorporate by reference the allegations of Paragraphs 1 through 213 of this Petition/Complaint.

215. The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small governments. The purpose of the RFA is to enhance agency sensitivity to the economic impact of rulemaking on small entities and to ensure that alternative proposals receive serious consideration at the agency level. The RFA was amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA") in 1996, making judicial review of compliance with the RFA available. 5 U.S.C. § 611.

216. The RFA provides that, whenever an agency is required by the APA to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an Initial Regulatory Flexibility Analysis ("IRFA"), 5 U.S.C. § 603(a), and subsequently prepare a Final Regulatory Flexibility Analysis ("FRFA") when it promulgates the final rule. 5 U.S.C. § 604.

217. The 2019 RFID Plan was adopted in violation of the RFA.

218. Respondents failed to conduct any RFA analysis for the 2019 RFID Plan.

219. The 2013 Final Rule assessed the costs and benefits of the traceability requirements being imposed on the livestock industry. The costs ranged from $10.9 million to $34.3 million. Because the 2013 Final Rule, however, does not require the use of RFID Respondents did not precisely calculate the cost of compliance to implement such a radio frequency program.

220. Respondents acknowledged in 2013 that the costs associated with adopting a full RFID system would be astronomical, ranging from as much as $ 1.2 billion to $1.9 billion. Such information apparently came from testimony before the U.S. International Trade Commission. Respondents rejected the applicability of the higher costs to the 2013 Final Rule on the basis that such costs related to implementation of *an electronic animal identification system involving data management and verification activities at the producer level.* Importantly, Respondents did not dispute the costs, stating instead that such costs were irrelevant because the 2013 Final Rule did not require an RFID system.

221. The 2013 Final Rule was designed to allow producers to use identification methods that do not require any electronic or special equipment to read official eartags. The 2013 Final Rule, in other words, has no RFID component.

222. Because the 2013 Final Rule does not require the use of RFID, Respondents did not calculate the costs associated with imposing such a requirement through the 2019 RFID Plan.

223. Because the 2013 Final Rule does not require the use of RFID, Respondents did not analyze the benefits of such a program.

224. Respondents have failed and refused to undertake the required cost-benefit analysis of the 2019 RFID Plan.

225. With respect to the 2019 RFID Plan Respondents failed to conduct a meaningful analysis of the impacts on small entities as required by 5 U.S.C. §§ 603-605 and 607 and failed to adequately consider reasonable alternatives that would minimize the economic impact on small entities as required by 5 U.S.C. §§ 603-604.

226. Respondents' actions in violating the RFA were arbitrary and capricious and an abuse of discretion.

227. Respondents' action in violating the RFA in issuing the 2019 RFID Plan is, by definition, in excess of statutory jurisdiction, authority, and limitations.

228. Respondents' action in violating the RFA in issuing the 2019 RFID Plan is, by definition, without observance of procedure required by law.

229. Petitioners will suffer immediate, direct, adverse, and irreparable injury if Respondents are allowed to implement the 2019 RFID Plan.

230. Petitioners qualify for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202 as against the Respondents' implementation and enforcement of the 2019 RFID Plan.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray that this Court:

1. Adjudge and declare that the 2019 RFID Plan is arbitrary, capricious, an abuse of discretion, and unlawful pursuant to the 9 C.F.R. Part 86, the APA, the CRA, the FACA, and the RFA, and other laws and regulations, and that Respondents have acted beyond the scope of their legal authority in adopting those actions;

2. Grant relief under the APA to hold unlawful and set aside the 2019 RFID Plan;

3. Adjudge and declare that Respondents failed to submit the 2019 RFID Plan to Congress and the Comptroller General as required by the CRA.

4. Adjudge and declare that Respondents improperly convened an "advisory committee" in violation of the mandates of the FACA, and require Respondents to disclose all information about such "advisory committee" and all materials that were provided to or received from the "advisory committee;"

5. Adjudge and declare that the RFA analyses are nonexistent, and grant the relief authorized by 5 U.S.C § 611(a)(4), including setting aside and remanding the challenged actions until adequate economic analyses have been prepared and a new decision has been made after considering all adverse economic consequences;

6. Enjoin and restrain Respondents, their agents, employees, successors, and all persons acting in concert or participation with them, from enforcing or implementing, and requiring others to enforce or implement, the 2019 RFID Plan;

7. Enjoin and restrain Respondents, their agents, employees, successors and all persons acting in concert or participation with them from phasing out or prohibiting the use of any of the types of identification (including various eartags) provided for in the 2013 Final Rule.

8. Grant such other and further relief as the Court deems just and proper, including an award of attorneys' fees and costs.

Dated this 3rd day of October, 2019

Attorneys for Petitioners/Plaintiffs

Harriet M. Hageman (Wyo. Bar # 2636)
Senior Litigation Counsel
New Civil Liberties Alliance
1225 19th Street NW, Suite 450
Washington, DC 20036
Harriet.Hageman@NCLA.legal
(202) 869-5210