No. 05-35264

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

BRIEF OF AMICI CURIAE STATES OF MONTANA, CONNECTICUT, NEVADA, NEW MEXICO, NORTH DAKOTA, AND SOUTH DAKOTA SUPPORTING APPELLEE AND URGING AFFIRMANCE

On Appeal from the United States District Court
for the District of Montana, Billings Division,
The Honorable Richard F. Cebull, Presiding

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QUESTION PRESENTED

Did the district court abuse its discretion in determining (1) that cattle producers had shown a substantial likelihood of succeeding on the merits on their claim that the United States Department of Agriculture ("USDA") had acted arbitrarily and capriciously and in violation of statutory mandates in adopting a rule reopening the national borders to importation of cattle and beef products from Canada following an outbreak of bovine spongiform encephalopathy ("BSE"), also known as "Mad Cow disease"; (2) that the producers would likely suffer irreparable injury if the USDA implemented the rule prior to full consideration of the matter in a trial on the merits, and (3) that serious questions have been raised and the balance of hardship tips in favor of the producers due to the strength of the producers' showing on the merits and the potentially catastrophic consequences of the USDA's illegal decision?

INTEREST OF AMICI

The states of Montana, Connecticut, Nevada, New Mexico, North Dakota, and South Dakota, through their respective Attorneys General, submit this brief amici curiae pursuant to Fed. R. App. P. 29(a) in support of

the Appellee cattle producers supporting affirmance of the district court's preliminary injunction order.

As a result of eating food contaminated with BSE, by December 31, 2003, 139 British citizens had died. Nat'l CJD Surveillance Unit & Dep't of Infectious & Tropical Diseases, *Creutzfeldt-Jakob Disease Surveillance in the UK: Twelfth Annual Report 2003* at § 2.2 (undated) (hereafter "*UK Report*").[1] They died of variant Creutzfeldt-Jakob Disease ("vCJD"), or "Mad Cow disease." The vCJD outbreak in the United Kingdom is referred to as an "epidemic." Id. In 2004, Scientists predicted 540 future cases of vCJD in the UK as a result of the outbreak in that country.[2] The U.S. government acknowledges that the vCJD disease "has been linked via scientific and epidemiological studies" to BSE. Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 462 (Jan. 4, 2005) (hereafter "APHIS BSE Supp. Info."). The disease is invariably fatal.

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[1] The Report is at www.cjd.ed.ac.uk/twelfth/rep2003.htm.

[2] D. Hilton and others, Prevalence of Lymphoreticular Prion Protein Accumulation in UK Tissue Samples, Journal of Pathology (March 22, 2004), A.R. 1584-1594.

The BSE that struck the UK's cattle herds spread to Canadian cattle. Prompt, forceful action by the USDA in May, 2003 protected the Nation's cattle from BSE and substantially reduced the risk that infected Canadian beef would find its way into America's food supply. 68 Fed. Reg. 31939 (May 29, 2003).

USDA's commendable action in 2003 satisfied the foremost responsibility of government, that is, to safeguard the health and welfare of its citizens. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905); United States v. Cruikshank, 92 U.S. 542, 549 (1876). States share this duty with the federal government.

The amici states submit this brief because the federal government, with its premature decision to reopen the border, has failed to protect the amici's interests. As the cattle producers clearly established in the district court, the proposed rule puts the citizens of the amici states at risk of eating food contaminated with BSE and contracting, and dying from, vCJD. As Appellees forcefully demonstrated below, and again in their brief on appeal, rather than exercise abundant caution to protect Americans, USDA made an early decision to reopen the border and then sought science to support it. The science is suspect.

Along with their public health interest, the amici states have a substantial economic interest in USDA's proposed rule. Many of the amici are cattle producing states. Cattle production is an integral, if not vital, part of their economies.

In North Dakota, for example, there are about 11,000 cattle operations managing 1.7 million animals with a value of $1.5 billion. N.D. Agricultural Statistics Service, North Dakota Agricultural Statistics 2004, at 136-38 (Aug. 2004) (hereafter "ND Ag. Stats."). In Montana, 13,000 ranchers run 2.4 million head of cattle valued at $2.3 billion.[3] In 2003, these producers generated gross receipts of $960 million, making cattle production the largest part of the Montana's farm economy.[4] North Dakota cattle producers earned $690 million in cash receipts in 2003, making cattle production, after wheat production, the second largest component of the state's farm income. ND Ag. Stats. at 150. And these earnings have significant links to other parts of the economy. Each dollar received from exporting "livestock from the state 'turns over' about four and a half times within the state." Thor Hertsgaard,

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[3] This information is found at www.nass.usda.gov/mt/livestock/catloper.htm and www.nass.usda.gov/mt/livestock/cattle&c.htm.

[4] This information is found at www.nass.usda.gov/mt/livestock/c&cpdi.htm.

F. Larry Leistritz, Arlen Leholm, and Randal Coon, *The North Dakota Input-Output Model: A Tool for Measuring Economic Linkages*, 42 North Dakota Farm Research 36, 37 (Oct. 1984). The beef cattle industry plays an important role in the economies of the other amici states. And in some of these states ranches and cattle helped form and are an enduring part of the amici states' history, culture, and identity.

State legislatures have recognized the importance of the BSE issue. The Montana Legislature recently adopted H.J.R. 7 (Addendum 1), urging Congress to reject the USDA rules that are the subject of this case. The 2005 South Dakota Legislature adopted House Concurrent Resolution No. 1001 (Addendum 2) requesting that the border remain closed until USDA takes a number of specific steps. See also H.C.R. 3009 59th N.D. Leg. Ass.

The Plaintiff cattle producers established in the District Court that if BSE appears in United States cattle, the domestic and international market for American beef will suffer a severe blow. This blow will be felt by ranchers throughout the country. The economic consequences of a USDA misstep are staggering. This is proven by the consequences other countries suffered upon the discovery of BSE. For example, in 2001 when the disease appeared in Japanese cattle, the discovery "ravaged Japan's beef industry." Hun J. Jin and Won W. Koo, *U.S. Meat Exports and Food Safety Information*

1 (Agribusiness & Applied Eco. Rpt. No. 514, Ctr. for Agric. Pol'y & Trade Studies, N.D. State Univ.) (May 2003).

In sum, the amici states have a significant interest in this case. The public health risks are clear. Economic risks are equally apparent. For the reasons that follow, the amici states urge affirmance of the District Court's Preliminary Injunction Order.

ARGUMENT

I. A PRELIMINARY INJUNCTION IS APPROPRIATE TO PRESERVE THE STATUS QUO AND ENSURE THAT PARTIES AND THE PUBLIC INTEREST ARE NOT IRREPARABLY HARMED DURING THE PENDENCY OF AN ACTION. THE DISTRICT COURT'S ORDER IS NECESSARY TO PROTECT THE APPELLEES, THE AMICI STATES, AND THE PUBLIC INTEREST.

The USDA does not dispute that an outbreak of BSE in the United States cattle industry would endanger public health and cause severe and irreparable damage to the domestic cattle industry.[5] The USDA does claim

[5] The government has acknowledged the risk to the domestic cattle industry from introduction of BSE: "The introduction and spread of BSE in the US cattle population would have major adverse consequences for that industry. In addition to the loss of cattle to the disease and the expense of controlling it, major overseas markets for US cattle products might be closed." FDA Center for Veterinary Medicine, *Environmental Assessment for Prohibition of Protein Derived from Ruminant and Mink Tissues in Ruminant Feeds* 2 (Oct. 1996). See also Answering Brief For Appellees at 56-60.

that its proposed rule adequately guards against introduction of BSE into the domestic cattle industry. Whether this claim is true is the core question in this lawsuit. The present issue, however, is much narrower.

It is not uncommon for a court to confront a case in which the passage of the time necessary to consider the case's merits fully will, as a practical matter, prove conclusive by subjecting the complaining party to the very harm the lawsuit has been brought to prevent. The law recognizes that a court faced with such a case may protect the plaintiff from this untoward result by entering a preliminary injunction to preserve the status quo until the court can fully consider the merits.

This is such a case. The plaintiff cattle producers brought the action to prevent implementation of the USDA's ill-considered decision to open the borders to importation of Canadian cattle and beef products without requiring adequate safeguards to prevent the introduction of BSE into the domestic cattle industry and ultimately into the domestic food supply. The USDA adopted the proposed rule on January 8, 2005, to become effective March 7, 2005. R-CALF and the USDA have strenuously debated the merits of the case, but one fact appears uncontested. If the USDA is wrong in its assessment of the efficacy of its program to prevent the introduction of BSE into the United States from Canada, the consequences to the public health

could be dire, and the consequences to the domestic cattle industry will likely be catastrophic.

The court below has not held the USDA's rule invalid. It has held that implementation of the rule on March 7, 2005, before the court has fully considered the merits of the cattle producers' challenges to the rule, would be inappropriate under the governing standards for entry of a preliminary injunction. The question before the Court today is a narrow one--whether the district court abused its discretion by taking this measured and deliberate approach to consideration of the case.

The USDA adopted the proposed rule in an atmosphere in which events and the thinking of scientists were changing rapidly. Perhaps the best evidence of the fluid, dynamic environment surrounding BSE may be found in the events that occurred after the USDA announced the proposed rule.

There were only two confirmed cases of BSE traceable to Canadian cattle when the USDA developed and considered the effects of its proposed rule. On January 2nd and January 11th of 2005, however, BSE was confirmed to have infected two more Canadian cows. Ctr. for Disease Control, "BSE and CJD Information and Resources" (hereafter "CDC Report").[6] One of these cows was born in March of 1998. *CDC Report.*

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[6] The Report is at www.cdc.gov/ncidod/diseases/cjd/cjd.htm.

The birth date is significant because it is after the Canadian "feed ban" was instituted. Id. The ban went into effect in 1997. Id. It is a key part of Canada's effort to control the disease and of USDA's rationale that the risk to U.S. interests is low. E.g., APHIS BSE Supp. Info., 70 Fed. Reg. at 467 (Canada's feed ban is a "crucial element" to prevent the spread of BSE). But it now appears that the feed ban may not be as effective as anticipated and as asserted.

USDA seemed to recognize the significance of the two recent BSE discoveries. On February 9, 2005, USDA announced in the press that it would not fully implement the proposed rule on the March 7th effective date. USDA Press Release (Feb. 9, 2005). USDA's rationale for this change is that its "ongoing investigations into the recent finds of BSE in Canada . . . are not complete." Id. USDA thus acknowledged that more work needs to done. On March 11, 2005, after the district court's preliminary injunction order, USDA published formal notice of its intended partial withdrawal of the rule. 70 Fed. Reg. 12112 (March 11, 2005).

One can easily imagine that had these two new cases of Canadian BSE not been fortuitously discovered, USDA would be before this Court today defending its original rule and arguing that imports of cattle older than 30 months of age should be allowed. One can also easily wonder whether some

other events may occur that undercut the USDA's certitude about the efficacy of the modified proposed rule it defends now. The district court was clearly cognizant of the fluid nature of the situation and appropriately exercised caution by preventing USDA from proceeding until the court could completely and thoroughly consider the merits.

The district court's order serves to protect the cattle producers and the amici states and their citizens from USDA's apparent willingness to force on the producers and the states and their citizens the risk that its decision was wrong before a court can evaluate it. The amici states submit that the preliminary injunction remedy was designed specifically to provide such protection.

II. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST CLEARLY FAVOR PRESERVATION OF THE STATUS QUO PENDING THE DISTRICT COURT'S CONSIDERATION OF THE MERITS.

The USDA is obligated by law to protect certain interests. Congress has expressed a national policy to protect the nation's food supply. It is "essential" to protect the people's health and welfare "by assuring that meat and meat food products . . . are wholesome." 1907 Federal Meat Inspection Act, 21 U.S.C. § 602. See also United States v. Mullens, 583 F.2d 134, 139

(5th Cir. 1978) (the Act "is to ensure a high level" of safety in meat products); Federation of Homemakers v. Hardin, 328 F. Supp. 181, 184 (D.D.C. 1971) (the Act is to benefit consumers and give them confidence in meat products). Congress has also stated that controlling animal diseases is "essential to protect animal health, the health and welfare of the people . . . [and] the economic interests of the livestock and related industries of the United States." 2002 Animal Health Protection Act, 7 USC § 8301(1).

The USDA, per se, has no interest at stake in this lawsuit beyond its statutory obligation to advance and protect these interests. The interests the USDA is obligated to protect are those of the cattle producers and the citizens of the amici states in a safe food supply and a healthy domestic livestock industry. With all due respect, the impact of the district court's order on the cattle industry in Canada is not a relevant consideration in this matter. Nor should any temporary effects on the commercial interests of meat packers be given controlling weight when the public health and likely long-term economic damage to the domestic cattle industry are on the other side of the balance.

Where, as here, the public interest is involved, the district court was also required to consider whether the relief sought furthers the public interest. Westlands Water Dist. v. Natural Resources Defense Council, 43 F.3d 457, 459 (9th Cir. 1994). The amici states submit that in light of the potentially

catastrophic consequences of an error by USDA in the adoption of the rule, the public interest requires the preservation of the status quo until the court below has the opportunity to consider and rule upon the merits of the cattle producers' claims.

If, as the district court found likely, the cattle producers are correct in their claims that the proposed rule was ill-considered, the district court's order will have harmed no one. Of course, in that circumstance, the failure by this Court to sustain the district court's order would inflict irreparable injury on the cattle producers, the amici states, and the public at large. If, on the other hand, the courts ultimately conclude that the USDA's rule was legally adopted, the delay will have caused no permanent injury to any interest that the USDA may legally consider in its evaluation of the rule. In this situation, the district court's conclusion that the public interest favors entry of a preliminary injunction is unassailable.

CONCLUSION

This is certainly a case in which it is better for the USDA to be right than fast in its decision. The district court carefully weighed the cattle producers' claims and considered the consequences of its actions, and exercised its discretion to preserve the status quo until a trial on the merits

could be held to allow full consideration of all aspects of the claims. It is undisputed that the potential consequences of an error by the USDA in the adoption of the rule are catastrophic. The cattle producers have raised serious questions regarding the legality of USDA's adoption of the rule. In this situation, entry of a preliminary injunction cannot reasonably be held an abuse of discretion. The amici states therefore respectfully request that the district court's order be affirmed.

RESPECTFULLY SUBMITTED This 7th day of June, 2005.

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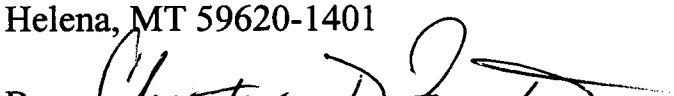
By: 
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STATEMENT OF RELATED CASES

The Amici Curiae are unaware of any related cases pending before this Court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) and CIRCUIT RULE 32-1 FOR CASE NUMBER 05-35264

I certify that:

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

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Q Monospaced, has 10.5 characters per inch and contains ___ words or ___ lines of text.

June 7, 2005
Date

Janet E. Myers
Signature

ADDENDUM 1

2005 Montana Legislature

About Bill – Links

HOUSE JOINT RESOLUTION NO. 7
INTRODUCED BY SMALL-EASTMAN

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA URGING THE UNITED STATES CONGRESS TO REJECT THE UNITED STATES DEPARTMENT OF AGRICULTURE'S PROPOSAL TO RESUME LIVE CATTLE TRADE WITH CANADA UNTIL MONTANA PRODUCERS AND CONSUMERS CAN BE ASSURED THAT THE FOOD SUPPLY IS SAFE FROM BOVINE SPONGIFORM ENCEPHALOPATHY (BSE) AND THAT THE CATTLE INDUSTRY OF MONTANA WILL NOT BE HARMED.

WHEREAS, Montana's beef industry is a significant contributor to the state's agricultural economy and is vital to Montana's economy; and

WHEREAS, Montana relies on export markets in the Pacific Rim and other markets around the world; and

WHEREAS, the United States' export markets have declined more than $2 billion since the first Canadian cow with bovine spongiform encephalopathy (BSE) was discovered in Washington state in 2003; and

WHEREAS, 70% of countries with a confirmed case of BSE have discovered additional infected animals after the initial outbreak; and

WHEREAS, Montana borders the province of Alberta, Canada, where all of the BSE-positive animals in North America have originated; and

WHEREAS, Montana provides a trucking corridor to the south for all Alberta feedlots; and

WHEREAS, 27,872 head of cattle, out of a national herd of approximately 6 million adult animals, or 0.46% of the national herd, have been tested for BSE in Canada compared to more than 199,166 in the United States, out of a national herd of approximately 80 million adult animals, or 0.24% of the national herd, despite the fact that all BSE-positive cases in North America have been discovered among the native Canadian herd; and

WHEREAS, Canada's meat and bone meal feed ban has not prevented several shipments of feed from

being turned back by the Canadian government because of unknown animal parts, there are reports that 70% of tested feed samples in Canada contained unknown animal proteins, and the Canadian Food Inspection Agency confirmed that the original BSE-positive Canadian cow that was discovered in May 2003 was rendered into nonruminant animal feed and distributed to approximately 1,800 Canadian farms; and

WHEREAS, in early January 2005, Canada confirmed a third BSE-positive animal; and

WHEREAS, the United States Department of Agriculture has announced opening the border to imports of live Canadian cattle and further Canadian beef products.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the United States Congress be urged to reject the current proposal by the U.S. Department of Agriculture to reestablish live cattle trade with Canada until safeguards have been established and specific measures have been met to assure the producers and consumers in Montana that the cattle industry in Montana will not be placed in jeopardy.

BE IT FURTHER RESOLVED that international trade be reestablished with as many countries as possible that maintain their ban on United States beef and beef products, including our largest international customers, Japan and South Korea, prior to the United States border with Canada being opened.

BE IT FURTHER RESOLVED that the United States Congress be urged to ban all meat and feed imports from countries that have not implemented and successfully enforced a 100% compliance rate with a ruminant-to-ruminant feed ban.

BE IT FURTHER RESOLVED that the United States Department of Agriculture be urged to immediately finalize reasonable, cost-efficient, and workable rules to implement mandatory country of origin labeling before any live cattle or any additional Canadian beef product imports resume.

BE IT FURTHER RESOLVED that the Secretary of State send a copy of this resolution to the President of the United States, the United States Department of Agriculture, and the Montana Congressional Delegation.

- END -

Latest Version of HJ 7 *(HJ0007.ENR)*

Processed for the Web on April 16, 2005 (10:06am)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted.

See the status of this bill for the bill's primary sponsor.

Prepared by Montana Legislative Services

(406) 444-3064

ADDENDUM 2

HOUSE CONCURRENT RESOLUTION NO. 1001

A CONCURRENT RESOLUTION, Requesting the United States Department of Agriculture to reimpose the ban on importation of Canadian cattle.

WHEREAS, United States Department of Agriculture (USDA) banned all imports of Canadian beef on May 20, 2003, after a cow from Alberta was discovered to be infected with bovine spongiform encephalopathy (BSE); and

WHEREAS, on December 23, 2003, BSE was discovered in a cow which had been imported from Alberta and discovered in Washington state; and

WHEREAS, the discovery of the second BSE infected cow resulted in the ban of at least $1.7 billion of United States beef exports into Japan and numerous other countries despite the fact that the cow was imported from Canada; and

WHEREAS, on January 2, 2005, the Canadian Food Inspection Agency (CFIA) confirmed that a third Canadian cow has tested positive for BSE; and

WHEREAS, on January 11, 2005, the CFIA detected BSE in another Alberta beef cow, not linked to the January 2nd case, and born after the 1997 feed restrictions; and

WHEREAS, no cases of BSE have been found in native United States cattle; and

WHEREAS, since 1997, the United States and Canada have prohibited the feeding of protein derived from ruminants (i.e. bone meal and meat meal) to ruminants, such as cattle, with the intention to prevent the establishment and amplification of BSE through feed and thereby minimize any risk to animals and humans; and

WHEREAS, a Canadian government study conducted in 2004 found that more than half the feed tested contained animal parts not listed on the ingredients; and

WHEREAS, there are concerns that Canada's feed ban is not being properly enforced; and

WHEREAS, the importation of Canadian cattle has the potential to jeopardize our ability to re-establish export agreements with Japan, South Korea, and other countries; and

WHEREAS, permitting the re-importation of young Canadian live cattle and also beef from older animals will unnecessarily place the United States cattle industry at a competitive disadvantage in global markets:

NOW, THEREFORE, BE IT RESOLVED, by the House of Representatives of the Eightieth Legislature of the State of South Dakota, the Senate concurring therein, that the Legislature of the State of South Dakota supports the efforts of Governor M. Michael Rounds to keep the Canadian border closed to the importation of Canadian cattle and hereby requests that the USDA initiate the following steps before lifting the import ban on Canadian cattle:

(1) Request audits of Canadian feed manufacturers and demand Canadian government officials provide a detailed assessment of feed ban compliance; and

(2) Fully define import permit systems and inspect border crossings to verify how cattle will be inspected, identified, have their age determined, and be approved for entry into the United States; and

(3) Verify Canadian compliance with BSE firewalls; and

(4) Evaluate Canada's BSE testing and surveillance program and review all the findings around the recent BSE cases; and

(5) Verify that Canada's surveillance and prevention strategies are sufficient to ensure that they have eliminated BSE in their cow herd; and

(6) Request an FDA audit of Canada's compliance with its feed ban; and

(7) Continue to ban importation of beef from Canadian cattle older than 30 months of age in any such case the ban is lifted; and

(8) Prior to implementing the rule, ensure that Canada and other trading partners with the United States adopt uniform rules regarding minimal risk countries to provide for fair and consistent trade; and

BE IT FURTHER RESOLVED, that copies of this resolution be forwarded to President George W. Bush, United States Secretary of Agriculture Mike Johanns, Senator John Thune, Senator Tim Johnson, and Representative Stephanie Herseth.

Adopted by the House of Representatives, January 18, 2005
Concurred in by the Senate, January 20, 2005

Matthew Michels
Speaker of the House

Karen Gerdes
Chief Clerk of the House

Dennis Daugaard
President of the Senate

Patricia Adam
Secretary of the Senate

State of South Dakota
~~Department of~~ House of Representatives

I hereby Certify, under penalty of perjury that the foregoing instrument is a true and correct ~~copy of the~~ original thereof as the same appears on record in this office.
In witness whereof, I have hereunto set my hand this 15th day of Feb. 2005

Karen Gerdes
(Name)

Chief Clerk
(Title)

(Seal)