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NCLA Sues USDA for Violating Federal Advisory Committee Act in Developing RFID Tech Mandate

Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America; Tracy and Donna Hunt; Kenny and Roxy Fox v. USDA et al.

Washington, DC (April 6, 2020) – The New Civil Liberties Alliance, a nonpartisan nonprofit civil rights group, filed an [amended complaint](#) today against the U.S. Department of Agriculture (USDA) and the Animal and Plant Health Inspection Service (APHIS) for violations of the Federal Advisory Committee Act (FACA). NCLA represents the trade association R-CALF USA (Ranchers Cattlemen Action Legal Fund United Stockgrowers of America) and four ranchers: Tracy and Donna Hunt from Wyoming, and Kenny and Roxy Fox from South Dakota. This lawsuit seeks to hold USDA and APHIS to its obligations under both FACA and the Administrative Procedure Act (APA) for the agencies’ operation of federal advisory committees that provided recommendations regarding how to implement mandatory electronic identification and traceability of livestock.

In 2017, APHIS established the “Cattle Traceability Working Group.” NCLA client Kenny Fox was a member of the CTWG and a vocal critic of its proposals to require “radio frequency identification” (RFID) eartags. Upon discovering that the CTWG was not producing the pro-RFID recommendations they desired, certain working group members sought to prevent anyone who opposed mandatory RFID from having a voice on the committee and from corresponding with other CTWG members and APHIS. The CTWG was ultimately dissolved in the Spring of 2019 and replaced with the “Producers Traceability Council” (PTC) advisory committee to provide similar recommendations to APHIS. Mr. Fox and other cattle producers who oppose mandating RFID eartag use have been entirely excluded from PTC membership, with only pro-RFID individuals and companies (such as electronic eartag manufacturers) being allowed to participate.

NCLA is challenging USDA’s and APHIS’s failure to comply with FACA’s statutory requirements, among other things, by establishing the advisory committees without first filing a charter and by failing to abide by FACA’s meeting, public access, disclosure, and balanced representation requirements.

NCLA released the following statement:

“The primary beneficiaries of mandatory RFID regulations are the eartag manufacturers and the four large beef packers, with both industries being well represented on the advisory committees at issue here, at the same time that RFID opponents were kept at bay. Even though USDA and APHIS removed the 2019 Factsheet from their

website, their efforts to implement the policy might resume. This Court must allow R-CALF and the ranchers affected by the agencies' actions to proceed with discovery, so that we can uncover the information exchanged, reviewed, discussed, drafted, evaluated, and disseminated by the agencies and the advisory committees in violation of FACA. This review will ensure that any future efforts to adopt the RFID requirement are not unlawfully tainted by such materials.” —**Harriet Hageman, Senior Litigation Counsel, NCLA**

Case background:

In 2013 USDA issued a Final Rule confirming that cattle and bison producers need not use RFID eartags and could instead use brands, tattoos, metal eartags, group identification numbers, or backtags. The work of the pro-RFID faction on the advisory committees played a role in drafting the [April 2019 “Factsheet”](#) released by the agencies, which purported to require livestock producers who move or sell bison or cattle across state lines to obtain a premises identification number (PIN), and also to outlaw the use of the most common forms of identification. In October 2019, NCLA [sued](#) USDA and APHIS in the Federal District Court for the District of Wyoming because the Factsheet violated the 2013 Final Rule, the APA and the FACA.

Last Fall, and within three weeks of being sued by NCLA, APHIS [removed](#) the 2019 Factsheet from its website, eventually filing a motion to dismiss claiming that such lawsuit was now “moot.” Judge Nancy D. Freudenthal, the Wyoming federal trial judge assigned to the case, [granted](#) the motion in February 2020, finding that the agencies had fully withdrawn not only the Factsheet, but the underlying policy as well.

Nevertheless, NCLA recently [found](#) an “informational page” published in the February and March 2020 editions of the *Nebraska Cattleman* magazine (jointly funded by USDA and the Nebraska Department of Ag) and almost identical to the 2019 Factsheet announcing that RFID eartags will in fact be mandatory in the near future. This discovery confirmed NCLA’s concern that the agencies have failed to issue and publish an effective retraction of the 2019 Factsheet, and that there remains substantial confusion and uncertainty in the industry.

In her order of dismissal, Judge Freudenthal did not address the Plaintiffs’ FACA claim. NCLA immediately brought this to her attention. She then handed down a modified order giving NCLA until April 6th to file an amended complaint addressing the issues related to FACA.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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