

FILED



8:25 am, 12/23/20

**Margaret Botkins**  
Clerk of Court

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

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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,

vs.

UNITED STATES DEPARTMENT OF  
AGRICULTURE, *et al*,

Defendant.

Case No. 19-CV-205-F

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**ORDER GRANTING IN PART AND DENYING PETITIONERS' MOTION  
FOR COMPLETION OF RECORD OR  
FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE**

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This matter comes before the Court by Petitioners' (hereinafter "R-CALF") motion for completion of record or for consideration of extra-record evidence. CM/ECF Document (Doc.) 47. This motion came in response to the Court's November 16, 2020 Order. Doc. 46. In the November Order, this Court allowed R-CALF to submit any request under Local Rule 83.6(b)(3) for completion of the record, or for consideration of extra-record evidence. For the reasons that follow, the Court grants R-CALF's motion under Local Rule 83.6(b)(3) to allow consideration of documents 1-4 and 6 attached to R-CALF's motion (Doc. 47-1, 47-2, 47-3, 47-4 and 47-6) and denies the motion in all other respects.

## Background

Petitioners accurately state the posture of the case which brings the instant motion before the Court:

The focus here is on whether USDA correctly determined that [the Federal Advisory Committee Act (FACA)] did not apply to its work with the [Cattle Traceability Working Group (CTWG)] and the [Producer Traceability Council (PTC)]. The ultimate question to be decided by this Court is whether USDA “established” or “utilized” these committees. Because the Court has ruled that this case is to be adjudged solely on the basis of an “Administrative Record,” such record must, at a minimum, include all of the documents that are relevant to the “established” and “utilized” issues.

Doc. 47, p. 2.

Petitioners argue the following documents are relevant to the FACA “established” and “utilized” issues and should be included in the Administrative Record:

1. A list of attendees at the September 26-27, 2017 “Strategy Forum on Livestock Traceability,” held at a hotel at the airport in Denver, Colorado (“Strategy Forum”). Petitioners allege this list demonstrates that a significant percentage of attendees at the forum were senior USDA officials. *See* Doc. 47-1.
2. The official program for the 2017 Strategy Forum. Petitioners allege this program confirms that USDA played a major role in organizing the Strategy Forum given that three of the ten members of the “Planning Committee” were senior USDA officials. *See* Doc. 47-2.
3. A September 25, 2017 slide show prepared by USDA and presented at the Strategy Forum. *See* Doc. 47-3.

4. A “White Paper” prepared following the Strategy Forum. Petitioners allege other documents in the record indicate that USDA prepared the White Paper which confirms USDA’s desire that the CTWG be formed to provide advice to USDA. *See* Doc. 47-4.
5. An undated document entitled, “Priority for Discussion and Input; USDA Summary of Feedback Topics.” Petitioners allege this document was prepared in mid-2018 by the “Opportunities and Responsibilities Task Group,” one of the subgroups formed by the CTWG, and that the document was distributed to USDA officials who participated in the subgroup’s proceedings. *See* Doc. 47-5.
6. Minutes of the April 5, 2018 meeting of the “Collection Technology Task Group,” which Petitioner alleges is another of the CTWG subgroups. Petitioners allege the document shows that a senior USDA official, Neil Hammerschmidt, attended the meeting and the minutes quote Hammerschmidt as stating that USDA was looking to CTWG for advice on animal disease-traceability issues. *See* Doc. 47-6.
7. Minutes (perhaps unofficial) of the June 28, 2018 meeting of the CTWG. Petitioners allege the document, entitled, “USDA Summary of Feedback Topics for Discussion & Input by the Opportunities and Responsibilities Task Group” (a title identical to the heading of the “ballot” (Document #4 above)), indicates that the CTWG’s discussions proceeded precisely as USDA suggested. *See* Doc. 47-7.
8. A YouTube video available only at [www.youtube.com/watch?v=DP5ZGP3x370](https://www.youtube.com/watch?v=DP5ZGP3x370) which Petitioners allege displays a slide presentation, prepared and narrated by USDA personnel in the late summer of 2017. Petitioners allege this video is highly

relevant to R-CALF's claim that the CTWG, which was established at the Strategy Forum, should be deemed to have been "established" by USDA for purposes of FACA.

9. A declaration from Plaintiff Kenny Fox dated November 30, 2020, which Petitioners allege provides Mr. Fox's first-hand account of the operations of the CTWG and of USDA's establishment of the PTC (the second advisory committee at issue in this case). *See* Doc. 47-8.

The government generally opposes Petitioners' motion on the basis that it fails to satisfy the extremely limited circumstances which warrant consideration of extra-record evidence. However, the government does not object to the Court withholding a ruling on Petitioners' Attachments 1-4 until consideration of whether USDA established or utilized CTWG and PTC as advisory panels or committees under FACA.

#### Applicable Legal Standard

Local Rule 83.6(b)(3) provides in relevant part:

To the extent a party believes the record does not contain all document(s) which were considered by the agency, a party may seek leave of Court to complete the record or may oppose a party's request for such completion. Extra-record evidence which was not considered by the agency will not be permitted except in extraordinary circumstances.

The Local Rule is consistent with caselaw from this Circuit which directs that "[t]he circumstances which warrant consideration of extra-record materials are 'extremely limited.'" *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) (quoting *American Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)). This rule reinforces the law that a court's "review of agency action is normally restricted to the

administrative record.” *Citizens for Alt. to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007). *See also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (“The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” (quotations omitted)). Therefore, the Court begins with the assumption that the agency “properly designated the Administrative Record absent clear evidence to the contrary.” *Citizens for Alt. to Radioactive Dumping*, 485 F.3d at 1097.

#### Discussion

In turning first to Petitioners’ attachments 47-1 through 47-4, while the government argues against the inclusion of these documents in the Administrative Record, it does not oppose withholding a ruling pending an order on the merits. This sort of “limbo” status for Petitioners’ documents is untenable. As to the substance of the documents, Petitioners allege the slide show (Doc. 47-3) and white paper (Doc. 47-4) were prepared by the USDA in the context of a “Strategy Forum on Livestock Traceability,” and that the list of attendees (Doc. 47-1) and the program (Doc. 47-2) indicate USDA’s involvement in the Strategic Forum. While the government argues the documents are not relevant to the issues presented in the case, it does not challenge Petitioners’ representations. Furthermore, “relevance” and what the agency considered in reaching a challenged decision are two separate standards. Therefore, the Court allows these documents as supplementation of the Administrative Record.

Next, the Court will consider attachment 47-6, which appears to be minutes from a task force associated with CTWG. Petitioners point to the remarks of Mr. Hammerschmidt

as stating that USDA was looking to CTWG for advice on animal disease-traceability issues. The government opposes inclusion of this document, claiming it does not have it in its possession, has not seen it, and Hammerschmidt had retired from APHIS approximately four months prior to the date of the minutes. The Court notes Hammerschmidt was present according to the minutes, but has no affiliation. In considering the document and Petitioners' briefing, the Court concludes Petitioners have not satisfied their burden to show that this document was considered by the USDA in reaching the challenged decision or that there is some extraordinary circumstance which warrants its consideration as an extra-record document.

In turning next to Attachments 5 and 7 (Doc. 47-5 and 47-7), these appear to be related documents on "Feedback Topics for Discussion & Input by the Opportunities and Responsibilities Task Group." Attachment 5 appears to be a request from some unknown entity to identify the priority level for certain topics, with an email supplied for response purposes ([jkritzke@equitycoop.com](mailto:jkritzke@equitycoop.com)). Petitioners allege Attachment 5 was prepared by the Task Group as a subgroup formed by the CTWG. Petitioners also allege it was distributed to USDA and USDA participated in the subgroup. Doc. 47, p. 6. The government contends APHIS officials have not seen the document and USDA officials were not part of this Task Group. Attachment 7 appears to be perhaps unofficial minutes. Again, the government contends they were not part of the Task Group and that the text seems to have been "cut and pasted" from a report posted on the APHIS public website. In considering the documents and Petitioners' motion, the Court concludes Petitioners have not satisfied their burden to show that these documents were considered by the USDA in reaching the

challenged decision or that there is some extraordinary circumstance which warrants their consideration as extra-record documents.

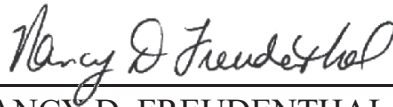
As to the YouTube video (identified as “unattached” Attachment 8 and only available on YouTube), the Court is unable to view this video given the firewalls set up to protect its available technology. Further, the Court is unwilling to bypass these protections simply on Petitioners’ representations that the video is “highly relevant.” It is the Petitioners’ burden to show that this video, which apparently is not in the agency’s possession and was not recorded by the agency, was considered by the USDA in reaching the challenged decision, or that there is some extraordinary circumstance which warrants its consideration as an extra-record supplement to the record. The conclusory allegations by Petitioners have not satisfied their burden.

Finally, the Court denies consideration of the Fox Declaration (Doc. 47-8). This declaration clearly was not considered by the USDA in any decision-making context. Further, other than declarations that Fox was a member of the CTWG and regularly attended meetings where other USDA members were present, it is replete with hearsay and phrased in a passive voice tense which fails to identify who did what, when, where, how or why. Consequently, it offers minimal if any additional probative value. Because of these issues, Petitioners have not satisfied their burden to show that there is some extraordinary circumstance which warrants consideration of the Fox declaration as an extra-record supplement to the record.

Conclusion

For the reasons explained above, the Court GRANTS Petitioners' motion (Doc. 47) as to Attachments 47-1 through 47-4. Petitioners' motion to supplement the record to allow consideration of extra-record documents is otherwise DENIED.

Dated this 22<sup>nd</sup> day of December, 2020.



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NANCY D. FREUDENTHAL  
UNITED STATES DISTRICT JUDGE