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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF WYOMING

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|---------------------------------|---|-----------------|
| RANCHERS CATTLEMEN ACTION LEGAL |) | |
| FUND UNITED STOCKGROWERS |) | |
| OF AMERICA; <i>et al.</i> |) | |
| |) | No. 19-CV-205-F |
| Petitioners/Plaintiffs, |) | |
| vs. |) | |
| |) | |
| UNITED STATES DEPARTMENT OF |) | |
| AGRICULTURE; <i>et al.</i> |) | |
| |) | |
| Respondents/Defendants. |) | |

**PLAINTIFFS’ REPLY BRIEF IN SUPPORT OF MOTION FOR COMPLETION
 OF RECORD OR FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE**

Defendants (collectively, “USDA”) seek to have things both ways. They have repeatedly argued on the one hand that the only issue before the Court is whether USDA either “established” or “utilized” the two advisory committees at issue in this case.¹ USDA seeks on the other hand to exclude from the administrative record documents prepared and/or considered by its very own

¹ Based on that argument, USDA asserts that it is irrelevant that its “administrative record” contains no documents discussing FACA or demonstrating that USDA ever affirmatively decided that it need not complete the procedures required by FACA. USDA Nov. 5, 2020 Br. at 7 (“there was no need for the agency to mention FACA because neither of the groups at issue were FACA advisory committees”). The APA normally requires an agency to articulate a “satisfactory explanation for its decision, including a rational connection between the facts found and the choices made.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019).

personnel that are directly relevant to the claims of Plaintiffs Ranchers Cattlemen Action Legal Fund United Stockgrowers of America, *et al.* (collectively, “R-CALF”), that USDA both established and utilized the two committees—the Cattle Traceability Working Group (CTWG) and the Producers Traceability Council (PTC).

USDA’s bait, switch and backflips should be rejected. If, as USDA insists, the “only issues” before the Court are whether it either established or utilized the two committees,² then the administrative record should include all documents that bear on that question. That includes each of the nine documents proffered by R-CALF, all of which are relevant to its claim that USDA did indeed both establish and utilize the CTWG and the PTC, and that such documents are thus properly part of the “whole record” that the APA mandates be considered. *See* 5 U.S.C. § 706.

The parties agree (and the documents included to date by USDA in its administrative record indicate) that the CTWG was established at a meeting in Denver, Colorado on September 26-27, 2017 entitled, “Strategy Forum on Livestock Traceability.” USDA failed to preserve (perhaps intentionally so) any documents memorializing the precise moment during the Strategy Forum when the CTWG was established. R-CALF will contend (in its merits brief) that the preponderance of the evidence demonstrates that USDA was responsible for establishing the CTWG. Among the evidence R-CALF will cite in support of that contention are documents demonstrating that the Strategy Forum was largely organized and funded by USDA and that, in advance of the meeting, USDA had called for creation of an advisory committee consisting of cattle-industry representatives who could advise USDA on how best to implement an RFID system for identifying

² *See* USDA Sept. 14, 2020 Br. at 6 (stating that “the only issues this Court needs to determine are whether the agency ‘established’ or ‘utilized’ the CTWG or the PTC”).

and tracing livestock. USDA denies that it was the principal organizer of the Strategy Forum, claiming that a private organization, the National Institute for Animal Agriculture (NIAA), was the official “host.”

Considering USDA’s theory, all of the proffered documents relating to the Strategy Forum are highly relevant to whether that Forum was (as we contend) a USDA-orchestrated event and thus whether the advisory committee created at that forum should be deemed to have been established by USDA. It is true, as USDA asserts (USDA Br. at 5), that the proffered documents do not mention FACA, but the same can be said of *every other document* (with one irrelevant exception) produced by USDA as part of its administrative record. USDA evidently chose documents for the administrative record based on their relevance to the “established” and “utilized” issues. It is therefore entirely appropriate for R-CALF to supplement the record with other documents related to the same event and that have similar relevance.

USDA objects that it did not prepare some of the proffered documents and that there is no evidence that any USDA official saw or considered some of the documents prepared by others. It is simply not credible for USDA to assert that its officials did not see and consider all of the proffered documents, given that (as demonstrated by documents in the USDA-prepared administrative record) USDA officials were in almost daily contact with members of the two advisory committees and their subgroups. In any event, the relevance of the proffered documents (*i.e.*, whether they make it more likely that USDA either established or utilized the two advisory committees) can best be determined in connection with the parties’ merits briefs.

Moreover, R-CALF objects to USDA’s efforts to supplement the record *sub rosa* at the very same time that it is opposing R-CALF’s motion for completion of the record. For example, in their objection to minutes of a CTWG meeting attended by a senior USDA official (Attachment

#6), USDA states, “agency officials do not believe they have ever seen them.” USDA Br. at 7. The statements of these unidentified officials are not part of the administrative record prepared by USDA. If R-CALF is not going to be allowed to cite evidence outside of the USDA-prepared record, then neither should USDA, especially considering the fact that R-CALF has no ability to question these officials to determine the scope of their involvement with these committees.

Similarly, USDA asserts that Neil Hammerschmidt, a long-time USDA official who worked for years to make RFID technology mandatory, and who is listed as attending the CTWG meeting described in Attachment #6, retired from USDA four months in advance of the meeting. Nothing in the administrative record supports that retirement claim. R-CALF intends to demonstrate (through other documents in the administrative record) that Hammerschmidt attended the meeting as a representative of USDA. If USDA can point to documents in the administrative record to refute R-CALF’s contention, it is free to do so. But it should not be permitted to make allegations that are not supported by the record, while also working tirelessly to prevent R-CALF from presenting documents that clearly go to the heart of the issue at hand.³

USDA objects to Attachment #9 (the Kenny Fox Declaration), citing *Olenhouse v. Commodity Credit Corp.*, 42 F.2d 1560, 1580 (10th Cir. 1994). That citation is mystifying; *Olenhouse* has nothing to say about R-CALF’s contention that the declaration of an individual with firsthand knowledge of administrative proceedings (Fox was a member of the CTWG) is

³ USDA’s objection to Attachment 8 makes no sense. USDA Br. at 8 (stating that the proffered YouTube video “is not in the agency’s possession, and the agency did not record it”). But USDA does not deny that the slide presentation depicted in the video *was* prepared by USDA and narrated by a USDA employee. Nor does USDA argue that the slide presentation is not relevant to R-CALF’s contention that USDA established the CTWG at the September 26-27 Strategy Forum. Simply because USDA apparently has lost its copy of the slide presentation is no reason to exclude it from the administrative record.

properly included in the administrative record. Moreover, *Olenhouse* (which overturned the administrative action at issue) strongly supports R-CALF's claim that agency action is arbitrary and capricious unless the agency provides a reasoned, *contemporaneous* explanation for its actions. 42 F.3d at 1577.

Finally, R-CALF is forced to renew its objections to the cavalier manner in which USDA has compiled the documents for inclusion in the administrative record it submitted to the Court. The original "record," filed on July 6, was woefully inadequate—as USDA conceded in its subsequent motion to supplement. USDA was forced to acknowledge the inadequacy of its original record, however, only *after* a FOIA request submitted by R-CALF's counsel uncovered numerous additional relevant documents. On December 11, 2020 (after R-CALF filed the current motion), USDA sent a fourth "partial" response to R-CALF's FOIA request, and produced yet another trove of records. The latest set of documents included several that are relevant to R-CALF's claim that the Strategy Forum in Denver was organized and orchestrated by USDA. For example, a March 31, 2017 document drafted by USDA stated that USDA had asked NIAA to serve as the host of the upcoming forum that USDA was planning in Denver. We assume that USDA will be filing another motion to supplement the administrative record with the additional 121 pages uncovered by R-CALF under FOIA. Suffice it to say that USDA has lost all credibility regarding its ability to produce a complete and comprehensive administrative record, and the "certifications" that it has filed with this Court are not entirely accurate.

CONCLUSION

Plaintiffs R-CALF, *et al.*, respectfully request that the Court grant their Motion for Completion of the Record or for Consideration of Extra-Record Evidence and order that Plaintiffs' nine proffered documents be made part of the record in this case.

Dated this 21st day of December 2020.

Attorneys for Petitioners/Plaintiffs

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on December 21, 2020, a copy of **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR COMPLETION OF RECORD OR FOR CONSIDERATION OF EXTRA-RECORD EVIDENCE**, was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman

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