



University of Arkansas Division of Agriculture

An Agricultural Law Research Project

**Beef, Beans, & the First Amendment:
Disappearing Sovereignty for State Beef Councils
and Soybean Boards?**

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I. INTRODUCTION

On May 2, 2016, a legal action titled *Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture*¹ was filed in Montana federal district court. This lawsuit challenges the constitutionality of a key aspect of the national beef research and promotion program established by the Beef Promotion and Research Act of 1985 (Beef Act).² The plaintiff asserts that the portion of the federally-mandated one-dollar-per-head of cattle assessment that is retained by the Montana Beef Council constitutes a “government-compelled subsidy of the speech of a private entity” which is unconstitutional under the First Amendment of the United States Constitution.³ *R-CALF* raises legal issues that could significantly impact the beef and soybean research and promotion programs, specifically including a loss of state sovereignty in the operation and administration of state beef councils and soybean boards throughout the United States. The issues raised by the litigants in *R-CALF* warrant careful consideration by any person, entity, or institution that pays, collects, remits, expends, administers, or is otherwise impacted by the national beef and soybean research and promotion programs. These issues are discussed in this article.⁴

Specifically, this article addresses a proposed rule issued by the United States Department of Agriculture Agricultural Marketing Service (AMS) on July 15, 2016 titled, *Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments*.⁵ The Proposed Redirection Rule is a key part of the defense raised by USDA to *R-CALF*. The article also addresses the historically and legally significant Memorandum of Understanding recently entered into between the Montana Beef Council and AMS that provides AMS direct oversight of the council and binds all third parties who contract with the council. The MOU was also entered into as a defense to the *R-CALF* argument that the Montana Beef Council is a private entity because it lacks sufficient federal oversight.⁶ Before addressing those issues, the article discusses the legal arguments presented in *R-CALF* by the plaintiff and USDA and how those arguments signal a loss of sovereignty for qualified state beef councils (QSBCs) and qualified state soybean boards (QSSBs) across the United States.

II. DISCUSSION

A. *R-CALF v. USDA*

¹ *Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America v. United States Department of Agriculture*, No. 4:16-cv-00041-BMM-JTJ (D. Mont. May 2, 2016) (hereinafter *R-CALF* Complaint).

² 7 U.S.C. §§ 2901 – 2911 (2012).

³ *R-CALF* Complaint at 2.

⁴ This article focuses on the Soybean Promotion, Research, and Consumer Information Act, although there is considerable overlap between Soybean Act and the Beef Act.

⁵ *Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments*, 81 Fed. Reg. 45984 (proposed July 15, 2016) (to be codified at 7 C.F.R. pt. 1220) (hereinafter Proposed Redirection Rule).

⁶ To qualify as government speech, the oversight need not be federal in nature. *See, e.g.*, *Delano Farms Company v. California Table Grape Commission*, 586 F.3d 1219 (9th Cir. 2009) and *Paramount Land Company v. California Pistachio Commission*, 491 F.3d 1003 (9th Cir. 2007) (expressing constitutionality of programs at issue because of degree of state government oversight via the California Department of Food and Agriculture).

On May 2, 2016, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) brought an action against the United States Department of Agriculture (USDA), alleging that the portion of the one-dollar-per-head of cattle assessment required by the Beef Act that is retained by the Montana Beef Council constitutes a “government-compelled subsidy of the speech of a private entity” that is unconstitutional under the First Amendment of the United States Constitution.⁷ According to R-CALF, “[t]he government-compelled subsidy of the speech of a private entity, which is not effectively controlled by the government, is unconstitutional under the First Amendment of the United States Constitution and should be enjoined.”⁸

The *R-CALF* private entity argument and the responses raised by USDA, while tailored specifically to the Montana Beef Council, could apply to other states’ QSBCs and QSSBs. Moreover, the arguments raised by the plaintiff and USDA in *R-CALF* significantly impact the sovereignty of the Montana Beef Council. Thus, the issues raised in *R-CALF* strike at the heart of the role and sovereignty of other QSBCs and QSSBs operating under the national beef and soybean research and promotion programs.

R-CALF is, in large measure, an outgrowth of *Johanns v. Livestock Mktg. Ass’n*, a 2005 United States Supreme Court decision in which the Court upheld the constitutionality of the beef research and promotion program.⁹ In *Johanns*, the issue presented was whether the same government compelled assessment at issue in *R-CALF* was unconstitutional under the First Amendment because it forced producers to pay for speech with which those producers disagreed.¹⁰ The Court ruled that the speech at issue was not unconstitutional because it constituted government speech, a determination based in part on the degree of control that the federal government had over the speech itself.¹¹

In *R-CALF*, the plaintiff calibrated the argument raised in *Johanns* to assert that the state beef council is a private entity because the state council lacks the federal oversight and control that was the basis for the government speech decision in *Johanns*. As such, the plaintiff asserts that the portion of the assessment paid by its members and retained by the Montana Beef Council is unconstitutional.

In addition, R-CALF also asserted in paragraph 74 of its complaint, the following:

None of the Montana Beef Council’s activities are undertaken with the direct oversight of the Secretary of Agriculture or any other federal official. Moreover, on information and belief, neither USDA nor the Montana Beef Council has established a procedure by which a cattle producer who disagrees with the Montana Beef Council’s message can request that the complete amount of his assessments be directed to the Beef Board, a body controlled by the federal government.¹²

⁷ R-CALF Complaint at 2. *See also* Findings and Recommendations, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. Dec. 12, 2016).

⁸ R-CALF Complaint at 2.

⁹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² R-CALF Complaint at 27-28.

The argument raised in paragraph 74 is important because it is the basis of the USDA's August 4, 2016, response to the plaintiff's complaint. Specifically, USDA states the following at the outset of its August 4 response:

Plaintiff brought this action . . . based on the mistaken 'information and belief' that USDA does not have 'a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board. Compl. ¶ 74, ECF No. 1 (May 2, 2016). Plaintiff alleges that forcing its cattle producer members to subsidize the speech of the Montana Beef Council, with which they disagree, violates the First Amendment."¹³

USDA stated in its August 4 response that it had "now made clear that, in accordance with USDA's longstanding policy, cattle producers in states like Montana may decline to contribute to a QSBC and instead direct the QSBC to forward the full amount of their federal assessment to the Beef Board."¹⁴ USDA further stated that on July 15, 2016 it issued the Proposed Redirection Rule, which applies to both beef and soybeans, "to explicitly include this option in the governing regulations."¹⁵ USDA concluded that the longstanding policy and the Proposed Redirection Rule applied such that the plaintiff lacked standing and failed to state a claim upon which relief could be granted.¹⁶ Thus, the Proposed Redirection Rule is directly germane to the question of the "private entity" argument presented in R-CALF.

On December 12, 2016, the Magistrate issued Findings and Recommendations overwhelmingly in favor of the plaintiff.¹⁷ In particular, the Magistrate stated that for purposes of whether the plaintiff had standing, the *policy* of redirection "does not remove the injury of having their assessment go towards funding speech, via a forced loan, that is contrary to Plaintiff's mission."¹⁸ The Magistrate also stated that "the presence of an opt out provision" – i.e., the policy of redirection – "is not fatal to Plaintiffs' claims and recommends that the district court deny Defendants' Motion to Dismiss for Failure to State a Claim."¹⁹ Finally, in considering the USDA Motion to Stay *R-CALF*, the Magistrate stated that "[w]hile the USDA's pending rulemaking may ultimately moot Plaintiffs concerns with the procedure for directing the MBC to send their full assessments to the Beef Board, the record before the Court does not indicate a time frame for completion of the rulemaking process."²⁰ The Magistrate added "staying this action indefinitely would be unfair to the Plaintiffs" and then recommended that the district court deny USDA's Motion to Stay.²¹

On December 23, USDA filed an objection to the Magistrate's Finding and Recommendations, arguing in part that the Magistrate "erred in determining that the redirection procedure violates the First Amendment" and

¹³ Memorandum in Support of Defendants' Motion to Dismiss Or, In The Alternative, To Stay The Case at 7, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. Aug. 4, 2016) (hereinafter Defendants' Motion to Dismiss).

¹⁴ *Id.* at 7-8.

¹⁵ *Id.* at 8.

¹⁶ *Id.* 8-9.

¹⁷ Findings and Recommendations of United States Magistrate Judge, Ranchers Cattlemen Legal Defense Fund, United Stockgrowers of America (R-CALF) v. United States Department of Agriculture, No. 4:16-cv-00041-BMM-JTJ (D. Mont. Dec. 12, 2016) (hereinafter Findings and Recommendations).

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.*

that there was sufficient federal control of the state beef council to cause the council's activities to be government speech.²² Additionally, and very importantly, USDA announced in the December 23 pleading that it entered into a Memorandum of Understanding with the Montana Beef Council that provides direct AMS oversight of the beef council and binds all third parties that contract with the beef council.²³ According to USDA, the MOU became effective December 22, 2016.²⁴ USDA stated that the MOU was entered into in a manner "consistent with defendants' statutory authority",²⁵ which indicates that USDA believes it has authority to enter into similar agreements with other state beef councils.²⁶

B. Proposed Redirection Rule: July 15, 2016

On July 15, 2016, the AMS issued the Proposed Redirection Rule. The Proposed Redirection Rule is confusing and very difficult to comprehend, but one can state with certainty that the rule would require, under certain circumstances, beef and soybean producers to "redirect" to the Cattlemen's Beef Promotion and Research Board (Beef Board) and United Soybean Board (Soybean Board) that portion of the beef and soybean assessment that would normally be collected and expended by QSBCs and QSSBs. This article focuses on the portion of the Proposed Redirection Rule that seeks to modify the Soybean Order, although there is considerable overlap in the national beef and soybean research and promotion programs.

More specifically, AMS states that the proposed rule would apply when "there is no state law requiring assessments to a state soybean board or state beef council, or (2) there is a state law requiring assessments, but the state law allows for refunds."²⁷ AMS further states that the Proposed Redirection Rule could result in decreased assessments for state beef councils and state soybean boards.²⁸ AMS predicts that twenty out of

²² Defendants' Objections to Findings and Recommendations of United States Magistrate Judge at 2-3, Ranchers-Cattlemen Action Legal Defense Fund, *United Stockgrowers of America v. United States Department of Agriculture*, 4:16-cv-00041-BMM, Doc. 45 (D. Mont., Dec. 23, 2016) (hereinafter Defendants' F&R Objections).

²³ For more information regarding the significance of the Memorandum of Understanding on state beef councils and state soybean boards, see *Recent MOU Provides Direct AMS Oversight of State Beef Council and Binds Third Parties Contracting with State Beef Council*, available [here](#).

²⁴ Defendants' F&R Objections at 26.

²⁵ *Id.*

²⁶ Ironically, plaintiff and USDA are in some degree of agreement regarding the central arguments in *R-CALF*. First, plaintiff argues in the *R-CALF* Complaint that there is no procedure available to redirect the assessment. However, USDA responds that such a process was already "longstanding policy" and that the Proposed Redirection Rule would "explicitly include this option in the governing regulations." Second, plaintiff asserts that the Montana Beef Council is a private entity due to the lack of federal oversight of the state council.²⁶ USDA disputes this allegation, but also announced in its December 23 pleading that it entered into a Memorandum of Understanding with the Montana Beef Council that provides AMS direct oversight over all checkoff-related activities of the state council.

²⁷ Press Release, Sam Jones-Ellard, *USDA Proposes Changes to Beef and Soybean Checkoff Programs*, UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE (July 15, 2016, 9:30 AM), <https://www.ams.usda.gov/press-release/usda-proposes-changes-beef-and-soybean-checkoff-programs> (hereinafter AMS Press Release).

This description may or may not be accurate because AMS provides additional and seemingly inconsistent explanations as to when the Proposed Redirection Rule would apply.

²⁸ Proposed Redirection Rule at 45987.

more than 900,000 cattle producers and ten out of approximately 600,000 soybean producers will request redirection.²⁹

The Proposed Redirection Rule features prominently into any discussion regarding states' sovereignty in the operation of state beef and soybean research and programs for at least two reasons. First, it is significant because it could be applied to defeat the plaintiff's "private entity" argument in *R-CALF* and any similar future challenges to other states' QSBCs and QSSBs. Under that scenario, states to whom the rule applied would enjoy a higher level of legal protection from constitutional challenges similar to *R-CALF*. Alternatively, if USDA's argument were to fail for one or more reasons, states would enjoy a lower level of legal protection from constitutional challenges similar to *R-CALF*. Second, the Proposed Redirection Rule is important because it could result in the loss of assessment funds that would have otherwise been collected and expended by a QSBC or QSSB. Instead of those funds being collected and expended by the QSBC or QSSB, those funds would be collected by the Beef Board or Soybean Board. Once forwarded to the national boards, those funds could be permanently lost by the QSBC or QSSB because there is no legal requirement that those funds be returned to the state from which they originated.³⁰

The Proposed Redirection Rule seeks to amend § 1220.228(b) by adding the following three sentences:

(b) * * *

(5) If the entity is authorized or required to pay refunds to producers, certify to the Board that any requests from producers for such refunds for contributions to it by the producer will be honored by forwarding to the Board that portion of such refunds equal to the amount of credit received by the producer for contributions pursuant to § 1220.223(a)(3). Entities not authorized by State statute but organized and operating within a State and certified by the Board pursuant to paragraph (a)(2) of this section must provide producers an opportunity for a State refund and must forward that refunded portion to the Board. Producers receiving a refund from a State entity are required to remit that refunded portion to the Board in the manner and form required by the Secretary.³¹

Thus, the *text* of the Proposed Redirection Rule sets out three circumstances under which it would apply. The first circumstance is when a QSSB is "authorized or required to pay refunds to producers."³² In those instances, the Proposed Redirection Rule requires the QSSB to forward to USB "that portion of such refunds equal to the amount of credit received by the producer for contributions pursuant to § 1220.223(a)(3)."³³ That credit is equal to one-half of the assessment – i.e., one-fourth of one cent per bushel of soybeans. The second circumstance arises when a QSSB is not created under state law and is "certified by the Board pursuant to paragraph (a)(2)."³⁴ In those instances, the Proposed Redirection Rule requires QSSBs to "provide producers an opportunity for a State refund and must forward that refunded portion to the Board."³⁵ The third

²⁹ *Id.*

³⁰ *See* 7 U.S.C. § 6304(j)(4) – (5).

³¹ Proposed Redirection Rule at 45991.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* In most circumstances, this provision essentially writes a new requirement into non-existent state law because QSSBs certified pursuant to § 1220.228(a)(2) are those that are *not* created by state law. Also, the requirement is at odds with one of AMS's explanations for issuing the Proposed Redirection Rule, which itself is different than the explanation for the Proposed Redirection Rule AMS provides in the Explanatory Comments

circumstance applies when a producer somehow obtains a refund from a state entity.³⁶ In that instance, the producer is required to remit the refund to the Soybean Board “in the manner and form required by the Secretary.” Regardless of which of the three circumstances apply under the *text* of the Proposed Redirection Rule, the sole factor that dictates whether the rule applies at all is the existence of a producer refund.

The Proposed Redirection raises at the least three important legal issues that warrant attention from any person, entity, or institution that pays, collects, remits, expends, administers, or is otherwise impacted by the soybean research and promotion program. First, one must consider whether or to what extent the Proposed Redirection Rule can be implemented by AMS insofar as states’ producer refund provisions are preempted or superseded by federal law. Second, there is an issue as to whether or to what extent the Proposed Redirection Rule is permissible in light of the plain language of the Soybean Act. A third issue is whether a final rule can be issued that adequately rectifies the extensive lack of clarity produced by the Proposed Redirection Rule, the Explanatory Comments to the rule, the State-by-State AMS Chart included in federal register announcement of the rule, and the other AMS-published documents that accompanied the issuance of the proposed rule.³⁷ Each of these issues is addressed immediately below.

1. Preempted or Superseded?

As noted, a determining factor regarding application of the text of the Proposed Redirection Rule is the existence of states’ laws that have “authorized or required” QSSBs to pay producer refunds. However, states’ producer refund provisions may be superseded or preempted by federal law, as espoused by the Soybean Board.³⁸ If states’ producer refund provisions are preempted or superseded by federal law, then those state laws are unenforceable or otherwise set aside, which raises the central legal question of whether or to what extent the Proposed Redirection Rule can even be implemented by AMS.³⁹ In other words, how can a producer request or obtain a

to the proposal. *Frequently Asked Questions*, UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE, Question 5, <https://www.ams.usda.gov/sites/default/files/media/FAQs%20Beef%20and%20Soybean%20Redirection.pdf> (hereinafter AMS FAQ Document) (explaining that the purpose of the Proposed Redirection Rule is to “close this gap” created when a beef or soybean producer receives a refund).

³⁶ This aspect of the Proposed Redirection Rule appears contradictory to the first sentence of the proposed rule’s requirement that a QSSB forward to USB “that portion of such refunds equal to the amount of credit received by the producer for contributions pursuant to § 1220.223(a)(3).” Additionally, as explained below, this provision appears contrary to existing policy of the Soybean Board that producer cannot receive refunds under state law because state’s producer refund provisions are superseded by federal law. The provision is also noteworthy because AMS explains that a beef or soybean producer who receives a refund will be in violation of the Soybean or Beef Act. *See* AMS FAQ Document at Question 5 (“If a producer obtained a refund of 50 cents from the State, the producer would not be compliant with the Beef Act. The same scenario holds true under the Soybean Act.”).

³⁷ *See, e.g.*, Debra T. Landis, Annotation, WHAT CONSTITUTES ADEQUATE NOTICE OF FEDERAL AGENCY RULE AS AGAINST OBJECTION THAT RULE ADOPTED DIFFERED IN SUBSTANCE FROM THAT PUBLISHED AS PROPOSED IN NOTICE, 96 A.L.R. Fed. 411 (originally published 1990).

³⁸ *See, e.g.*, *Exhibit C – Refund Letter from Producer to QSSB*, UNITED SOYBEAN BOARD (2017), http://internal.unitedsoybean.org/compliance_manual/qssb-manual/appendix-l-qssb-refund-letters/exhibit-c-refund-letter-from-producer-to-qssb/ (stating, in part, “. . . you will comply with my refund request by remitting the state portion retained by the QSSB to USB ***because the federal law supersedes the state’s research and promotion refund statutes*** and there is no federal provision where a producer can receive a refund.”) (emphasis added).

³⁹ *See, e.g.*, Black’s Law Dictionary 1437 (“Obliterate, set aside, annul, replace, make void,

producer refund, the event that triggers application of the Proposed Redirection Rule, if there is no state law provision that allows the producer to request or obtain a refund? Under this scenario, the Proposed Redirection Rule would be unavailable as a defense to future legal actions that allege that a QSBC or QSSB is a private entity. Additionally, this scenario opens the door even farther to the prospect of increased federal oversight – perhaps even direct oversight by AMS similar to current status of the Montana Beef Council – of the QSSB or QSBC as a means of defending an *R-CALF* style legal challenge.

Section 6309(a) of the Soybean Act expressly addresses whether states’ research and promotion programs are preempted or superseded by the Soybean Act. Section 6309(a), coupled with § 1220.228(c) of the Soybean Order, expressly help define the contours of states’ sovereignty under the soybean research and promotion program.⁴⁰ Specifically, § 6309(a) of the Soybean Act states, in part, the following:

Except as otherwise provided in subsection (b) of this section, nothing in this chapter may be construed to—

- (1) preempt or supersede any other state programs related to soybean promotion, research, consumer information, or industry information organized and operated under the laws of the United States or any State; or
- (2) authorize the withholding of any information from Congress.⁴¹

Thus, the Soybean Act sets forth the general rule that, subject to the two exceptions contained in § 6309(b), states’ laws related to soybean research and promotion are not preempted or superseded by the Soybean Act. One of those exceptions, § 6309(b)(3), is directly relevant to the question of whether states’ producer refund provisions are preempted or superseded.⁴² In fact, if states’ producer refund provisions are preempted or superseded it would have to be by virtue of § 6309(b)(3).

Section 6309(b)(3) provides as follows:

(3) Assessments collected by qualified State Soybean Boards

To ensure adequate funding of the operations of qualified State soybean boards under this chapter, whenever an order is in effect under this chapter, no State law or regulation that limits the rate of assessment that the qualified State soybean board in that State may collect from producers on soybeans produced in such State, or that has the effect of limiting such rate, may be applied to prohibit such State board from collecting, and expending for

inefficacious or useless, repeal. To set aside, render unnecessary, suspend, or stay.”) (defining “supersede”).

⁴⁰ 7 C.F.R. §1220.228(c) states as follows:

“Notwithstanding any other provisions of this subpart, and provided that activities of a Qualified State Soybean Board are authorized under the Act and this subpart, the Board shall not have authority to:

- (1) Establish guidelines, regulations, or rules which would restrict or infringe upon a Qualified State Soybean Board’s authority to determine administrative or program expenditure allocations or administrative or program implementation; and
- (2) Direct Qualified State Soybean Boards to participate or not participate in program activities or implementation.

⁴¹ 7 U.S.C. § 6309(a).

⁴² The first exception to that general rule is not relevant to the Proposed Redirection Rule because it relates to states conducting a referendum during a time period following issuance of the Soybean Order.

authorized purposes, assessments from producers of up to the full amount of the credit authorized for producer contributions to qualified State soybean boards under section 6304(l)(4) of this title.⁴³

A plausible interpretation of § 6309(b)(3) is that it preempts or supersedes states' producer refund provisions because those state law provisions either limit the rate of assessment or have "the effect of limiting such rate" that QSSBs collect and expend.⁴⁴ Moreover, AMS addressed the preemptive effect of § 6309(b)(3) when it issued the Soybean Order on July 9, 1991. Specifically, AMS stated the following in the Explanatory Comments of the Soybean Order:

One commenter requested that the Order repeat the preemption language in the Act section 1974(a)(3) and clearly indicate that the Qualified State Soybean Boards can keep ¼ of 1 percent of the net market price. We believe this assurance is contained in several sections of the Order and does not need to be repeated. This suggestion is not adopted.⁴⁵

This statement by AMS indicates that § 6309(b)(3) preempts or supersedes states' producer refund statutes in order to "ensure adequate funding of the operations of qualified State soybean boards."⁴⁶ If that is accurate, the Proposed Redirection Rule turns this view on its head in at least two ways. First, the proposed rule contradicts the AMS statement made at the time the Soybean Order was issued that § 6309(b)(3) applies such that QSSBs "can keep ¼ of 1 percent" of the assessment because the proposed rule denies the ability of a QSSB to retain – i.e., collect and expend – "¼ of 1 percent" of the federal assessment.⁴⁷ Second, the proposed rule is contradictory to the core purpose of § 6309(b)(3) – "to ensure adequate funding of the operations" of QSSBs – because its application actually results in the loss of funds, which is potentially permanent, by QSSBs that would have otherwise been retained by the QSSB. The Proposed Redirection Rule may also be contradictory to plain language of the Soybean Act, an issue that is discussed immediately below.

2. Plain Language of the Soybean Act

The Soybean Act mandates and authorizes a three-step process with which producers, first purchasers, and QSSBs "shall" comply regarding (1) the payment, (2) the collection, and (3) the remittance of the one-half of one percent per bushel assessment required by the Soybean Act.⁴⁸ In each instance that producers, first purchasers, and QSSBs comply with those requirements, the three-step process always concludes with the QSSB retaining the portion of the federally-required assessment that is not remitted to Soybean Board. The failure to comply with these requirements subjects a producer, first purchaser, or QSSB to the enforcement provisions set forth and authorized in the Soybean Act. However, the Proposed Redirection Rule contradicts these plain language requirements because the rule, when complied with, concludes with the QSSB *not*

⁴³ 7 U.S.C. § 6309(b)(3) (emphasis added).

⁴⁴ *Id.* Moreover, if producer refund provisions are not preempted or superseded by federal, the Proposed Redirection Rule (or the apparently "longstanding" policy of redirection) creates multiple legal problems that could seriously undermine the long-term viability of both the beef and soybean research and promotion programs.

⁴⁵ Soybean Promotion and Research Order, 56 Fed. Reg. 31043, 31048 (July 9, 1991) (hereinafter Soybean Order).

⁴⁶ 7 U.S.C. § 6309(b)(3).

⁴⁷ Soybean Order at 31048.

⁴⁸ *See* 7 U.S.C. § 6304(l)(1).

retaining – i.e., collecting and expending – the portion of the federally-required assessment that it would have otherwise retained in accordance with the Soybean Act.

Additionally, it bears noting that word “redirection” is neither used nor defined in either the Soybean Act or Order. Further, the Act does not expressly set forth a process for redirection of funds that would otherwise have been collected and expended by the QSSB.

(a) Three-Step Process Set Forth in Soybean Act & Order

(i) Step 1: Collection of Assessment by First Purchaser from Producer

Section 6304 (“Required terms in orders”) of the Soybean Act states that “[a]ny order issued under this chapter shall contain the terms and conditions specified in this section.”⁴⁹ Section 6304(l)(A)(i) provides the following general rule:

The order shall provide that each first purchaser of soybeans from a producer shall collect, in the manner prescribed by the order, an assessment from the producer and remit the assessment to the Board. The Board shall use qualified State soybean boards to collect such assessments in States in which such boards operate.”⁵⁰

The Soybean Order provides that “each first purchaser of soybeans shall collect an assessment from the producer, and each producer shall pay such assessment to the first purchaser, at the rate of one-half of one percent (0.5%) of the net market price of soybeans purchased.”⁵¹

A first purchaser that does not collect the assessment from a producer and remit it to the QSSB for the state in which the first purchaser is located will be in violation of the Soybean Act and, therefore, subject to the enforcement provisions set out in or authorized by the Soybean Act.⁵² Likewise, a producer who does not pay the assessment will be in violation of the Soybean Act and, therefore, subject to the enforcement provisions set out in or authorized by the Soybean Act.⁵³

(ii) Step 2: Remittance of Assessment by First Purchaser to the QSSB

The Soybean Order requires a first purchaser to remit the assessment to the QSSB that operates in the State in which that first purchaser is located.⁵⁴ The Soybean Order further states that “[e]ach first purchaser shall remit such assessment to the Board or to a Qualified State Soybean Board, as provided in paragraph (a)(5) of this section.”⁵⁵ Paragraph (a)(5) provides, in relevant part, that if the soybeans upon which the assessment by a producer were grown in a state other than the state in which the first purchaser is located, “the first purchaser . . . shall remit the assessment and information as to the State of origin of the soybeans to the Qualified State Soybean

⁴⁹ Id. at § 6304(a) (emphasis added).

⁵⁰ Id. at § 6304(l)(A)(i) (emphasis added). *See also id.* at 6304(l)(A)(ii) (stating that the rate of assessment “shall be one-half of one percent of the net market price of soybeans sold by the producer to the first purchaser.”) (emphasis added).

⁵¹ 7 C.F.R. § 1220.223(a)(1) (emphasis added).

⁵² *See, e.g.*, 7 U.S.C. § 6307.

⁵³ *See id.*

⁵⁴ 7 C.F.R. § 1220.223(a)(1). *See also id.* at § 1220.223(a)(5)(i) (State of Origin Rule). *See also* 7 C.F.R. § 1220.223(c)(1).

⁵⁵ Id. (emphasis added).

Board operating in the State in which the first purchaser is located.”⁵⁶ A first purchaser that does not comply with this requirement will be in violation of the Soybean Act and Order and, therefore, subject to the enforcement provisions set out in or authorized by the Soybean Act.

(iii) Step 3: Remittance of Assessment by QSSB to the United Soybean Board

The Soybean Order requires all QSSBs to remit to the Soybean Board “each assessment paid and remitted to it, *minus* authorized credits pursuant to § 1220.222(c) and credits issued to producers pursuant to § 1220.223(a)(3), and other required deductions. . . .”⁵⁷ This is not only a requirement placed on a QSSB, but also a requirement that a QSSB must agree to in order to exist.⁵⁸

Section 1220.223(a)(3), one of the single-most significant provisions of the national soybean research and promotion program, provides, in relevant part, the following:

In determining the assessment due from each producer . . . , a producer who is contributing to a Qualified State Soybean Board *shall* receive a credit from the Board for contributions to such Qualified State Soybean Board on any soybeans assessed under this section in an amount not to exceed one-quarter of one percent of the net market price of the soybeans assessed.”⁵⁹

Thus, QSSBs *shall* remit to the Soybean Board the assessment that was collected and remitted by the first purchaser to the QSSB. The amount that the QSSB must remit equals one-half of one percent per bushel, *minus* the amount of the credit received by a producer as a result of payment to the first purchaser and other authorized credits. The same requirement stated differently: the Soybean Act sets forth a process that, when complied with, always concludes with the QSSB retaining the portion of the one-half of one percent assessment that is not remitted to the Soybean Board.⁶⁰ A QSSB that does not comply with this requirement will be in violation of the Soybean Act and, therefore, subject to the enforcement provisions set out in or authorized by in the Soybean Act. Additionally, a QSSB that does not comply with this requirement will have failed to comply with either § 1220.228(a)(iv) or § 1220.228(b)(4) of the Soybean Order, depending on what type of QSSB is at issue.⁶¹

⁵⁶ Id. (emphasis added).

⁵⁷ Id. at § 1220.228(a)(1)(iv) and § 1220.228(b)(4).

⁵⁸ Section 1220.222(c) authorizes a credit to QSSBs “of up to 5 percent of the amount to be remitted to the Board pursuant to § 1220.223 and § 1220.228 . . . to offset collection and compliance costs relating to such assessments and for fees paid to State governmental agencies or first purchasers for collection of the assessments” by the QSSBs.

⁵⁹ 7 C.F.R. § 1220.223(a)(3) (emphasis added).

⁶⁰ See Soybean Order at 31048 (providing assurance that Soybean Act and Order clearly indicate that Qualified State Soybean Boards can keep ¼ of 1 percent of the net market price.”).

⁶¹ *But see* AMS FAQ Document at Question 7 (“Because of the original structure of both Orders when refunds were allowed under the national programs, the assessment collection process is framed in terms of credits rather than QSBCs or QSSBs collecting the full assessment and retaining half.”). This statement by AMS is perplexing because the Soybean Act and Beef Act, as well as the AMS’s July 9, 1991 assurance that states retain “¼ of 1 percent of the net market price” as per the Soybean Act, frames the programs in terms of producer credits *and* in terms of councils and boards “collecting the full assessment and retaining half.”). See *also* Defendants’ Motion to Dismiss at 11 (“As relevant here, a QSBC must certify that it will ‘collect assessments paid on cattle originating from the State or unit within which the council operates’ and that it will ‘remit to the [Beef Board] assessments paid and remitted to the council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3).’” (citation omitted)).

Finally, and ironically, AMS addresses this issue in the Explanatory Comments of the Proposed Redirection Rule. Specifically, AMS states the following:

The Soybean Act and the Soybean Order issued thereunder authorize the collection of an assessment from soybean producers of one-half of one percent (0.5 percent) of the net market value of soybeans, processed soybeans, or soybean products. In most cases, these assessments are collected by QSSBs that retain up to half of the assessments *as authorized by the Soybean Act*. The QSSBs as defined under Section 1967(14) of the Soybean Act will forward the remainder to the United Soybean Board (Soybean Board), which administers the national soybean checkoff program.⁶²

In other words, in explaining the Proposed Redirection Rule, AMS uses the same language of the Soybean Act and Soybean Order that appears to contradict the stated purpose of the Proposed Redirection Rule.

3. Lack of Clarity

The text of the Proposed Redirection Rule, standing alone, is very confusing. That level of confusion is significantly elevated when the text of the proposed rule is compared to the Explanatory Comments to the proposed rule. The proposed rule becomes even more confusing when the text of the proposal and Explanatory Comments are compared with the State-by-State Charts AMS provided in the federal register announcement of the proposed rule. Oddly enough, the capacity to understand the rule is diminished even further when the above-mentioned information is compared to the July 15 AMS Press Release and the AMS Frequently Asked Questions Document that accompanied the release of the proposed rule. The above-described confusion engenders a lack of clarity so significant that it is not possible for one to reliably discern the circumstances under which the rule would apply, to whom the proposed rule would apply, or even the precise purpose(s) of the proposed rule.⁶³ As described below, the law firm that represents the Soybean Board submitted comments that sought to help clear confusion about the Proposed Redirection Rule. Remarkably, those comments are written in such a way that causes even more confusion about the Proposed Redirection Rule.

A key example of this confusion is that the Proposed Redirection Rule appears to apply to only one of the two types of QSSBs created under the Soybean Act. However, the Explanatory Comments and the AMS State-by-State Chart, and the AMS-published documents seem to imply that the Proposed Redirection Rule applies to both types of QSSBs created under the Soybean Act. In the comments submitted on behalf of the Soybean Board by the law firm that represents the Soybean Board, it was recommended that AMS both rewrite and restructure the language of the final rule so that the rule would apply to both types of QSSBs.⁶⁴ In so doing, these

⁶² Proposed Redirection Rule at 45985 (emphasis added).

⁶³ This article focuses on just a few aspects of the confusing nature of the Proposed Redirection Rule. A more thorough explanation is currently in draft form for a forthcoming law review article that addresses several current issues associated with state and federal checkoff programs.

⁶⁴ See United Soybean Board, Comment Letter on Proposed Rule titled "Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research, Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments," (Sept. 12, 2016) (hereinafter Law

comments also recommend an entirely different and new legal standard that deviates from not only proposed § 1220.228(b)(5) but, remarkably, also from the Soybean Order language at § 1220.228(b)(5)(i) as originally promulgated on July 9, 1991.⁶⁵ These matters are discussed below.

Two Types of QSSBs: (a)(1) & (a)(2)

The Soybean Act defines “Qualified State Soybean Board”, in part, as “a State soybean promotion entity that is authorized by State law.”⁶⁶ The Act further provides the following:

If no such entity exists in a State, the term . . . means a soybean producer-governed entity –

- (A) That is organized and operating within a State;
- (B) That receives voluntary contributions and conducts soybean promotion, research, consumer information, or industry information programs; and
- (C) That meets criteria established by the Board as approved by the Secretary relating to the qualifications of such entity to perform duties under the order and is recognized by the Board as the soybean promotion and research entity within the State.⁶⁷

QSSBs created under state law are governed by § 1220.228(a)(1) of the Soybean Order.⁶⁸ QSSBs that are not created under state law fall under § 1220.228(a)(2) and are governed by § 1220.228(b) of the Soybean Order.⁶⁹ Very importantly, § 1220.228(b) pertains only to those QSSBs created under § 1220.228(a)(2).

Firm/Soybean Board Comments).

⁶⁵ The Law Firm/Soybean Board comments are particularly remarkable in light of AMS’s explanation in the Explanatory Comments that the reason for the Proposed Redirection Rule is to correct the unintended error that occurred when the original language of § 1220.228(b)(5)(i) was removed in 1995.). *See* Proposed Redirection Rule at 45985.

⁶⁶ 7 U.S.C. § 6302(14) (defining “Qualified State Soybean Board”).

⁶⁷ *Id.* This distinction is expressly reaffirmed in the Soybean Order. *See* Soybean Order at § 1220.122 (defining “Qualified State Soybean Board”).

⁶⁸ 7 C.F.R. § 1220.228(a)(1) provides, in part, as follows:

Any soybean promotion entity that is authorized by State statute to collect assessments required by State law from soybean producers may notify the Board of its election to be the Qualified State Soybean Board for the State in which it operates so that producers may receive credit pursuant to § 1220.223(a)(3) for contributions to such organization. *Only one such entity may make such election or be qualified pursuant to paragraph (a)(2) of this section.* (emphasis added).

⁶⁹ 7 C.F.R. § 1220.228(a)(2) provides, in part, as follows:

If no entity elects to serve as a Qualified State Soybean Board within a State pursuant to paragraph (a)(1) of this section, any State soybean promotion entity that is organized and operating within a State, and receives assessments or contributions from producers and conducts soybean or soybean product promotion, research, consumer information, or industry information programs, may apply for certification as the Qualified State Soybean Board for such State so that producers may receive credit pursuant to § 1220.223(a)(3) for contributions to such organizations.

As previously discussed, the Proposed Redirection Rule seeks to amend only § 1220.228(b) of the Soybean Order. Thus, the structure of the Proposed Redirection Rule demonstrates that it applies only to those QSSBs created under § 1220.228(a)(2).

However, the Explanatory Comments, the State-by-State AMS Chart, and the other AMS-published documents seem to imply that AMS failed to recognize that Congress created two types of QSSBs. In so doing, those documents may imply that AMS intends that the proposed rule apply to both types of QSSBs. As noted, the Law Firm/Soybean Board comments respond to this lack of clarity by recommending AMS rewrite and restructure the Proposed Redirection Rule and to do so in a manner that creates an entirely new legal standard that does not appear in either the Proposed Redirection Rule or in language that originally appeared at § 1220.228(b)(5)(i) of the Soybean Order.

Specifically, the comments submitted by the law firm that represents the Soybean Board stated the following:

Proposed Section 1220.228(b)(5).

Proposed Section 1220.228(b)(5) is incompatible with Section 1220.228(b). Section 1220.228(b) begins with the following: “In order for the State soybean entity to be certified by the Board pursuant to paragraph (a)(2) of this section, as a Qualified State Soybean Board, the entity must:....” The referenced paragraph (a)(2) of Section 1220.228 concerns only those entities that apply for certification as QSSBs, and does not apply to those entities that elect to serve as QSSBs due to their state authorization under Section 1220.228(a)(1). Therefore, if USDA persists in placing proposed Section 1220.228(b)(5) in Section 1220.228(b), the refund rules set forth in Section 1220.228(b)(5) will apply only to those entities that apply for certification as QSSBs, and will not apply to those entities that elect to serve as QSSBs due to their state authorization under Section 1220.228(a)(1). Since the language of the proposed Section 1220.228(b)(5) appears intended to regulate three separate groups (entities authorized to pay refunds, entities not authorized by state statute, and producers receiving refunds), we recommend that proposed Section 1220.228(b)(5) be broken into three parts and moved to new Sections 1220.228(e)(1)-(3) to correct the above-described incompatibility.

We recommend that new Section 1220.228(e)(1) contain a revised version of the first sentence of proposed Section 1220.228(b)(5) *to clarify that it is applicable to those entities authorized by statute and qualified under Section 1220.228(a)(1)*. Accordingly we recommend that USDA, in creating a new Section 1220.228(e)(1) from the first sentence of proposed Section 1220.228(b)(5), use the following text for Section 1220.228(e)(1): “If an entity that elects to be the Qualified State Soybean Board pursuant to ***paragraph (a)(2)*** of this section is ***authorized or permitted*** to pay refunds to producers, the entity must certify to the Board that portion of such refunds equal to the amount of credit received by the producer for contributions pursuant to § 1223(a)(3).” . . .

”⁷⁰

The Soybean Board is an instrumentality of AMS and plays a preeminent role in the operation and administration of the national soybean research and promotion program. Thus, recommendations from the Soybean Board regarding the proposed rule are especially significant. In addition to all other concerns addressed regarding the application of the rule, this proposed change would add even more uncertainty, if somehow adopted as part of final agency rulemaking for at least two significant reasons.

⁷⁰ Law Firm/Soybean Board Comments at 2-3 (emphasis added).

First, comments by the law firm that represent the Soybean Board appear to be error. Specifically, the comment recommends that the first sentence of the Proposed Redirection Rule be rewritten to state that “an entity that elects to be the Qualified State Soybean Board pursuant to (a)(2) of section . . . must certify that any requests . . . for . . . refunds . . . will be honored by forwarding that portion of such refunds. . . .” That particular recommendation is made in order to make certain that the final rule would apply to QSSBs created under § 1220.228(a)(1). Yet, the recommendation refers to QSSBs that *elect* to be the QSSB under (a)(2), rather than elect to be the QSSB under (a)(1). Thus, if finalized as proposed by the law firm that represents the Soybean Board, the final rule would, amazingly, be even more confusing than the proposed rule.

Second, the comment recommends the creation of an entirely new legal standard, which is in addition to the recommendation that the Proposed Redirection Rule be restructured and rewritten. Specifically, the comments recommend that the rule apply to QSSBs created under § 1220.228(a)(2) – though the likely intention is that should apply to QSSBs created under § 1220.228(a)(1) – apply when a QSSB is “*authorized or permitted* to pay refunds to producers. . . .” The Proposed Redirection Rule – which, as structured, applies only to QSSBs created under § 1220.228(a)(2) – states that the rule applies when a QSSB is “*authorized or required* to pay refunds to producers” As originally promulgated, the Soybean Order also employed the phrase “authorized or required to pay refunds to producers.” Thus, the comments submitted by the law firm that represents the Soybean Board recommend that AMS adopt as a final rule a legal standard that *has never appeared* in the Soybean Order and does not appear in the Proposed Redirection Rule. This last statement is true despite the fact that AMS states in the Explanatory Comments of the Proposed Redirection Rule that the rationale for the proposed rule is to add back into the Soybean Order the language it mistakenly removed in 1995.

Additional Lack of Clarity

The Proposed Redirection Rule is even more unclear when the text and structure of the proposal are compared with the Explanatory Comments, the State-by-State Chart AMS provided in the federal register announcement of the proposed rule, the July 15 AMS Press Release, and the AMS Frequently Asked Questions Document issued in conjunction with the rule. These documents are intended to help explain the Proposed Redirection Rule and how it will apply, even though they do not have the force of law.

For example, the AMS State-By-State Chart is prominently featured in the federal register announcement of the Proposed Redirection Rule.⁷¹ According to AMS, the State-by-State Chart represents “to the best of its knowledge, whether cattle and soybean producers in each state are eligible to request redirection of their assessments”⁷² However, even a cursory review of the AMS Chart reveals substantive errors, potentially dubious representations of states’ laws, and otherwise misleading information.

The Law Firm/Soybean Board comments characterize the AMS State-by-State Chart as containing “certain information that appears to be misleading”, as does several other comments that were submitted.⁷³

⁷¹ Proposed Redirection Rule at 45987 – 45989.

⁷² AMS FAQ Document at Question 4.

⁷³ Law Firm/Soybean Board at 1 (also stating that “[a]lthough USDA is not proposing that the chart be included in the technical amendments to the Soybean Promotion, Research, and Consumer Information Order, it is important that USDA not disseminate such apparently misleading information going forward, because misleading information can confuse soybean producers and other interested parties.”).

Another example of the confusing nature of the Proposed Redirection Rule is that the July 15 AMS Press Release describes application of the Proposed Redirection Rule in a manner that is fundamentally different than the text of the Proposed Rule. The July 15 AMS Press Release states, in relevant part, the following:

For producers to be able to request that their assessments be redirected from the state organization to the national program, they must be in a state meeting one of the two circumstances:

- There is no state law requiring assessments to a state board or council; or
- There is a state law requiring assessments, but the state law allows for refunds.⁷⁴

These standards are not only stated differently than the requirements set forth in text of the Proposed Redirection Rule, but they are not evidenced within the text of the proposed rule. For example, the text of the Proposed Redirection Rule makes clear that the sole factor that dictates whether the rule applies is the existence of a producer refund, either under state law or because AMS would require all QSSBs formed under § 1220.228(a)(2) to offer producer refunds.⁷⁵ However, the July 15 AMS Press Release explains that the factor that determines whether the rule applies is the non-existence or existence of a state law that requires assessments to a state board or council.⁷⁶ In the latter circumstance, AMS explains that the state law must also “allow” for refunds.⁷⁷ Regardless of the inconsistency, though, the standard set forth in the July 15 AMS Press Release may not be at all relevant or capable of implementation by AMS. Recall that the plain language of the Soybean Act requires and authorizes the three-step process that, when complied with by producers, first purchasers, and QSSBs, always concludes with the QSSB retaining – i.e., “collecting and *expending*” – the portion of the one-half of one percent per bushel assessment that is not remitted by the QSSB to the Soybean Board. Thus, the non-existence (or existence) of a state law that requires assessments to a QSSB or QSBC is not relevant in determining whether a

⁷⁴ AMS Press Release.

⁷⁵ According to AMS, producers will never be able to obtain or retain these producer refunds. This requirement is at odds with an explanation that AMS states as to why the Proposed Redirection Rule had been issued. Namely, AMS states that the rule was proposed to “close this gap” created when states provide producer refunds. To “close this gap”, remarkably, AMS proposes a rule that requires QSSBs that did not previously offer refunds to now do so, but to do so in a manner that will not allow producers to ever obtain or retain that refund.

⁷⁶ This standard is also included on the Soybean Board’s website. *See Exhibit C – Refund Letter from Producer to QSSB*, UNITED SOYBEAN BOARD (2017), http://internal.unitedsoybean.org/compliance_manual/qssb-manual/appendix-l-qssb-refund-letters/exhibit-c-refund-letter-from-producer-to-qssb/. Additionally, it is a standard that is espoused by USDA as part of its defense in *R-CALF*. *See* Defendants’ F&R Objections at 6 (“In states like Montana, where no state law requires cattle producers to contribute to the QSBC, producers may direct the QSBC to forward the full amount of their federal assessment to the Beef Board.”). *But see* Defendants’ F&R Objections at 11-12 (stating that the federal assessment “is remitted to the QSBC or, in states where there is no QSBC, directly to the Beef Board. . . . Some state laws also require cattle producers to pay to the applicable QSBC a state law assessment on the sale of cattle . . . The remaining QSBCs receive voluntary assessments or contributions.”). This argument is perplexing because the existence of states’ laws, such as those cited by defendants, that are in addition to the federal assessment are not at issue in *R-CALF*. Note also that this argument is incorporated as part of the Magistrate’s Findings and Recommendations issued on December 12, 2016. *See* Findings and Recommendations at 3 (“The MBC is a private entity. No state law created the it. [sic] *Likewise, there is no state law requiring cattle producers to contribute to it.*”) (emphasis added).

⁷⁷ *But see* AMS FAQ Document at Question 3 (providing explanation for Proposed Redirection Rule that differs significantly in this regard from both the text of the proposed rule and the AMS Press Release).

QSSB or QSBC obtains or retains the assessment. Rather, it is a matter dictated by the Soybean Act and one that AMS itself acknowledged, as previously discussed in this article, when it issued the Soybean Order on July 9, 1991.

Moreover, the Soybean Act and Order confirm this very point by distinguishing between the two types of QSSBs – those that are created by state law and those that are not created by state law. The three-step process, which always ends with the state retaining the portion of the assessment not remitted to the Soybean Board, applies equally to QSSBs created by state law and those not created by state law. Thus, not only did Congress not provide a process dependent on the existence or non-existence of states’ laws requiring assessments to a QSSB or QSBC, it also affirmatively recognized that the three-step process for (1) the payment, (2) the collection, and (3) the remittance of the assessment applied to QSSBs in states in which there was no state law creating the QSSB.

4. AMS – Montana Beef Council Memorandum of Understanding

On December 23, 2016, USDA announced in a court pleading filed in *R-CALF* that AMS and the Montana Beef Council entered into a MOU that provides direct oversight by AMS of the Montana Beef Council.⁷⁸ This development is extremely significant to any discussion regarding the sovereignty of states’ QSSBs and QSBCs because it could be exported to other states, especially if there is a perception that the arrangement is necessary to defend an *R-CALF* style lawsuit. The significance of the MOU increases to the extent that the Proposed Redirection Rule is an ineffective defense to future *R-CALF* style lawsuits.

According to the pleading, the MOU became effective December 22, 2016.⁷⁹ The MOU also binds all third-party persons, entities, or institutions that contract with MBC to conduct research, consumer information, and industry information programs.⁸⁰ Additionally, the MOU provides that the USDA Secretary “or agents of the Beef Promotion Operating Committee or the Beef Board may audit periodically the records of the contracting party.”⁸¹ The MOU is binding on the beef council until such time as both the council and AMS mutually agree to terminate the MOU.⁸² The nature of the legal issues at play in *R-CALF* strongly suggest that the MOU concept could be exported and applied to other QSBCs and QSSBs across the nation.

Under the MOU, the council agrees to submit to the USDA Secretary for approval “an annual budget outlining and explaining the council’s anticipated expenses and disbursements in the administration of its responsibilities, including probable costs of promotion, research, and consumer information and industry information plans or projects.”⁸³ That budget must also provide a description of the proposed promotion, research, consumer information, and industry programs.⁸⁴

The MOU also requires that any council-funded promotion, advertising, research, and consumer information plans or projects be pre-approved by AMS.⁸⁵ The council must also submit “for pre-approval by the Secretary any and all potential contracts or agreements to be entered into by MBC for the implementation and conduct

⁷⁸ Defendants’ F&R Objections at 8, 26. *See also* Defendants’ F&R Objections, EXHIBIT A, MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE AND MONTANA BEEF COUNCIL (hereinafter Exhibit A).

⁷⁹ Exhibit A at 2.

⁸⁰ *Id.* at 2-3.

⁸¹ *Id.* at 3.

⁸² *Id.* at 4.

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 2-3.

⁸⁵ *Id.* at 3.

of plans or projects funded by checkoff funds.”⁸⁶ The MOU expressly requires that any proposed project or plan “shall become effective only upon AMS’ approval.”⁸⁷ The MOU also requires the council “to submit to AMS such additional information as may be requested.”⁸⁸

The MOU requires that any contracting party – i.e., universities or private companies conducting research – must provide any reports regarding projects or plans that AMS may request.⁸⁹ These reports include but are not limited to “records of all transactions under the contract,” “periodic reports of activities conducted”, and “an accounting for funds received and expended.”⁹⁰

The MOU also allows contracting parties to be audited. Specifically, the MOU states the USDA Secretary “or agents of the Beef Promotion Operating Committee or the Beef Board may audit periodically the records of the contracting party.”⁹¹

The MOU also addresses the potential de-certification of the council. Specifically, if at any time the council fails to comply with the MOU, the council “acknowledges and agrees that AMS may direct the Beef Board to de-certify MBC as a QSBC, and, in the event of such de-certification, MBC shall stop receiving national checkoff assessment funds.”⁹²

The MOU between MBC and AMS is a highly significant development that represents a dramatic shift in the federal-state implementation and operation of the national beef research and promotion program. For example, the MOU is a shift from AMS’s publicly repeated view that AMS does not have direct oversight of state research and promotion programs.⁹³ Similarly, this development is germane to the future operation of the national soybean research and promotion program. QSBCs and QSSBs, producers, relevant states’ farm bureaus and states’ departments of agriculture, and third parties that contract with QSBCs and QSSBs – i.e., Cooperative Extension Service professionals, universities of the land grant university system, and others – should heed the implications of the shift represented in the MOU entered into between Montana Beef Council and AMS in the course of *R-CALF*.

III. CONCLUSION

Although *R-CALF* targets the constitutionality of the beef research and promotion program vis-à-vis the Montana Beef Council, the legal arguments raised by the litigants in *R-CALF* signal a potential loss of sovereignty for QSBCs and QSSBs across the United States. Any person, entity, or institution that pays, collects, remits, expends, administers, or is otherwise impacted by the national beef and soybean research and promotion programs should give very careful consideration to the impact that *R-CALF*, the AMS policy of redirection, the Proposed Redirection Rule, and the memorialization of an MOU that gives AMS direct

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Id. at 4.

⁹³ See, e.g., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs*, UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE at 2 (Sept. 2015), <http://www.aeb.org/images/PDFs/AboutAEB/USDAGuidelinesAMSOversight.pdf> (“Some State, regional, or local programs receive and expend funds from the national checkoff program. Though AMS does not have direct oversight of these State and local programs. . .”).

oversight of the Montana Beef Council will have on stakeholders within their state. States should carefully review all research and promotion laws, particularly state laws applicable to beef and soybean research and promotion programs, and assess the likelihood those programs would survive an *R-CALF* type challenge as well as the impact that the AMS-professed policy of redirection or a final rule may have on those state programs.⁹⁴

In addition to the legal issues associated with *R-CALF*, any person, entity, or institution that pays, collects, remits, expends, administers, or is otherwise impacted by the national beef and soybean research and promotion programs should consider the long-term policy impact that a loss of sovereignty could mean for the beef and soybean research and promotion programs. For example, any loss of state sovereignty could erode political support for the beef and soybean programs, motivating some to question whether the federal programs should be terminated so that research and promotion programs operate squarely under state laws akin to how the programs operated prior to the existence of the Soybean and Beef Orders.

⁹⁴ See, e.g., *Delano Farms Company v. California Table Grape Commission*, 586 F.3d 1219 (9th Cir. 2009) and *Paramount Land Company v. California Pistachio Commission*, 491 F.3d 1003 (9th Cir. 2007).