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Beef Council and Binds All Third Parties That Contract With  
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by

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## **Recent MOU Provides Direct USDA AMS Oversight of State Beef Council and Binds All Third Parties That Contract With State Beef Council**

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### Summary

On December 23, 2016, USDA announced in a court pleading filed in *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) (*R-CALF*) that a Memorandum of Understanding (MOU) has been entered into between the USDA Agricultural Marketing Service (AMS) and the Montana Beef Council (MBC) for the purpose of providing direct AMS oversight of the MBC in its use of state-retained funds derived from the \$1.00 per-head assessment paid by Montana beef producers pursuant to the national beef research and promotion program. Importantly, the MOU also binds all third-party persons, entities, or institutions that contract with MBC to conduct research, consumer information, and industry information programs. 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.” The MOU is binding on MBC until such time as both MBC and AMS mutually agree to terminate the MOU.

The MOU represents a historically and legally significant shift in the administration and operation of a state beef council under the national beef research and promotion program. Further, the MOU carries very significant implications for future federal-state implementation of both the national beef and soybean research and promotion programs. As such, the December 23 development is relevant to Qualified State Beef Councils (QSBCs), Qualified State Soybean Boards (QSSBs), states’ departments of agriculture and states’ farm bureaus that administer state beef and soybean programs, and any parties that contract with QSBCs and QSSBs. The nature of the legal issues at play in the *R-CALF* lawsuit strongly suggest that the MOU concept could be exported and applied to other QSBCs and QSSBs across the nation.

### Background

In *R-CALF*, the plaintiff alleges that payment of the \$1.00 per head assessment required by the Beef Promotion and Research Act requires its Montana members to subsidize speech of a private entity – the MBC – in violation of the First Amendment of the U.S. Constitution. According to *R-CALF*, insofar as MBC is a private entity, its speech via promotion programs is not “government speech” that would otherwise be protected under the First Amendment. The key factor, according to *R-CALF*, that causes MBC to be a private entity is the lack of federal oversight over the activities of the MBC. On December 12, 2016 the Magistrate Judge assigned to the case sided with *R-CALF*, recommending to the federal district judge several findings in favor of *R-CALF*.

On December 23, USDA filed its objections to the Magistrate's finding and recommendations. USDA otherwise disputes R-CALF's claims, but stated the following in its December 23 filing: "In any event, to address the purported concerns identified by the Magistrate Judge about the actual level of control exercised by the government, defendants and MBC recently entered into an MOU that makes clear that the advertisements of MBC are government speech. . . ." That MOU became effective on December 22, 2016.

### MOU Terms

Under the MOU, the MBC agrees to submit to the USDA Secretary for approval "an annual budget outlining and explaining MBC'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." That budget must also provide a description of the proposed promotion, research, consumer information, and industry programs.

The MOU also requires that any MBC-funded promotion, advertising, research, and consumer information plans or projects be pre-approved by AMS. MBC 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 of plans or projects funded by checkoff funds." The MOU expressly requires that any proposed project or plan "shall become effective only upon AMS' approval." The MOU also requires MBC "to submit to AMS such additional information as may be requested."

The MOU requires that any contracting party – i.e., universities conducting research -- must provide any reports regarding projects or plans that AMS may request. 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."

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."

The MOU also addresses the potential de-certification of the MBC. Specifically, if at any time MBC fails to comply with the MOU, "MBC 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."

### Conclusion

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. Similarly, this development is germane to the future operation of the national soybean research and promotion program. QSBCs, 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 MBC and AMS.

The above-mentioned stakeholders should also carefully review the USDA AMS 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* (81 Fed. Reg. 45984, July 15, 2016). In addition to the MOU, USDA

has asserted in the *R-CALF* litigation that the proposed redirection rule moots the plaintiff's action because R-CALF's Montana members could elect to remit the state portion of their assessment directly to the Cattlemen's Beef Board. While not discussed in this article, the AMS proposed redirection rule is the subject of an upcoming publication that thoroughly reviews several legal and policy issues created by the proposed rule and the already existing USDA policy of redirection. That article is in its final draft review and will be publicly available soon.

To learn more about these and other checkoff issues, tune in February 15, 2017 for a webinar titled, [Checkup on Checkoffs: Recent & Emerging Legal Issues in State & Federal Checkoff Programs.](#)