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Beef Checkoff Dollars & USDA “Redirection”: Compatible with Federal Law?

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INTRODUCTION

Congress enacted the Beef Promotion and Research Act of 1985¹ (Beef Act) to authorize “a coordinated program of promotion and research designed to strengthen the beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.”² This program, commonly referred to as the beef checkoff, is funded by a mandatory assessment of one dollar per-head of cattle sold in the United States.³ Additionally, the Beef Act and Beef Promotion and Research Order⁴ (Order) set forth a mandatory three-step process for the payment, collection, and remittance of the assessment that, when complied with, results in a state’s Qualified State Beef Council⁵ (QSBC) retaining one-half of the assessment and remitting the remaining half to the Cattlemen’s Beef Promotion and Research Board (Board).⁶

However, the USDA Agricultural Marketing Service (AMS) implements a “redirection” policy that appears incompatible with the Beef Act and Order, specifically including the three-step process that governs the payment, collection, and remittance of the dollar per-head assessment.⁷ The policy at issue allows beef producers in certain states to “redirect” the full dollar per-head assessment to the Board, thereby prohibiting the QSBC from retaining the fifty cents of the assessment it would have otherwise retained. More recently, AMS issued a proposed rule that “is intended to formalize the policy.”⁸ Outside of redirection, there appears to be no other legal avenue under the Beef Act or Order that allows QSBCs to be “bypassed” such that the assessment they would have collected, retained, and expended is otherwise remitted to the Board. Thus, redirection is very significant because it directly impacts – and challenges – the federal-state relationship Congress envisioned when it enacted the Beef Act more than three decades ago.

The apparent incompatibility between “redirection” and the Beef Act and Order raises questions as to whether, or to what extent, redirection is legally permissible. Additionally, there is a central question as to

¹ 7 U.S.C. §§ 2901-2911 (2012).

² *Id.* at § 2901(b).

³ *Id.* at § 2904(8)(C). The Beef Act requires importers to pay the one dollar per-head assessment “or the equivalent thereof.” *Id.*

⁴ 7 C.F.R. Part 1260.

⁵ See 7 U.S.C. § 2902(14) and 7 C.F.R. § 1260.115 (defining “Qualified State Beef Council”). See also 7 C.F.R. § 1260.181 (setting forth requirements for certification as a Qualified State Beef Council).

⁶ See *Flow of a Checkoff Dollar*, CATTLEMEN’S BEEF PROMOTION AND RESEARCH BOARD, <http://www.beefboard.org/> (follow “Resources +” tab; then follow “Flow of a Checkoff Dollar” hyperlink under “References”).

⁷ 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, 45986 (proposed July 15, 2016) (to be codified at 7 C.F.R. pt. 1220 and 1260) (hereinafter Redirection Proposed Rule). See also Defendants’ Objections to Findings and Recommendations of United States Magistrate Judge at 7-8, *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) (“Defendants have 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.”).

⁸ Redirection Proposed Rule at 45986 (“In States where payments to a QSBC are not required by State law, the opportunity for producers to choose to direct the full assessment is already AMS’ current policy; this rule is intended to formalize the policy.”).

whether AMS's stated legal basis for its redirection policy is based on an accurate interpretation of the Beef Act and Order. This article briefly addresses these questions.

A. *Beef Act & Order: Three-Step Process*

The Beef Act and Order establish a mandatory three-step process for the payment, collection, and remittance of the dollar per-head assessment that fuels the beef checkoff at the state and national levels. That process is as follows:

- (1) The purchaser "shall" collect the dollar per-head assessment from the producer;⁹
- (2) The purchaser "shall" remit to the appropriate QSBC the dollar per-head assessment it collected from the producer;¹⁰ and
- (3) The QSBC "shall remit to the Board assessments paid and remitted to the council, *minus authorized credits issued to producers pursuant to § 1260.172(a)(3) . . .*"¹¹

Additionally, if a purchaser fails to collect the assessment from the producer, that failure "shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council . . ." ¹² A producer, purchaser, or QSBC that fails to comply with these requirements stands in violation of the Beef Act and Order.¹³

Section 1260.172(a)(3) provides that "a producer who is contributing to a qualified State beef council(s) shall receive a credit from the Board for contributions to such council, but not to exceed 50 cents per head of cattle produced."¹⁴ The practical application of the § 1260.172(a)(3) is that QSBCs retain fifty cents of the dollar per-

⁹ 7 U.S.C. § 2904(8)(A) ("The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed in the order, collect an assessment . . ."); 7 C.F.R. §§ 1260.172(a)(1) (" . . . each person making payment to a producer for cattle purchased from such producer . . . shall collect an assessment from the producer, and each producer shall pay such assessment . . ."); and 7 C.F.R. § 1260.311(a) (" . . . each person making payment to a producer for cattle purchased . . . shall collect from the producer an assessment at the rate of \$1-per-head of cattle. . .").

¹⁰ 7 U.S.C. § 2904(8)(A); *id.* at § 2904(8)(B) ("If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph(1), such assessment shall be collected by the Board."); 7 C.F.R. § 1260.172(a)(1) (" . . . such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5)."); 7 C.F.R. § 1260.172(a)(5) ("Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board."); 7 C.F.R. § 1260.311(a) (" . . . each person making payment . . . shall collect . . . an assessment . . . and shall be responsible for remitting assessments to the QSBC or Board as provided in § 1260.312."); 7 C.F.R. § 1260.311 ("Each person responsible for the collection and remittance of assessments shall transmit assessments . . . to the qualified State beef council of the State in which such person resides or if there is not qualified State beef council in such State, then to the Cattlemen's Board as follows . . ."). *See also* 7 C.F.R. § 1260.310(c) ("Failure of the collecting person to collect the assessment on each head of cattle . . . shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.").

¹¹ 7 U.S.C. § 2904(8)(A); 7 C.F.R. § 1260.181(b)(4) (emphasis added).

¹² 7 C.F.R. § 1260.310(c).

¹³ *See* 7 U.S.C. § 2908 (Enforcement). *See also id.* at § 2904(2)E).

¹⁴ 7 C.F.R. § 1260.172(a)(3).

head assessment so that the QSBC can “determine how it should be invested in local and state programs.”¹⁵ It bears noting that the requirement that the QSBC remit fifty cents to the Board and retain fifty cents is one that a state entity “must” agree to in order to even exist as a QSBC.¹⁶

B. *AMS Redirection Policy & Proposed Rule: An Overview*

AMS states that it maintains a “longstanding policy” that allows producers “to decline to contribute to a QSBC and instead direct the QSBC to forward the full amount of their federal assessment to the Beef Board.”¹⁷ The redirection policy applies whenever “there is no state law requiring cattle producers to contribute to the QSBC.”¹⁸ On July 15, 2016, AMS issued a proposed rule that is “intended to formalize the policy.”¹⁹

AMS’s proposed rule encompasses its “longstanding policy” of redirection but also includes a standard that deals with the existence of producer refund provisions “authorized or required” under state law. According to the AMS Press Release that accompanied the issuance of the proposed rule, the rule would apply when (1) “there is no state law requiring assessments to a state . . . council”; or (2) “there is a state law requiring assessments, but the state law allows for refunds.”²⁰

C. *Redirection: Legally Permissible?*

1) AMS’s Core Legal Basis for Redirection May Be In Fundamental Error

AMS’s core legal basis for its “longstanding policy” of redirection appears to be based on an interpretation of the Beef Act and Order that may be precisely the opposite of the meaning given by the plain language of the Beef Act and Order. If true, AMS’s stated legal basis for redirection would be in serious error. Similarly, the portion of the proposed rule that applies when “there is no state law requiring assessments to a state . . . council” would stand in equal legal jeopardy.

In explaining its redirection policy, AMS states the following:

Furthermore, while the Beef Act and Beef Order *authorize* QSBCs to retain up to 50 cents per head of cattle assessed, neither the Beef Act or the Beef Order *require* producers to contribute a portion of the \$1.00-per-head assessment to a QSBC. Thus, unless State statutes require the collection of the \$1.00-per-head assessment set forth in the Beef Act (the federal assessment) or require producers to contribute a portion of the \$1.00-per-head assessment to the State

¹⁵ *Flow of a Checkoff Dollar*, CATTLEMEN’S BEEF PROMOTION AND RESEARCH BOARD, <http://www.beefboard.org/> (follow “Resources +” tab; then follow “Flow of a Checkoff Dollar” hyperlink under “References”).

¹⁶ 7 C.F.R. § 1260.181.

¹⁷ Defendants’ Objections to Findings and Recommendations of United States Magistrate Judge at 7-8, *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). See also Proposed Redirection Rule at 45986.

¹⁸ *Id.* at 12-13 (citing Proposed Redirection Rule at 45986).

¹⁹ Proposed Redirection Rule at 45986).

²⁰ 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>.

beef council, producers may be able to choose not to contribute up to 50 cents per head of the federal assessment to their QSBC.²¹

Here, AMS clearly espouses that the legal foundation of its “longstanding policy” of redirection is predicated upon an interpretation that the Beef Act and Order merely “authorize” – rather than “require” – QSBCs to retain fifty cents per head of cattle assessed. However, as previously detailed, the mandatory three-step process set forth in the Beef Act and Order, when complied with, concludes with the QSBC retaining fifty cents of the assessment and remitting fifty cents to the Board. Thus, it may be that AMS’s entire legal foundation for redirection has no basis in law because its interpretation is precisely the opposite of the meaning given to the plain language of the Beef Act and Order.

Additionally, AMS’s view that “neither the Beef Act or the Beef Order require producers to contribute *a portion* of the \$1.00-per-head assessment to a QSBC”²² may be expressly contradicted by the Beef Act and Order. Specifically, “[f]ailure of the collecting person to collect the assessment . . . shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or Cattlemen’s Board as required in §1260.312.”²³ The Beef Act and Order require that such payment be made to the QSBC if one exists in that state; the assessment is to be made directly to the Board only if there is no QSBC.²⁴ Finally, the Beef Act and Order actually characterize such payments to QSBCs – as well as those payments that are remitted to QSBCs when the purchaser does *not* fail to collect the assessment – as “*contributions* to such Council.”

AMS asserts that “[t]hus, unless State statutes require *the collection* of the \$1.00-per-head assessment set forth in the Beef Act . . . to the State beef council, . . . producers may be able to choose not to contribute up to 50 cents per head of the federal assessment to their QSBC.”²⁵ The Beef Act expressly speaks to this precise issue, which presumably negates the legal relevance of a standard that depends upon the existence of state laws that “require the collection of the \$1.00-per-head assessment”. Specifically, the Beef Act states as follows: “The Board *shall* use qualified State beef councils *to collect* such assessments.”²⁶ Therefore, this particular basis for redirection appears to be expressly prohibited by the plain language of the Beef Act and Order.

Next, AMS asserts that “[t]hus, unless State statutes require . . . producers to contribute *a portion* of the \$1.00-per-head assessment to the State beef council, producers may be able to choose not to contribute up to 50 cents per head of the federal assessment to their QSBC.”²⁷ As noted, the Beef Act and Order require producers to pay the dollar per-head assessment to the purchaser at the point of sale or, in the event the purchaser fails to collect the assessment, directly to the appropriate QSBC. Once the assessment is remitted to and collected by the QSBC, the fate of the assessment is governed not by the producer or state law. Rather, the fate of the assessment is governed by the Beef Act and Order requirement that the QSBC “*shall* remit to

²¹ Proposed Redirection Rule at 45986 (emphasis added).

²² *Id.* (emphasis added).

²³ 7 C.F.R. § 1260.310(c).

²⁴ 7 U.S.C. § 2904(8)(A); 7 C.F.R. § 1260.312.

²⁵ Proposed Redirection Rule at 45986 (emphasis added).

²⁶ 7 U.S.C. § 2904(8)(A) (emphasis added).

²⁷ Proposed Redirection Rule at 45986 (emphasis added).

the Board assessments paid and remitted to the council, *minus authorized credits issued to producers pursuant to § 1260.172(a)(3).*²⁸

Finally, it bears re-emphasizing that even if AMS's legal basis for redirection is not in error, its reliance on the existence or non-existence of state law requiring assessments to a QSBC remains legally problematic. The Beef Act and the Order – not state law – clearly establish the mandatory three-step process that, when complied with, concludes with the QSBC retaining one-half of the dollar per-head assessment. That mandatory process in no way involves or is otherwise influenced by the existence of a state law. Therefore, AMS's reliance on the existence of state laws that alter the mandatory requirements of the Beef Act and Order appears to be a false standard that falls outside the boundaries prescribed by the Beef Act and Order, even if AMS's legal basis for redirection is somehow based on a proper interpretation of the Beef Act and Order.

2) Preemption or Superseding of States' Producer Refund Provisions

Another key issue regarding redirection is whether states' producer refund provisions are preempted or superseded by the Beef Act and Order. If states' refund provisions are preempted or superseded by federal law, then those state laws are unenforceable or otherwise set aside. Thus, the state law would not be available for a producer to even request the refund that then triggers "redirection". If true, the portion of AMS's redirection policy and proposed rule that applies to QSBCs that are "authorized or required" to provide producer refunds may not even be capable of implementation. Conversely, if states' refund provisions are somehow not preempted or superseded by state law, the question arises as to how a producer's request for a refund under an otherwise valid and operable state law simultaneously results in the producer's loss of a refund *and* the QSBC's loss of funds that the QSBC would have otherwise retained in accordance with the mandatory, three-step process for the payment, collection, and remittance of the full assessment.

CONCLUSION

Redirection is a very unique legal concept that directly impacts the "coordinated" federal-state relationship Congress established when it enacted the Beef Act thirty-two years ago. As such, it warrants scrutiny from any person or entity who pays, collects, expends, or is otherwise impacted by the beef checkoff.

The uniqueness of redirection is amplified when one considers that redirection appears to be the only mechanism in the Beef Act and Order – or USDA policy based on interpretation of the Beef Act and Order – through which assessment funds that would otherwise be collected, retained, and expended by QSBCs are instead collected, retained, and expended by the Board. Stated differently, USDA's "longstanding policy" of redirection appears to be the only way in which a QSBC is deprived of the funding it would otherwise collect and retain as a result of producers', purchasers', and QSBCs' compliance with the mandatory three-step process set forth in the Beef Act and Order. Redirection therefore strikes at the very heart of the federal-state relationship Congress wove into the beef checkoff in 1985.

Yet, the term "redirection" is never defined, discussed, or otherwise mentioned in the Beef Act or Order. Currently, redirection exists only as a policy that is born entirely from AMS's interpretation that "neither the Beef Act or Order require producers to contribute a portion of the \$1.00-per-head assessment to a QSBC." As discussed in this brief article, AMS's interpretation may be exactly the opposite of what Congress – and AMS itself – envisioned when beef checkoff launched more than three decades ago. Further, AMS's reliance on the existence or non-existence of state law may be based not only on a faulty interpretation of the Beef Act and

²⁸ 7 C.F.R. § 1260.181(b)(4) (emphasis added).

Order but also be expressly contradicted by the plain language of the Beef Act and Order. The proposed rule, which incorporates AMS's existing policy as well as a standard that depends on the existence of states' producer refund provisions, may also be legally problematic.

Ironically, redirection requires QSBCs to violate § 1260.181(b)(4) of the Beef Order, one of several criteria state entities "must" agree to comply with in order to even exist as a QSBC. Namely, § 1260.181(b)(4) requires that the state entities that applied to the Board for certification as a QSBC "must" agree that it "shall remit to the Board assessments paid and remitted to the Council, minus authorized credits issued to producers pursuant to § 1260.172(a)(3)." Like redirection itself, § 1260.181(b)(4) strikes at the heart of the federal-state relationship that Congress constructed under the Beef Act. Yet, § 1260.181(b)(4) is effectively suspended in each instance that redirection applies; namely, when (1) "there is no state law requiring assessments to a state . . . council"; or (2) "there is a state law requiring assessments, but the state law allows for refunds."²⁹

What's a QSBC to do when it receives a producer's request for redirection or for a refund "authorized or required" under state law? Should the QSBC comply with the mandatory requirements placed upon it by the Beef Act and Order, or comply with AMS's policy of redirection based the agency's interpretation of the Beef Act and Order? The lack of compatibility between redirection and the Beef Act and Order suggests that it is not possible for a QSBC to simultaneously comply with both, thereby setting the stage for legal and political tension between cattle producers, QSBCs, the Board, and USDA that could undermine the vitality of the beef checkoff.³⁰

²⁹ 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>.

³⁰ Chris Bennett, *Legal Jumble Over Beef, Soybean Checkoff Articles?* AGWEB (POWERED BY FARM JOURNAL), Nov. 6, 2016, available at <https://www.agweb.com/article/legal-jumble-over-beef-soybean-checkoff-dollars-naa-chris-bennett/>.