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Legal Checkup on Checkoffs: Recent & Emerging Issues for State and Federal Checkoff Programs



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Topics/Issues Areas

- Background & Recent/Emerging Issues
- “Government Speech” & Federal/State Checkoff Programs
- *R-CALF v. USDA*
 - Much ado about nothing? Or, much ado about everything?
 - “Went from 0-60” really, really fast – i.e., AMS Direct Oversight via MOU, “Redirection” policy/Proposed Redirection Rule
- “Disqualification”/“De-certification” of state councils/boards
 - Checkoff “Death Penalty”
 - *All* assessment funds, functionality, and sovereignty disappear from state councils/boards
- Comments/Q&A

Background: Key Terminology

- USDA Agricultural Marketing Service (AMS)
- Cattlemen’s Beef Promotion and Research Board (Beef Board)
- United Soybean Board (Soybean Board or USB)
- Qualified State Beef Council (QSBC)
- Qualified State Soybean Board (QSSB)
 - There are **TWO** types of QSSBs!
 - Those authorized by state law (7 C.F.R. § 1220.228(a)(1)) and those NOT created by state law (7 C.F.R. § 1220.228(a)(2))
- USDA Secretary (Secretary)
- *R-CALF v. USDA (R-CALF)*

Background: What is a Checkoff?

- Research and promotion program, commonly referred to as a “checkoff”
 - Many created under commodity-specific federal legislation
 - Others created under Commodity Promotion, Research, and Information Act of 1996
 - Some are purely state programs, some are a combination
- Approximately two dozen checkoffs administered by AMS
 - One size does *not* fit all
 - Unique attributes from one to the other with many similarities
- Producer assessments on specific commodities that fund promotion, research, and consumer information activities
 - Beef and soybeans are unique stars in the checkoff galaxy

Recent & Emerging Issues

- Potential loss of state sovereignty for QSBCs and QSSBs
 - See “Beef, Beans, & The First Amendment: Disappearing Sovereignty for State Beef Councils & Soybean Boards?” ([here](#))
 - See “Recent MOU Provides USDA AMS Direct Oversight of State Beef Council and Binds All Third Parties That Contract With State Beef Council” ([here](#))
- De-certification/Disqualification of QSBCs and QSSBs
 - Results in full assessment going to Beef Board or Soybean Board
 - Total loss of state sovereignty and function
- Government speech & state checkoffs post-*Johanns* (2005)
 - *R-CALF* is most significant issue at this time
- Federal legislative proposals ([S. 3201](#) & [S. 3200](#))
 - Voluntary at point of sale; no mandatory program
 - Increased transparency and accountability; prohibition on conflicts of interest for “any person or entity” that contract with boards “for anything of economic value”

Recent & Emerging Issues

- Oklahoma Beef Council (articles [here](#))
- Humane Society of the United States (HSUS) & Checkoffs
 - Pork Checkoff and Beef Checkoff FOIA issue
 - Proposition 2 in California
- Egg Research and Consumer Information Order (USDA Report [here](#))
- Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order

Recent & Emerging Issues

- **State legislation creating assessments *in addition to* federal assessment**
 - Examples: Ohio & Texas
 - Different issue than in *R-CALF*, although mentioned in *R-CALF* pleadings
- **Louisiana Rice Checkoff (non-delegation doctrine)**
 - Same issue in Arkansas several years ago
 - 23 U. Ark. Little Rock L. Rev. 297 (2000) (author Benjamin McCorkle)
- **Marketing Orders**
 - Technically not the same thing, but some courts and parties may not make the distinction

“GOVERNMENT SPEECH” & CHECKOFFS

“Government Speech” & Checkoffs: “What’s The Beef?”

- **Core argument: Requirement that producers pay a state/federal assessment forces certain producers to pay/subsidize speech with which they disagree**
 - Arguments center on promotion activities, although checkoffs are broader in scope
 - Compelled speech v. Compelled-subsidy
- **Significant history of court challenges in this area, *R-CALF* action is the most recent and currently most significant**
 - Key guidepost is *Johanns v. Livestock Marketing Association*, 125 S. Ct. 2055 (2005)

Johanns v. Livestock Mktg. Ass’n

- *Johanns*: In 2005, U.S. Supreme Court held that promotion activities of the beef checkoff was “government speech”, based in large measure on the degree of control the federal government had over the Beef Board
- *Johanns* charted a new course for the constitutionality of federal **and** state checkoff programs

(See also *Glickman v. Wilman Brothers & Elliot*, 521 U.S. 457 (1997) and *United States v. United Foods*, 533 U.S. 405 (2001))

(hmpittm@uark.edu for an abbreviated list of articles on case law)

Post-*Johanns v. Livestock Mktg. Ass’n*

- *Avocados Plus Inc. v. Johanns*, 421 F.Supp.2d 45 (D. D.C. 2006) (Relying on *Johanns*, rejected gov’t speech challenge to Hass Avocado Program)
- *Cricknet Hosiery, Inc. v. United States*, 30 C.I.T. 576 (2006) (same, regarding Cotton Research and Promotion Act)
- *American Honey Producers Ass’n v. USDA*, 2007 WL 1345467 (E.D. Cal. 2007) (same, regarding Honey Program)

Government Speech & State Checkoffs

- *Paramount Land Co. LP v. California Pistachio Com’n*, 491 F.3d 1003 (9th Cir. 2007) (appeal of preliminary injunction)
- Relied on *Johanns*, viewed California Pistachio Program as government speech based on:
 - California Secretary appointed one of 9 Commission members
 - Secretary had to concur in nomination and election procedures
 - Secretary authorized to attend/participate in meetings
 - Commission must submit to Secretary for his concurrence “an annual statement of contemplated activities”
 - Secretary has authority to “correct or cease any existing activity or function that” violates law or against public interest
 - Secretary could suspend or discharge the Commission’s President
 - Dissatisfied growers could file grievance with Secretary
 - Secretary approves annual budget before Commission can disburse

Government Speech & State Checkoffs

- *Delano Farms Co. California Table Grape Com'n*, 586 F.3d 1219 (9th Cir. 2009)
- Relied on *Johanns* and *Paramount Land*, viewed California program as government speech based on:
 - Commission is established by Act of legislature
 - California Secretary appoints and can remove Commissioners**
 - “State possesses additional oversight powers over the Commission” by requiring Commission to “keep accurate books, records, and accounts of all its dealings”
 - Records open to review by the state
 - Secretary did **NOT** have power to “correct or cease” Commission activity
 - Secretary did **NOT** have authority for final approval of Commission plans/projects
 - Commission could recommend to Secretary that its operation be suspended
 - Focus was on statutorily-authorized control, not whether that authority was exercised

R-CALF v. USDA (2016)

Plaintiff's Core Arguments:

- 1) Montana Beef Council is a private entity due to lack of federal oversight and, therefore, state-retained assessments are not government speech and are thus unconstitutional
- 2) “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.” (¶ 74)

- From May 2, 2016 to December 23, 2016, R-CALF has evolved **a lot**

Source: R-CALF v. USDA, Civ. No. 4-16-cv-00041-BTM-JTJ (D. Mont. May 2, 2016)

R-CALF v. USDA

- USDA’s August 4 Response focuses almost exclusively on Plaintiff’s second argument regarding a process for “redirection”
 - Asserted that “redirection” already “longstanding policy”
 - Proposed Redirection Rule for **beef and soybeans** issued to “explicitly include this option”
- USDA has “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 assessment to the Beef Board.”

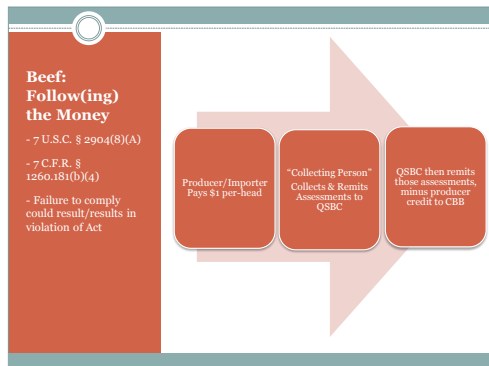
Source: Memorandum in Support of Defendants’ Motion to Dismiss Or, In the Alternative, To Stay the Case, R-CALF v. USDA, Civ. No. 4-16-cv-00041-BTM-JTJ (D. Mont. Aug. 4, 2016)

R-CALF v. USDA

“But neither the Beef Act nor the Beef Order requires cattle producers to contribute a portion of the \$1-per-head checkoff to a QSBC. 7 U.S.C. § 2904; 7 C.F.R. Pt. 1260; see also . . . [Proposed Redirection Rule]. Therefore, in circumstances where there is no state law requiring cattle producers to contribute to the QSBC, USDA has always understood and interpreted the Beef Act and Beef Order to permit a cattle producer who does not wish to voluntarily contribute to a QSBC to submit a redirection request to the QSBC. (citing [Proposed Redirection Rule Exp. Comments]). A QSBC that receives such a request must forward the full amount of that producer’s federal assessment to the Beef Board.”

-Alright, now let’s break that first sentence and the citations down

Source: Memorandum in Support of Defendants’ Motion to Dismiss Or, In the Alternative, To Stay the Case, R-CALF v. USDA 12-43, Civ. No. 4-16-cv-00041-BTM-JTJ (D. Mont. Aug. 4, 2016)



Beef Checkoff: Follow(ing) the Money

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 by the order, collect an assessment and remit the assessment to the Board. The Board **shall** use qualified State beef councils to collect such payments.”

Beef Checkoff: Follow(ing) the Money

7 C.F.R. § 1260.181(b)(4):

In order to be certified as a QSBC, the QSBC **must** –

“(4) Certify to the Board that such organization **shall** remit to the Board assessments paid and remitted to the council, **minus** authorized credits issued to producers pursuant to § 1260.172(a)(3)”

Beef Checkoff: Follow(ing) the Money

- **ALSO SEE:** 7 C.F.R. § 1260.310 (“Domestic Assessments”) –

“(c) Failure of a collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 **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.**”

Beef Checkoff: Follow(ing) the Money

- **ALSO SEE:** 7 C.F.R. § 1260.312 (“Remittance to the Cattlemen’s Board or Qualified State Beef Councils”)

“Each person responsible for the collection and remittance of assessments **shall transmit assessments and a report of assessments to the qualified State beef council of the state in which such person resides** or if there is no qualified State beef council in such State, then to the Cattlemen’s Board as follows. . . .”

→ And, don’t forget about “de-certification” by AMS/Beef Board!

R-CALF v. USDA

~~“But neither the Beef Act nor the Beef Order requires cattle producers to contribute a portion of the \$1-per-head checkoff to a QSBC.” 7 U.S.C. § 2994; 7 C.F.R. Pt. 1260; see also — [Proposed Redirection Rule].~~
Therefore, in circumstances where there is no state law requiring cattle producers to contribute to the QSBC, USDA has always understood and interpreted the Beef Act and Beef Order to permit a cattle producer who does not wish to voluntarily contribute to a QSBC to submit a redirection request to the QSBC. (citing [Proposed Redirection Rule Exp. Comments at 45986]. A QSBC that receives such a request must forward the full amount of that producer’s federal assessment to the Beef Board.”

-- Alright, now let’s break the rest of it down

Source: Memorandum in Support of Defendants’ Motion to Dismiss Or, In the Alternative, To Stay the Case, R-CALF v. USDA 12-43, Civ. No. 4-05-cv-00041-RTM-JTJ (DC Mont. Aug. 4, 2016)

Existence/Non-Existence of State Law?

- AMS’s explanation of the original Beef Order language, which was removed in 1995 and is apparently the basis of the “longstanding policy” and the reason AMS issued the Proposed Redirection Rule, can be found at 51 Fed. Reg. 26132, 26135 (July 18, 1986)
 - hmpittm@uark.edu
- The explanation makes **no mention** whatsoever of the existence or non-existence state laws that require an assessment to a QSBC
- That said, here’s the law in Montana

Montana Law: M.C.A. 81-8-901

- The department “**shall** . . . enter into a contract with the Montana beef council to collect *on behalf of the beef council*” the \$1 per-head federal assessment
 - Plausible interpretation is that this is a state law that **requires** the assessment be paid to a beef council
 - Also: places the Montana Livestock Department under AMS oversight via MOU to some extent
 - “De-certification”/“Disqualification” is an AMS/USB/CBB “keep confidential” action that essentially repeals a state law passed by a state legislature (I’m looking at you, Montana and Arkansas legislatures)
- Department “**shall** . . . adopt rules necessary for the administration of this section.”
 - Viable alternative to MOU b/t Council and AMS
 - Department could adopt rules that ensure government oversight vis-à-vis *Delano Farms and Paramount*

Back to *R-CALF v. USDA*

- On December 12, Magistrate issued Findings & Recommendations largely in favor of *R-CALF*
- On December 23, USDA filed its Objections to F&R
 - Included a focus on government speech argument this time
 - **IMPORTANT:** USDA also announced that AMS and Montana Beef Council entered into an MOU (effective Dec. 22) that provides direct oversight of beef council **AND** binds third parties who contract with council

USDA Dec. 23 Response to F&R

- Asserts that Secretary is authorized by **Beef Order** to review “every word” of a beef council’s advertising campaigns (citing 7 C.F.R. § 1260.181(b)(6))
- “Indeed, the level of **statutorily-authorized control** (as well as actual control) exercised over QSBCs by the Secretary (both directly and through the Beef Board . . . is comparable to—or greater than—that of the State in *Paramount and Delano Farms*.”

(cont’d)

Source: Defendants’ Objections to Findings and Recommendations of United States Magistrate Judge at 23.

USDA Dec. 23 Response to F&R

- “Congress and the Secretary have ‘set out the overarching message’ to be conveyed by QSBCs ‘and some of its elements’”
- “In addition, . . . the Secretary appoints all members of the Beef Board, . . . which in turn certifies organizations as QSBCs, thereby enabling them to receive checkoff funds and engage in advertising under the Beef Act. . . . **The Beef Board, with the Secretary’s concurrence, similarly may revoke a QSBC’s certification.** Therefore, an organization’s very existence as a QSBC, and thus its ability to receive checkoff funds, is controlled by the federal government.” (emphasis added) (citations omitted).

(cont’d)

Source: Defendants’ Objections to Findings and Recommendations of United States Magistrate Judge at 23, 24.

USDA Dec. 23 Response to F&R

- “Moreover, if it is determined that a QSBC has improperly used checkoff funds for an activity that is outside the scope of the Beef Act or Beef Order, the Beef Board can require the QSBC to cease the activity, seek restitution from the QSBC, or, if necessary, **revoke the QSBC’s certification with the approval of the Secretary.**” (citing Payne Decl. ¶¶ 27, 29)

HOWEVER:

- “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.”

See “Recent MOU Provides USDA AMS Direct Oversight of State Beef Council and Binds All Third Parties That Contract With State Beef Council” (Pittman 2017) ([link](#))”

USDA AMS/Beef Council MOU

- Became effective December 22, 2016*
- MOU requires Pre-approval by AMS of:
 - “any and all promotion, advertising, research, and consumer information plans and projects”
 - “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” that can only become effective with AMS approval

MOU between USDA AMS and Beef Council

- Requires council “to submit to AMS such additional information as may be requested.”
 - See 7 C.F.R. § 1260.181(b)(6) (QSBC agrees to “furnish . . . any other reports and information the Board or Secretary may request. . . .”)
- **Decertification:** “If *at any time* MBC fails to comply with the terms of this 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 funds.” (emphasis added)

MOU between USDA AMS and Beef Council

MOU also binds all third parties who/that contract with the council (I'm looking at you, Montana Livestock Board & Co.):

- “The party or parties contracting with MBC shall . . . provide . . . such other reports as AMS may require”
 - In addition to “an accounting of all funds received and expended, periodic reports of activities conducted, and maintenance of accurate records of all transactions under the contract”
- “The Secretary or agents of the Beef Promotion Operating Committee or the Beef Board may audit periodically the records of the contracting party.”

DE-CERTIFICATION/DISQUALIFICATION OF QSBs & QSSBs BY AMS/FEDERAL BOARDS

De-Certification/Disqualification: Summary

- De-certification or Disqualification of a QSB or QSSB results in the **entire assessment being remitted to federal Board**
 - “Death penalty” for a QSB or QSSB and total loss of funds/sovereignty
 - No requirement that the funds be returned to the state from which those funds originated
- Record of one QSB having been de-certified (since July 9, 1986)
 - “In the past, a QSB’s certification was revoked for non-compliance. Details regarding decertification are **keep confidential** and shared only with the Beef Board’s Executive Committee, in executive session.” (emphasis added)
(DECLARATION OF KENNETH R. PAYNE, DIRECTOR OF THE RESEARCH AND PROMOTION DIVISION IN THE LIVESTOCK, POULTRY, AND SEED PROGRAM OF USDA AMS)
- No record of a QSSB ever having been disqualified
 - Arkansas Soybean Promotion Board has been told by United Soybean Board legal counsel and USB Audit & Evaluation Committee that it “risks being recommended for disqualification” as a QSSB

De-Certification (Beef)

- “The Beef Board, with the Secretary’s concurrence, similarly may revoke a QSB’s certification. Therefore, an organization’s very existence as a QSB, and thus its ability to receive checkoff funds, is controlled by the federal government.” (citations omitted here)
- “Moreover, if it is determined that a QSB has improperly used checkoff funds for an activity outside the scope of the Beef Act or Beef Order, the Beef Board can . . . if necessary, revoke the QSB’s certification with the approval of the Secretary.” (citing to AMS Administrator Statement of Fact)
- De-certification also detailed in AMS – Montana Beef Council MOU

Source: USDA Objectives to Findings and Recommendations of United States Magistrate Judge at 24 and 25; R-CALF v. USDA, Civ. No. 4:10-cv-000141-BTM-JTJ (D. Mont. Dec. 23, 2010)

De-Certification: Legal Authority

- No express provisions for de-certification/disqualification in the Beef Act or Beef Order
 - Also no mention in AMS’s “Guidelines for AMS Oversight of Commodity Research and Promotion Programs”
- USDA cites to four sources of authority for decertification (via R-CALF pleadings):
 - 7 C.F.R. § 1260.150(n) (“Duties of Board”)
 - 7 C.F.R. § 1260.181 (“Qualified State Beef Councils”)
 - 7 C.F.R. § 1260.169 (Plans and Projects)
 - Statements made by Kenneth R. Payne, Director of Research and Promotion Division in the Livestock, Poultry, and Seed Program of USDA AMS

De-Certification: Legal Authority

- 7 C.F.R. § 1260.150(n) (“Duties of Board”):

The Board shall have the following duties:

- (a)
- (n) To review applications submitted by State beef promotion organizations pursuant to § 1260.181 and to make determinations with regard to such applications;”

De-Certification: Legal Authority

- 7 C.F.R. § 1260.181 (“Qualified State Beef Councils”)
 - Provides that state beef promotion entities can apply for certification and that the Beef Board “shall review such applications for certification and shall make a determination as to certification of such applicant.”
 - Sets out several criteria that a council must agree to in order to be certified by the Beef Board, including “Conduct activities as defined in § 1260.169”
 - Also includes requirement that QSBC “shall remit . . . assessments, minus authorized credits. . . .”
- Does not expressly address decertification/disqualification

De-Certification/Disqualification: Legal Authority

- 7 C.F.R. § 1260.169 (“Promotion, Research, Consumer Information, and Industry Information”)
 - § 1260.169 deals with “plans or projects” that the Beef Committee “shall receive and evaluate, or on its own initiative, develop and submit to the Secretary for approval . . . for promotion, research, consumer information and industry information authorized by this subpart.”
- Does not directly or indirectly address de-certification or disqualification

De-Certification/Disqualification: Legal Authority

Statement of AMS Director Kenneth R. Payne:

- “As with any non-compliance, repeated infractions can result in disqualification of the QSBC by the Beef Board, with AMS’ concurrence.” (no legal authority cited)
- “The Beef Board, with AMS’s concurrence, may revoke a QSBC’s certification for failure to comply with the requirements of the Beef Act or Beef Order. In the past, a QSBC’s certification was revoked for non-compliance. Details regarding decertification are kept confidential and shared only with the Beef Board’s Executive Committee, in executive session.” (citing §§ 1260.150(n) and 1260.181)).

De-Certification/Disqualification (Soybeans)

- No record of the disqualification/decertification of any QSSB since Soybean Order launched in July 1991
- United Soybean Board has recently communicated to the Arkansas Soybean Promotion Board that it “risks being recommended for disqualification as a Qualified State Soybean Board and ultimately considered by the United States Department of Agriculture (USDA).”
(cont’d)

De-Certification/Disqualification (Soybeans)

USB to Arkansas Soybean Promotion Board:

“If it were to be disqualified, all soybean checkoff assessments under the federal Soybean Act would be remitted to the USB and Arkansas soybean farmers would be assessed separately for the Arkansas state assessment under Arkansas state law. Also, Arkansas would lose Farmer representation on the USB. *Arkansas soybean farmers would pay twice the assessments but would have no influence on where or how the federal assessment on their soybeans was spent.*” (emphasis added)

PROPOSED REDIRECTION RULE (AND
“LONGSTANDING POLICY”)

Proposed Redirection Rule for Beef & Soybeans

- **Virtually impossible to determine to whom the rule applies, when, or why the rule was even issued**
 - For example, structure and text of proposed rule applies only to QSSBs created under (a)(2), but other AMS documents imply it applies to (a)(1) QSSBs as well
- AMS states that it could result in decreased assessments for QSSBs and QSBCs
- AMS predicts that 20 out of 900K+ cattle producers, and 10 out of approx. 600K soybean producers will request
- So many things to address, so little time

When Does the Rule Apply?

AMS states that the proposed rule applies when:

“(1) 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.”

VERY IMPORTANT: Compare with actual language of the proposed rule for both beef **and** soybeans

→ QSBCs/QSSBs “authorized or required to pay producer refunds”

Proposed Redirection Rule for Beef & Soybeans

Some issues to consider:

- Whether producer refund provisions are preempted or superseded by the Beef Act and/or Soybean Act
- Whether there is conflict between redirection policy/proposed rule and the plain language of Beef Act and Soybean Act
- Impact of the significant lack of clarity

Preempt or Supersede?

- Does the Beef/Soybean Act preempt or supersede state programs entirely?
- Does the Beef/Soybean Act preempt or supersede states’ producer refund provisions?
 - United Soybean Board website: “. . . 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 statutes and there is no federal provision where a producer can receive a refund.”

“Supersede” Defined

Black’s Law Dictionary:

“Obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend, or stay.”

Beef Checkoff: Preempt or Supersede State Laws?

- 7 U.S.C. § 2910:

“(a) Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this chapter applicable to the order shall be applicable to amendments to the order.”

Soybeans: Preempt or Supersede State Laws?

7 U.S.C. § 6309(a):

“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;

(2) Authorize withholding of any information from Congress.

Soybeans: Preempt or Supersede State Laws?

7 U.S.C. § 6309(b)(3):

*To ensure adequate funding of [QSSBs], . . . no State law . . . that limits the rate of assessment the [QSSB] . . . may collect from producers . . . , or that has the effect of limiting such rate, may be applied to prohibit such State board from *collecting, and expending* for authorized purposes, assessments from producers”*

- Decreased assessments
- “collecting, and expending”

Soybeans: Preempt or Supersede?

AMS stated in Prefatory Comments to Soybean Order as issued July 9, 1991:

“One commenter requested that the Order repeat the preemption language in the Act . . . 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.”

Proposed Redirection Rule: Lack of Clarity

- 2 types of QSSBs – those created by state law (§ 1220.228(a)(1)) and those not created by state law (§ 1220.228(a)(2))
 - (a)(2)'s are governed by § 1220.228(b)
 - Proposed Redirection Rule amends only § 1220.228(b)
- Law firm that represents USB submitted comments recommending that AMS rewrite and restructure the rule
 - Would include entirely new legal standard that has never appeared in the Soybean Order

Proposed Redirection Rule: Lack of Clarity

- AMS State-by-State Chart severely deficient and misleading
- AMS states that the Chart represents “to the best of its knowledge, whether cattle and soybean producers in each state are eligible to request redirection of their assessments. . . .”
- Arkansas is a prime example, regardless of which one of AMS's stated standards are applied
 - Arkansas does not provide refunds for beef or soybeans, though AMS indicates it is “authorized or required” to do so (including full refunds for soybeans)
 - Arkansas law **expressly requires** the state portion of the assessment to be remitted to the Arkansas Soybean Promotion Board

Comments/Q&A

- Private entity argument can apply to broad range of research and promotion programs
 - Soybeans and beef the most affected b/c of their unique nature
 - But, it's not 2000/2006 anymore
 - Defense: “Redirection” policy/rule vs. Government oversight
- Assess degree of government control at state level within context of government speech cases
 - Model legislation
 - Contact me @ hmpittm@uark.edu or (479) 575-7640
- Montana – if “redirection” policy or rule OR the AMS MOU doesn't work, then what?
- De-Certification/Disqualification of state councils and boards
 - Very significant re: state sovereignty
 - “Death penalty” for QSSB/QSBC, but no articulated standard by Congress or AMS
 - What's the standard and who establishes it?

Comments/Q&A

- Determine whether a state's law requires assessments to QSBC or QSSB (even though this may not even be relevant)
 - National Agricultural Law Center Chart
- What does "voluntary" mean in the context of Beef Act and Soybean Act (for (a)(2) QSSBs)?
- MOU can be exported to other states
- Is "research" equal to "promotion" in terms of government speech?
- Carefully review *R-CALF* pleadings to evaluate parties' full suite of arguments

Contact Information:



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Soybeans: Follow(ing) the Money

- 7 U.S.C. § 6304(a)
- 7 C.F.R. § 1220.228(a)(1)(iv) **AND** § 1220.228(b)(4)
- Failure to comply could result/results in violation of Act

"First Purchaser" collects assessment of 1/2 of 1% of net market price

First Purchaser Remits That Assessment to QSSB

QSSB Remits Assessment to USB, "minus authorized credits. . . ."

Soybeans: Follow(ing) the Money

- 7 U.S.C. § 6304(a)

"Any order issued under this chapter shall contain the terms and conditions specified in this section."

- 7 U.S.C. § 6304(l)(1)(A) ("In general")

"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 [QSSBs] to collect such assessments in States in which such boards operate."

Soybeans: Follow(ing) the Money

- 7 C.F.R. § 1220.228(a)(1)(iv) **AND** § 1220.228(b)(4):

An (a)(1) QSSB, "upon making election, agrees to the following:

(iv) Remit to the Board each assessment paid and remitted to it, minus authorized credits issued pursuant to § 1220.222(c) and . . . § 1220.223(a)(3)

An (a)(2) QSSB, "to be certified by the Board . . . must:

(4) Certify to the Board that such organization will remit to the Board each assessment paid and remitted to it, minus credits issued pursuant to