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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

RANCHERS-CATTLEMEN ACTION
LEGAL FUND, UNITED
STOCKGROWERS OF AMERICA,

Plaintiff,

v.

SONNY PERDUE, IN HIS OFFICIAL
CAPACITY AS SECRETARY OF
AGRICULTURE, AND THE UNITED
STATES DEPARTMENT OF
AGRICULTURE,

Defendants.

Case No. 4:16-cv-00041-BMM-JTJ

**BRIEF IN SUPPORT OF
UNOPPOSED (AS TO RULE 24(b))
MOTION TO INTERVENE BY
PROPOSED DEFENDANT-
INTERVENORS MONTANA BEEF
COUNCIL, NEBRASKA BEEF
COUNCIL, PENNSYLVANIA BEEF
COUNCIL, TEXAS BEEF
COUNCIL, LEE CORNWELL,
GENE CURRY, AND WALTER J.
TAYLOR, JR.**

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Proposed Defendant-Intervenors the Montana Beef Council (“MBC”), Nebraska Beef Council (“NBC”), Pennsylvania Beef Council (“PBC”), Texas Beef Council (“TBC”), and collectively, the “QSBC Intervenors”), Lee Cornwell, Gene Curry, and Walter J. Taylor, Jr. (the “Individual Producers,” and with the QSBC Intervenors, “Proposed Intervenors”), hereby file this Brief in Support of their Unopposed (as to Rule 24(b)) Motion to Intervene (“Motion”). Proposed Intervenors seek status as defendant-intervenors as a matter of right pursuant to Fed. R. Civ. P. 24(a), or alternatively, permissively under Fed. R. Civ. P. 24(b).

Permissive intervention is not opposed by any of the parties, but Plaintiff Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (“Plaintiff”) does not concede intervention as of right under Rule 24(a). As explained herein, however, Proposed Intervenors also meet the requirements to intervene as of right pursuant to Rule 24(a). Proposed Intervenors have significant interests in protecting the operations of the QSBC Intervenors against the entry of a declaratory judgment finding certain conduct as to fifteen QSBCs in violation of the First Amendment and a permanent injunction enjoining USDA from various conduct vis-à-vis those fifteen QSBCs; Proposed Intervenors will be impaired and impeded in protecting their interests absent intervention; Proposed Intervenors timely seek to intervene; and Proposed Intervenors are not adequately represented by the existing parties.

I. PRELIMINARY STATEMENT

A Qualified State Beef Council (“QSBC(s),” as herein defined), is an entity that receives voluntary contributions and conducts beef promotion, research, and consumer information programs in a particular state. QSBCs are recognized by the Cattlemen’s Beef Board (“CBB”) as the approved beef promotion entities within their respective states. To that end, QSBCs have provided innumerable benefits to beef producers within their respective states. The QSBC Intervenor’s activities protect and increase demand for beef and beef products through consumer marketing programs (promotion, education and research) and enhance profit opportunities for state beef producers.

On the heels of the Ninth Circuit’s mandate and this Court’s November 5, 2018 order lifting of the stay of these proceedings, the case is now ripe to continue. Following remand, Plaintiff filed a “Supplemental Pleading” seeking, in essence, to expand the scope of the current case to an additional fourteen QSBCs through a permanent injunction. Dkt. 56-1. The Court allowed Plaintiff to serve the Supplemental Pleading and ordered Defendants Secretary Sonny Perdue (the “Secretary”) and the United States Department of Agriculture (“USDA” and with the “Secretary,” the “Defendants”) to answer the original complaint and Supplemental Pleading. Dkt. 59 at 1-2.

Plaintiff originally brought this case against USDA's conduct with MBC; however, Plaintiff seeks a permanent injunction applicable to now *fifteen* QSBCs through its amended "Supplemental Pleading." Plaintiff's requested relief threatens QSBC Intervenor's very existence and their longstanding operations, beyond its role administering the Beef Checkoff Program. For example, without a functioning Montana Beef Council, the livelihood of Montana beef producers (including the Individual Producers) is and will be harmed. The Proposed Intervenor's effort to intervene is necessary, as a matter of right, in order to allow these QSBCs, and individuals benefitting from QSBCs, to protect their unique interests and critical role in the beef industry.

The current preliminary injunction (Dkt. 47) enjoins various activities that directly impact MBC, a non-party. Plaintiff's Supplemental Pleading seeks to expand its reach to fourteen more QSBCs. Certain of those QSBCs—the QSBC Intervenor—now seek to intervene to protect their interests. Should a declaratory judgment and expansive permanent injunction result, it would effectively prevent QSBC Intervenor from functioning as contemplated under the Beef Act and Beef Order (as herein defined).

In addition, the Individual Producers (and others who have "opted-in") have designated MBC to retain its portion of the assessments, but are not receiving any benefits or services that their checkoff assessments traditionally have provided and

that are expected from MBC, and seek relief to ensure their benefits will not be eliminated in the future by Plaintiff's requested relief.

The Proposed Intervenors have timely sought to intervene following the Ninth Circuit's entry of the mandate and promptly after this Court's order lifting the stay. As explained herein, QSBC Intervenors and the Individual Producers each have unique and protectable interests that warrant intervention. The involvement of the Proposed Intervenors would not prejudice the existing parties. In fact, intervention would facilitate these proceedings and provide a more complete record and for thorough disposition by the Court. The Government takes no position on this Motion, and Plaintiff does not oppose Proposed Intervenors' Motion under Rule 24(b).

Allowing intervention will neither delay nor further prolong these proceedings. There is no scheduling order issued (as of this filing), Defendants have not yet filed an answer (which the Court has ordered be filed on or before November 16, 2018), and, most importantly, the Proposed Intervenors are prepared to comply with any such scheduling order and deadlines entered by the Court. Finally, the current parties do not (and cannot) adequately represent the Proposed Intervenors. While the Government is defending its authority over administration of the Beef Checkoff Program, its factual bases and legal arguments—in addition to the scope of the relief now at issue through Plaintiff's Supplemental Pleading—

are similar, but not the same as the Proposed Intervenors. The Proposed Intervenors' interests pertain to the unique functioning of the Beef Checkoff Program to each of the QSBC Intervenors, and the impact of this litigation on individual cattle producers, including the Individual Producers.

For these reasons, Proposed Intervenors respectfully request that the Court allow them to intervene as defendant-intervenors, and to participate fully in these proceedings. While Proposed Intervenors believe their intervention should be granted as of right, their permissive intervention is unopposed by Plaintiff, as explained further in the Proposed Intervenors' motion certification.

II. BACKGROUND

A. The Beef Checkoff Program

The Beef Promotion and Research Act, 7 U.S.C. §§ 2901, *et seq.* ("Beef Act"), and the Beef Promotion and Research Order, 7 C.F.R. §§ 1260, *et seq.* ("Beef Order"), established CBB to carry out a program of generic beef promotion and research ("Beef Checkoff Program"). *See* Declaration of AMS Director Kenneth Payne, Dkt. 40-1 ¶ 3. CBB administers the federal Beef Checkoff Program. *Id.* ¶ 9. The Beef Checkoff Program is funded entirely through a \$1-per-head assessment on all cattle sold in the United States and a \$1-per-head equivalent on imported cattle. 7 U.S.C. § 2901(b).

This assessment is collected in each state through a Qualified State Beef Council (“QSBC”). *See* 7 C.F.R. § 1260.172. A QSBC is defined as “a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by [CBB] as the beef promotion entity within such State.” 7 U.S.C. § 2902(14); *see also* 7 C.F.R. § 1260.115. Half of every \$1-per-head is retained by a QSBC and half is remitted by the QSBC to CBB. 7 C.F.R. § 1260.172. QSBCs – like the QSBC Intervenor – use their portion of the assessment to fund their own operations, programs (such as educational and safety programs), promotions and marketing, and related checkoff activities.

B. The Proposed Intervenor

1. The QSBC Intervenor

As explained further below and in the accompanying declarations, the QSBC Intervenor operates within the Beef Act and Beef Order in order to enhance profit opportunities for respective states’ producers, execute and participate in local, state, national, and international promotion, research, and education programs, and manage the Beef Checkoff Program within their states. Declaration of Chaley Harney (“Harney”) ¶¶ 9-10, attached hereto as **Exhibit 1**; Declaration of Richard Wortham (“Wortham”) ¶¶ 10-11, attached hereto as **Exhibit 2**; Declaration of

Bridget Bingham (“Bingham”) ¶¶ 9-10, attached hereto as **Exhibit 3**; Declaration of Ann Marie Bosshamer (“Bosshamer”) ¶¶ 9-10, attached hereto as **Exhibit 4**. Individual producers within the states do not have the means or capacity on their own to exercise the same impact that the QSBC Intervenors are able to achieve and individual producers depend on the QSBC Intervenors to provide such framework, structure, and capacity. Harney ¶ 17; Wortham ¶ 18; Bingham ¶ 17; Bosshamer ¶ 17. The QSBC Intervenors operate to protect and increase demand for beef and beef products; such efforts also allow the QSBC Intervenors to provide benefits to their respective state producers, their respective state packers, consumers of beef products (both within and outside their respective states), and others. Harney ¶ 8; Wortham ¶ 9; Bingham ¶ 8; Bosshamer ¶ 8. The Beef Checkoff Program provides these QSBC Intervenors the ability to exert local decision-making subject to the Beef Act, Beef Order, and any USDA rules or guidelines.

Each of the QSBC Intervenors are the Qualified State Beef Council for their respective states. As the QSBCs for their respective states, the QSBC Intervenors are responsible for the collection and remittance of assessments. 7 C.F.R. § 1260.312. The QSBC Intervenors are almost exclusively funded through their collection of assessments. *See* Harney ¶ 12; Wortham ¶ 13; Bingham ¶ 12; Bosshamer ¶ 12.

The QSBC Intervenor also undertake many activities and programs that do not involve promotional activities—including research, education, checkoff administration (and expenses), program development, producer communications, and beef safety programs. Harney ¶¶ 19-20; Wortham ¶ 20; Bingham ¶¶ 19-20; Bosshamer ¶ 19. The QSBC Intervenor’s retention of their recognized portions of the assessments allow the QSBC Intervenor to provide individual producers within their respective states with the operational and institutional structure by which to collect and remit the assessments, and also to implement educational programs, industry information, and producer communications. Harney ¶ 21; Wortham ¶ 21; Bingham ¶ 21; Bosshamer ¶ 20.

Each of the QSBC Intervenor has separately entered into Memoranda of Understanding with USDA (“MOU(s)”), providing USDA with oversight of the QSBC Intervenor to ensure that each is “appropriately expending [their] checkoff dollars in accordance with federal legislation, regulations, and any applicable policies.” Harney ¶ 22; Wortham ¶ 23; Bingham ¶ 22; Bosshamer ¶ 21. All of the QSBC Intervenor’s marketing and promotional activities are now overseen and controlled by both CBB and USDA, and the details of such oversight and control are explained further in the accompanying declarations. *See* Harney ¶¶ 22-25; Wortham ¶¶ 23-27; Bingham ¶¶ 22-25; Bosshamer ¶¶ 21-24. In addition, all of the QSBC Intervenor submit their annual audited financial reports to USDA,

make their books and records available to USDA for inspection and audit, and provide USDA with advance notice of their board meetings and copies of board meeting minutes. *See, e.g.*, MBC Memorandum of Understanding, Dkt. 45-1.

Intervention as of right is even more imperative since Plaintiff's Supplemental Pleading, in which Plaintiff seeks to levy the preliminary injunction (which is only against USDA as to MBC) into a permanent injunction against fourteen *additional* QSBCs. Thus, Plaintiff seeks to expand a limited, preliminary injunction affecting, potentially, only MBC, to the businesses of the QSBC Intervenor, their respective state cattle producers, their respective state beef industry, and their respective state agricultural industry. Harney ¶ 32; Wortham ¶ 28; Bingham ¶ 26; Bosshamer ¶ 25. These four QSBCs have come forward to intervene and so their individual, and different, concerns can be heard on these issues and the operational impact on their QSBCs.

The unique status, history, and functioning of each of the QSBC Intervenor are addressed in the accompanying declarations and summarized briefly below.

a. Montana Beef Council

MBC was created in 1954 as an organization for the Montana beef industry. Harney ¶ 3. MBC is managed by a 12 member board of directors appointed or elected by several industry groups. *Id.* ¶ 4. Since its creation, MBC has operated

to protect and increase demand for beef and beef products through local, state, national, and international promotion, consumer education, and research. *Id.* ¶ 5.

With its portion of the \$1-per-head assessment, MBC spends approximately 6% on beef education and safety, approximately 47% percent on marketing and promotional activities, and approximately 43% percent on its operational activities, including administering checkoff collections. *Id.* ¶¶ 18-19. For example, MBC had planned to invest over \$800,000 into programs relating to education, consumer information, industry information, and producer communications in fiscal year 2018. *Id.*

The previously-mentioned MBC operations are directly impacted by the preliminary injunction, because MBC now is unable to fully provide the benefits and programs previously provided and expected by Montana producers. Harney ¶ 29. For example, MBC currently has several promotional programs and materials that have already been reviewed and approved by CBB and USDA (as required by the MOU), but MBC is unable to fund because of the decrease in checkoff assessment revenue, stemming from the preliminary injunction and the “opt-in” requirements. *Id.*

b. Texas Beef Council

TBC was created in 1986 by Texas cattle producers as an organization for the Texas beef industry. Wortham ¶ 3. TBC has been the certified QSBC for the

State of Texas since that time. *Id.* TBC is currently managed by a 20-member board of directors and several cattle producer organizations and allied organizations are currently qualified to nominate directors to the board. *Id.* ¶¶ 4.

Unlike the other QSBC Intervenors, TBC is also a contractor to the Beef Promotion and Research Council of Texas (“Texas BRPC”), which administers the refundable \$1-per-head state beef checkoff overseen by the Texas Department of Agriculture. *Id.* ¶ 11. The Texas BRPC is appointed by the Texas Commissioner of Agriculture from producers nominated by TBC. *Id.* TBC uses funds through the Texas Beef Checkoff and Texas BRPC consistent with the parameters of Texas law, which includes beef promotion, marketing, research, and consumer education for beef and beef products within the State of Texas, the United States, and internationally. *Id.* ¶ 22.

With its portion of the \$1-per-head national checkoff assessment, TBC invests approximately 37% percent in promoting domestic and foreign marketing at the national level, 26% percent in local promotion, 20% on consumer information, 4% in foreign marketing, 3% in producer communications, 1% in industry information, 1% in research, 1% on collections, and 7% in administrative costs. Wortham ¶ 19.

c. Pennsylvania Beef Council

PBC was created on May 3, 1976 by Pennsylvania cattlemen as an organization for the Pennsylvania beef industry. Bingham ¶ 3. PBC operates to protect and increase demand for beef and beef products through local, state, national, and international promotion, consumer education, and research. *Id.* ¶ 5. While PBC is primarily funded through its collection of assessments from the Beef Checkoff Program, it also receives funding from the Pennsylvania Department of Agriculture for beef producer initiatives and youth education and from CBB's Beef Promotion Operating Committee to execute the Northeast Beef Promotion Initiative ("NEBI"). Bingham ¶ 12. PBC is currently managed by 21 elected directors and 6 ex-officio directors and these 21 voting members are nominated by various Pennsylvania agriculture organizations and industry groups. *Id.*

With its portion of the \$1-per-head assessment, PBC has budgeted \$169,400 for its programs in 2018-2019. Bingham ¶ 18. The PBC Board of Directors, USDA, and CBB have approved this program budget to be spent as follows: 43% percent on consumer and channel education, marketing and promotional activities; 35% on producer education, quality assurance programming and communications; 16% percent on its federation investment and industry events; and 6.5% on collection, compliance and USDA oversight activities. *Id.* ¶ 18.

d. Nebraska Beef Council

NBC was created in 1991 as a 501(c)(5) as the successor organization to the Nebraska Beef Industry Council. Bosshamer ¶ 3. NBC is currently managed by a 9-member board that is elected by producer peers in their district, with elections held on even numbered years for a four year term. *Id.* Like other QSBCs, NBC operates to protect and increase demand for beef and beef products through local, state, national, and international promotion, consumer education, and research. *Id.* ¶ 5.

With its portion of the \$1-per-head assessment, NBC spends approximately 45% on domestic marketing and 15% on foreign marketing via the Federation and the USMEF, 6% on promotion, 8% on consumer information, 1% on industry information, 3% on producer communications, 5% on research, 3% on foreign marketing via the Nebraska Department of Agriculture, 2% on collections and 5% for administrative costs. Bosshamer ¶ 18.

2. The Individual Producers

As explained further in the accompanying declarations, the Individual Producers receive significant benefits from MBC. For example, Montana producers (like those in other states) depend on MBC's operational and institutional structure by which to implement educational programs, industry information, and producer communications throughout the State of Montana.

Harney ¶ 21; *see also* Cornwell (as herein defined) ¶ 9; Curry (as herein defined) ¶ 9; Taylor (as herein defined) ¶ 12. Individual Montana producers recognize that they do not have the means or capacity to exercise the same impact on their own. Harney ¶ 17. Montana producers acknowledge that they are directly and tangibly impacted by the preliminary injunction and by MBC's administration of the Beef Checkoff Program. Taylor ¶ 14.

MBC also allows Montana producers to be "in charge" of their checkoff dollars, as MBC and its leaders (who are also Montana residents) are answerable to Montana producers. Curry ¶ 6. The Individual Producers want their investments in MBC to have a discernable impact, and do not want their checkoff assessments sent to CBB. *Id.* ¶ 14. Further, MBC activities have a direct impact on the economic well-being of the Individual Producers, the Montana beef industry, Montana producers, and others throughout Montana. Taylor ¶ 15.

a. Walter J. Taylor, Jr.

Walter J. Taylor, Jr. ("Watty") is a cattle rancher in Busby, Montana. *See* Declaration of Walter J. Taylor, Jr. ("Taylor") ¶ 1, attached hereto as **Exhibit 5**. Watty's family has ranched in the area since 1948. *Id.* ¶ 3. Watty has been a rancher since 1973, when he returned to Montana following his service in the United States Navy. *Id.* The family runs a cow calf operation that summers cattle

in the Wolf Mountains east of Lodge Grass Montana, and winters them near the Tongue River. *Id.* ¶ 4.

Over the years, Watty has been an active participant and supporter of the Montana beef industry, serving in various roles with the Montana Stockgrowers Association, MBC, and the Northern International Livestock Exposition in Billings, Montana. Taylor ¶ 5. He served on MBC's Board of Directors from 1991-1999 and as its chairman from 1996-1997. *Id.* ¶ 6. Watty also served three years on CBB's Collection Compliance Committee and another three years as a member of the Beef Promotion Operating Committee. *Id.* ¶ 7. In these roles, Watty gained experience and an understanding of MBC's interaction with CBB and USDA. *Id.* ¶¶ 8-9. Watty has paid the \$1-per-head assessment to MBC since the beginning of the Beef Checkoff Program. *Id.* ¶¶ 10-11.

Watty has witnessed firsthand that the checkoff assessment dollars received by MBC benefit Montana producers and the Montana beef industry. Taylor ¶ 9. For example, Watty has seen how the checkoff assessment dollars were essential for the beef industry to respond to an *E. coli* outbreak with safe handling and cooking instructions and also "mad cow" disease. *Id.* Watty is seeking to intervene because he is experiencing the consequences of the current limitations on MBC's use of assessments and because he is concerned that this litigation will negatively impact MBC programs and operations that he supports, and because

Watty desires to “defend the investment” he and other “Montana producers have made in our industry through MBC.” *Id.* ¶¶ 12-18.

b. Lee Cornwell

Lee Cornwell (“Lee”) is a rancher in Glasgow, Montana. *See* Declaration of Lee Cornwell (“Cornwell”) ¶ 1, attached hereto as **Exhibit 6**. Lee’s family has ranched in the Glasgow area for over 120 years. *Id.* ¶ 3. After graduating from Montana State University in 1974, Lee returned to the ranch where he and his brothers were partners for many years. *Id.* ¶ 4. After their passing, Lee continued to ranch with his and his brothers’ families. *Id.* ¶ 5. In addition to being a rancher, Lee is active in industry organizations, having served on the Board of Directors of the Montana Stockgrowers Association and for over a decade as Vice Chairman of the Montana Board of Livestock. *Id.* ¶ 6. Lee has paid the \$1-per-head assessment to MBC since the beginning of the Beef Checkoff Program. *Id.* ¶ 7.

Lee is concerned that this case has (and will) significantly curtail important programs and activities of MBC that support Montana producers and the Montana cattle industry. *See* Cornwell ¶¶ 9-14. One such example is the Agriculture in Curriculum Program that is offered in schools throughout Montana, consumer education, and beef safety initiatives. *Id.* ¶ 11-14. Since the preliminary injunction, Lee has observed a decrease in MBC promotion and marketing

materials and related programs specific to supporting Montana producers and the Montana beef industry, including the Agriculture in Curriculum Program. *Id.*

c. Gene Curry

Gene Curry (“Gene”) is a rancher in Valier, Montana, near Glacier National Park. *See* Declaration of Gene Curry (“Curry”) ¶ 1, attached hereto as **Exhibit 7**. Gene and his family have ranched in the area since 1971, operating a cow-calf operation and grazing yearlings. *Id.* ¶ 3. Gene has also been active in Montana beef industry organizations, and he recently completed a term as President of the Montana Stockgrowers Association, and also served on its Board of Directors for over a decade. *Id.* ¶ 4. Gene is also involved in a variety of civic and agricultural business organizations in his community. *Id.* For several decades, Gene has worked to promote Montana beef and grow the Montana beef industry and improve the economics of the Montana beef business for all ranchers. *Id.* ¶¶ 4, 6. To that end, Gene is passionate about keeping checkoff dollars in Montana to promote the beef and cattlemen industry. *Id.* ¶ 6. Since the beginning of the Beef Checkoff Program, Gene has paid the \$1-per-head assessment to MBC. *Id.* ¶ 5.

Gene is concerned that the decades-long investment in MBC by Montana producers to benefit the beef industry is at risk as a result of this lawsuit and believes that MBC cannot fully utilize its checkoff dollars to his and other Montana producers’ benefit. Curry ¶ 9-10. For example, since the preliminary

injunction, Gene no longer observes local promotion activities in Montana grocery stores and schools. *Id.* ¶ 11. Gene also believes that MBC’s involvement and sponsorship of the Montana Environmental Stewardship Award has been negatively impacted or stopped altogether. *Id.* ¶ 12. Gene, like other Montana producers, appreciates that MBC is run and managed by fellow Montanans who he can call with questions or comments. *Id.* ¶ 13.

C. Current Litigation Status

In 2016, Plaintiff sued USDA and the Secretary for declaratory and injunctive relief directly impacting MBC. Shortly after filing the complaint, Plaintiff filed a motion for summary judgment, or in the alternative, motion for preliminary injunction. Dkt. 21. On June 2, 2017, this Court entered a preliminary injunction enjoining USDA “from continuing to allow [MBC] to use the assessments that it collects under the Beef Checkoff Program to fund its advertising campaigns, unless the payer provides affirmative consent authorizing [MBC] to retain a portion of the payer’s assessment.” Dkt. 47 at 23. USDA appealed the decision to the Ninth Circuit. Dkt. 48. In a split decision, the Ninth Circuit affirmed the entry of the preliminary injunction on April 9, 2018 and the mandate issued on June 1, 2018. Dkts. 53, 54.

On August 9, 2018, Plaintiff filed a “Motion to Lift Stay and Serve Supplemental Pleading.” Dkts. 55, 56. Plaintiff argued that its proposed

Supplemental Pleading “seeks to expand Plaintiff’s requested declaratory and injunctive relief to stop Defendants from allowing 13 additional state beef councils . . . from using the Beef Checkoff tax to fund those councils’ private speech in violation of the First Amendment.” Dkt. 56 at 6. On November 5, 2018, this Court lifted the stay of these proceedings, scheduled a telephonic status conference for November 7, 2018, ordered that Plaintiff be permitted to serve the supplemental pleading, and directed Defendants to file an answer to the original complaint and supplemental pleading within fourteen days. *See* Dkt. 59 at 1-2.

The following day, Proposed Intervenors notified counsel for Plaintiff and Defendants of their intent to seek intervention and sought their respective positions as to the requested relief. This Motion promptly followed.

III. ARGUMENT

A. The Proposed Intervenors are Entitled to Intervene As a Matter of Right Under Rule 24(a).

Federal Rule of Civil Procedure 24(a) provides that:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the applicant’s ability to protect its interest, unless existing parties adequately represent that interest.

An applicant seeking intervention as of right must show that: (1) it has a “significant protectable interest” relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter,

impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997) (citing *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995)); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

Courts "generally interpret the requirements broadly in favor of intervention." *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *see also U.S. ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) ("Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations.") (citations omitted). The court must accept as true the non-conclusory allegations made in support of an intervention motion absent sham, frivolity, or other objections. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001).

1. The Proposed Intervenors' Application to Intervene is Timely.

A court considers three factors for whether a motion for intervention is timely: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *Orange Cnty. v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). To determine timeliness of an intervention application, a district court should also focus "on the

date the person attempting to intervene should have been aware his interest[s] would no longer be protected adequately by the parties, rather than the date the person learned of the litigation.” *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (citations omitted); *see also Chamness v. Bowen*, 722 F.3d 1110, 1121 (9th Cir. 2013) (citing *Bates*, 127 F.3d at 873).

Here, these proceedings are still at an early stage. There has been no discovery, the parties are in discussions regarding preparation of stipulated facts, and the Proposed Intervenors have agreed to engage in such discussions consistent with any deadlines that this Court sets. While Plaintiff filed this case in 2016, a Ninth Circuit decision affirming a preliminary injunction has only recently been decided and the mandate issued, returning the case to this Court, and a stay of the proceedings was in place from September 18, 2017 until November 5, 2018. Dkts. 52, 59. Intervention would have been impractical and procedurally improper had the Proposed Intervenors sought to intervene in the district court while the District Court proceedings were stayed or while the appeal of the preliminary injunction was pending before the Ninth Circuit.

Intervention will not prejudice the existing parties. In fact, intervention by the QSBC Intervenors would permit those entities most directly impacted by the preliminary injunction (MBC) and the ultimate relief requested in the Supplemental Pleading (the QSBC Intervenors) to be involved in these

proceedings. Similarly, intervention by the Individual Producers' intervention does not prejudice the existing parties. Intervention of the Individual Producers would also add to these proceedings individuals directly and tangibly impacted by the preliminary injunction and by the potential relief Plaintiff requests.

MBC's application for intervention is further timely because it is directly impacted by the current state of the "opt-in" and preliminary injunction requirements. Harney ¶ 29. Similarly, the remaining QSBC Intervenors have sought to intervene within days of this Court allowing Plaintiff to serve its Supplemental Pleading, which included, for the first time, fourteen additional QSBCs.

2. The Proposed Intervenors Have Significant and Legally Protectable Interests in this Action.

Next, an applicant seeking intervention must demonstrate a "significant protectable interest [and] must establish that interest is protectable under some law and that there is relationship between legally protect[able] interest and claims at issue." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

a. The QSBC Intervenors Have a Significant and Legally Protectable Interest.

As to the remaining QSBC Intervenors, Plaintiff has expanded the requested relief sought to include entry of a declaratory judgment finding certain conduct as

to *fifteen* QSBCs in violation of the First Amendment and a permanent injunction enjoining USDA from various conduct vis-à-vis those QSBCs. The QSBC Intervenor seek to intervene in order to protect their interests against such an expanded and widespread result, with entities spanning states from Pennsylvania to Texas to Nebraska, well beyond this Court and the Ninth Circuit.

The QSBC Intervenor are structured and operate for all segments of their respective state livestock industry in a coordinated effort to expand the utilization and merchandising of all products derived from cattle and calves. Harney ¶ 5; Wortham ¶ 5; Bingham ¶ 5; Bosshamer ¶ 5. The preliminary injunction and requested declaratory judgment, permanent injunction, and requested relief directly impact not only the QSBC Intervenor’s promotional activities, but also their educational, administrative, program development and beef safety programs. Harney ¶ 19; Wortham ¶ 20; Bingham ¶ 19; Bosshamer ¶ 19.

The QSBC Intervenor’s “significant protectable interest” relates to their operations, control, as well the adequacy and extent of CBB and USDA oversight and the impact of Plaintiff’s expanded requested declaratory and permanent injunctive relief. Curiously, Plaintiff did not originally name MBC as a defendant in this action, nor did Plaintiff seek to add the fourteen other QSBCs named in the “Supplemental Pleading” as parties. Instead, Plaintiff has carefully avoided adding

naming these entities, while at the same time placing them directly in the crosshairs through the preliminary injunction and the Supplemental Pleading.

The structure and intent of the Beef Checkoff Program is to provide a QSBC with some ability to exert local decision-making. Harney ¶ 15; Wortham ¶ 16; Bingham ¶ 15; Bosshamer ¶ 15. The loss of state-specific control and the impact on the QSBC Intervenor's myriad non-promotional and marketing activities is one of the many inadvertent consequences of the preliminary injunction and one of many significant consequences that would result from Plaintiff's "supplemental" and expanded requested relief. The QSBC Intervenor also have a legitimate and protectable interest to continue their operations without being improperly restrained. Accordingly, the QSBC Intervenor should be allowed to intervene as right in order to protect such interests.

b. The Individual Producers Have a Significant and Legally Protectable Interest.

As to the Individual Producers, they too have a significant and legally protectable interest in ensuring that their "opted-in" assessments under the preliminary injunction are used to fund those activities and programs that are of most benefit to them and other Montana producers by MBC. *See* Taylor ¶ 18; Cornwell ¶ 11; Curry ¶ 10. The Individual Producers have remitted (and continue to remit) assessments and have completed the Producer Consent Form to designate as an "opt-in." Yet, MBC's retention of the Individual Producers' assessments is

serving no current or apparent purpose. The vast majority of MBC's operations are prohibited by the preliminary injunction, and so the services and benefits MBC previously provided to Montana producers have been substantially curtailed. Harney ¶ 29; Curry ¶ 12 (“My interests as a Montana producer are directly impacted upon the issuance of the preliminary injunction, which has prevented checkoff dollars from being spent in Montana by [MBC].”); *see also* Taylor ¶ 13; Cornwell ¶¶ 12-13.

Indeed, the Individual Producers see their intervention as integral to “defend th[e] investment in [the beef] industry” and ensure that the livelihood of those Montana producers who will be affected the most by the preliminary injunction are able to defend their interests. Taylor ¶ 18. The Individual Producers “believe it is important that cattlemen be allowed to promote the Montana beef industry without all of [the Montana checkoff] dollars being sent to [CBB].” Curry ¶ 14. Accordingly, there are significant and legally protectable interests at stake for the Individual Producers.

3. The Proposed Intervenors’ Interests are Not Adequately Represented by the Existing Parties.

As to the final consideration, in assessing the adequacy of representation, the focus should be on the “subject of the action,” not just the particular issues before the court at the time of the motion. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The burden of showing inadequacy is “*minimal*,” and

the applicant need only show that representation of its interests by existing parties “*may be*” inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). If it is likely that the parties will not advance the same arguments as a proposed intervenor, “there is sufficient doubt about the adequacy of representation to warrant intervention.” *Id.* at 538. Where the interests of a proposed intervenor are “similar, but not necessarily the same” as a federal defendant, intervention is proper. *Indigenous Envtl. Network v. U.S. Dep’t of State*, 4:17-cv-29-BMM, Dkt. 37 at 2 (D. Mont. May 25, 2017); *see also Citizens for Clean Energy v. U.S. Dep’t of the Interior*, Case No. 4:17-cv-30, 2017 WL 9289124 at *1 (D. Mont. May 30, 2017) (unpublished) (granting Wyoming’s intervention request because it “has unique interests” beyond interests represented by Department of Interior).

Here, the Proposed Intervenors have a “similar, but not necessarily the same” interest as USDA. The subject of this action is for a declaratory judgment finding that certain conduct (of the QSBC Intervenors and the other named QSBCs) is in violation of the First Amendment and for a permanent injunction enjoining USDA from permitting the QSBCs from certain conduct. The Proposed Intervenors have raised significant concerns noting the significant consequences for QSBCs (through the QSBC Intervenors) and for their respective state producers (through the Individual Producers). While the Government is defending USDA

and the Secretary, the Proposed Intervenor's interests are distinct from the interests of the Government.

Specifically, USDA is defending USDA's authority and the Beef Checkoff Program generally. The QSBC Intervenor, meanwhile, has specific and discrete concerns with how this lawsuit and the preliminary injunction will permanently impact their very structure, operations, funding, personnel, budgeting, and a myriad of other activities. *See, e.g.*, Harney ¶ 32 (MBC seeks to intervene so that it "could make the voices of its Board, organization, and those Montana producers it represents heard on the issues presented in this case.").

USDA cannot adequately represent the QSBC Intervenor's interests because, as explained herein and in the supporting declarations, they are distinct, varied, and unique; the interests are "*similar*, but not necessarily the same." *Indigenous Envtl. Network*, 4:17-cv-29-BMM, Dkt. 37.

The QSBC Intervenor is all similar in some respects; however, they are distinct and separately autonomous entities. For example, TBC is also a contractor with the Texas BRPC and involved in the *state* checkoff program. Wortham ¶ 14. PBC, meanwhile, obtains some funding from the Pennsylvania Department of Agriculture for beef producer initiatives and youth education and also some funding from CBB's Beef Promotion Operating Committee to execute the NEBI. Bingham ¶ 12. As the several declarations for the QSBC Intervenor demonstrate,

it is quite the contrary; one size does not fit all. Intervention is proper so as to allow the QSBC Intervenors to present different arguments, develop separate facts, and protect their “unique interests” to the Court. *Citizens for Clean Energy*, 2017 WL 9289124 at *1. Accordingly, the QSBC Intervenors have met the “minimal” burden to show inadequacy of representation.

As to the Individual Producers, the same “minimal” burden is also satisfied because their interests are again similar to that of the Government, but not the same. *See Trbovich*, 404 U.S. at 538; Taylor ¶ 18 (“I seek to intervene in these proceedings so that the voice of Montana cattlemen, like myself, can be directly involved and have a say.”); Cornwell ¶ 15; Curry ¶ 16.

Plaintiff’s position in this litigation does not represent the Proposed Intervenors’ interest. The Proposed Intervenors’ interests are not adequately represented and intervention as of right is proper.

B. In the Alternative, the Proposed Intervenors are Entitled to Permissively Intervene and this Request is Unopposed.

An applicant seeking permissive intervention must show that (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant’s claims. *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). Permissive intervention is within the broad discretion of the trial court. *Orange*

County, 799 F.2d at 539. Alternatively, each of the permissive intervention factors are also satisfied.

First, MBC and the Individual Producers seek to intervene so that they can be heard by the Court on Plaintiff's allegations. While interests are "similar, but not necessarily the same" with USDA, the basis for the Proposed Intervenors' claims and arguments are from the same set of facts and law as in the "main action."

Second, as explained herein, the Proposed Intervenors' request for intervention is timely. Intervention is sought promptly after the Ninth Circuit's issuance of the mandate and this Court's lifting of the stay of these proceedings. It would have been inappropriate, and likely improper, for the Proposed Intervenors to attempt to intervene in this Court while the Ninth Circuit appeal was pending or before the stay in these proceedings had been lifted.

Third, this Court has an "independent basis" for jurisdiction over MBC's claim for the reasons stated herein.

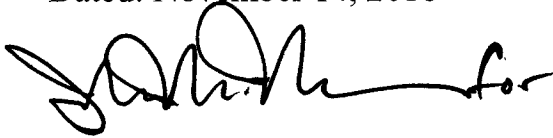
Finally, Plaintiff does not oppose the request for permissive intervention and the Government takes no position on the Motion.

IV. CONCLUSION

For the foregoing reasons, the Proposed Intervenors' Motion to Intervene should be granted and Proposed Intervenors this Court should order Proposed

Intervenors to be defendant-intervenors either as a matter of right or permissively for all purposes of these proceedings.

Dated: November 14, 2018



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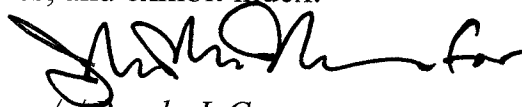
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I hereby certify the attached brief contains 6,428 words, excluding any caption, certificates of services and compliance, table of contents and authorities, and exhibit index.


/s/ Randy J. Cox

CERTIFICATE OF SERVICE

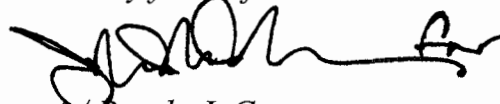
I hereby certify that on November 14, 2018, I electronically filed the motion to intervene, brief in support, and any exhibits with the Clerk of Court using the CM/ECF system, which sent notice of filing to the following counsel of record:

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