

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICHAEL P. CALLICRATE,)
)
Plaintiff,)

v.)

Case No. 12-cv-2521 RDR/KGS

UNITED STATES DEPARTMENT)
OF AGRICULTURE,)
1400 Independence Avenue, S.W.)
Washington, DC 20250)

SECRETARY OF AGRICULTURE)
TOM VILSACK,)
U.S. Department of Agriculture)
1400 Independence Avenue, S.W.)
Washington, DC 20250)

CATTLEMEN'S BEEF PROMOTION)
AND RESEARCH BOARD,)
9000 E. Nichols Avenue, Suite 215)
Centennial, CO 80112)

BEEF PROMOTION OPERATING)
COMMITTEE,)
9000 E. Nichols Avenue, Suite 215)
Centennial, CO 80112)

AGRICULTURAL MARKETING)
SERVICE,)
U.S. Department of Agriculture)
1400 Independence Avenue, S.W.)
Washington, DC 20250)

Defendants.)

COMPLAINT FOR PERMANENT INJUNCTION

This is an action to permanently enjoin violations of the Beef Research and Information Act of 1985 (the "Act"), 7 U.S.C. §§ 2901 et seq. and 7 C.F.R. §§ 1260 et seq. by the U.S. Department of Agriculture, the Secretary of Agriculture, the Cattlemen's Beef Promotion and Research Board, the Beef Promotion Operating Committee, and the Agricultural Marketing

Service. These statutes and regulations govern the national “Beef Checkoff,” which generates over \$80,000,000 from beef producers annually to be allocated by Defendants, with the express proscription that none of the “funds collected [may be] used in any manner for the purpose of influencing governmental action or policy.” 7 U.S.C. § 2904(10). Defendants violated the Act and the implementing regulations, 7 C.F.R. §§ 1260 et seq., by giving the National Cattlemen’s Beef Association’s (“NCBA”) hundreds of millions of dollars in Beef Checkoff funds even though the NCBA is primarily a policy and lobbying organization and uses the Beef Checkoff funds to influence governmental action and policy. For this reason, Plaintiff respectfully asks the Court to permanently enjoin Defendants from giving any more Beef Checkoff dollars to the NCBA.

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1361 and 5 U.S.C. § 702.
2. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events giving rise to the claim occurred in Kansas. Kansas had 6.1 million cattle on ranches and in feed yards as of January 1, 2012 (third among U.S. states) and 6.5 million head of commercial cattle processed in 2010 (also third among U.S. states). Kansas cattle producers pay millions of dollars per year to the Beef Checkoff. Plaintiff Michael Callicrate sells a majority of his cattle in St. Francis, Kansas, and the Beef Checkoff for those cattle is remitted in Kansas.

THE PARTIES

3. Plaintiff Michael Callicrate, a U.S. citizen and resident of Colorado, is an individual who has raised cattle since 1973. He has paid the Beef Checkoff since it became

required under the Act and continues to pay the \$1 per-head-of-cattle assessment mandated by the Act.

4. The United States Department of Agriculture (“USDA”) is an agency of the United States government.

5. Defendant Tom Vilsack is the Secretary of Agriculture (the “Secretary”) and is sued here in his official capacity only. The Secretary is charged with administering the Act, 7 U.S.C. §§ 2901-11, which establishes the beef promotion program through per-head assessments on cattle producers. This program is known in the industry as the “Beef Checkoff.”

6. Defendant Cattlemen’s Beef Board (“CBB”) is an organization authorized pursuant to the Act, 7 U.S.C. § 2904(1), and created pursuant to the Beef Research and Promotion Order, 7 C.F.R. §§ 1260 et seq. (July 18, 1986). The CBB is composed of cattle producers and importers, who are appointed by the Secretary and charged with administering the Act and the Beef Research and Promotion Order.

7. Defendant Beef Promotion Operating Committee (“BPOC”) is an organization authorized pursuant to the Act, 7 U.S.C. § 2904(1), and created pursuant to the Beef Research and Promotion Order, 7 C.F.R. §§ 1260 et seq. Defendant BPOC consists of twenty members, and is responsible for approving projects and funding to carry out Beef Checkoff programs. Ten members of Defendant BPOC are NCBA representatives (described in ¶ 9, below).

8. Defendant Agricultural Market Service (“AMS”) is an agency of the United States government, and a division of Defendant USDA, that oversees the research and promotion boards for 18 separate commodities, including Defendant CBB.

9. Third Party National Cattlemen’s Beef Association (“NCBA”) is a Delaware non-profit corporation. Its primary place of business is located at 910 E. Nichols Ave., #300,

Centennial, CO, 80112. NCBA is a contractor of Defendant CBB that receives tens of millions of checkoff dollars each year and has received approximately \$200,000,000 in checkoff funds in the past six years.

BACKGROUND

STATUTORY AND REGULATORY SCHEME

10. The Beef Research and Information Act, 7 U.S.C. §§ 2901-11, originally enacted in 1976, is intended to strengthen the beef industry's position in the marketplace through a coordinated program of promotion and research. 7 U.S.C. § 2901(b).

11. The Beef Checkoff is funded by mandatory producer contributions known as "Checkoffs." Currently, there are eighteen other producer-funded promotion and research "checkoff" programs for various agricultural commodities, such as pork and soybeans, similar in many of their functional respects to the Beef Checkoff.

12. The Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order to be financed through one-dollar-per-cattle-head assessments and that must be paid by all cattle producers and importers. 7 U.S.C. § 2904(8)(C). Each person receiving a payment from a producer is designated a "collecting person," 7 C.F.R. § 1260.311(a), and is required to remit the assessments either to a qualified State beef council or directly to the CBB. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.172(A)(5), 1260.311(a) & 1260.312(c).

13. 7 U.S.C. § 2904(10) prohibits the use of Beef Checkoff funds for influencing governmental action or policy: "The order [required to be issued by the Secretary under 7 U.S.C. § 2904(1)] shall prohibit any funds collected by the [CBB] under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order."

14. The Beef Checkoff regulations promulgated by Defendant USDA state: “No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this Part.” 7 C.F.R. § 1260.169(e).

15. Defendant BPOC is required to enter into “contracts or agreements for implementing and carrying out the activities authorized by this chapter with established national nonprofit industry-governed organizations . . . to implement programs of promotion, research, consumer information, and industry information.” 7 U.S.C. § 2094(6).

16. NCBA contracts with BPOC and receives nearly half of the approximately \$80,000,000 raised annually by the Beef Checkoff.

17. The Secretary has delegated authority to oversee and monitor Defendant CBB to Defendant AMS. Defendant AMS’s primary responsibility is to ensure that Defendant CBB uses checkoff funds in accordance with legislative and regulatory requirements. One of its critical responsibilities is ensuring that checkoff funds are not used to influence any legislation or governmental action.

18. In November 2010, Defendant USDA published Guidelines for AMS Oversight of Research and Promotion Boards (“Guidelines”).

19. The phrase “influencing governmental policy or action,” as used in the Act, is defined in the Guidelines. Pursuant to the Guidelines, the term “influencing of governmental policy or action” means “any action the principle purpose of which is to bring about a change in existing policy or regulation or affect the outcome of proposed policy or regulation, except those actions which are specifically provided for in the act, order and/or rules and regulations.”

20. Significantly, the Guidelines also state that the “prohibition on the use of checkoff funds applies equally to any trade/producer organizations funded wholly or in part by a particular board or contractors to the board.” Therefore, no contractor of Defendant BPOC may use the Beef Checkoff funds for the purpose of influencing governmental action or policy.

21. The Beef Checkoff was established over 25 years ago, with more than \$1.6 billion collected and spent. Beef producers pay approximately \$80 million each year to the checkoff. During these 25 years, beef producers have lost market share, downsized the domestic cattle herd, and suffered from a drastically reduced producer’s share of the retail beef dollar. Nearly 500,000 beef cattle operations have gone out of business, including 35,000 feeders, since 1996.

NCBA’S ACTIVITIES

22. NCBA “works to advance the economic, *political* and social interests of the U.S. cattle business and to be an *advocate for the cattle industry’s policy positions and economic interests.*” (NCBA, About Us, available at <http://www.beefusa.org/aboutus.aspx>) (last visited August 7, 2012) (emphasis added).

23. According to the Beef Industry Long-Range Plan for 2011-2013 posted on NCBA’s website (available at <http://www.beefusa.org/CMDocs/BeefUSA/Media/APPROVED-2011-2013-Long-Range-Plan-ONE-PAGE.pdf>, last visited on August 6, 2012), “Core Strategies and Strategic Initiatives” include:

- Educate policy makers and regulators on structure, operation and value of the beef industry; and
- Coordinate lobbying efforts among like-minded beef industry advocates.

24. The NCBA's 2012 Policy Book, which is currently 161 pages and contains over 500 legislative positions, is a statement that, according to the NCBA, guides "NCBA's actions on behalf of the cattle industry in influencing the government relating to agriculture."

25. As stated in the 2012 Policy Book, NCBA's priorities include: (a) achieving a reduction in federal spending and the deficit; (b) minimizing direct federal involvement in agriculture; (c) preserving the right of individual choice in the management of land, water, and other resources; (d) providing an opportunity to compete in foreign markets; and (e) opposing Farm Policy that favors one producer or commodity over another. (Beef USA 2012 Policy Book, June 2012, available at <http://www.beefusa.org/CMDocs/BeefUSA/Issues>) (last visited August 6, 2012).

26. The 2012 NCBA Policy Priorities include the death tax, farm dust regulation, the Equal Access to Justice Act, and the 2012 Farm Bill. (available at <http://www.beefusa.org/2012ncbapolicypriorities.aspx>) (last visited August 6, 2012)

27. The NCBA's website has a "Political Action" page. The page states: (a) "Call to Action – Find out what legislation NCBA is currently paying close attention to in the Legislative Watch"; (b) "Or, contact your Elected Officials using the Capwiz online advocacy tool to send messages to legislators and other key people"; and (c) "Stay Informed with the Beltway Beef weekly report from Washington, D.C., for an up-to-date summary of top policy initiatives concerning the cattle industry."

28. The NCBA has a "Public Policy Internship," through which, according to NCBA, "Interns work alongside NCBA's lobbying team, regulatory experts, communications team and political action committee to ensure legislative and regulatory actions taken inside the nation's

Beltway don't cause harm to the cattle industry." (available at <http://www.beefusa.org/ncba/publicpolicyinternship.aspx>, last visited on August 7, 2012).

29. The NCBA's website further shows a cattleman proclaiming: "NCBA is our voice in Washington."

30. The NCBA reported income of \$69,298,644 in its 2006 Form 990. Of this amount, \$46,239,644 (approximately 67%) was attributed to Defendant BPOC contracts.

31. The NCBA reported income of \$65,583,483 in its 2007 Form 990. Of this amount, \$42,681,347 (approximately 65%) was attributed to Defendant BPOC contracts.

32. The NCBA reported income of \$56,694,160 in its 2008 Form 990. Of this amount, \$35,832,980 (approximately 63%) was attributed to Defendant BPOC contracts.

33. The NCBA reported income of \$58,678,003 in its 2009 Form 990. Of this amount, \$37,000,615 (approximately 63%) was attributed to Defendant BPOC contracts.

2010 INDEPENDENT AUDIT OF NCBA

34. In February 2010, Defendant CBB conducted a routine compliance review of the NCBA.

35. Defendant CBB engaged a Certified Public Accounting firm, Clifton Gunderson, to perform the NCBA audit.

36. The audit reviewed NCBA's compliance with its contract with Defendant BPOC and to test NCBA's "firewall," by which the NCBA claims to separate Beef Checkoff expenses from non-checkoff expenses.

37. The independent audit revealed a number of deficiencies, including numerous violations of the prohibition against using Beef Checkoff funds to influence governmental actions and policies.

38. The independent auditors tested a small sample of 45 expenditures that were included in the overhead cost pool for the eligibility of those items as overhead expenses. Examples of these overhead expenses included facilities or occupancy costs, depreciation, equipment leases, office supplies, supervisory labor costs, and other general and administrative costs.

39. The independent auditor reported that five of the 45 items audited were not eligible checkoff expenses. These expenses included consulting fees incurred by NCBA to investigate a potential certified beef program for NCBA, which should have been charged wholly to the NCBA's Policy Division, not the Beef Checkoff program.

40. For nine of the 45 items audited, the independent auditor was unable to determine eligibility of the expenses for overhead because NCBA failed to provide adequate documentation, in violation of 7 U.S.C. § 2904(6)(c), which requires Beef Checkoff contractors like NCBA to maintain adequate records of its transactions..

41. The independent auditor also tested a small sample of time reports for 25 employees for the months of January 2008, September 2008, April 2009, June 2009, and February 2010.

42. The time reports were compared to the employees' job description, travel expense reports, calendars, personnel leave forums and notes in the time reporting system to verify if the coding of the time agreed with the supporting documents.

43. The independent auditor reported numerous instances of improper time coding or improper documentation for time worked for these 25 employees during the five months tested.

44. In auditing the time records of the 25 employees, the independent auditor noted the following discrepancies: (a) in one instance, an employee's job description contained revenue

development responsibilities (i.e., membership) for NCBA's Policy Division, but the employee coded all of his or her time to checkoff projects; (b) in six instances, the employees' time was improperly coded based on the supporting documentation (for example, three of the employees tested indicated they participated in a membership revenue development meeting in FY 2009 and charged their time to checkoff projects); (c) in all 25 instances, the independent auditor could not determine if the employee's time was recorded correctly (for example, three employees attended meetings in FY 2008 related to the issue of Country of Origin Labeling of beef products and charged their time to Beef Checkoff projects); (d) and a senior staff member charged all of his or her time to the Beef Checkoff since April 2009 instead of charging time to the specific areas in which he or she actually spent time.

45. The independent auditor also found that travel expenses were coded to the wrong project code in six instances. These expenses included travel expenses for NCBA's Spring Legislative Conference, for a Governance Task Force meeting and for an executive staff member's spouse to travel with the employee to attend the Five Nations Beef Conference in New Zealand. These expenses were improperly charged to the Beef Checkoff.

46. The independent auditor also could not determine the proper coding of the travel expenses for numerous items because NCBA provided inadequate documentation, in violation of 7 U.S.C. § 2904(6)(c).

47. According to the Executive Summary of the independent audit, NCBA violated the Beef Checkoff rules by failing to keep adequate records of transactions charged to the Beef Checkoff: "the nature of several of the exceptions and undetermined items reported by [the independent auditor] clearly indicates that NCBA breached the financial firewall during the periods tested and that NCBA did not maintain sufficient documentation in many instances to

adequately support the separation of expenditures between the policy side of NCBA and the checkoff side of NCBA. Although not reported as such by [the independent auditor], [Defendant CBB] considers this lack of sufficient documentation to be noncompliance.”

48. The independent auditor’s report proves that NCBA’s so-called “firewall” failed to ensure that only checkoff-eligible expenses were charged to the Beef Checkoff.

49. The audit evaluated a small portion of NCBA transactions charged to the Beef Checkoff in FY 2008, FY 2009, and the first five months of FY 2010, ended February 28, 2010. Specifically, the audit investigated only 45 expenditures and 25 employees’ timesheets for five months.

50. According to NCBA’s Forms 990, NCBA had total expenses of \$110,412,425 in 2008 and 2009, and of that \$72,833,595 (approximately 66%) came from the Beef Checkoff. However, only a miniscule forty-five transactions that occurred during this period were audited by the independent auditor. If the average expense evaluated by the independent auditor was \$1,000, the independent auditor examined approximately \$45,000 of transactions. This tiny fraction—less than one percent—of the NCBA’s Beef Checkoff funds revealed numerous expenditures that violated the Act.

51. Further, according to NCBA’s 2008 Form 990, NCBA had approximately 193 employees in 2008. If each of these employees worked the two years and five months of the audit period, NCBA had a total of 5,597 “employee months” that Defendant CBB could have audited. However, only 25 employees’ timesheets for five months were audited, for a total of 125 employee months. Although the independent auditor examined less than 2.2% of NCBA employee months, the small fraction audited of the total employee months revealed numerous expenditures that violated the Act.

52. This independent audit of a small number of NCBA's transactions during a two-year-and-five-month period revealed only the tip of the iceberg. As a result of the audit, NCBA agreed to return the checkoff fund over \$216,000 to settle claims of unlawful expenditures. If the ratio of misappropriated funds holds for the rest of the Beef Checkoff funds received by NCBA, the amount misappropriated by NCBA would be in the tens of millions of dollars, if not more.

53. Despite the auditor's findings, NCBA's Beef Checkoff contract was not suspended by the Defendants.

2012 USDA AUDIT OF AMS

54. On March 12, 2012, Defendant USDA's Office of Inspector General (the "OIG Audit") reported the results of an audit of Defendant AMS's oversight of the eighteen checkoff programs.

55. According to the OIG Audit, "[Defendant] AMS program area staff did not always require the various boards, [including Defendant CBB,] to comply with agency guidelines. For example, [Defendant] AMS program area staff did not receive detailed information about boards' administrative expenses. [Defendant] AMS needs this information in order to verify that boards are operating in compliance with regulations and legislation. . . . [P]rogram area staff did not have enough information to determine that the administrative expenses incurred by these boards were in compliance with the legislation requirements."

56. The OIG Audit also found that Defendant AMS failed to recognize that its oversight role extends to monitoring subcontracts, such as those between Defendant CBB and the NCBA or NCBA subcontractors.

57. Additionally, the OIG Audit found that Defendant AMS “did not ensure that independent auditor reports included required statements of assurance on board compliance with specific regulatory and legislative requirements.”

58. The OIG Audit found that none of the independent audit reports of the checkoff boards, including those of Defendant CBB, contained statements by the auditor confirming that none of the checkoff funds were used for lobbying, that internal controls over checkoff fund accounts met accounting standards, and that checkoff funds were used only for projects and other expenses authorized in a budget. The OIG Audit explained that the independent auditors had not listed these required assurances in their reports because the board had not asked them to perform such work.

59. NCBA continues to receive tens of millions of dollars annually from the Beef Checkoff, and the funds continue to be used to fund NCBA’s efforts to influence government action and policies.

COUNT I
PERMANENT INJUNCTION

60. Plaintiff reiterates and incorporates by reference paragraphs 1-59 hereof.

61. Plaintiff has paid and continues to pay the Beef Checkoff.

62. The Act expressly prohibits the use of Beef Checkoff funds for the purpose of influencing governmental action or policy.

63. Defendant BPOC has given the NCBA approximately \$200,000,000 in checkoff funds since 2006.

64. NCBA has used and continues to use checkoff funds for the purpose of influencing governmental action or policy.

65. Defendants' approval of NCBA's improper expenditures and failure to properly ensure that none of the Beef Checkoff funds given to NCBA are used for the purpose of influencing governmental action or policy is arbitrary and capricious, an abuse of discretion, and is not in accordance with law, and is thus a violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and the Beef Research and Information Act, 7 U.S.C. §§ 2901 et seq.

66. Irreparable harm will continue to be caused to Plaintiff and all other similarly-situated beef producers if the Court does not issue a permanent injunction because NCBA will continue to use Beef Checkoff funds for the improper purpose of influencing governmental action or policy.

67. Plaintiff has no adequate remedy at law to prevent NCBA from further misappropriating checkoff funds.

68. The balance of hardships tips in the Plaintiff's favor, and the requested injunction is not adverse to the public interest. The public interest will be served by permanently enjoining Defendants' violation of the Act.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully asks the Court to enter an Order:

- (a) immediately and permanently suspending any contracts between NCBA and Defendants; and
- (b) permanently enjoining Defendants from contracting with the NCBA under the Act or otherwise giving the NCBA any additional Beef Checkoff funds, together with awarding Plaintiff costs, attorney fees, and such other relief as the Court deems just and equitable.

Dated: August 9, 2012

By: /s/ Daniel D. Owen

Daniel D. Owen KS # 14629

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