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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. CV-16-41-GF-BMM-JTJ **PLAINTIFF'S OPPOSITION TO WOULD-BE INTERVENORS' MOTION TO INTERVENE PURSUANT TO RULE 24(a)**

Several private state beef councils that the government allows to collect the federal Beef Checkoff tax and put it towards the councils' activities, and several ranchers who support the councils ("Intervenors") seek to join the defense of this action, Dkt Nos. 62-63; Plaintiff seeks a declaration and injunction to stop the government from allowing these and other councils from taking checkoff funds for their use without the payer's consent because doing so violates the First Amendment. Plaintiff, the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF")—an association of independent ranchers whose members object to funding the private councils' activities without their consent—explains that the government requiring people to fund the private councils' activities is equivalent to requiring them to fund private speech, which is a form of compelled speech, and never allowed under the First Amendment. *See*, *e.g.*, Dkt. Nos. 1 & 58-3 (Complaints).

Intervenors' contention that they are entitled to "[i]nterven[e] [as] of [r]ight" under Federal Rule of Civil Procedure 24(a) fundamentally misstates the law: Intervenors have no rights at issue here. No private entity is entitled to a person's money to fund its private speech. Absent the payer's consent, the intervening state beef councils can only collect and use the Beef Checkoff tax if the federal government exercises control over their expenditures. That control must be so extensive the private entity's expressions amount to "government speech," not

private speech, to the point where listeners will hold the government, not Intervenors, accountable for the statements. Unless the government created these conditions and subjected the councils' collection and use of the Beef Checkoff money to such restrictions, not only are the councils *not* entitled to Beef Checkoff funds, but the government allowing them to take the money without the payer's consent violates the Constitution. For the private councils to lawfully access and use the money, they must be an extension of the government's operations. R-CALF explains this is not the case. So, the councils' rights are not at issue here.

However, R-CALF cannot oppose Intervenors' motion for discretionary, "[p]ermissive [i]ntervention" under Rule 24(b) because their motion is evidence of R-CALF's claim: that the current administration of the Beef Checkoff program is unconstitutional. Intervenors state that they are entitled to enter this action to protect the existing "state-specific control" and "local decision-making" over the Beef Checkoff funds. Dkt. No. 63, at 24. Their interest in preserving "local" "control" over the checkoff funds, they explain, provides them "distinct, varied, and unique" interests in defending the current operation of the checkoff program, which sets them apart from the government-Defendants. *Id.* at 27. Indeed, demonstrating that they currently put checkoff money towards their own ends—which are different from those of the federal government—Intervenors detail that they are before the Court because their private board of directors decided

intervention would be a good expenditure of checkoff funds, even though the government does *not* consent to them entering the case. Dkts. Nos. 63-1 ¶ 32, 63-2 ¶ 28, 63-3 ¶ 26, 63-4 ¶ 25 (declarations of intervening state councils); Dkt. No. 62, at 1 (motion stating that the government "takes no position on the Proposed Intervenors' motion to intervene"). Since the councils' "right" to obtain checkoff funds only exists if they are using the money to express the government's views, Intervenors' statements are an admission that their present collection and use of the funds does not support "government speech" and is thereby unconstitutional.

For these reasons, R-CALF requests that the Court deny Intervenors' motion to intervene pursuant to Rule 24(a), but does not object to the Court exercising its discretion to allow their permissive intervention pursuant to Rule 24(b).

I. Private state beef councils can only take and use checkoff money without the payer's consent if the councils engage in "government speech"; therefore Intervenors have no rights at issue in this case and cannot intervene under Rule 24(a).

a. Private state councils can only take and use Beef Checkoff funds if the councils' expenditures are subject to government control so that the money is only put towards "government speech."

The Beef Checkoff program is subject to the First Amendment's restrictions, meaning that, absent the payer's affirmative consent, the money collected under the program cannot be used to fund private speech. Without consent, the funds can only be used by the government, or by private entities generating "government speech." For the private state beef councils to generate "government speech," the

government must exercise such control over the councils' expenditures that the councils only ever use the money to articulate the government's views. The private state beef councils' "right" to use checkoff money is dependent on the government creating these conditions, which R-CALF claims do not exist, making the councils' expenditure of the funds unconstitutional.

The Supreme Court explained in *United States v. United Foods, Inc.*—concerning the Mushroom Checkoff program, which is in all relevant respects identical to the Beef Checkoff program—that the checkoffs' "principal object is speech itself," making all expenditures under the programs subject to the First Amendment. 533 U.S. 405, 415 (2001) (quotation marks omitted). By statute, the "only" end the checkoffs "serve" is to develop "advertising scheme[s]" for products, *i.e.*, speech. *Id.*; *see also* 7 U.S.C. § 2901(b) (explaining Beef Checkoff money can only be spent on a "coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace"). The speech produced by the checkoff programs is not part of a "broader regulatory" agenda; it is the only object of the programs. *United Foods*, 533 U.S. at 415. Thus, courts need not wrestle with whether the expenditures are paying for speech or some other government end. The checkoff programs can only ever survive if they are administered consistent with the First Amendment. *Id.* at 415-16; *see also R.J.*

Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 916 (9th Cir. 2005) (explaining the same).

Intervenors imply that these rules may not apply to their expenditures because they put checkoff money towards "activities and programs that do not involve promotional activities—including research, education, checkoff administration (and expenses), program development, producer communications and beef safety." Dkt. No. 63, at 8. Not so. In *United Foods*, the Supreme Court recognized checkoff money could be spent on "research, consumer information and industry information" and nonetheless concluded that the First Amendment restricts the checkoffs' operation. 533 U.S. at 408 (quotation marks omitted). Likewise, in addressing the constitutionality of the expenditure of Beef Checkoff funds by the USDA-controlled Beef Board and Beef Operating Committee, the Court stated that those funds are spent on "marketing efforts; market and food-science research, such as evaluations of the nutritional value of beef; and informational campaigns for both consumers and beef producers." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 554-55 (2005). Nonetheless, the Court continued, the expenditures were subject to "First Amendment challenge." *Id.* at 560.

Intervenors demonstrate why this was plainly the correct conclusion. The Montana Beef Council lists its "activities" that "do not involve promotion[]" as

including "beef demonstrations in kindergarten through twelfth grade classrooms," "food fairs," and "events to educate individuals about beef as it relates to heart health." Dkt. No. 63-1 ¶ 19 (declaration of Chaley Harney). That the Montana Beef Council does not believe these activities "involve promotion" strains credulity. Indeed, by statute, all expenditures under the Beef Checkoff program must "strengthen the beef industry's position in the marketplace" whether they are traditional advertisements or otherwise. 7 U.S.C. § 2901(b). Moreover, the activities the council lists as "not involving promotion" are as much "speech" as any advertisement. The Beef Checkoff program's sole function is to generate speech and thus it must comply with the First Amendment.

The central First Amendment rule applicable to the checkoffs is that "[t]he First Amendment prohibits the Government from compelling its citizens to subsidize private speech to which they object." *Ranchers-Cattlemen Action Legal Fund v. Perdue*, No. CV 16-41-GF-BMM, 2017 WL 2671072, at *4 (D. Mont. June 21, 2017). To do so is equivalent to compelled speech. *United Foods*, 533 U.S. at 416. Therefore, absent some applicable exception, the checkoffs' requirement that "citizen[s] [] subsidize … a private entity without first obtaining the citizen's 'affirmative consent,'" by allowing nongovernmental entities to take and use the funds, "violates the First Amendment." *Ranchers-Cattlemen Action Legal Fund*, 2017 WL 2671072, at *4.

The sole reason any of the checkoffs' collections and expenditures have survived is that "[t]he First Amendment does not prohibit the Government from compelling its citizens to subsidize government speech." *R-CALF*, 2017 WL 2671072, at *5. This is because, "[u]nlike private speech, government speech remains 'subject to democratic accountability.'" *Id.* (quoting *Johanns*, 544 U.S. at 560). "People and groups who disfavor government speech may use the political process to compel the government to change its speech." *Id.* Therefore the First Amendment's prohibitions on compelled funding of speech do not apply when the money is used to fund government speech. *Id*.

"[N]ongovernmental entit[ies]," like the intervening state beef councils, can be engaged in "government speech," but only if their speech is "effectively controlled by the Federal Government itself." *Johanns*, 544 U.S. at 560. This requires that the speech be "from beginning to end the message established by the Federal Government," which has been held to involve the federal government: (i) establishing the concepts the speech "shall contain"; (ii) "exercis[ing] final approval authority over every word"; and (iii) ensuring that the entity crafting the statements is made up of "members [that] are answerable to the" government, by being appointed and subject to removal by the government. *Id.* at 560-61. Indeed, the Ninth Circuit emphasized in its decision in this case that each of these elements was present in every one of the "prior cases" it reviewed that held a

nongovernmental entity was engaged in government speech. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 Fed. App'x 541, 542 (9th Cir. 2018).

Further, the Supreme Court has indicated that, in addition to government control over the speech's creation, for speech to be "government speech" the government may also need to ensure the final product will be "attributed to … the government." *Johanns*, 544 U.S. at 564. Indeed, in considering other forms of government speech, the Ninth Circuit has emphasized that "the identity of the 'literal speaker'" is a central part of the inquiry. *Az. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008) (quotation marks omitted).

In sum, the First Amendment issue presented here is whether the government has established the prerequisites for private state beef councils to constitutionally obtain and use Beef Checkoff funds. The only circumstances in which the intervening state beef councils can obtain and use Beef Checkoff money is if their expenditures are made by people selected by the government and in a manner approved by the government, and only if the statements are understood to be an expression of the government and not the private state beef councils. R-CALF contends this is not the case, and thus the government allowing the councils to take and use the money without the payer's consent violates the First Amendment and must be enjoined.

b. ***Intervenors have no right to intervene under Rule 24(a).***

In light of the case law above, the state beef councils and the checkoff payers who support their speech that seek to intervene have no "right" at issue here that would allow them to proceed under Rule 24(a).

To have a "right" to intervene under Rule 24(a), Intervenors must demonstrate that they have an "interest relating to the property or transaction that is the subject of the action" and that the "existing parties" do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2); Dkt. No. 63, at 19.

An "interest relating to the property or transaction" is defined as a legally "'protectable interest.'" *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 162 F. Supp. 3d 1053, 1055 (C.D. Cal. 2014) (quoting *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir.2006)); *see also Ace Bus. Sols., LLC v. Glob. Mktg. & Dev., Inc.*, No. 15CV1464-MMA (NLS), 2017 WL 1519902, at *4 (S.D. Cal. Apr. 27, 2017) (allowing intervention under Rule 24(a) because intervenors had a "property right" at stake in the underlying claims, which amounted to the necessary "legally protectable interest[]").

Intervenors cannot meet this test because the "right" they assert—to access the Beef Checkoff funds—only exists if R-CALF's claims are defeated. It would violate the First Amendment for Intervenors to assert any independent right to take and use the money absent government control, as this would make clear that the

money is being used to fund private activities, not government speech. *See, e.g.*, *Ranchers-Cattlemen Action Legal Fund*, 2017 WL 2671072, at *4. Therefore, Intervenors' legally protectable interest in obtaining checkoff money only comes into existence if the government can prevail in this action. It is not at issue here.

Were that not enough to deny intervention pursuant to Rule 24(a) (and it is), Intervenors also fail to demonstrate that the government will not adequately represent their interests. The Ninth Circuit has recognized "an assumption" that the government adequately represents others' interests "when the government is acting on behalf of a constituency that it represents." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Intervenors must make a "very compelling showing to the contrary" to proceed under Rule 24(a). *Id.* (quotation marks omitted). Where, as here, Intervenors do not merely seek to defend a government program from which they benefit, but are claiming their activities are "effectively controlled" by the government, that presumption must weigh even more heavily against them. *See Nooksack Indian Tribe v. Zinke*, 321 F.R.D. 377, 381-82 (W.D. Wash. 2017) (denying motion to intervene under Rule 24(a) where intervenors sought to defend a government policy because "intervenor[s] share[] the same interest as a government entity").

Intervenors do not begin to overcome the presumption that the government-Defendants adequately represent their interests. In fact, Intervenors' arguments

reveal that the government's administration of the checkoff program is unconstitutional and that the government should be enjoined from continuing to allow Intervenors to take and use checkoff money. Intervenors claim that the private state beef councils should be allowed to intervene because "the Government is defending USDA and the Secretary," but "the Proposed Intervenors' interests are distinct from the interests of the Government." Dkt. No. 63 at 26-27. Intervenors continue that they are "autonomous entities" that "have specific and discrete concerns with how this lawsuit … will permanently impact" them, which are not encompassed by "USDA [] defending USDA's authority and the Beef Checkoff Program generally." *Id.* at 27. The unique interests of the state beef councils "relate[] to their operations [and] control" of the Beef Checkoff funds and how those funds are used. *Id.* at 23.

Beyond being conclusory, Intervenors' statements reveal that the private state beef councils currently have an "autonomous" voice in how the Beef Checkoff money is used, which places them at odds with the government, disproving that there is government control over the councils. Their motion contains admissions that the *councils'* present "control" of the checkoff funds means Intervenors' use of the money is not synonymous with the government's vision for the program, thus the state beef councils are engaged in private, not government speech and the operation of the program is unconstitutional. Of course,

if the councils cannot constitutionally obtain the money, that individual ranchers support the councils' use of the money does not alter or add to the analysis.

Indeed, the very filing of Intervenors' motion is concrete evidence that the private state councils are being allowed to use Beef Checkoff funds for their private speech in violation of the Constitution. Intervenors acknowledge that their motion was not invited or even acceded to by the government-Defendants. Dkt. No. 62, at 1. Nonetheless, they decided for themselves to use checkoff money to fund their arguments in this case. Dkts. Nos. 63-1 ¶ 32, 63-2 ¶ 28, 63-3 ¶ 26, 63-4 ¶ 25. They have put checkoff money towards promoting their own agenda, not government speech. Put simply, Intervenors' motion disproves that the government-Defendants cannot defend Intervenors' purported "right" to access checkoff funds because the motion substantiates that if Intervenors proceed they will prove R-CALF's claims—that their taking and using checkoff funds without consent is unlawful.

Intervenors have no legally protectable rights at stake in this litigation and, even if they did, the government can adequately defend those interests. Therefore, they are not entitled to intervene under Rule 24(a).

II. For the reasons above, R-CALF cannot oppose intervention, thus R-CALF does not object to permissive intervention under Rule 24(b).

Intervenors correctly state that R-CALF does not oppose their intervention, Dkt. No. 63, at 1, because, as detailed above, their request is evidence in R-CALF's favor. In addition to Intervenors' motion revealing that they wish to and are currently using checkoff money to pay for their "discrete" interests that are distinct from those of the federal government, Intervenors also explain that the state beef councils are structured in a manner so that they *cannot* generate "government speech." Intervenors detail how each of the intervening state beef councils determine for themselves—without input from the federal government—who sits on their board and thereby designs and directs the councils' activities. *See, e.g.*, *id.* at 9-13. They explain that this allows certain producers, and not the government, "to be 'in charge' of their checkoff dollars." *Id.* at 14. Indeed, Intervenors assert that the "structure" of the state beef councils allows for "state-specific control" over their expenditures. *Id.* at 24. Put another way, Intervenors explain that they lack a central feature of entities engaged in "government speech," directors who are appointed and removable by the federal government. As a result, they admit that their objective is not to implement the government's views, but to express their own ideas, as informed by their nongovernmental constituencies. Intervenors' motion is replete with judicial admissions that the current operation of

the checkoff program violates the First Amendment. Therefore, R-CALF cannot object to their intervention.

Moreover, the Court would be within its discretion to permit Intervenors to enter this action under Rule 24(b), which allows the Court to grant "permissive interventions." The test for permissive intervention "is liberally construed." *Nooksack Indian Tribe*, 321 F.R.D. at 383. Where would-be intervenors could be impacted by the "questions of fact" that may be resolved by the case, permissive intervention is allowable. *Id.* Intervenors can be impacted by a case even if they have no right to pursue the claims or defenses on their own. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). So long as the action could have an economic effect on intervenors, intervention is allowed. Wright et al. 7C *Fed. Prac. & Proc. Civ.* § 1911 (3d ed. West 2018).

Therefore, R-CALF does not oppose Intervenors' intervention under Rule 24(b).

III. Conclusion.

For the foregoing reasons, the Court should deny Intervenors' motion to intervene pursuant to Rule 24(a) as they have no legally protectable interest at stake in this case. However, R-CALF does not oppose their permissive intervention under Rule 24(b), although such intervention is at the Court's discretion.

RESPECTFULLY SUBMITTED this 27th day of November, 2018.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)

I hereby certify that this reply brief contains 3,225 words, excluding the caption and certificates. That word count was calculated using the Microsoft Word program used to write this brief.

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