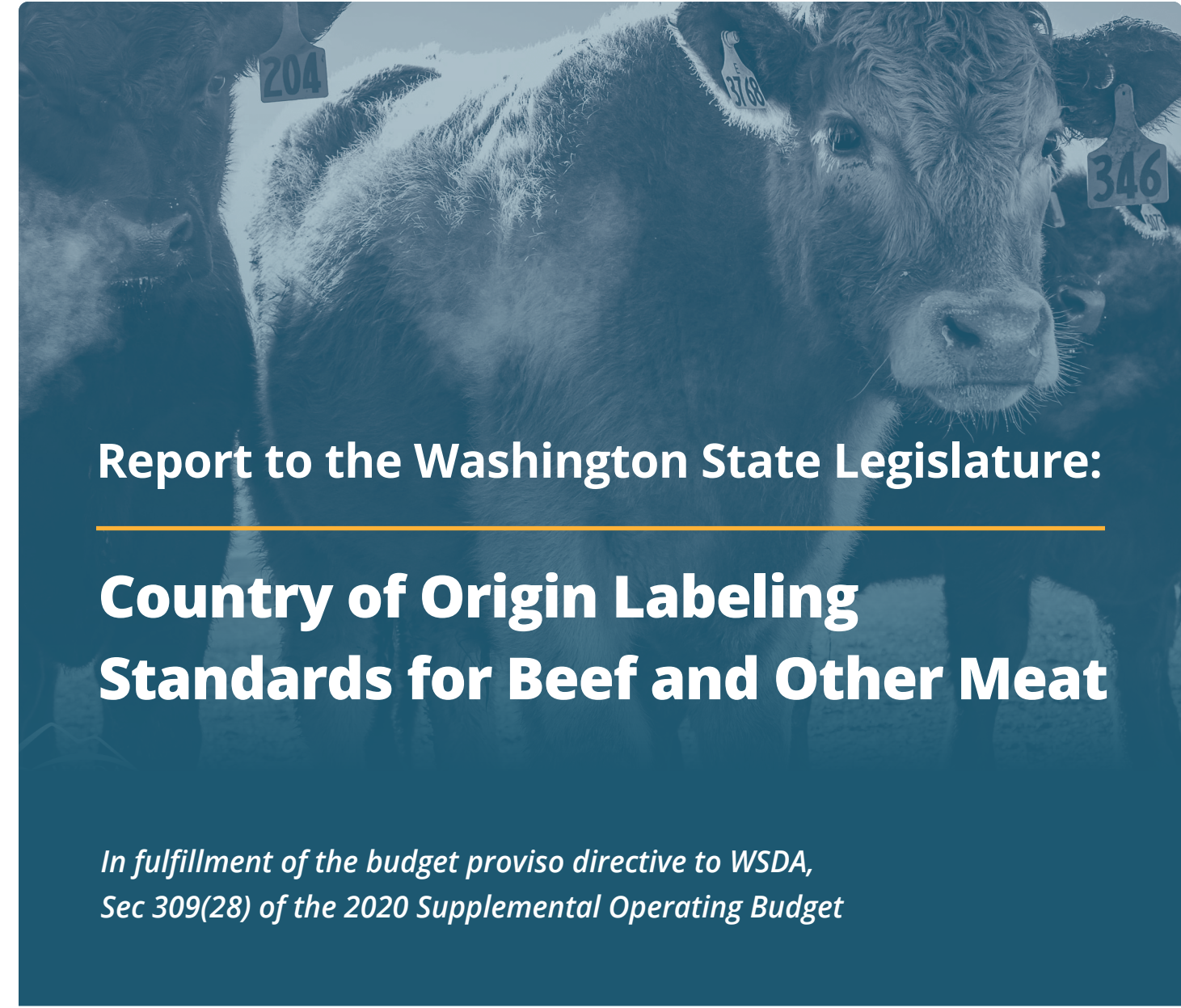




Report to the Washington State Legislature:

Country of Origin Labeling Standards for Beef and Other Meat

*In fulfillment of the budget proviso directive to WSDA,
Sec 309(28) of the 2020 Supplemental Operating Budget*

December 2020



Washington
State Department of
Agriculture

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WSDA Budget Proviso Report to the Washington State Legislature Country of Origin Labeling Standards for Beef and Other Meat

This report fulfills the budget proviso directive to the Washington State Department of Agriculture (WSDA) in Sec 309(28) of Washington's 2020 [Supplemental Operating Budget](#):

“(28) The appropriations in this section include sufficient funding for the department to work with representatives from Canada and other stakeholders to develop labeling standards regarding country of origin for beef and other meat products. The standards are for the purpose of clearly displaying the country of origin for beef or other meat products sold to the public. The department shall report and propose any legislation and administrative changes that may be needed to the appropriate committees of the legislature by December 31, 2020.”

Executive Summary

WSDA has always valued solutions that help consumers make informed choices to purchase Washington food and agricultural products. Labeling of food, particularly for beef and other meat products, was a major [topic of interest](#) during Washington's 2020 legislative session. Since then the COVID-19 pandemic has disrupted many traditional food supply chain market channels, and has dislocated many connection points (like restaurants and school meal programs) that traditionally linked local consumers with local producers. This has widened gaps in marketplace visibility for Washington food and agricultural products. Consumers of all types are now seeking better and easier access to local meat products, and Washington producers are now working hard to overcome COVID-19 challenges to meet growing consumer demand for products of local origin. WSDA is sympathetic to solutions that would better connect Washington producers with Washington consumers. The rocky shoals of law and policy around country of origin labeling (COOL), however, are not easy to navigate.

U.S. meat product labels must be approved by the United States Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS). All labeling must be consistent with the Federal Meat Inspection Act (FMIA, 21 U.S.C. Sec 601, et seq.). In August, a U.S. district court relied on statutory text and prior case law to reject petitioner arguments that current USDA-FSIS COOL standards for beef and other meat products are inherently misleading. The court instead supported the [USDA-FSIS position](#) that the FMIA grants USDA the *exclusive* authority to regulate the *labeling* and retail *display or advertising* of beef and meat products sold in the United States. This case is consistent with the view that a court would likely find that federal law preempts state labeling or placarding laws, rules and standards that differ from or are inconsistent with the FMIA or USDA-FSIS COOL standards in any material way. To address concerns that USDA-FSIS COOL standards for beef and other meat products are inherently misleading, FSIS intends to adopt clarifying rules.

Thus, until the courts clarify the preemptive reach of the FMIA and there is more clarity on what the new COOL rules will include, state agencies and legislatures will have a difficult time establishing federally compliant country of origin labeling or placarding standards. Furthermore, to promote good public policy, federal standards that are consistent across state lines are

preferred over a patchwork of conflicting state regulations which can be confusing, costly and inefficient for consumers, producers, processors and regulators to navigate. For these reasons WSDA has refrained from developing state country of origin labeling or placarding standards at this time.

COOL Law and Policy Timeline

The timeline below highlights several legal and policy developments affecting state options around country of origin standards for meat products. Much has happened since the budget proviso calling for this report was enacted.

2013 –Mandatory COOL Rules Established

USDA-FSIS adopted mandatory COOL rules to implement FMIA provisions in 2013, requiring U.S. meat labels to provide retail customers with country of origin source information for certain foods. The 2013 COOL rules originally required beef and other meat labels to indicate where source animals were *born, raised, and slaughtered*. FSIS administers the COOL label approval program for USDA.

2015 – Mandatory COOL Rules Challenged

In 2015, Canada and Mexico challenged the mandatory COOL rules at the World Trade Organization (WTO). This challenge resulted in a legally binding WTO determination that USDA's mandatory COOL meat labeling requirements violated U.S. trade obligations to Canada and Mexico, and that Canada and Mexico could collectively levy \$1 billion in retaliatory trade tariffs against U.S. products. Such punitive tariffs did not need to be limited to U.S. beef products involved in the dispute. They could also be levied against other U.S. products including airplanes, software, apples, cherries, wine, wheat or French fry potatoes.

December 2015 – Congress Repeals Mandatory COOL for Beef and Other Meat Products

To avoid the economically harmful retaliatory tariffs authorized by the WTO decision, the [U.S. Congress repealed](#) the mandatory COOL meat labeling requirements in December 2015. Following the enactment of new rules in 2015, [USDA-FSIS formally concluded](#) that “States and local jurisdictions are preempted from creating or operating country of origin labeling programs for the commodities specified in the Act and these regulations.”

March 13, 2020 – COVID-19 Pandemic State of Emergency Declared

The impacts of COVID-19 have placed unprecedented strains on our food supply system. Surging grocery sales, a precipitous drop in food service demand, and soaring food assistance needs have created challenges for producers and consumers alike.

March 26, 2020 – USDA-FSIS Commits to New COOL Rules to Address Labeling Concerns

In March USDA-FSIS formally committed to address concerns over misleading COOL meat labeling by initiating rulemaking to limit “Product of USA” or “Made in the USA” labels to meat products derived from livestock *slaughtered and processed* in the United States. USDA's new position came in response to petitions and legal challenges from consumers and ranchers asserting, in part, that consumers seeking to purchase domestic meat are not able to make an

informed choice. This is in part because imported meat that is merely *repackaged* in the United States continues to be [misleadingly labeled](#) as a “Product of USA.”

On March 26, 2020, [USDA-FSIS responded](#) by letter to petitioners as follows:

“After careful consideration of your petition and the 2,593 public comments submitted to [regulations.gov](#) in response to your petition, FSIS has concluded that its current labeling policy, which permits meat and poultry products that were derived from animals that may have been *born, raised and slaughtered* in another country but *processed* in the United States to be labeled as ‘Product of USA,’ may be causing confusion in the marketplace, particularly with respect to certain imported meat products. ... Therefore ... FSIS is denying the petition and has decided to initiate rulemaking to limit ‘Product of USA’ and certain other voluntary U.S. origin statements to meat products derived from livestock that were *slaughtered and processed* in the United States. The Agency has determined that a voluntary U.S. meat product origin labeling policy that focuses on where the product is made, i.e., where the livestock are *slaughtered and processed*, without regard to where the source animals were *born*, may more accurately reflect what ‘origin’ means with respect to meat products processed in the United States and will thus result in labels that are truthful and not misleading.”

July 1, 2020 – USMCA Goes Into Effect

With [broad support across agriculture](#) sectors in Washington the United States-Mexico-Canada (USMCA) Trade Agreement was ratified by all three countries making it effective and binding on each country and its states and provinces.

August 2020 – Voluntary COOL Rule for Meat Challenged

Consumers and ranchers continued to challenge the USDA-FSIS approach through lawsuits and petitions asserting that some USDA-FSIS-approved “Product of USA” labels are unlawful, because they inherently mislead consumers into thinking beef from cattle *raised* in other countries that was merely *repackaged* in the U.S. was in fact *raised* in the U.S.. The [FMIA establishes](#) that meat or meat products are misbranded if product labeling is false or misleading in any particular.

August 27, 2020 – New Mexico U.S. District Court Confirms Exclusive FSIS COOL Authority

In August the New Mexico United States District Court dismissed petitioner claims that USDA-FSIS standards are misleading, and thus illegal under the FMIA ([Thorton v. Tyson Foods, Inc.](#)). The court observed that, under well-established case law, USDA-FSIS has the *exclusive* legal authority to regulate country of origin statements on beef product labels and only USDA-FSIS may determine what is and is not misleading under the FMIA. The court agreed with the USDA-FSIS position that the FMIA prohibits and preempts all country of origin labeling standards and advertisements for meat that are “in addition to, or different than” USDA-FSIS standards. Motions and briefs were [filed](#) in early December asking the 10th Circuit Court of Appeals to review and overturn the decision.

October 20-22, 2020 – Tri-National Accord Meets Virtually

COVID-19 prevented U.S., Mexican and Canadian negotiators from meeting in person to work toward a shared trilateral approach to USMCA implementation. Nonetheless, North American state and provincial agriculture officials from Mexico, Canada and the U.S. gathered virtually in late October for the 29th annual Tri-National Agricultural Accord. WSDA Director Derek Sandison participated virtually as chair of the Marketing and International Trade Committee for the National Association of State Departments of Agriculture (NASDA).

The virtual Accord hosted trilateral trade sessions on USMCA implementation and bilateral trade discussions between U.S. and Mexican representatives, and U.S. and Canadian representatives. A [joint communiqué](#) was issued to highlight the trading bloc potential of the North American trade alliance and the role of each country, state and province in implementing the USMCA through cooperative agricultural trade and development policies.

Further USCMA and Accord discussions will be needed to develop a reciprocal approach to the domestic promotion of local origin products, which consumers in all three countries support. Discussions will continue February 22-24, 2021, at NASDA's upcoming Winter Policy Conference, and October 25-27, 2021, when NASDA will host the 30th Annual Tri-National Agricultural Accord in Arlington, Virginia.

November – December 2020 – WSDA Discussions with Industry Stakeholders

WSDA worked with industry stakeholders as directed to better understand positions around country of origin labeling. Most of the agricultural and cattlemen stakeholders WSDA interacted with during the interim support finding ways to grow consumer access to Washington food and agricultural products, while continuing to oppose state legislation or rule-making that could invite another WTO challenge or upset fair and reciprocal implementation of the now-ratified USMCA trade agreement. The broad concern across Washington agriculture is largely because the WTO allowed Mexico and Canada to levy retaliatory trade tariffs against U.S. products generally and did not limit retaliation to the beef interests involved in the dispute. The USMCA is expected to open tremendous potential economic opportunities for Washington agricultural producers by maintaining certainty within critical trade channels. Together the U.S., Canada and Mexico represent the most powerful economic [trading bloc](#) in the world.

Stakeholder views were not uniform however. Some cattle producer representatives continued to advocate for a return to a mandatory COOL approach where state standards promote “*beef born, raised and slaughtered*” in the U.S. and/or Washington. USDA-FSIS, however, lost authority to implement a mandatory COOL program for meat when Congress eliminated mandatory COOL statutory authorities to avoid the WTO-approved retaliatory tariffs in 2015.

Alternatively, cattle producer representatives support the most recent version of [a bill](#) introduced in the state Legislature last session that aimed to create state standards for retailers to placard and display co-located products that come to the store labeled as U.S. or Washington meat or beef products. Undeterred by the New Mexico U.S. District Court decision, they argue the FMIA does not preempt state placarding and advertising laws or standards. WSDA, nonetheless, views the federal preemption law highlighted in that case to be a barrier that would likely block WSDA from successfully adopting state labeling or placarding standards at this time.

December 10, 2020 – WSDA Interim Discussions with Representatives of USDA-FSIS

USDA-FSIS reported that its proposed “Product of USA” COOL rule for meat will soon be included on the regulatory agenda for upcoming federal rulemakings. Once USDA-FSIS submits the proposed rule revisions, stakeholders will have opportunity to comment. USDA-FSIS representatives also reported that the agency’s federal preemption authority extends to advertising displays and statements made in the retail setting, and that state placarding standard criteria that differ materially from federal criteria face uncertainty and significant legal risk.

USDA-FSIS further and importantly reported that current law allows retailers to voluntarily use FSIS-approved placards to identify, display and co-locate meat bearing FSIS-approved labels so long as the origin of the meat is accurately and truthfully identified according to FSIS standards. USDA-FSIS representatives also said the agency can approve [state-origin beef labels](#) voluntarily submitted to USDA-FSIS by producer groups. Washington law complements preemptive federal authorities. Washington's [food safety and security act](#) provisions (See [RCW 15.130.210](#)) prohibit misbranding of food origins, and Washington's [consumer protection act](#) and related agricultural protection provisions (See [RCW 15.04.410](#)) prohibit false retail sale declarations related to products represented as Washington agricultural products when such products are not in fact Washington agricultural products.

USDA-FSIS offered to review proposed label or placarding approaches from Washington producer groups, noting that there would be more clarity (and less risk) once the proposed federal COOL revisions become effective. The [Kentucky origin approach](#) used to gain USDA-FSIS approval for the labeling and advertisement of Kentucky beef is instructive. To meet USDA-FSIS criteria that labeling and advertising statements be voluntary, truthful and not misleading, Kentucky beef proponents had to create an electronic identification and traceability system that could verify the location of source animals from birth, to the ranch, to the feedlot and through processing. A similar system would need to be developed to support claims that meat is sourced from animals *born, raised and processed* in Washington. WSDA stands ready to help interested producers develop such a verification system as it would increase consumer access to Washington meat products and promote the economic viability of Washington ranchers.

December 15, 2020 – WSDA Interim Discussions with Representatives of Canada

Canadian representatives noted that the rules being described by USDA-FSIS appear to align with USMCA provisions and country of origin statements in broadly accepted [international code provisions](#) for food production and safety. They also shared that Canada has mandatory cattle traceability requirements to help manage emergencies such as animal disease outbreaks, and that they look forward to reciprocal U.S.-Canada trade relations that treat Canadian products in a fair and non-discriminatory fashion.

WSDA Recommendations

Given the significant federal preemption constraints on state actors in the context of COOL meat standards, as well as legal uncertainty due to the ongoing COOL placarding and advertising litigation, the pending federal COOL rulemaking, and the upcoming USMCA trade negotiations, WSDA has no COOL-specific legislative or administrative standards to recommend at this time. Furthermore, due to these current legal barriers and pending process uncertainties, WSDA also

respectfully requests that the Legislature put a 2021 session hold on COOL legislation that does not include a process sufficient to ensure consistency with USDA-FSIS COOL standards.

WSDA does recommend legislative consideration of a path forward, however, that is parallel to and aligned with the pending USDA-FSIS COOL rulemaking and USMCA trade discussions. To help Washington farm and food producers pivot to new markets and business models to meet COVID-19 challenges, WSDA submitted a 2021 “Farm and Food Systems Resiliency” package to OFM. That package includes funding for a food infrastructure and market access grant program that is now in the governor’s proposed budget. If funded, meat producers and processors would be eligible to apply for grant funding to work with USDA-FSIS on a legally defensible labeling and placarding approach within the federal rules. That approach would increase the visibility of Washington meat products and help Washington producers better connect with consumers in the marketplace.