

**1999 SENATE AGRICULTURE**

**SB 2187**

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187

Senate Agriculture Committee

Conference Committee

Hearing Date 1/15/99

Tape Number	Side A	Side B	Meter #
1	X		0-END
Committee Clerk Signature <i>Tricia Jorgensen</i>			

Minutes:

Senator Wanzek called the meeting to order. Roll call was taken, Senator Kinnoin was absent.

Senator Wanzek opened the hearing on SB 2187.

Senator Solberg, sponsor of the bill, explained it. He stated that in the case against the North Dakota Stockmen's Association basically says that the way the NDSA was doing the brand inspections and brand recordings via the authority of the century code all funds had to be deposited into the State Treasury of the state of North Dakota. So that basically is what the bill pertains to. He also commented on SB 2048 stating that the only differences in the bills is the last sentence in section 7 on SB 2187, it was added after conferring with the council of the North Dakota Stockmen's Association and Attorney General's Office. He stated that section 7 was basically the "meat" of the bill. It states that all funds collected by the Stockmen's Association will be deposited in the Treasurer's office. He mentioned that there was also a Repealer that



repeals the section of law that says all moneys for estray cattle must be deposited in a separate account.

Senator Sand: Are the employees of this group going to be part of the state program or are they going to part of a separate program?

Senator Solberg: No, they will stay as they are now, which is employees of the NDSA.

Senator Wanzek: It seems akward that two bills should be so similar. Are you saying that SB 2187 is more specific than SB 2048.

Senator Solberg: Yes they are generally the same except for that one sentence.

Senator Bowman, sponsor of the bill, also spoke in favor of the bill. He agreed with everything Senator Solberg had said but also mentioned that when they met with Kathy Gilmore, the State Treasurer, she said she is willing to do the work.

Vonette Richter spoke to explain SB 2048. Testimony enclosed.

Senator Wanzek: Did the Supreme Court ruling on this case present problems for other entities in other areas as well?

Richter: I'm not sure if that was addressed in the opinion but I know that the attorney generals office reaches that issue when they presented the testimony before the committee.

Senator Wanzek: Are you aware of how they are addressing the situation?

Richter: I'm not sure.

Senator Klein: How do we handle this, do we just with draw it?

Richter: I think that's right, I think it can just be killed on the floor.

Wade Moser from the NDSA spoke in support of SB 2187. He also recommended that SB 2048 not be passed. Clarified certain things in the bill so people would know why they were done.

Section 1 Line 10- crosses out “commissioner who will get you registered feedlot numbers”, they are not taking away any authority from the commissioner of agriculture. The repealer was a recommendation, that there was no need to have two separate accounts.

Senator Mathern: Why did all this take place, the lawsuit?

Moser: I can only tell you my side but basically because there were some hard feelings that just escalated to this.

Senator Urlacher: Was there any effort to package a bill that would correct all these problems together?

Moser: Yes there was but it got to be too long and it was confusing, people didn't know what category they fell into.

Wayne Carlson from the ND Department of Agriculture gave testimony. Testimony enclosed.

Jack Chase from the NDSA spoke in support of SB 2187. He made the comment that ND has the simplest, most efficient brand inspection program around and it should be kept that way.

Larry Schuler, State Veterinarian, spoke in support of SB 2187. Testimony enclosed.

Larry Schnell from the ND Livestock Marketing Association spoke in support of SB 2187. Said he agreed with Jack Chase that the brand inspection program is one of the best and that it would be a shame to encumber it.

Ken Halvorson, sheriff of Montrail County, spoke in support of SB 2187. Said the guys for the NDSA were all very trustworthy men.

Senator Wanzek asked Wade Moser to come back to the podium for more questions.

Senator Wanzek: On pg. 3 line 25, there might be some question about that sentence and the ramifications of that.

Moser: We do not place a statute of limitations on a claim. There was, however, a suggestion that there be a limit of six years.

Senator Wanzek: Would you still have the authority to distribute the claim after six years?

Moser: Yes.

Senator Wanzek: The Stockman's Association would not be offended if we try to clarify that?

Moser: No.

Senator Wanzek closed the hearing on SB 2187 and SB 2048.

Discussion was held on both bills.

Senator Sand made the motion to amend SB 2187. Senator Klein seconded. Motion was carried.

ROLL CALL VOTE: 6 yes, 0 no, 1 absent and not voting.

CARRIER: Senator Wanzek

Senator Klein made the motion for a Do Pass as Amended on SB 2187. Senator Mathern seconded. Motion was carried.

ROLL CALL VOTE: 6 yes, 0 no, 1 absent and not voting.

CARRIER: Senator Wanzek

# FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: \_\_\_\_\_ Amendment to: SB 2187  
 Requested by Legislative Council Date of Request: 1-22-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

**Narrative:** The bill will create a special fund to which feed lot registration fees, brand recording and inspection fees and estray inspections are remitted regularly to the state treasurer for deposit to the North Dakota Stockmen's Association fund. The Stockmen's Association has developed this budget projection.

This bill will not impact the Department of Agriculture. The State Board of Animal Health, which is part of the Department, will maintain its role as the agency that will set fee rates and adopt rules to insure compliance with this law.

There would be no financial impact with the amendment. Even though the amendment provides for a six year limitation, the North Dakota Stockmen's Association would still pay claims older than that but would not be legally obligated to do so.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	0	324,870	0	1,800,000	0	1,800,000
<b>Expenditures</b>	0	324,870	0	1,800,000	0	1,800,000

What, if any, is the effect of this measure on the budget for your agency or department:

- a. For rest of 1997-99 biennium: 0  
(Indicate the portion of this amount included in the 1999-2001 executive budget:)
- b. For the 1999-2001 biennium: 0  
(Indicate the portion of this amount included in the 1999-2001 executive budget:)
- c. For the 2001-03 biennium: 0

4. **County, city, and school district** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

Signed: \_\_\_\_\_  
 Typed Name: Jeff Weispfenning  
 Department: Department of Agriculture – State Board of Animal Health  
 Phone Number: 328-2655  
 Date Prepared: January 25, 1999

ADDENDUM FOR FISCAL NOTE ON SB 2187

	1997-99 BIENNIUM	1999-2001 BIENNIUM	2001-03 BIENNIUM
LAND RECORDING	9,000	50,000	50,000
INSPECTION FEES	288,870	1,600,000	1,600,000
ESTRAY FUNDS	27,000	150,000	150,000
TOTAL	324,870	1,800,000	1,800,000

# FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: SB 2187 Amendment to: \_\_\_\_\_

Requested by Legislative Council Date of Request: January 7, 1999

- Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

**Narrative:** The bill will create a special fund to which feed lot registration fees, brand recording and inspection fees and estray inspections are remitted regularly to the state treasure for deposit to the North Dakota Stockmen's Association fund. The Stockmen's Association has developed this budget projection.

This bill will not impact the Department of Agriculture. The State Board of Animal Health which is part of the Department will maintain its role as the agency that will set fee rates and adopt rules to insure compliance with this law.

- State fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	0	324,870	0	1,800,000	0	1,800,000
Expenditures	0	324,870	0	1,800,000	0	1,800,000

- What, if any, is the effect of this measure on the budget for your agency or department:

- For rest of 1997-99 biennium: 0  
(Indicate the portion of this amount included in the 1999-2001 executive budget:)
- For the 1999-2001 biennium: 0  
(Indicate the portion of this amount included in the 1999-2001 executive budget:)
- For the 2001-03 biennium: 0

- County, city, and school district fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

Signed: \_\_\_\_\_  
 Typed Name: Jeff Weispfenning  
 Department: Department of Agriculture – Board of Animal Health  
 Phone Number: 701-328-2655  
 Date Prepared: January 8, 1999

APPENDUM FOR FISCAL NOTE ON SB 2187

	1997-99 BIENNIUM	1999-2001 BIENNIUM	2001-03 BIENNIUM
BRAND RECORDING	9,000	50,000	50,000
INSPECTION FEES	288,870	1,600,000	1,600,000
ESTRAY FUNDS	27,000	150,000	150,000
TOTAL	324,870	1,800,000	1,800,000

Date: 1/15/99  
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2187

Senate Agriculture Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number 90283.0101

Action Taken Do Pass

Motion Made By Senator Sand Seconded By Senator Klein

Senators	Yes	No	Senators	Yes	No
Senator Wanzek	✓				
Senator Klein	✓				
Senator Sand	✓				
Senator Urlacher	✓				
Senator Kinnoin					
Senator Kroeplin	✓				
Senator Mathern	✓				

Total (Yes) 6 No 0

Absent Senator Kinnoin

Floor Assignment Senator Wanzek

If the vote is on an amendment, briefly indicate intent:  
Sec. 7 line 26 pg 3 - insert if the action is commenced w/in six years + after sum is deposited  
pg. 3 line 26 overstrike "law governing other claims for relief of like character."



Date: 1/15/99  
Roll Call Vote #: 8

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2187

Senate Agriculture Committee

Subcommittee on \_\_\_\_\_

or

Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass As Amended

Motion Made By Senator Klein Seconded By Senator Mathern

Senators	Yes	No	Senators	Yes	No
Senator Wanzek	✓				
Senator Klein	✓				
Senator Sand	✓				
Senator Urlacher	✓				
Senator Kinnoin					
Senator Kroeplin	✓				
Senator Mathern	✓				

Total (Yes) 6 No 0

Absent Senator Kinnain

Floor Assignment Senator Wanzek

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2187: Agriculture Committee (Sen. Wanzek, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2187 was placed on the Sixth order on the calendar.

Page 3, line 25, overstrike "within the period of limitation given by general"

Page 3, line 26, overstrike "law governing other claims for relief of like character" and insert immediately thereafter "if the action is commenced within six years after the sum is deposited"

Renumber accordingly

**1999 HOUSE AGRICULTURE**

**SB 2187**

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2187

House Agriculture Committee

Conference Committee

Hearing Date 2/25/99

Tape Number	Side A	Side B	Meter #
One SB 2187	x		0 to 34.4
Committee Clerk Signature <i>Arlin Hanson</i>			

Minutes:

Summary of bill: Relates to providing a special fund relating to feedlot reg. fees, brand recording and inspection fees and estray inspection fees.

Sen Solberg: Dist 7.. He did not sponsor the bill out of desire but as a result off lawsuit with the ND Stockman Assoc. Funds that the Stockmen were collecting for a service rendered, Brand inspection, This bill also effects the hunting and fishing license fees that are collected by County Auditors and each kept a portion for their work now this unconstitutional. Now all money must be turned in according to law. Some years ago we moved the Brand Inspection for the State from the Dept of Agr to the ND Stockmens. No where do we find such efficiency as the ND Stockmens do with their work. It is being done not only more efficiently but less costly to the producers. Section rearranges the estray fund whereby the Stockmen's Assoc. does not have to keep a separate account of the estray fund and deposit those funds separate with the treasurer as

long as they keep it separate in their books, the treas is willing to take one check. I have been a member of audit and fiscal review committee since 1991 we have looked at every interim session at the ND Stockmen's assoc., the State Auditor has looked over there books and never once has there been any question of wrong doing by the Stockmen's in their bookkeeping. There has been a very strict adherence to keeping the dues section from the brand inspection section. We have reviewed their audit and have found nothing wrong. I'll let other people speak now and I do urge a do pass on this bill.

Sen Bowman: Sponsor of bill. We brought this bill before you because there was no alternative after the Judge's ruling. We support it if this is what we have to do.

Wade Moser: ND Stockmen's Association.. The Judge made the ruling as it is because there was no mechanism to deposit the money taken in from brand inspection. The amendment is at the recommendation of the Attorney General Office. Page 1 line 10 talks about a permit or registration for a registered feedlot must be obtained from the Dept of Agr. The Commissioner never did issue the permits. Guess we don't understand why that was in there, The Stockmen's Assoc has always issued those permits to the registered feedlots. Section 3,, when we did get the responsibility of doing the brand recording in 1993 there was concern could the Stockmen's Assoc. handle the recording. This is a big process every 10 years when we will record somewhere between 20,000 and 25,000 brands. We did do the job, we did take care of it. The Treas did make some suggestions which was to eliminate the repealer of Section 36-22-05. They thought it was unnecessary for their purposes. Goal of this legislation is not effect the producer any more then possible we know that we are going to have more work in the office but so be it.

We do an annual audit every year even though it's only required every two years. We appear before the Audit and Fiscal review committee each year and answer questions. If we want to make any changes in our rules or how we operate we must make the rule changes and present them to the Board of Animal Health for approval. The Board of Animal Health also must approve any rate changes that we have either increasing or decreasing, we do not have the authority to the fees without that approval. Then once those changes are approved we must go before the Legislative Rules committee for their approval. Now with this bill we will also have some additional oversight with OMB. On the Federal level we have the Packers & Stockyards Administration that must also approve our rules and our fees.

Dr Susan Keller: Assist State Veterinarian We are in support of SB 2187. The State Board of Animal Health is in complete support of this bill.

Rep Stefonowicz: On page one of the bill it says the board may adopt rules, is that the Board of Animal Health?

Dr Susan Keller: Yes that is right.

Jack Chase: Former State Brand Inspector for 40 years, 15 of those years as Chief Brand Inspector. While Chief Brand Inspector, I had the opportunity to attend many Brand Conferences and visit with Brand Inspectors from many states, Canadian provinces, and 1 Mexican state and there wasn't any of them as cheap and efficient as we are here in North Dakota. They run from \$.90 to \$1.20 per head in other states and in North Dakota you can still get it done for \$.60. In other states it can take up to 4 to 6 months to get a brand and in ND up to 1 hour.

James Billey: Farmer in Dickey County.. (Testimony attached) I have some concerns with this bill. Senate bill 2415 was killed in the Senate earlier in the session. Proponents of this bill say it

will correct the faulty statues dealing with brand inspections, brand registration, and estrays which were brought to light by the District court in 1997 and the Supreme Court in June of last year (1998). Copies of these decisions are included with my testimony. In the Billey-Peterson vs the North Dakota Stockmen's case The District Court Judge found certain sections of the Century Code in violation of the North Dakota Constitution by declaring that brand inspection, brand registration and estray fund public money. Because of this decision the District Court ruled that these funds could not be deposited in the private bank account of the ND Stockmen's Assoc. but had to be accounted for according to our constitution. The ND Supreme Court approved the District court decision with implementation of the decision held until the adjournment of this legislative session. This delay was implemented to allow you, the legislature, the opportunity to correct the errors made by your predecessors in 1949 and again in 1993. Testimony Attached)

Rep Berg: Are there any services that the ND Stockmen representatives do that is not up to standards.?

Billey: No I have the highest regards for work done by the Assoc.

Rep Nowatzki: What would be your reaction be to having the NDSA report annually before the Legislature & tell how the money was spent.

Billey: That would be an improvement from the way it is done now.

Chm Nicholas: Is your beef with the ND SA?

Billey: No how it is run is where my beef is.

Rep Froelich: We are talking about producer funds right? The brand inspection program does not affect the wheat farmer, canola farmer, etc so we are not talking state general funds so we are talking producer funds.

Billey: Because of the way it's collected its public money, state money.

Rep Froelich: The Stockmen Assoc is producer owned and operated isn't it? The funds that are going into the brand fees are coming from cattle people and the cattle people control the Stockmens Assoc.

Billey: Yes but there are a lot of people out there who do not belong to the NDSA and pay brand fees.

Rep Froelich: But that's there prerogative. Right What you want us to do is kill this bill and set it up as a state agency. Don't compare this to South Dakota cause they have a mess.

Rep Rennerfeldt: I was a Co-sponsor of legislaton in 1993. With it in the St of ND Agr Department there wasn't enough money to run the brand inspection program because the money was used for other programs. It would seem that we have it segregated now.

Rep Stefonowicz: Some people said that brand inspection has been going on for 70 years by the Stockmen's Assoc. What happened in 1993 to change that? Enforcement has always been with the NDSA

3-4-99.. Committee work. Motion by Rep Berg for a DO PASS second by Rep Rennerfeldt

Vote total: YES 13 NO 1 ABSENT 1 Bill carrier Rep Berg



Date: 3-4-99  
Roll Call Vote #:

**1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 9187**

House AGRICULTURE Committee \_\_\_\_\_

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Berg Second By Rennerfeldt

Representatives	Yes	No	Representatives	Yes	No
Eugene Nicholas, Chaiman	✓		Bob Stefonowicz	✓	
Dennis E. Johnson, Vice Chm	✓				
Thomas T. Brusegaard	✓				
Earl Rennerfeldt	✓				
Chet Pollert	✓				
Dennis J. Renner	✓				
Michael D. Brandenburg	✓				
Gil Herbel	✓				
Rick Berg	✓				
Myron Koppang	✓				
John M. Warner	✓				
Rod Froelich					
Robert E. Nowatzki		✓			
Phillip Mueller	✓				

Total (Yes) 13 No 1

Absent 0

Floor Assignment Berg

SCR 4049: A concurrent resolution directing the Legislative Council to study establishment and operation of a disaster relief fund to address property tax needs in federally declared disaster areas.

SCR 4050: A concurrent resolution directing the Legislative Council to study the feasibility and desirability of implementing a grant preapproval process for every state agency, except institutions under the state board of higher education.

Engrossed SCR 4053: A concurrent resolution urging Congress to act quickly to fulfill its obligation under the Internet Tax Freedom Act with regard to balanced membership of the Advisory Commission on Electronic Commerce and urging the Advisory Commission on Electronic Commerce to be mindful in its deliberations of the impact of Internet usage and Internet sales transactions on telecommunications, traditional retail businesses, and state and local tax bases.

#### ROLL CALL

The question being on the final adoption of the resolutions, which have been read, the roll was called and there were 90 YEAS, 0 NAYS, 0 EXCUSED, 8 ABSENT AND NOT VOTING.

YEAS: Aarsvold; Beller; Berg; Bernstein; Boehm; Boucher; Brandenburg; Brekke; Brusegaard; Byerly; Carlisle; Carlson; Clark; Cleary; DeKrey; Delmore; Delzer; Devlin; Disrud; Dorso; Drovdat; Eckre; Ekstrom; Fairfield; Froelich; Froseth; Galvin; Glassholm; Gorder; Grande; Grosz; Grumbo; Gullason; Gunter; Haas; Hanson; Hawken; Henegar; Hoffner; Huether; Jensen; Johnson, D.; Johnson, N.; Keiser; Kelsch, R.; Kelsh, S.; Kerzman; Klein; Klermin; Kliniske; Koppang; Koppelman; Kroeber; Lemieux; Lloyd; Lundgren; Mahoney; Martinson; Melcalf; Meyer; Mickelson; Monson; Mueller; Nelson; Nicholas; Nichols; Niemeier; Noltestad; Nowatzki; Pollert; Poolman; Price; Renner; Pannerfeldt; Rose; Sandvig; Severson; Solberg; Stefanowicz; Svedjan; Sveen; Thoreson, B.; Thoreson, L.; Thorpe; Timm; Tollefson; Warner; Wentz; Winrich; Speaker Wald

ABSENT AND NOT VOTING: Dalrymple; Herbel; Kempenich; Maragos; Portis; Schmidt; Weisz; Wikenheiser

Engrossed SCR 4024, SCR 4043, SCR 4047, SCR 4049, SCR 4050, and Engrossed SCR 4053 were declared adopted.

#### APPOINTMENT OF CONFERENCE COMMITTEE

THE SPEAKER ANNOUNCED the following appointment to a Conference Committee on SB 2275: Reps. Jensen, B. Thoreson, Rose.

#### APPOINTMENT OF CONFERENCE COMMITTEE

THE SPEAKER ANNOUNCED the following appointment to a Conference Committee on SB 2309: Reps. Jensen, B. Thoreson, Rose.

#### APPOINTMENT OF CONFERENCE COMMITTEE

THE SPEAKER ANNOUNCED the following appointment to a Conference Committee on SB 2388: Reps. Kliniske, Porter, Niemeier.

#### CONSIDERATION OF MESSAGE FROM THE SENATE

REP. FROSETH MOVED that the House do not concur in the Senate amendments to Engrossed HB 1272 as printed on HJ page 790 and that a conference committee be appointed to meet with a like committee from the Senate, which motion prevailed.

#### APPOINTMENT OF CONFERENCE COMMITTEE

THE SPEAKER APPOINTED as a Conference Committee on Engrossed HB 1272: Reps. Koppelman, Wikenheiser, Ekstrom.

#### MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)

MADAM PRESIDENT: The House has passed unchanged: SB 2119, SB 2177, SB 2213, SB 2420.

#### MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)

MADAM PRESIDENT: The House has failed to pass: SB 2277, SB 2278, SB 2348, SB 2379.

#### MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)

MADAM PRESIDENT: The House has amended and subsequently failed to pass: SB 2284.

MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)  
MADAM PRESIDENT: The House has amended, subsequently passed, and the emergency clause carried: SB 2075, SB 2101, SB 2235.

MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)  
MADAM PRESIDENT: The House does not concur in the Senate amendments to Engrossed HB 1272 and the Speaker has appointed as a conference committee to act with a like committee from the Senate on:

HB 1272: Reps. Koppelman; Wikenheiser; Ekstrom

MESSAGE TO THE SENATE FROM THE HOUSE (LANCE HAGEN, CHIEF CLERK)  
MADAM PRESIDENT: The Speaker has appointed as a conference committee to act with a like committee from the Senate on:

SB 2275: Reps. Jensen; B. Thoreson; Rose

SB 2309: Reps. Jensen; B. Thoreson; Rose

SB 2388: Reps. Kliniske; Porter; Niemeier

#### MOTION

REP. MONSON MOVED that the absent members be excused, which motion prevailed.

#### MOTION

REP. MONSON MOVED that the House be on the Fifth, Twelfth, and Sixteenth orders of business and at the conclusion of those orders, the House stand adjourned until 1:00 p.m. Monday, March 15, 1999, which motion prevailed.

#### REPORT OF STANDING COMMITTEE

SB 2071: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends DO PASS (13 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2071 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SB 2187: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). SB 2187 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SB 2282, as engrossed: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends DO PASS (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2282 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SB 2353: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 03 ABSENT AND NOT VOTING). SB 2353 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SB 2366, as engrossed: Natural Resources Committee (Rep. Grosz, Chairman) recommends DO PASS (9 YEAS, 2 NAYS, 4 ABSENT AND NOT VOTING). Engrossed SB 2366 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SB 2436: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends DO PASS (10 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). SB 2436 was placed on the Fourteenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SCR 4018: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS and BE PLACED ON THE CONSENT CALENDAR (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SCR 4018 was placed on the Tenth order on the calendar.

#### REPORT OF STANDING COMMITTEE

SCR 4020: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS and BE PLACED ON THE CONSENT CALENDAR (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SCR 4020 was placed on the Tenth order on the calendar.

1999 TESTIMONY  
SB 2187

**Testimony of Wayne R. Carlson  
Livestock Services Coordinator  
North Dakota Department of Agriculture  
Senate Bill 2187 and 2048  
January 15, 1999  
Agriculture Committee  
Roosevelt Room**

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Chairman Wanzek and Committee members, for the record, my name is Wayne R. Carlson, I am the Livestock Services Coordinator.

The protection provided by the brand law is important to North Dakota cattlemen. Any disruption of the service provided by the Stockmen's Association may create hardships for some producers. We ask that the committee and the Legislative Assembly take appropriate measures to correct what the Supreme Court has ruled unconstitutional. The Department of Agriculture will be ready to assist in any way to help correct the problem at hand.

Thank you.

If any questions, I would be glad to answer them.

**Testimony of Larry A. Schuler DVM  
State Veterinarian  
Executive Officer of State Board of Animal Health  
Senate Bill 2187  
January 15, 1999  
9:00 A.M. CST  
Senate Agriculture Committee  
Roosevelt Room**

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Chairman Wanzek and Committee members, my name is Larry Schuler. I am the state veterinarian and executive officer of the State Board of Animal Health. I am here to testify in support of SB 2187.

The State Board of Animal Health is involved in the current brand inspection system as the state agency that adopts rules and approves changes in fees relative to brand inspection. This bill does not alter that role. The State Board of Animal Health is comfortable and willing to maintain that relationship.

The State Board of Animal Health recently met and unanimously approved supporting this bill.

If there are any questions, I would be glad to answer them.

February 4, 1999

Mr. Chairman, Members of the Senate Agriculture Committee.

My name is James Billey and I live on a farm southeast of Ellendale in Dickey County. For the last 30 years I have been in the livestock business. Ten years in backgrounding and feeding cattle and the last twenty years raising sheep and feeding lambs. From 1983 to 1993 I was privileged to serve as the sheep industry representative on the Board of Animal Health.

I am here today to support Senate Bill 2415 because I believe it can be the basis for enacting required statutory changes. Exactly one year ago to the day, I had the "once in a lifetime" experience of being an appellee in the North Dakota Supreme Court. The Court was hearing oral arguments in the appeal of the North Dakota Stockman's Association in the case of Billey/Peterson vs. North Dakota Stockman's Association.

If you are not familiar with this case, the District Court Judge found certain sections of the Century Code in violation of the North Dakota Constitution by declaring brand inspection, brand registration and estray funds public monies. Because of this determination, the District Court found that these funds could not be deposited in the private bank account of the Stockman's Association and that they had to be accounted for as required by our Constitution. The North Dakota Supreme Court affirmed the District Court decision with implementation of the decision held until the adjournment of this Legislative Session. This delay was granted to allow you the opportunity to correct the errors made by your predecessors in 1949, and repeated in 1993, when brand recording was moved from the State Agriculture Department to the Stockman's Association. If you are wondering, I opposed that bill in this body and with the Governor for the same reasons.

North Dakota government has some unique characteristics which when challenged have been held inviolate by our citizens. This includes provisions for initiative and referendum; the state ownership of a bank and mill and elevator; the requirement for a balanced budget; the requirement for voting up or down on every legislative bill; the strict provisions for accounting on the expenditures of public monies; and the ban on aid or assistance with public funds to any private organization. The Court decisions in our case focused on the last two aforementioned areas of our laws.

Senate Bill 2415 proposes the establishment of a State Brand Board consisting of five members appointed by the Governor. This new Board would assume the statutory responsibility for the functions of brand registration, brand inspection, publishing a brand book and handling estrays currently held by the North Dakota Stockmans' Association. It will require that all related funds be deposited with the State Treasurer in a state brand fund as required by our Constitution. The accounting for these funds then would be handled by the Office of Management and Budget like funds for any other state agency or board.

One of the best features of this bill is the proposed new Section 11 on p. 4 which allows the State Brand Board to contract with any person to perform the inspection function. I believe one of the downfalls of the present system is the lack of a competitive or negotiated contract between the State and the Stockman's Association. In 1993 the cry was heard on the floor of the House of Representatives for "privatization" but shouldn't that require a bidding process and a written contract for services provided? Doesn't the Department of Transportation have contracts with providers of road construction services and for sellers of license tabs and titles in local communities?

Another excellent feature of this bill is in Section 17 at p.7 relating to police powers. This section designates the chief brand inspector and two fieldman investigators, state employees, to have the police power. There has always been a question about the current statute giving police powers to the employees of a private organization.

Some areas that may need to be examined by this Committee include the relationship between the proposed State Brand Board and the Board of Animal Health. The Board of Animal Health has the court approved authority to set the brand recording, inspection, and brand book fees and certain rule making authority which may be better placed with the Brand Board. Another option could be to give all of the proposed Brand Board authority to the Board of Animal Health.

The revision of the statutes relating to brands and marks is timely because of several factors beyond your control. First, the interest in hot iron branding is diminishing because of economic loss from damage to the hide. Second, new identification systems are coming into use such a electronic ID. Third, consumer insistence for identification of traditional and non-traditional large animals in the food chain from the producer to the rail in the cooler. Fourth, the increase in non-traditional large animals compared to stable or lower cattle numbers. With these changing trends and looking to the needs of the next century, planning for new systems of identification would be appropriate at this time.

Your work with the statutes cited in our court case will not be judged by Mr. Peterson or myself, but will be viewed by the livestock producers in your district. If the Court stops the North Dakota Stockman's Association from doing brand inspections of cattle and horses at the end of the legislative session, your constituents will be faced with the prospect of not selling or committing a class B misdemeanor under Section 36-09-23 for selling without inspection.

I urge you to give this bill your serious consideration. Thank you for giving me this opportunity, Mr. Chairman.

James Billey  
PO Box 726  
Ellendale, ND 58436

Mr. Chairman, Members of the House Agriculture Committee.

My name is James Billey and I live on a farm southeast of Ellendale in Dickey County. For the last 30 years I have been in the livestock business. Ten years in backgrounding and feeding cattle and the last twenty years raising sheep and feeding lambs. From 1983 to 1993 I was privileged to serve as the sheep industry representative on the Board of Animal Health.

I am here today to express my concerns over SB 2187. Proponents of this bill believe it will correct the faulty statutes dealing with brand inspection, brand registration, and estrays which were brought to light by the District Court in 1997 and the Supreme Court in June of last year. Copies of these decisions are included with my statement so you can read them yourself.

If you are not familiar with Billey/Peterson vs. North Dakota Stockman's Association, the District Court Judge found certain sections of the Century Code in violation of the North Dakota Constitution by declaring brand inspection, brand registration and stray funds public monies. Because of this determination, the District Court found that these funds could not be deposited in the private bank account of the Stockman's Association and that they had to be accounted for as required by our Constitution. The North Dakota Supreme Court affirmed the District Court decision with implementation of the decision held until the adjournment of this Legislative Session. This delay was granted to allow you the opportunity to correct the errors made by your predecessors in 1949, and repeated in 1993, when brand recording was moved from the State Agriculture Department to the Stockman's Association. If you are wondering, I opposed that bill in this body and with the Governor for the same reasons.

It appears to me that SB 2187 was prepared by the Legislative Council in accordance with the sponsor's request. If this bill was prepared by the Attorney General's office to comply with the laws and court decisions, are they represented here today to support it? I know they are working on other bills to make statutory corrections dictated by the Billey/Peterson decision.

In this bill Section 1 corrects an error in the 1993 legislation by proposing to move obtaining a feedlot registration number from the Commissioner of Agriculture to chief brand inspector. Section 3 would remove the bond requirement passed in 1993 to prevent discrimination by the Stockman's Association against non-members. This is just an effort to reduce costs to the Association and give them more freedom to do as they wish. Neither of these sections has any relationship to the Court decisions.

The rest of the bill deals with the handling of brand registration and inspection fees, brand book fees and stray funds by directing that they be deposited with the State Treasurer in the North Dakota Stockman's Association fund. While this change relates to the court decisions, the continuing appropriation authorized by Section 7 does not comply with the District Court Judge's opinion. He states on page 5 "The



plaintiff next claims that Section 18 of Article 10 has been violated. That Section prohibits the state from loaning or giving its credit or making donations to any corporation except specified ones. The continuing appropriation to a private corporation violates this provision."

You need to be concerned about these public funds and how they are used. According to the financial reports filed by the Association with the State Auditor as per Section 36-22-09, Mr. Moser's salary with 20% (estimated) added for benefits was \$42,000 (35,000 + 7,000) in 1990. In 1997 the salary was \$57,600 (48,000 + 9,600) for an increase of \$15,600. The Association membership dues increased from \$50,228 in 1990 to \$69,520 for an increase of \$19,292. The \$3,692 difference doesn't allow much for the cost of operating an office with staff. For this 8 year period Mr. Moser's salary increased 37% while I doubt if livestock producers experienced the same increase in income from 1990 to 1997. The major sources of income for the Association are membership dues; interest on reserves probably generated by brand inspection fees in years when lots of animals move to market; and brand inspection, registration and estray funds. The later mentioned funds are public monies and the interest on surpluses from previous years should also be public monies. Is Mr. Moser, the Association's lobbyist, paid from membership dues, interest (public money), registration and inspection fees (public money) or some combination. This situation is a good example of the problems created when public monies flow to a private association.

The Stockman's Association financial report also indicates their cash reserves on 12-31-97 as \$795,039. In addition, the Association has a number of vehicles purchased with estray funds and other equipment which would be considered public property under the court decisions. S-2187 fails to provide a plan to determine how much of those reserves and which assets belong to the public. The District Court Judge directed the Association as of June 9, 1997 to "properly identify all funds resulting from receipts of fees from the chapters of the code" related to his decision. To assist the Court, I believe this session of the Legislature needs to enact a revised program for the future and determine what should be done to rectify the mistakes of the past.

Proponents of this bill are the same people who helped ram through the bill to move the registration function out of the State Agriculture Department and into the Stockman's Association in 1993. This move violated the laws of North Dakota. Do you want to be pressured into following their leadership again? The courts are not telling you what to do. They are saying major policy decisions have to be made during this session.

Removing the statutory responsibility from the Stockman's Association and returning it to a state agency seems to be needed. You could use the State Agriculture Department, the Board of Animal Health or create a new State Brand Board similar to South Dakota. The inspection work could be performed under a contract just as other services are purchased by the state. Later today, when I can get copies made, I will provide you with some additional material and views relating to SB 2415 which is

patterned after the South Dakota plan.

Your work with the statutes cited in our court case will not be judged by Mr. Peterson or myself, but will be viewed by the livestock producers in your district. If the Court stops the North Dakota Stockman's Association from doing brand inspections of cattle and horses at the end of the legislative session, your constituents will be faced with the prospect of not selling or committing a class B misdemeanor under Section 36-09-23 for selling without inspection.

I urge you to completely rewrite this bill or send it back with a Do Not Pass. You and the Senate Agriculture Committee have to decide on the provisions for any new bill in consultation with competent legal counsel. Thank you for giving me this opportunity, Mr. Chairman.

James Billey

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

JAMES BILLEY AND PETE PETERSON, )

Plaintiffs, )

-v- )

NORTH DAKOTA STOCKMEN'S )  
ASSOCIATION, )

Defendants. )

File No. 95-C-2544

MEMORANDUM OPINION

This is an action asking for a Declaratory Judgment finding that certain sections of Chapter 36-09 relating to brands and marks and Chapter 36-22 relating to brand inspections violate Section 2 and Section 12 of Article 10 of the Constitution of the State of North Dakota. The defendants deny the invalidity of such sections and specifically allege the statutes are constitutional.

The enactments of the legislature are presumed to be constitutional, and will be upheld unless it is manifestly in violation of the state constitution. In considering the constitutionality, every reasonable presumption in favor of its constitutionality prevails. The Courts will not declare a statute void unless its invalidity is shown beyond a reasonable doubt. Obviously, the legislature has the power to enact any law not prohibited by the state or federal constitution. See generally, Menz v. Coyle 117 NW 2d 290 (ND 1962).

The facts of this case show that the North Dakota Stockmen's Association has, since 1949, been the body entrusted with the authority to make

inspections of all cattle shipped from our state to any public livestock market, including auction markets, buying stations or packing stations within or without the State of North Dakota. Prior to that time, there had been three separate systems of inspection. In 1993, the association was designated to handle all brand recording duties as well. The North Dakota Board of Animal Health (formerly the Livestock Sanitary Board) sets fees for brand inspections, brand registration, and the cost of brand books. The association has no authority to independently set fees. The Board of Animal Health Members are appointed by the governor. The board approves all rule changes to the regulations governing brand inspections and recording. The statute provides that all fees received as a result of these duties are deposited in the North Dakota Stockmen's Association general fund.

The initial claim of the plaintiff is that this state of facts violates Section 2 of Article 10 of the Constitution which states that the power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any county or other municipal corporation shall be a party. Clearly, there has been no violation of this constitutional provision. The setting of the fees for the services involved are established by a board appointed by the governor. The Stockmen's Association provides input into such determination, but the board establishes the payment involved.

The next contention of the plaintiff is that Section 12 of Article 10 of the Constitution has been violated by the statutory powers granted to the Stockmen's Association. Section 12 generally provides that all public monies from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau or institution of the state receiving the same to the State Treasurer. There are specific exceptions none of which apply herein and, in

addition, the amendment further exempts fees and monies received in connection with the licensing and organization of certain professional people in the state.

Section 36-22-02 vests authority with the stockmen's association as follows:

“North Dakota stockmen's association authority. The North Dakota stockmen's association, a livestock association duly organized under the laws of the state of North Dakota, and duly registered as a market agency under the Act of Congress commonly known as the Packers and Stockyards Act, 1921 (Pub. L. 67-51; 42 Stat. 159; 7U.S.C. 181 et seq.), for the better protection of the livestock industry of the state of North Dakota and for the purpose of securing uniformity of inspection and cooperation with the department of agriculture of the United States. shall make an inspection to determine ownership, of all cattle shipped or consigned from this state to any public livestock markets, including auction markets, buying stations, or packing plants within or without the state of North Dakota.”

In regard to the authority of the association to maintain the brand books, Section 36-09-01 reads as follows:

“Office for recording brands. The North Dakota stockmen's association shall appoint a chief brand inspector. The chief brand inspector shall maintain a general office for recording marks and brand. As used in this chapter, “chief brand inspector” means the chief brand inspector of the North Dakota stockmen's association.

In each instance, the fees generated from such activity are ordered paid into the general fund of the North Dakota Stockmen's Association as a continuing appropriation. All parties agree that the North Dakota Stockmen's Association is a private, nonprofit corporation organized and existing under the laws of the State of North Dakota. It was incorporated in 1941 for promoting the general welfare of the livestock industry in the state.

The initial question before the Court is whether the fees involved

constitute "public monies". Section 21-04-01(5) defines public funds as follows:

"Public funds" includes all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state have legal custody. The term includes funds of which any board, bureau, commission, or individual, created or authorized by law, is authorized to have control as the legal custodian for any purpose whatsoever whether such funds were derived from general or special taxation or the assessment of persons or corporations for a specific purpose. The term does not include funds of students or student organizations deposited in a student financial institution approved by and under the control of the school board."

From a review of the statutes, I am satisfied that the North Dakota Stockmen's Association is an agent of the state for purposes of maintaining the brand book and conducting brand inspections. Clearly, the statute make it clear that the association is enforcing the rules and regulations as designed by a public board of the State of North Dakota. The history of the brands and marks chapter of the code show that prior to 1993, the general office for recording marks and brands was maintained in the office of the Commissioner of Agriculture. The purposes of the law in each case are for the general protection of the public. In establishing them as an agent for the state, they have been made the exclusive provider of such services. They name and appoint the chief brand inspector who then appoints the people at local areas. As the agents of the state, they carry out a state function.

The defendant first claims that the fees involved herein are not public funds. They say these are only costs for services performed and no different than a health certificate provided by a veterinarian. This Court believes there is a substantial difference. Initially, the Stockmen's Association has been vested with a monopoly. Any veterinarian throughout the state can provide the health certificate.

I believe these are fees generated directly for the benefit of the public. I am satisfied that they do constitute public funds, and must be returned to the state.

The association next contends that they should exempt under the constitutional amendment regarding the licensing and organizations of various professionals. I am satisfied these are not fees for identification and regulation of an industry. They next suggest that they are one of the boards or associations under Section 54-44-12 which has the power to deposit money in any bank selected by them. Clearly, however, this section applies to boards, associations and commissions which are created by law and not existing private corporations which are designated to perform a public purpose.

The plaintiff next claims that Section 18 of Article 10 has been violated. That section prohibits the state from loaning or giving its credit or making donations to any corporation except specified ones. The continuing appropriation to a private corporation violates this provision. In addition, that portion of Section 36-22-08 which allows receipts from the sale of strays to be turned over to the general fund of the association violates such a provision. Although logically, there is a cost involved in taking care of these matters, it must be done in a different manner. The defendant argues that North Dakota's system is similar to South Dakota's and should be held constitutional as a result. The systems are similar except that all excess funds in South Dakota are returned to the State Treasurer.

Accordingly, the Court finds that portion of Section 36-22-03 which reads as follows:

“Brand Inspectors under this chapter shall charge and collect fees for inspection ... which funds, so collected must be paid into the general fund of the North Dakota Stockmen's Association.”

And that portion of Section 36-09-18 which states:

“Any fees collected under this chapter must be deposited in the general fund of of the Stockmen’s Association. The fees deposited under this Chapter in Section 36-22-03 are appropriated as a continuing appropriation of the North Dakota Stockmen’s Association.”

are violations of Section 12 of Article 10 of the Constitution of the State of North Dakota. No exemption is provided for the North Dakota Stockmen’s Association in the constitutional provision nor can they fit under any of the exemptions allowed. By naming them in the statute, they become an agent of the state. As such, they must return the money to the treasurer in an appropriate manner.

The Court hereby stays the effective date of this opinion and order until such time as it can be appealed to the Supreme Court of the State of North Dakota. Until that can be accomplished, the Court orders that the Stockmen’s Association properly identify all funds resulting from the receipt of fees from these chapters of the code. I likewise believe that this opinion should be stayed until such time as the legislature can amend the statutes to properly conform to the Constitution of the State of North Dakota.

Counsel for the plaintiff may prepare the appropriate Order for this Court’s signature.

Dated: June 9, 1997

BY THE COURT:



BENNY A. GRAFF, DISTRICT JUDGE



Citation/Title

579 N.W.2d 171, Billey v. North Dakota Stockmen's Ass'n, (N.D. 1998)

\*171 579 N.W.2d 171

1998 ND 120

**James BILLEY and Pete Peterson, Plaintiffs and Appellees,**  
**v.**  
**NORTH DAKOTA STOCKMEN'S ASSOCIATION, Defendant and Appellant.**

Civil No. 970332.  
Supreme Court of North Dakota.  
June 4, 1998.  
Rehearing Denied July 1, 1998.

State residents who owned livestock and had registered brands brought a declaratory judgment action against the Stockmen's Association, challenging the constitutionality of statutory brand inspection, brand recording, and estray provisions. The District Court, Burleigh County, Benny A. Graff, J., entered summary judgment declaring portions of three statutes unconstitutional, and the Stockmen's Association appealed. The Supreme Court, Sandstrom, J., held that: (1) residents had standing; (2) the Stockmen's Association acted as an agent of the state when performing brand inspection and recording services, such that the fees thereby generated were "public moneys," and thus statutes requiring that fees be deposited in the general fund of the Stockmen's Association violated the State Constitution; and (3) state law requiring the Stockmen's Association to remit to the state Treasurer fees the Association collected for its brand inspection and recording services was not preempted by the Packers and Stockyards Act.

Affirmed.

- 1. CONSTITUTIONAL LAW ↻42.3(2)
  - 92 ----
  - 92II Construction, Operation, and Enforcement of Constitutional Provisions
    - 92k41 Persons Entitled to Raise Constitutional Questions
    - 92k42.3 Particular Classes of Persons
      - 92k42.3(2) Citizens, residents, or taxpayers; property owners.

N.D. 1998.  
Residents who had paid fees to register brands, and one of whom owned cattle, which required brand inspections when he sold them, and had paid brand inspection fees to the Stockmen's Association, had standing to challenge the constitutionality of statutory brand inspection, brand recording, and estray provisions. NDCC 36-09-18, 36-22-03, 36-22-08.

- 2. STATES ↻168.5
  - 360 ----
  - 360IV Fiscal Management, Public Debt, and Securities

579 N.W.2d 171, Billey v. North Dakota Stockmen's Ass'n, (N.D. 1998)

60k168.5 Rights and remedies of taxpayers.  
N.D. 1998.

Any state taxpayer has standing to challenge a statute on the basis state funds are being unlawfully dissipated.

3. ACTION ↪13  
13 ----  
13I Grounds and Conditions Precedent  
13k13 Persons entitled to sue.

N.D. 1998.

Motive is irrelevant to the determination whether a party has standing.

4. STATES ↪129.1  
360 ----  
360IV Fiscal Management, Public Debt, and Securities  
360k129 Appropriations  
360k129.1 In general.

N.D. 1998.

Stockmen's Association acted as an agent of the state when performing brand inspection and recording services, such that the fees thereby generated were "public moneys," and thus, statutes requiring that such fees be deposited in the general fund of the Stockmen's Association violated the provision of the State Constitution requires all public moneys to be paid over to the State Treasurer and disbursed only by appropriation by the legislature. Const. Art. 10, § 12; 36-09-18, 36-22-03.

See publication Words and Phrases for other judicial constructions and definitions.

5. MUNICIPAL CORPORATIONS ↪889.1  
268 ----  
268XIII Fiscal Matters  
268XIII(B) Administration in General, Appropriations, Warrants, and  
Payment  
268k889 Appropriations  
268k889.1 In general.

N.D. 1998.

"Appropriation" is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object.

See publication Words and Phrases for other judicial constructions and definitions.

6. STATES ↪129.1  
360 ----  
360IV Fiscal Management, Public Debt, and Securities  
360k129 Appropriations

579 N.W.2d 171, *Billey v. North Dakota Stockmen's Ass'n*, (N.D. 1998)

360k129.1 In general.  
N.D. 1998.

Purported "continuing appropriation" which wholly bypasses the state treasury does not comply with the constitutional mandate all public moneys be paid to the State Treasurer. Const. Art. 10, § 12.

7. STATES 18.3  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.3 Preemption in general.

N.D. 1998.

Because of the interstitial nature of Federal law, preemption of state law by federal statute or regulation is not favored, and consideration under the Supremacy Clause begins with the basic assumption that Congress did not intend to displace state law. U.S.C.A. Const. Art. 6, cl. 2.

8. STATES 18.3  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.3 Preemption in general.

N.D. 1998.

Courts are reluctant to infer preemption of state law by federal statute or regulation, and the party claiming preemption bears the burden of proving that Congress intended to preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

9. ANIMALS 5.1  
28 ----  
28k5 Marks and Brands  
28k5.1 In general.

[See headnote text below]

9. STATES 18.15  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.15 Particular cases, preemption or supersession.

N.D. 1998.

Packers and Stockyards Act was not intended to occupy the field, and does not wholly preempt state regulation of brand inspections. U.S.C.A. Const. Art. 6, cl. 2; Packers and Stockyards Act of 1921, § 1 et seq., as amended, 7 U.S.C.A. § 181 et seq.

10. STATES 18.11  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption

579 N.W.2d 171, Billey v. North Dakota Stockmen's Ass'n, (N.D. 1998)

360k18.11 Congressional intent.  
1998.

When congressional intent to preempt state law is not clear from the face of the statute, deference should be given to the implementing agency's interpretation of the statute. U.S.C.A. Const. Art. 6, cl. 2.

11. ANIMALS 5.1  
28 ----  
28k5 Marks and Brands  
28k5.1 In general.

[See headnote text below]

11. STATES 18.15  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.15 Particular cases, preemption or supersession.  
N.D. 1998.

It was not impossible to comply with both state law requiring the Stockmen's Association, a registered market agency under the Packers and Stockyards Act, to remit to the State Treasurer fees the Association collected for its brand inspection and recording services, and the Act section requiring that charges be collected by the market agency and paid to the department, agency, or association performing such service, and thus, state law was not preempted; the Act section at issue governed the relationship between two market agencies, one brokering the sale and the other providing brand inspection services, and did not purport to govern the ultimate disposition of the fees received by the "department, agency, or association performing such service." U.S.C.A. Const. Art. 6, cl. 2; Const. Art. 10, § 12; Packers and Stockyards Act of 1921, § 317(c), as amended, 7 U.S.C.A. § 217a(c); NDCC 36-09-18, \*171 36-22-03.

12. STATES 18.5  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.5 Conflicting or conforming laws or regulations.  
N.D. 1998.

Even when Congress has not intended to entirely displace state law in a particular area, state law is pre-empted to the extent that it actually conflicts with federal law. U.S.C.A. Const. Art. 6, cl. 2.

13. STATES 18.5  
360 ----  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.5 Conflicting or conforming laws or regulations.  
N.D. 1998.

Conflict pre-emption occurs where compliance with both federal and state laws

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physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

\*172 Lynn M. Boughey, of Boughey Law Firm, Minot, for plaintiffs and appellees.

Gordon W. Schnell, of Mackoff, Kellogg, Kirby & Kloster, P.C., Dickinson, and Robert F. Williams (on brief), Rutgers University School of Law, Camden, N.J., for defendant and appellant.

SANDSTROM, Justice.

[¶ 1] The North Dakota Stockmen's Association (Stockmen's Association) appeals from a summary judgment declaring portions of N.D.C.C. §§ 36-09-18, 36-22-03, and 36-22-08 unconstitutional. Concluding brand inspection and registration fees are public moneys which must be paid over to the state Treasurer under North Dakota's Constitution, we affirm.

I

[¶ 2] The Stockmen's Association was formed in 1929, and incorporated as a non-profit corporation in 1941. Prior to 1949, brand inspection in North Dakota was conducted by county brand inspectors, veterinarians, and the Stockmen's Association. In 1949, the legislature designated the Stockmen's Association as the sole entity authorized to conduct brand inspections in the state. 1949 N.D. Sess. Laws Ch. 231, § 2; see N.D.C.C. § 36-22-02. The Stockmen's Association employs a Chief Brand Inspector, two fieldmen, and approximately thirty other employees statewide to conduct brand inspections. The fees for brand inspections are set by the Board of Animal Health, a state board whose members are appointed by the Governor. See N.D.C.C. §§ 36-01-01 and 36-22-03. All fees generated by brand \*173 inspections are paid into the general fund of the Stockmen's Association. N.D.C.C. § 36-22-03.

[¶ 3] Under the version of N.D.C.C. Ch. 36-09 in effect prior to 1993, the state Agriculture Commissioner was responsible for recording brands or marks, maintaining brand books, collecting fees for recording brands, and paying those fees over to the state Treasurer. In 1993, the legislature transferred these duties to the Stockmen's Association and directed the fees generated by brand registration and sale of brand books be paid into the general fund of the Stockmen's Association. See 1993 N.D. Sess. Laws Ch. 357; N.D.C.C. Ch. 36-09.

[¶ 4] The Stockmen's Association also is given broad authority over estrays. The Stockmen's Association is authorized to take all sale proceeds from estrays, (FN1) and, if those funds are unclaimed for one year, place them in its general fund. See N.D.C.C. Ch. 36-22. The Stockmen's Association uses these stray funds to purchase vehicles for the Chief Brand Inspector and two fieldmen.

[¶ 5] James Billey and Pete Peterson are North Dakota residents who own

579 N.W.2d 171, *Billey v. North Dakota Stockmen's Ass'n*, (N.D. 1998)

Stock and have registered brands. They brought this declaratory judgment action challenging the constitutionality of the brand inspection, brand recording, and estray provisions in N.D.C.C. Chs. 36-09 and 36-22. On cross-motions for summary judgment, the district court concluded portions of N.D.C.C. §§ 36-09-18, 36-22-03, and 36-22-08 violate N.D. Const. Art. X, § 12, which requires all public moneys be paid to the state Treasurer, and N.D. Const. Art. X, § 18, which prohibits the state from making loans, giving credit, or making donations to or in aid of any individual, association, or corporation. The court directed its order be stayed "until such time as it can be appealed" to this Court, and further stayed "until such time as the legislature can amend the statutes to properly conform to the Constitution of the State of North Dakota."

[¶ 6] The district court had jurisdiction under N.D. Const. Art. VI, § 8, and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, § 6, and N.D.C.C. §§ 28-27-01 and 28-27-02. The appeal was timely under N.D.R.App.P. 4(a).

## II

[1] [2] [¶ 7] The Stockmen's Association asserts *Billey* and *Peterson* lack standing to challenge the constitutionality of the statutes. *Billey* and *Peterson* both have paid fees to register brands. *Peterson* owned cattle, which required brand inspection when he sold them, and he had paid brand inspection fees to the Stockmen's Association. "Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." *Black's Law Dictionary* 1405 (6th ed.1990). *Billey* and *Peterson* clearly have an interest and are affected by the challenged statutes. Furthermore, any state taxpayer has standing to challenge a statute on the basis state funds are being unlawfully dissipated. See *Danzl v. City of Bismarck*, 451 N.W.2d 127, 129 (N.D.1990).

[3] [¶ 8] The Stockmen's Association asserts standing is lacking because *Peterson* has "an ax to grind" with the Association. *Peterson* was employed by the Stockmen's Association for 37 years, including 23 years as a fieldman. *Peterson* apparently retired after conflicts with the executive vice-president of the Stockmen's Association, and the Association asserts he has an improper motive in bringing this suit. The Association, however, cites no authority indicating a plaintiff's motives for initiating suit may jeopardize his standing to sue. Motive is irrelevant to the determination whether a party has standing.

[¶ 9] We conclude *Billey* and *Peterson* have standing to bring this action.

## III

[4] [¶ 10] The Stockmen's Association asserts the trial court erred in holding portions \*174 of N.D.C.C. §§ 36-09-18 and 36-22-03 violate N.D. Const. Art X, § 12.

11] The legislature has given the Stockmen's Association exclusive

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Authority to conduct brand inspection and recording in the state. N.D.C.C. Ch. 36-09 and § 36-22-02. Any fees collected under N.D.C.C. Ch. 36-09 for recording of brands, sale of brand books, and other related services, go to the general fund of the Stockmen's Association:

"Any fees collected under this chapter must be deposited in the general fund of the North Dakota stockmen's association. The fees deposited under this chapter and section 36-22-03 are appropriated as a continuing appropriation to the North Dakota stockmen's association."

N.D.C.C. § 36-09-18. N.D.C.C. § 36-22-03 directs any funds collected for brand inspection services performed in the state must be deposited in the general fund of the Stockmen's Association:

"Brand inspectors under this chapter shall charge and collect fees for inspections on all shipments or consignments of cattle at livestock markets ... and shall charge and collect fees for inspection at auction markets, buying stations, and packing plants ... which funds, so collected, must be paid into the general fund of the North Dakota stockmen's association."

[¶ 12] N.D. Const. Art. X, § 12, requires all "public moneys" be paid over to the state Treasurer and disbursed only by appropriation by the legislature:

"All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature; ..."  
(FN2)

[¶ 13] The seminal question is whether the fees generated under N.D.C.C. Chs. 36-09 and 36-22 are "public moneys." The Stockmen's Association asserts the fees are merely payment for services rendered between private parties and were never in the hands of any state official, and thus are not public moneys. The district court determined the Stockmen's Association acted as an agent of the state when providing brand inspection and recording services, and the fees generated are therefore public moneys.

[¶ 14] The Stockmen's Association's assertion the fees are a "quid pro quo" for services rendered and were never the property of the state is too simplistic. Under N.D. Const. Art. X, § 12, all fees collected by an officer or agent of the state for a state-wide public purpose, by authority of law, must be paid to the state Treasurer and spent only by specific appropriation. See *Menz v. Coyle*, 117 N.W.2d 290, 302 (N.D.1962); *Langer v. State*, 69 N.D. 129, 138-39, 284 N.W. 238, 243 (1939). There is no dispute these fees are for a state-wide public purpose and are collected under authority of law. See N.D.C.C. § 36-22-02 (purpose of inspection requirements is for protection of the North Dakota livestock industry and to ensure uniformity of inspections). Thus, the Stockmen's Association is acting as an agent for the state in providing

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services, the fees are covered by N.D. Const. Art. X, § 12, and must be deposited with the state Treasurer.

[¶ 15] The Stockmen's Association argues it is not acting as an agent of the state:

"The trial court somehow concluded that brand fees were public money because the Association is 'an agent of the state.' We submit that in order for the Association to be an agent, there must be an intent on the part of the principal to create an agency relationship, and there must be a specific scope or set of powers for the agent to perform (to the exclusion of others).... There is nothing in NDCC § 36-22-02 or § 36-22-03 or elsewhere which indicates an intention to create an agency relationship, particularly one relating to collection of fees for the State. Rather, as stated above, the Association's brand inspection activities are a fee for service arrangement, a quid pro quo. Clearly, the plain intent is for the Association to perform the service and retain the fee. There is nothing \*175 to even imply that the Association's possession of the fees is on behalf of the State or acting as an agent for the State."

[¶ 16] The Stockmen's Association's argument is the polar opposite of the position it asserted in prior litigation involving the nature of its brand inspection services. In *United States v. Robinson*, 106 F.Supp. 212 (D.N.D.1952) the United States sued the Stockmen's Association and the members of the State Stock Sanitary Board, asserting the fees charged for brand inspections violated Ceiling Price Regulation 34 under the Defense Production Act of 1950, which restricted increases in charges for services in the course of a trade or business. The Stockmen's Association in that case asserted:

"that brand inspection of livestock is a governmental function coming under the police power of the State of North Dakota and that the North Dakota Stockmen's Association, a non-profit corporation, has been designated by statute as an agency of the State of North Dakota for the performance of such governmental function...."

*Robinson* at 216.

[¶ 17] The court agreed, holding:

"The law of the State of North Dakota, then, provides that inspection for health and brands shall be made before livestock is offered for sale. In other words, it is mandatory. The purpose of such inspection for either health or brands seems perfectly clear. Insofar as the inspection for brands is concerned, it is to determine ownership, to prevent and detect crime and to prevent fraud and to regulate the sale and distribution of livestock. That has none of the characteristics of a trade or business. It is performed under the direction of the State of North Dakota by a non-profit corporation. It is for the protection and benefit of the public generally...."



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"It further seems clear to the Court that by virtue of Chapter 36-22 ... the State of North Dakota, through legislative act, designated the North Dakota Stockmen's Association, a corporation, as its agency for the making of brand inspections on cattle sold within the state.... [C]ertainly the North Dakota Stockmen's Association is an agent of the state in making brand inspections. In other words, the North Dakota Stockmen's Association is, insofar as brand inspection is concerned, designated as an agency of the state to carry out the physical performance of a governmental function."

*Robinson* at 217. The opinion in *Robinson* also directly refutes the Stockmen's Association's assertion in this case it is merely providing a service for a fee:

"In this instance, the State of North Dakota, through the North Dakota Stockmen's Association, is selling neither a commodity nor a service in trade or business. It is in competition with no one. It is exercising purely a governmental function in policing the sale of livestock in the state through having inspectors inspect livestock for brand markings. No one other than the State or North Dakota, through the North Dakota Stockmen's Association, has been authorized to do such inspecting and make charge therefor."

*Robinson* at 218.

[¶ 18] Further support for the conclusion the Stockmen's Association is acting as an agent for the state and performing purely governmental functions when providing brand inspection or recording services is found in N.D.C.C. § 36-09-24:

"Police powers of chief brand inspector and two fieldmen. The chief brand inspector and two fieldmen employed by the North Dakota stockmen's association have the power:

"1. Of a police officer for the purpose of enforcing brand laws and any other state laws or rules relating to livestock.

"2. To make arrests upon view and without warrant for any violation of this chapter or any other state laws or rules relating to livestock committed in the inspector's presence.

"3. To respond to requests from other law enforcement agencies or officers for aid and assistance...."

This broad grant of police powers to the Stockmen's Association's employees is a clear indication the Stockmen's Association is acting \*176 as an agent of the state when performing services under N.D.C.C. Chs. 36-09 and 36-22. The Stockmen's Association cites no basis for granting such police powers to a private entity merely performing a private service for a fee.

[¶ 19] Finally, the legislature also recognized these fees were public

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fees belonging to the state. N.D.C.C. § 36-09-18 provides fees collected for brand inspection or recording services and deposited in the Stockmen's Association's general fund "are appropriated as a continuing appropriation" to the Stockmen's Association. If, as the Association asserts, the legislature intended to create a private fee-for-service arrangement, there would be no reason to attempt to make a continuing appropriation. "An 'appropriation' is the 'setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object.'" *State ex rel. Link v. Olson*, 286 N.W.2d 262, 268 (N.D.1979) (quoting *Campbell v. Towner County*, 71 N.D. 616, 3 N.W.2d 822, 825 (1941), and *State v. Holmes*, 19 N.D. 286, 123 N.W. 884, 886-87 (1909)). By nature, an "appropriation" is the expenditure of public funds.

[¶ 20] The Stockmen's Association does not rely upon the "continuing appropriation" in N.D.C.C. § 36-09-18 to uphold the validity of the transfer of fees to its general fund. Rather, the Association asserts this language is "not necessary" because the Association has earned the fees and already has possession of the funds, so "[t]here is therefore no need for an appropriation."

[6] [¶ 21] The question in this case is not the validity of a continuation appropriation in general, but whether a continuing appropriation can bypass the state treasury. In *Gange v. Clerk of Burleigh County District Court*, 429 N.W.2d 4 (N.D.1988), this Court upheld a continuing appropriation of marriage resolution fees to fund a "displaced homemaker program." In doing so, the Court stressed the statute specifically directed the clerks of court to pay the fees to the state Treasurer, and therefore did not violate N.D. Const. Art. X, § 12. *Gange* at 435. Other similar continuing appropriations provisions in our statutes also require payment of such fees first to the state treasury, with a subsequent appropriation of the funds to special uses. See, e.g., N.D.C.C. § 4-10.1-09 ("spud fund" of the North Dakota Potato Council); N.D.C.C. § 54-17.4-09.1 ("fossil excavation and restoration fund" of the North Dakota Geological Survey). Although a continuing appropriation is not per se impermissible, any such appropriation must comply with N.D. Const. Art. X, § 12. A purported "continuing appropriation" which wholly bypasses the state treasury does not comply with the constitutional mandate all public moneys be paid to the state Treasurer.

[¶ 22] We conclude the Stockmen's Association acts as an agent of the state when performing brand inspection and recording services, and the fees thereby generated are "public moneys" under N.D. Const. Art X, § 12. Accordingly, those portions of N.D.C.C. §§ 36-09-18 and 36-22-03 which direct payment of fees into the general fund of the Stockmen's Association are unconstitutional.

#### IV

[¶ 23] N.D. Const. Art. X, § 18, provides, in part:

neither the state nor any political subdivision thereof shall otherwise loan

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or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor...."

The district court concluded that provision was violated by the portion of N.D.C.C. § 36-09-18 which provides the brand inspection and recording fees deposited in the general fund of the Stockmen's Association "are appropriated as a continuing appropriation" to the Stockmen's Association. The Stockmen's Association challenges the district court's holding, asserting there has been no donation or aid because the funds are not state funds, and because the Stockmen's Association provides a service for those fees. Because we have already held N.D.C.C. §§ 36-09-18 and 36-22-03 violate N.D. Const. Art. X, § 12, we need not address \*177 whether those provisions also violate N.D. Const. Art. X, § 18. See, e.g., *Peterson v. Peterson*, 1997 ND 14, ¶ 22, 559 N.W.2d 826 (a court generally will not decide constitutional questions which are not necessary to its decision); *State v. King*, 355 N.W.2d 807, 809 (N.D.1984) (a court will inquire into the constitutionality of a statute only to the extent required by the case before it).

[¶ 24] The district court also concluded the portion of N.D.C.C. § 36-22-08 which allows receipts from the sale of estrays to go into the general fund of the Stockmen's Association violated N.D. Const. Art. X, § 18. The Stockmen's Association has not challenged this holding on appeal.

V

[¶ 25] The Stockmen's Association asserts federal law requires that it receive and retain the fees for brand inspection within North Dakota, and any contrary interpretation of our statutes is preempted by federal law.

[¶ 26] The Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-231, authorizes the Secretary of Agriculture to regulate transactions affecting interstate commerce at stockyards. Anyone who buys or sells livestock in interstate commerce on a commission basis or offers services, including brand inspection, at a federally-regulated stockyard must register with the Secretary of Agriculture as a "market agency." 7 U.S.C. §§ 201, 203. Under 7 U.S.C. § 217a(a), the Secretary has discretion to authorize fees for brand inspection at federally-regulated stockyards, and to designate a single market agency to provide inspections:

"The Secretary may, upon written application made to him, and if he deems it necessary, authorize the charging and collection, at any stockyard subject to the provisions of this chapter, by any department or agency of any State in which branding or marking or both branding and marking livestock as a means of establishing ownership prevails by custom or statute, or by a duly organized livestock association of any such State, of a reasonable and nondiscriminatory fee for the inspection of brands, marks, and other identifying characteristics of livestock originating in or shipped from such State, for the purpose of determining the ownership of such livestock. No charge shall be made under any such authorization until the authorized

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Department, agency, or association has registered as a market agency. No more than one such authorization shall be issued with respect to such inspection of livestock originating in or shipped from any one State. If more than one such application is filed with respect to such inspection of livestock originating in or shipped from any one State, the Secretary shall issue such authorization to the applicant deemed by him best qualified to perform the proposed service.... The decision of the Secretary as to the applicant best qualified shall be final."

The market agency which disburses the funds from the sale of the livestock must collect the brand inspection fees and pay them to the market agency which performed the inspection. 7 U.S.C. § 217a(c).

[¶ 27] The Stockmen's Association is a registered market agency under the Act, and has been authorized by the Secretary to perform brand inspection services at federally-regulated stockyards in North Dakota. The Stockmen's Association asserts 7 U.S.C. § 217a(c) therefore requires it receive and retain the fees for such inspections, and any contrary interpretation of state law is preempted.

[7] [8] [¶ 28] Because of the "interstitial nature of Federal law," preemption of state law by federal statute or regulation is not favored, and consideration under the Supremacy Clause begins with the basic assumption Congress did not intend to displace state law. *Federal Land Bank of St. Paul v. Lillehaugen*, 404 N.W.2d 452, 455 (N.D.1987). Accordingly, courts are reluctant to infer preemption, and the party claiming preemption bears the burden of proving Congress intended to preempt state law. *State v. Liberty National Bank and Trust Co.*, 427 N.W.2d 307, 310 (N.D.), cert. denied, 488 U.S. 956, 109 S.Ct. 393, 102 L.Ed.2d 382 (1988). Ultimately, " 'the question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction.' " *Liberty National Bank*, 427 N.W.2d at 310 (quoting L. Tribe, *American Constitutional Law* § 6-25, at 480 (2d ed.1988)).

[¶ 29] In *NoDak Bancorporation v. Clarkson*, 471 N.W.2d 140, 142 (N.D.1991), we enumerated the three bases of federal preemption:

"Federal preemption of state law may occur if: (1) Congress explicitly preempts state law; (2) Congress impliedly preempts state law by indicating an intent to occupy an entire field of regulation; or (3) state law actually conflicts with federal law."

See also *Liberty National Bank*, 427 N.W.2d at 309-10; *Lillehaugen*, 404 N.W.2d at 455. The Stockmen's Association does not assert Congress has explicitly preempted state law.

[9] [¶ 30] The Stockmen's Association asserts the Packers and Stockyards Act preempts Congressional intent to occupy the entire field with regard to the sale of livestock and related services. The Stockmen's Association concedes,

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However, the Act does not apply to all livestock transactions within North Dakota. By its terms, the Act applies only to transactions occurring at a "stockyard" as defined in the Act. See 7 U.S.C. § 202(a). Furthermore, the specific provision governing brand inspection grants discretion to, but does not require, the Secretary to authorize collection of fees for brand inspection by a designated entity: "The Secretary may, upon written application made to him, and if he deems it necessary, authorize the charging and collection ... of a reasonable and nondiscriminatory fee for the inspection of brands ..." 7 U.S.C. § 217a(a) (emphasis added). If Congress had intended the federal law wholly occupy the field and prevent all state regulation of brand inspection, it surely would have employed mandatory, rather than discretionary, language.

[¶ 31] Any doubt about the preemptive effect of the Act is clarified in other provisions of the Act and in the regulations promulgated by the Department of Agriculture under the Act. Congress has specifically provided *limited* preemption under the Act for state provisions governing bonding of packers and payment requirements for livestock purchases:

*"Federal preemption of State and local requirements*

"No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under section 204 of this title, and prompt payment provisions of section 228b of this title, respectively: *Provided*, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder: *Provided further*, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this chapter or section 204 of this title."

7 U.S.C. § 228c. This provision would be mere surplusage if Congress intended the Act to wholly occupy the field and preempt all state regulation of subjects covered by the Act. The inclusion of a specific, limited preemption provision is a clear expression of Congressional intent the Act was not meant to wholly preempt state law in this field.

[10] [¶ 32] The regulations promulgated under the Act by the Department of Agriculture also support this conclusion:

"The regulations in this part shall not prevent the legitimate application or enforcement of ... any other valid law, rule or regulation, or requirement to which any packer, stockyard owner, market agency, or dealer shall be subject which is not inconsistent or in conflict with the act and the regulations in this part."

C.F.R. § 201.4(a) (1998). This is a clear indication the Act, and the

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Regulations thereunder, are not intended to entirely occupy the field and wholly preempt state law. When Congressional intent to preempt state law is not clear from the face of the statute, deference should be given to the implementing agency's interpretation of the statute. *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir.1996) \*179 ; *Health Maintenance Organization of New Jersey, Inc. v. Whitman*, 72 F.3d 1123, 1127, 1128 (3d Cir.1995).

[¶ 33] In *Mahon v. Stowers*, 416 U.S. 100, 113, 94 S.Ct. 1626, 1632, 40 L.Ed.2d 79, 89 (1974), the Supreme Court held "nothing in the Packers and Stockyards Act or the regulations issued by the Secretary under the Act overrides the Texas Business and Commercial Code in determining the respective rights of the parties to the funds held by the trustee" of a bankrupt meat packer. On the precise issue presented in this case, the court in *Black Hills Packing Co. v. S.D. Stockgrowers Ass'n*, 397 F.Supp. 622, 630 (D.S.D.1975), held the Packers and Stockyards Act was not intended to preempt state laws governing brand inspection. See also *Kelly v. Lang*, 62 N.W.2d 770, 771, 773 (N.D.1953) (the Packers and Stockyards Act was not intended to preempt state laws governing chattel mortgages on livestock); *Sig Ellingson & Co. v. DeVries*, 199 F.2d 677, 679 (8th Cir.1952), cert. denied, 344 U.S. 934, 73 S.Ct. 505, 97 L.Ed. 719 (1953); *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39, 44, cert. denied, 332 U.S. 768, 68 S.Ct. 79, 92 L.Ed. 353 (1947); but see *Colorado v. United States*, 219 F.2d 474, 477-78 (10th Cir.1954).

[¶ 34] We conclude the Packers and Stockyards Act was not intended to occupy the field, and does not wholly preempt state regulation of brand inspections.

[11] [¶ 35] The Stockmen's Association asserts, even if the Act does not occupy the field and wholly preempt state law governing brand inspection, an interpretation of state law requiring the Stockmen's Association to remit the fees to the state Treasurer would directly conflict with 7 U.S.C. § 217a(c). The Stockmen's Association therefore asserts the federal law must prevail.

[12] [13] [¶ 36] We set forth the standards for applying "actual conflict" preemption in *Liberty National Bank*, 427 N.W.2d at 309-10:

"[E]ven when Congress has not intended to entirely displace state law in a particular area, state law is pre-empted to the extent that it 'actually conflicts' with federal law. *Michigan Cannery & Freezers v. Agricultural Bd.*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). Conflict pre-emption occurs where compliance with both federal and state laws is a physical impossibility, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)."

See also *NoDak*, 471 N.W.2d at 142; *Lillehaugen*, 404 N.W.2d at 455. In this we believe the state and federal statutory schemes can be interpreted so

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compliance with both is not a "physical impossibility," and the Congressional purposes and objectives may be accomplished.

[¶ 37] Among the main objectives of the Packers and Stockyards Act are preventing monopolistic practices by packers and stockyard owners and ensuring fair and reasonable charges for stockyard services:

"The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect to prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce."

180. *Stafford v. Wallace*, 258 U.S. 495, 514-15, 42 S.Ct. 397, 401, 66 L.Ed. 741 (1922); see also *Mahon*, 416 U.S. at 106, 94 S.Ct. at 1629, 40 L.Ed.2d at 85; *United States v. Morgan*, 307 U.S. 183, 188-89, 59 S.Ct. 795, 798-99, 83 L.Ed. 1211, 1216 (1939) (the Act's "dominant purpose [is] to secure to patrons of the stockyards prescribed stockyard services at just and reasonable rates").

[¶ 38] The Stockmen's Association asserts 7 U.S.C. § 217a(c) directly conflicts with any state requirement fees from brand inspections at stockyards be paid over to the state Treasurer. 7 U.S.C. § 217a(c) provides:

"Charges authorized to be made under this section shall be collected by the market agency or other person receiving and disbursing the funds received from the sale of livestock with respect to the inspection of which such charge is made, and paid by it to the department, agency, or association performing such service."

[¶ 39] Read in light of the purposes and objectives of the Act, this provision is clearly intended to prohibit the market agency disbursing the funds from retaining a portion of the brand inspection fees, thereby increasing the overall cost of these services, reducing the profit to the seller, and increasing the cost to the ultimate consumer. See *Stafford*, 258 U.S. at 515, 42 S.Ct. at 401, 66 L.Ed. at 741. It governs the relationship between the two market agencies, one brokering the sale and the other providing brand inspection services.

[¶ 40] The statute does not purport to govern the ultimate disposition of the

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fees received by the "department, agency, or association performing such service." We see no conflict between state and federal law in a procedure whereby the Stockmen's Association receives the fees for brand inspection from the market agency disbursing the sale proceeds, as required by federal law, but then remits those fees to the state Treasurer, as required by state law. So interpreted, compliance with both statutory schemes is not a "physical impossibility" and the state law is not an obstacle to the purposes and objectives of the federal law. See *Liberty National Bank*, 427 N.W.2d at 309-10.

[¶ 41] We conclude the state statutory scheme, as interpreted in this opinion, is not preempted by the federal law.

## VI

[¶ 42] The judgment of the district court, including the stay through the next legislative session, is affirmed.

[¶ 43] VANDE WALLE, C.J., and NEUMANN, MARING and MESCHKE, JJ., concur.

FN1. "Estray" is defined in N.D.C.C. § 36-22-01:

"Any marked or branded cattle found at any livestock market, to which a shipper cannot produce title or satisfactory evidence of ownership, is considered as an estray."

FN2. The constitutional provision includes numerous exceptions to its rule. None of these exceptions applies to the fees collected by the Stockmen's Association.



**Testimony of Susan J. Keller DVM  
Deputy State Veterinarian  
Senate Bill 2187  
February 25, 1999  
10:00 A.M. CST  
House Agriculture Committee  
Peace Garden Room**

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Chairman Nicholas and Committee members, my name is Susan Keller. I am the deputy state veterinarian and am here as a representative of the State Board of Animal Health. I am here to testify in support of SB 2187.

The State Board of Animal Health is involved in the current brand inspection system as the state agency that adopts rules and approves changes in fees relative to brand inspection. This bill does not alter that role. The State Board of Animal Health is comfortable and willing to maintain that relationship.

The State Board of Animal Health met and unanimously approved supporting this bill.

If there are any questions, I would be glad to answer them.