

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-21

Date issued: December 17, 1991

Requested by: Peter H. Furuseth  
Williams County State's Attorney

- QUESTION PRESENTED -

Whether a sheriff must collect a \$1.00 beef checkoff fee when selling cattle at a sheriff's sale.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a sheriff must collect a \$1.00 beef checkoff fee when selling cattle at a sheriff's sale if the checkoff fee would otherwise be payable by a producer of such cattle in other than a forced sale.

- ANALYSIS -

No North Dakota statutory provisions specifically require a sheriff to collect a \$1.00 checkoff fee when cattle are sold at a sheriff's sale. N.D.C.C. ch. 4-34, known as the Beef Promotion Act, was adopted as a vehicle to collect a checkoff fee and to expend proceeds from those collections to support the domestic beef industry. The 1987 amendments to N.D.C.C. ch. 4-34 were adopted to bring North Dakota law in compliance with the Beef Promotion and Research Act of 1985 as found at 7 U.S.C. ' 2901. See Minutes of House Committee on Agriculture, February 6, 1987, and Minutes of Senate Committee on Agriculture, March 5, 1987.

Whether a checkoff fee to support beef promotion and research activities must be collected by a sheriff at a sheriff's sale is not specifically addressed in N.D.C.C. ch. 4-34. N.D.C.C. ' 4-34-08 levies an assessment of 50¢ per head for each animal sold by a person who is a resident of this state who sells cattle within the state or from the state. However, a person is not considered to have sold cattle for purposes of N.D.C.C. ch. 4-34 if that person's only share in the proceeds of the sale of cattle is a sales commission, handling fee, or other service fee, or if the person acquired ownership of cattle to facilitate the transfer of ownership of the cattle from the seller to a third party, resold the cattle no later than ten days from the date on which the person acquired ownership, and has certified that the requirements of applicable federal regulations have been satisfied. In addition, N.D.C.C. ' 4-34-09 requires that the assessments be collected by "selling agencies" at all livestock terminal markets, livestock auction markets, and by all livestock dealers licensed by the state of North Dakota. N.D.C.C. ' 4-34-09 further provides that any other person selling cattle

within the state must remit the assessments directly to the North Dakota Beef Commission.

N. D. C. C. ' 4-34-02(10) defines a "selling agency" as any person engaged in the business of buying or selling in commerce livestock on a commission basis.

Based upon these state statutory provisions, a sheriff conducting a sheriff's sale might not be considered to be a person who has sold cattle under N. D. C. C. ch. 4-34 because the sheriff's only share in the proceeds of the sale of cattle is a sales commission, handling fee, or other service fee. Although federal regulations implementing the Beef Promotion and Research Act of 1985 contain a similar provision, by limiting this exclusion to the definition of a "producer," North Dakota state law does not provide a similar limitation. In addition, a sheriff is clearly not a "selling agency" as defined in N. D. C. C. ' 4-34-02(10) and is not a person listed in N. D. C. C. ' 4-34-09 who must collect the assessment.

Although some difficulties may arise in applying N. D. C. C. ch. 4-34 to sheriffs' sales of cattle based upon the specific statutory language of that chapter, it is unnecessary for purposes of this opinion to resolve any conflicts which may arise in application of state law to the duties of a sheriff upon a sheriff's sale of cattle. It is my conclusion that the activities of a sheriff when selling cattle at a sheriff's sale are governed by federal law and regulation regardless of the existence of state law on the matter or conflicts that may arise in application of that state law.

Congress adopted the Beef Promotion and Research Act of 1985 as a part of a national effort to promote the domestic beef industry. This act, as codified in 7 U. S. C. " 2901 et seq., and rules and regulations promulgated thereunder, established a \$1.00 checkoff fee upon each head of cattle sold. This fee was payable by the producer of the cattle and collected by persons who have sold the cattle.

Congress set forth its declaration of policy in 7 U. S. C. ' 2901(b) by stating:

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products. Nothing in this Act shall be construed to limit the right of individual producers to raise cattle.

7 U. S. C. ' 2901(b).

Preemption or displacement of state law by federal statute or regulation is not favored. The basic assumption is that Congress did not intend to displace

state law. Federal Land Bank of St. Paul v. Lillehaugen, 404 N.W.2d 452 (N.D. 1987). However, 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.

NoDak Bancorporation v. Clarkson, 471 N.W.2d 140 (N.D. 1991). State v. Liberty Nat. Bk. and Trust Co., 427 N.W.2d 307 (N.D. 1988), cert. den., 488 U.S. 956 (1988).

The question of whether federal law preempts state action in any given case remains largely a matter of statutory construction. State v. Liberty Nat. Bk. and Trust Co., supra.

In upholding the constitutionality of the Beef Promotion and Research Act, the Third Circuit Court of Appeals in United States v. Frame, 885 F.2d 1119 (3rd Cir. 1989), cert. den., 493 U.S. 1094 (1990), found that the Act represented a valid exercise of Congress's broad power to stimulate interstate commerce. The power to regulate interstate commerce includes the power to promote interstate commerce. As a part of its power to regulate interstate commerce, Congress may also regulate activities affecting commerce. The court stated:

To stimulate the demand for beef, the lack of which Congress has determined is harming the beef industry, Congress has chosen from its arsenal of regulatory means promotion and advertising, research, consumer information and industry information. These endeavors are rationally related to the maintenance and expansion of the nation's beef markets. Consequently, we hold that the Beef Promotion Act is a valid exercise of congressional power to regulate interstate commerce.

United States v. Frame at 1127.

In rejecting Frame's constitutional attacks against the Act, the court specifically found a compelling national interest in maintaining and expanding beef markets. Widespread losses and severe drops in the value of inventory had driven many cattlemen to bankruptcy as well as to the abandonment of ranching altogether. The court concluded that a continuation of this trend would endanger not only the country's meat supply, but the entire economy. In addition, the court concluded that Congress believed the Beef Promotion and Research Act to be in the public interest.

Both the Act itself and rules and regulations promulgated thereunder provide strong evidence of a congressional intent to have a uniform national program to promote and regulate the beef industry. Congress has found that the production of beef and beef products plays a significant role in the nation's economy, that beef and beef products should be readily available and

efficiently marketed to ensure that the people of this country receive adequate nourishment; that the maintenance and expansion of existing markets for beef and beef products are vital to producers, those marketing, using, and producing beef products, and the general economy of the nation; and that even beef products that do not move in interstate and foreign commerce directly burden or affect interstate commerce of beef and beef products. 7 U.S.C. ' 2901(a).

The manner in which the assessments are to be made and collected provide further evidence of a congressional intent to have a uniform and national application of the Act. Both 7 U.S.C. ' 2904(8)(A) and 7 C.F.R. ' 1260.172(a) require that the checkoff assessments be remitted to a qualified state beef council as a collecting agent. However, if a qualified state beef council does not exist to collect the assessment, the assessment must be collected by the Cattlemen's Beef Promotion and Research Board established under the Act. 7 U.S.C. ' 2904(8)(B); 7 C.F.R. ' 1260.172(a).

As shown by these provisions, Congress intends that the producer pay, collect, and remit the assessment on each head of cattle sold in accordance with federal law. This payment and collection process is imposed regardless of the existence of a state beef council authorized to act as a collecting agent for the federal board or other state laws imposing similar assessments.

It is my conclusion that Congress has indicated an intent to occupy this field of regulation of the sale of cattle for the purposes set forth in the Beef Promotion and Research Act of 1985 and, to the extent inconsistent with North Dakota state law, has preempted the state law. Although Congress has not expressly declared that it intends to preempt state law in this particular field, the mandated collection and assessment procedures set forth in federal law, rule, and regulation sufficiently dominate this field of activities for the purpose of meeting the national interests as declared by Congress.

In implementation of this federal law, Congress has required a producer of cattle to pay a \$1.00 per head assessment on cattle which have been sold. 7 C.F.R. ' 1260.310(a). A "producer" is defined in 7 U.S.C. ' 2902(12) as:

(12) the term "producer" means any person who owns or acquires ownership of cattle, except that a person shall not be considered to be a producer if the person's only share in the proceeds of a sale of cattle or beef is a sales commission, handling fee, or other service fee;

A "collecting person" has a duty to collect the assessment from the producer and must remit the assessment to a qualified state beef council. 7 C.F.R. ' 1260.172.

A "collecting person" is defined as:

. . . the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations

prescribed by the Board and approved by the Secretary.

7 C. F. R. ' 1260.106. The collecting person must collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. 7 C. F. R. ' 1260.311.

I am aware that a forced sale of cattle at a sheriff's sale may involve no actual payment to a cattle producer. Rather, payment of funds from the sale may be paid directly to the judgment creditor or lienholder to satisfy the execution or order of sale. N. D. C. C. ' 28-21-11. However, payment to the creditor will reduce the debt of a producer.

Although federal law and its regulations do not specifically address whether a sheriff is a "collecting person" when cattle are sold at a sheriff's sale, I conclude that the broad authority granted by Congress for the assessment and collection of a \$1.00 per head checkoff fee requires application of the federal law to a sheriff's sale if the producer would otherwise be required to pay the checkoff fee in other than a forced sale.

To conclude otherwise may result in absurdity and difficulty of application of the federal law and regulations. If a producer sold the cattle at a non-forced sale and paid the proceeds to the producer's creditor, the checkoff fee would be assessed and payable by the producer. In addition, if the sheriff would pay the proceeds of the sheriff's sale to the producer who then immediately, and in the presence of the sheriff, endorsed the check constituting payment to the creditor, a fee would also be chargeable since payment would have been made by the sheriff to the producer. To say that the checkoff fee would not be assessed if the sheriff directly paid the creditor as a result of the sheriff's sale, causing a reduction of the producer's debt to the creditor would result in not only an absurd result but would also be beyond the congressional mandate for collection of the checkoff fee upon the sale of cattle. As previously noted, the "collecting person" has a responsibility to collect the assessment at the time the collecting person makes payment or any credit to the producer's account for the cattle purchased. 7 C. F. R. ' 1260.311(a). By making payment to the creditor, the sheriff is making a payment or credit to the producer's account for the cattle purchased.

A conclusion different than what I have drawn in this opinion may also cause problems in application of N. D. C. C. ' 28-23-09. That section provides that any surplus from a sheriff's sale must be paid to the debtor. It is doubtful that Congress intended that the assessment fee would be applicable only to those proceeds attributable to a sale of cattle resulting in a surplus in a sheriff's sale but not applicable to those proceeds attributable to cattle sold to satisfy a judgment or other debt of the producer.

In light of the potential civil penalties that could be imposed under the federal law for failing to collect and remit checkoff fee assessments, it is necessary to avoid absurd results and the imposition of difficulties in its application. To avoid these problems, it is my conclusion that the Beef Promotion and Research Act requires the collection of a \$1.00 checkoff fee for

cattle sold at a sheriff's sale when the checkoff fee would otherwise be payable by a producer of such cattle in other than a forced sale. Remittance of this checkoff fee must be made to the North Dakota Beef Commission as the state beef council qualified by federal law to act as a collecting agent for the federal board. In addition, the sheriff must provide a receipt to the producer evidencing the assessment as required by federal regulation. Since federal law mandates collection and remittance of this \$1.00 per head checkoff fee, this fee may be deducted as a cost of sale from the proceeds which may be due a creditor or the surplus which may be due the debtor/producer.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. '54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth  
Attorney General

Assisted by: Robert P. Bennett  
Assistant Attorney General

pg