

LETTER OPINION
93-L-91

March 17, 1993

The Honorable Gary Porter
North Dakota House of Representatives
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505

Dear Representative Porter:

Thank you for your March 1, 1993, letter asking for an opinion concerning the definition and meaning of "brand inspection." It is my understanding that your question arises because of allegations that the clipping process used during some brand inspections may cause weight loss or "shrinkage" just prior to the sale of the animal, and that clipping also may affect the appearance of the animal resulting in a lower price per pound when the animal is sold.

Nothing in North Dakota law defines the term "brand inspection." N.D.C.C. ? 36-09-23 provides:

36-09-23. Removal of livestock from state - Brand inspection - Penalty. No person may remove cattle, horses, or mules from this state or to within a mile (1.61 kilometers) of any boundary of the state for the purpose of removal unless the livestock has been inspected for marks and brands by an official brand inspector of the North Dakota stockmen's association and a certificate of inspection must accompany the livestock to destination. In lieu of the inspection, the owner or possessor may make and sign an invoice or waybill covering the stock showing marks and brands, number, sex and kind of the stock, and the consignee and market destination where official brand inspection is provided by or for the stockmen's association and mail a copy of such invoice or waybill to the association before the stock leaves the state.

It is unlawful for the owner or possessor to remove any livestock from any place of regular official brand inspection unless and until official brand inspection has been made and the brand inspection certificate issued.

A person who violates this section is guilty of a class B misdemeanor. A person who violates this section a second time within fifteen years or violates this section three

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or more times is guilty of a class C felony.

Although this statute allows the official brand inspector to inspect for "marks or brands," it gives little guidance as to how the inspection is to be done.

N.D. Admin. Code ? 48-09-01-02 does provide some guidance as to when and where brand inspections are to occur, but it provides little guidance as to how, except to require that animals not be (1) inspected after dark, or (2) inspected when loaded in trucks, or (3) inspected by artificial light except in places designated by the chief brand inspector. N.D. Admin. Code ?? 48-09-01-02(4), (5), (6) provide:

48-09-01-02. Brand inspection. For the purpose of complying with North Dakota Century Code chapters 36-05, 36-09, and 36-22:

...

4. Sales agency, packing plant, and buying stations where inspection is maintained must furnish necessary help without charge to assist the brand inspectors in handling cattle, horses, or mules to be inspected for brands.
5. All cattle, horses, or mules entering an inspection point shall be placed in pens assigned to individual sellers, and shall be kept separate from all other cattle, horses, or mules until inspected by the brand inspector and released for sale or shipment.
6. No cattle, horses, or mules shall be inspected after dark or by artificial light or inspected when loaded in trucks; provided, however, that under emergency circumstances deemed by the brand inspector to warrant inspection by

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artificial light, such inspection may be made at places designated by the chief brand inspector as having lighting which meets the specifications required by the chief brand inspector for inspection by artificial light. The chief brand inspector shall have authority to give approval to premises which meet such specifications, and to extend or remove such approval.

These sections, however, do not define specifically what a brand inspector can and cannot do when inspecting cattle or other animals for brands.

Words of a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. ? 1-02-02. The word "brand" originally meant the burning of the hide of an animal with a hot iron in order to leave a mark to prove ownership. Johnson v. State, 1 Tex. App. 333, 345 (1876). However, the word brand has come to include other types of permanent marks, painted or otherwise, made or attached to the animal. State v. Hickenbottom, 178 P.2d 119, 125-26 (Wyo. 1947); Pollock v. Kansas City, 123 P. 985, 986 (Kan. 1912).

North Dakota law provides for the recording of "marks and brands" with the commissioner of agriculture, so the types of marks and brands for which the brand inspector may inspect goes beyond the traditional marking of cattle by means of a hot iron. N.D.C.C. ?? 36-09-01 and 02. An example of how an animal might be marked is the band used to identify ownership of an animal grown on a wild game farm in North Dakota or the marks painted on sheep. See Hickenbottom; N.D.C.C. ch. 36-01 and the administrative rules promulgated thereunder.

N.D.C.C. ? 36-09-23 requires that cattle, horses, and mules be inspected for marks and brands before removal from the state. The triggering event that allows the inspection is the owner's decision to sell the

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particular animal. The brand inspector may then proceed with a reasonable inspection of the cattle, horses, and mules in question for marks and brands. What constitutes a "reasonable" inspection varies with the facts and circumstances of each case. The brand inspector may take reasonable steps to inspect the livestock for identifying marks and brands, but may not intentionally conduct the inspection in a way that unnecessarily devalues the animal.

In summary, N.D.C.C. ? 36-09-23 requires the brand inspector to inspect livestock for marks and brands before they can be removed from the state. North Dakota law does not define "brand inspection." What constitutes a "reasonable" brand inspection varies with the facts and circumstances of each case.

Sincerely,

Heidi Heitkamp
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