

1999 SENATE GOVERNMENT AND VETERANS AFFAIRS

SCR 4010

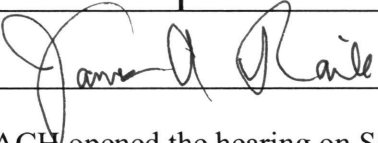
1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4010

Senate Government and Veterans Affairs Committee

Conference Committee

Hearing Date January 21, 1999

Tape Number	Side A	Side B	Meter #
1		X	1492-4503
Committee Clerk Signature 			

Minutes: CHAIRMAN KREBSBACH opened the hearing on SCR 4010 which is a resolution to create and enact a new section to Article XI of the constitution of North Dakota relating to the collection of fees by non governmental entities. Appearing before the committee to introduce the resolution to the committee was SENATOR KEN SOLBERG, Rugby, representing District 7, Pierce, McHenry, and part of Ward counties. This resolution is here because of the Supreme Court case of Billey vs. North Dakota Stockman's Association. In that lawsuit it was found by the Supreme Court that the Stockman's Association was in violation of the North Dakota Constitution in their brand inspection and brand reporting program authorized by the North Dakota Legislature. And the violation that they were committing was that they were not depositing the money that they had charged for their services rendered into the state treasurer's office. I don't think the legislature ever intended to do that. That has been for your information operating like that for 51 years. I'm not here only concerned about North Dakota Stockman's



Association, and the brands we put on a few cows running around out there in the hills. This decision is a far, far reaching decision. And we're finding more and more how far it's reaching all the time. Mr. Olheiser, will attest to that. If we continue on I'm sure we're going to see more and more areas that are going to be affected. I want to touch on a few of those and this is a memo from the office of the Attorney General dated August 27th of '98 and just let me review a few of those that are going to be affected. We saw a bill about two weeks ago that rectifies one of these whereby the county auditors that sell hunting and fishing licenses, they now on that bill are required to send all the money to the state treasurer. He will send back to the auditor what they have due. Authorizes clerks of district court to collect statutory fees and pay only part of the money collected to state treasurer for deposit in the general fund. He enumerated several other areas and spoke about them at this time. This is a far reaching resolution or decision. This resolution hopes to rectify a part of that. I don't think it is going to rectify all of that. I know there are concerns in the attorney general's office. There are concerns in the state land department. There are concerns we are going to see as the legislative session goes on. I would hope that we can hold this as long as possible and combine as many resolutions into one. I'm not concerned about authorization of a resolution. That doesn't bother me. But, what I want to do is get one resolution on the books to get to the voters so we can go with a unified front because if we don't we are going to run 4 resolutions up there and I may vote against them too because I might suspect something is going on down there. And that's just exactly what the people will do. I think we've got a good chance to pass a resolution that explains to them that without this there will be no privatization of government services. We need a resolution of this type to allow the privatization of government services as we the legislature see fit. That pretty well explains

the resolution and Senator Stenehjem has been on top of this. SENATOR THANE-First of all I'm not necessarily opposed to the resolution in fact it can very well have some merit. But, if I might I would like to play the devil's advocate and ask you this question. Do you believe that all money whether it is taken from the taxpayers in one form or another is still the people's money? And if that be the case, should agencies regardless of what there position is have the right to spend that money as they see fit, or should it go back into the depository of the peoples money and then be re-utilized? I know that's a tough question I just want to hear your philosophical comments on that. SENATOR SOLBERG-I don't think that that is a tough question. No, I do not feel all money is, because and I'll use the brand recording. This is a fee for service. I don't think Senator Stenehjem has a brand so he's not going to pay that \$10.00 registration fee. You could have a brand, very possible, you will pay it. Yet if you don't sell any cattle, you're not going to pay that 50 cents per head service fee or fee for service unless you utilize that service. I don't think we can classify--I'm not covered by that as a tax, that's a fee. I don't think all the money that we collect under legislation can be classified as public money. I think you've got a separation senator of taxes, fees for service. Now there's a lot of things that we call other things than taxes that you can call taxes. But when you use a certain service I believe that's a fee for services.

SENATOR SOLBERG indicated that he would provide the committee of copies of the Billey decision for its review. Further support for SCR 4010 was offered from BOB OLHEISER, State Land Commissioner. Appearing in a neutral position on SCR 4010 was BETH BAUMSTARK with the Office of the Attorney General. There was no further testimony offered on SCR 4010.

CHAIRMAN KREBSBACH closed the hearing on SCR 4010.

**January 26, 1999: (Tape 1, Side A, Meter #'s 2280-2850) Senator W. STENEHJEM**

**handed out proposed amendments to the committee on SCR 4010. He indicated that this is the resolution for a constitutional amendment that is necessary because of the supreme court ruling in the Billey vs. North Dakota Stockman's Association Case. Which now we have learned has some far reaching implications far beyond that case. He spoke with Senator Solberg who is the prime sponsor of this bill and also worked with the Attorney General's Office to come up with wording that everybody is comfortable with and that is what these amendments are. So this is kind of a hog house amendment. What it would do is say unless otherwise specifically provided by the legislative assembly all public moneys must be paid over to the state treasurer as required by Section 12 of Article 10. Whenever the legislative assembly provides that public money may be paid to an entity other than the state treasurer, the legislative assembly shall also provide for regular audits of the funds by the state auditor and periodic reporting of the transactions by the entity. SENATOR**

**KREBSBACH: Now has the legislature specifically given authority to all of these other?**

**SENATOR STENEHJEM: We have given authority to a wide ranging variety of state agencies and non-state agencies to do their own. For example the board of university schools, lands. They invest their money. They pay the people who do the investing for them a fee. There's a question whether that is now constitutional because of what the supreme court said in the Billey Case. There are dozens of other possible agencies that would be in the same situation. SENATOR KREBSBACH: And this will suffice even**

**though our constitution requires it. Oh that's right, this will be going to the people to vote on it. This is what they will be approving, that is if the legislature authorizes them to do**

their own they can so do. SENATOR STENEHJEM: But, we would however also be compelled to provide for regular audits of the funds and also periodic reporting of those funds so we can keep a handle on the money. SENATOR KILZER: Do the audits have to be done by the state auditor or can they contract that out? SENATOR STENEHJEM: The state auditor does contract out a number of audits he does to private companies and then they are billed and they have to pay them. SENATOR KREBSBACH: Senator Stenehjem, you worked with the Attorney General's Office in preparing these amendments and she is comfortable with what is being proposed here? SENATOR STENEHJEM: The wording actually was come up with by Rosie Sand up in the Attorney General's Office. The only difference between the version she submitted was her wording would have required annual audits of the funds and monthly reporting of transactions by the entity and I thought maybe that was too specific. Maybe would should just have regular audits and periodic reports and the legislature will decide how often they need to be done. Some of the audits I know that the state auditor usually does every two years not every year. I showed her that and she was comfortable with it. SENATOR W. STENEHJEM moved that the committee adopt the proposed amendments version .0201, seconded by SENATOR DEMERS. ROLL CALL VOTE indicated 7 YEAS, 0 NAYS, 0 ABSENT OR NOT VOTING. A motion for DO PASS as amended was made by SENATOR STENEHJEM, seconded by SENATOR KILZER. ROLL CALL VOTE indicated 7 YEAS, 0 NAYS, 0 ABSENT OR NOT VOTING. SENATOR STENEHJEM will carry the bill. March 1, 1999

The committee held a brief discussion of SCR 4010 (Tape 1, Side A, Meter #'s 805-1244)

The discussion centered around the proper way to amend 4010. Senator Stenehjem

**indicated he would meet with a member of the legislative council and have the amendment**

**put into its proper form.** *March 2, 1999: (Tape 1, Side A, Meter #'s 0-END) The Senate GVA Committee met to reconsider their actions on HCR 4010. A motion to Reconsider the action of DO PASS AS AMENDED was made by SENATOR STENEHJEM, seconded by SENATOR WARDNER. Roll Call Vote indicated 5 YEAS, 0 NAYS, 2 ABSENT OR NOT VOTING. A motion to reconsider the Amendments to SCR 4010 was made by SENATOR STENEHJEM, seconded by SENATOR WARDNER. ROLL CALL VOTE indicated 5 YEAS, 0 NAYS, 2 ABSENT OR NOT VOTING. A motion to AMEND SCR 4010 using version .0202 was made by SENATOR STENEHJEM, seconded by SENATOR WARDNER. ROLL CALL VOTE indicated 5 YEAS, 0 NAYS, 2 ABSENT OR NOT VOTING. A motion for DO PASS AS AMENDED was made by SENATOR STENEHJEM, seconded by SENATOR WARDNER. ROLL CALL VOTE indicated 4 YEAS, 1 NAY, 2 ABSENT OR NOT VOTING.*

PROPOSED AMENDMENTS TO SENATE CONCURRENT RESOLUTION NO. 4010

Page 1, line 2, replace "the collection of fees by nongovernmental entities" with "authorizing the legislative assembly to provide that public moneys may be paid over to an entity other than the state treasurer"

Page 1, line 4, replace "certain fees collected" with "public moneys may be paid over to an entity other than the state treasurer if the legislative assembly provides for regular audits of funds and periodic reporting of the transactions."

Page 1, remove line 5

Page 1, replace lines 14 through 17 with "Unless otherwise specifically provided by the legislative assembly, all public moneys must be paid over to the state treasurer as required by section 12 of article X. Whenever the legislative assembly provides that public moneys may be paid to an entity other than the state treasurer, the legislative assembly shall also provide for regular audits of the funds by the state auditor and periodic reporting of transactions by the entity."

Renumber accordingly

Date: 2/26/99  
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SCR 4010

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

or

Conference Committee

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

Action Taken Adopt Amend

Motion Made By Sen Stenehjem Seconded By Sen Demers

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE	✓				
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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

Date: 2/26/99  
Roll Call Vote #: 2

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

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

or

Conference Committee

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

Action Taken Do Pass as Amended

Motion Made By Sen. Stenehjem Seconded By Sen. Kilzer

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE	✓				
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Sen. Stenehjem

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



**REPORT OF STANDING COMMITTEE**

**SCR 4010: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SCR 4010 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "the collection of fees by nongovernmental entities" with "authorizing the legislative assembly to provide that public moneys may be paid over to an entity other than the state treasurer"

Page 1, line 4, replace "certain fees collected" with "public moneys may be paid over to an entity other than the state treasurer if the legislative assembly provides for regular audits of funds and periodic reporting of the transactions."

Page 1, remove line 5

Page 1, replace lines 14 through 17 with "Unless otherwise specifically provided by the legislative assembly, all public moneys must be paid over to the state treasurer as required by section 12 of article X. Whenever the legislative assembly provides that public moneys may be paid to an entity other than the state treasurer, the legislative assembly shall also provide for regular audits of the funds by the state auditor and periodic reporting of transactions by the entity."

Renumber accordingly

Date: 3/02/99  
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SCR 4050

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

or

Conference Committee

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

Action Taken Reconsider Do Pass as Am.

Motion Made By Sen. W. Stenehjem Seconded  
By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE					
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER					

Total (Yes) 5 No 0

Absent 2

Floor Assignment \_\_\_\_\_

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

Date: 3/02/99  
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SCR 4010

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

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

Action Taken Reconsider Amendments .0201

Motion Made By Sen W. Stenehjem Seconded By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE					
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER					

Total (Yes) 5 No 0

Absent 2

Floor Assignment \_\_\_\_\_

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

PROPOSED AMENDMENTS TO SENATE CONCURRENT RESOLUTION NO. 4010

Page 1, line 2, replace "the collection of fees by nongovernmental entities" with "authorizing the legislative assembly to provide that public moneys may be paid over to certain entities if the legislative assembly provides for regular audits and reports"

Page 1, line 4, replace "certain fees collected" with "public moneys may be paid over to an entity other than the proper official as required by the Constitution of North Dakota if the legislative assembly provides for regular audits of funds and periodic reporting of the transactions."

Page 1, remove line 5

Page 1, replace lines 14 through 17 with "Unless otherwise specifically provided by the legislative assembly, all public moneys must be paid over to the proper official as required by section 12 of article X. Whenever the legislative assembly provides that public moneys may be paid to an entity other than as provided by section 12 of article X, the legislative assembly shall also provide for regular audits of the funds by the state auditor and periodic reporting of transactions by the entity."

Renumber accordingly

Date: 3/02/99  
Roll Call Vote #: 3

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SCR 4010

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

Conference Committee

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

Action Taken Adopt Amendments .0202

Motion Made By Sen. W. Stenehjem Seconded By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE					
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER					

Total (Yes) 5 No 0

Absent 2

Floor Assignment \_\_\_\_\_

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

Date: 3/02/99  
Roll Call Vote #: 4

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SCR 4010

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

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

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

Action Taken Do Pass as Amended

Motion Made By Sen. W. Stenehjem Seconded By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM	✓				
SENATOR THANE					
SENATOR DEMERS		✓			
SENATOR MUTZENBERGER					

Total (Yes) 4 No 1

Absent 2

Floor Assignment Sen. Stenehjem

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

**REPORT OF STANDING COMMITTEE**

**SCR 4010: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman)**  
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). SCR 4010 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "the collection of fees by nongovernmental entities" with "authorizing the legislative assembly to provide that public moneys may be paid over to certain entities if the legislative assembly provides for regular audits and reports"

Page 1, line 4, replace "certain fees collected" with "public moneys may be paid over to an entity other than the proper official as required by the Constitution of North Dakota if the legislative assembly provides for regular audits of funds and periodic reporting of the transactions."

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Page 1, replace lines 14 through 17 with "Unless otherwise specifically provided by the legislative assembly, all public moneys must be paid over to the proper official as required by section 12 of article X. Whenever the legislative assembly provides that public moneys may be paid to an entity other than as provided by section 12 of article X, the legislative assembly shall also provide for regular audits of the funds by the state auditor and periodic reporting of transactions by the entity."

Renumber accordingly

1999 HOUSE GOVERNMENT AND VETERANS AFFAIRS  
SCR 4010



1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4010

House Government and Veterans Affairs Committee

Conference Committee

Hearing Date 3-18-1999

Tape Number	Side A	Side B	Meter #
1	X		19.6 - 61.2
1		X	0 - 7.8
1		X	30.5 - 51.2
Committee Clerk Signature <i>James Williams</i>			

Minutes: Some of the individuals testifying submit written testimony. When noted please refer to it for more detailed information.

Summary of the Resolution: Relating to authorizing the legislative assembly to provide that public moneys may be paid over to certain entities if the legislative assembly provides for regular audits and reports.

Representative Klein, Chairman of the GVA Committee opened the hearing on March 18, 1999.

Testimony in Favor:

Senator Solberg, Appeared before the committee to introduce the resolution. This comes to you out of a lawsuit filed against the ND Stockmen's Association. The Supreme Court found in favor of the plaintiff, but it does not stop there. The lawsuit takes away the mobility of the ND legislature to privatize the functions of government that they see fit. This bill was drawn up in conjunction with the Attorney Generals Office. We killed a couple of resolutions in the Senate

that were basically the same as this. What we have instead of less government is more government. All the money must come back to the treasurers office before any of the entities can be paid. I think we have this pretty well stream lined.

Representative Klein, Could you give the new members of this committee a brief explanation of the bill passed relating to branding that resulted in this lawsuit.

Solberg, Six years ago I sponsored a bill to take the brand recording from the Dept. of Agriculture and put that with the ND Stockman's Association. A form of privatization that worked well. There was a personality situation that brought this lawsuit by two individuals that had personal (in my opinion) vendetta. I was surprised by the outcome of the verdict as were many others.

Representative Hawken, Where these functions being done prior to the lawsuit? Are going back to what we use to do prior to the lawsuit in many of these instances?

Solberg, No. What 4010 will do is put it before the people to vote on and then we will have to redo the laws again that we have undone this time. It's a long process that would allow us to go back.

Representative Winrich, As I understand this, it would allow these things to go on but require regular audits of the private entities that keep state funds. Are we going to have to go out and audit ever little gas station that sells fishing licenses?

Solberg, I hope not. There are some functions such as the ND Stockman's Association that provides an audit every single year through the state auditor. This would allow the legislature (permissive language) if they saw a function that needed to be audited they could.

Representative Haas, There is another clause in this bill that talks about periodic reporting. I believe this periodic reporting would take care of those types of things (the bait shop example of selling licenses).

Solberg, I believe that's true.

Representative Fairfield, I remember the arguments of this lawsuit in 1993 that there were constitutional questions. Aren't there bills right now that would address the ruling and let the stockman's association take care of the problems created. My point is aren't we opening a whole new can of worms here?

Solberg, Absolutely not. Were closing the can of worms. It is now open and we want to put it back in the bag.

Wade Moser, North Dakota Stockmen's Association testified that their problem has been resolved with the passage of SB 2187. There could be some problems with other state agencies. The reason we took the brand recording from the Department of Agriculture was that they were looking for a way to cut their budget. The money collected when into the general fund and the department would have to come in to the legislature and ask for money to run the program. This was creating problems and they approached us in taking it over (brands and inspections in one office). We think it is a good change that still has accountability.

Representative Kroeber, You did the job and received the money. The only difference is that your not holding the money yourself. You turn it into the treasurer and they in turn cut you a check for your services. Is that correct?

Moser, That is correct.

Representative Kroeber, That seems to be an excellent form of audit right there. Assuming this is quite a bit of work for the treasurer, is it not?

Moser, I am assuming it will be. It's another motion in the system, is it necessary? Maybe it is or maybe it isn't.

Representative Klein, Right now up until this court case, you were collecting these fees and performing the work. Under this new system, the fees go to the treasurer and then go back to you.

Moser, That is correct and we will still perform the work, except for the extra work the treasurer will have. We will still provide an audit.

Beth Baumstark, North Dakota Attorney Generals Office stated that her office has no position on this particular resolution. In the past, some entities were sending in only net proceeds instead of gross proceeds and we want to prevent other agencies ending up in law suits and some of the agencies have taken care of this with bills introduced this session. Our office has said that it is fine for you to go forth with a resolution that will be voted on by the people, but there is no guarantee that the voters will approve this and we can't just wait to fix the problems. This would if passed allow the legislature to have the option of going back and changing those that they want to change.

Representative Winrich, Why is this needed? Changing the constitution.

Baumstark, I don't know if this is needed. The problem is that some people don't like the way it is being taken care of without this amendment in that the money does need to go to the treasurer.

Representative Winrich, Line 19 of the bill doesn't sound like permissive language to me. It says we shall provide for those audits. Isn't this going to generate a lot more work for the state auditor?

Baumstark, I believe it would provide more work for the state auditor. I believe it is mandatory for the auditors.

Representative Klein, Does this open up all of the state boards to this?

Baumstark, No.

Representative Cleary, Wouldn't it be more expensive this way?

Baumstark, Yes I believe it would be.

Representative Devlin, I don't see this as an overwhelming amount of new audits.

Baumstark, I think that would depend on what the legislature does once this would be passed.

Testimony in Opposition:

James Billey, Livestock producer submitted written testimony which he read in it's entirety **(please refer to his testimony)**.

Representative Klein, On the top of page 2, spending additional amounts for brand registration fees. Your making assumption there that kind of surprises me.

Billey, My statement is an assumption.

Representative Klein, Closed the hearing on SCR 4010.

Representative Klemin, I am not entirely certain why it is that the state auditors office would have to directly doing these audits. Can't they just be supervised by the state auditor?

Representative Haas, I think that's exactly right. I have never heard of the state auditors office not accepting an independent audit.

Representative Brekke, Sure they can.

Representative Klemin, Maybe we should talk to the state auditor and the secretary of state for the correct language.

Representative Klein, Would you and Representative Brekke and Winrich check this out and will hold on this till you find your results.

Representative Devlin, Maybe we should change "shall" to "may" and leave it up to the legislature.

Representative Winrich, My basic concern is whether this amendment is even needed or not.

Beth Baumstark said they could handle it under the present system

Representative Kliniske, I understood it that if we don't pass it, everything would have to go to the state and if we do pass it, the payments could go to state agencies.

Representative Metcalf, The way it is now, it seems like a lot of work for the little guy. This kind of make sense to me in that regard.

Representative Kliniske, Yes the state treasurer collects the funds, but then they turn it over to OMB so that they can cut the check. Actually it's a two steps in the process.

Representative Haas, I think it's ridiculous the way it is now and that we need this.

Representative Kroeber, This has to do with a constitutional problem that back in 1993 when we went through this, I was on the committee and we told them that this is not constitutional. They said it is if we say it is until they say it isn't. Well they have said it isn't constitutional.

Representative Klein, Does everybody agree to changing "shall" to "may" and amend that.

Representative Kliniske, Made a motion to move the amendment from "shall" to "may" on line

Page 7

House Government and Veterans Affairs Committee

Bill/Resolution Number SCR 4010

Hearing Date 3-18-1999

Representative Grande, Seconded the motion.

Motion Passes: Yes (vocal).

Representative Klemin, Let me suggest that on line 22 change the word "by" to "to".

Representative Kroeber, If we put may in there, then we will be having public moneys that are never audited.

Representative Kliniske, OK, I withdraw my motion.

Representative Grande, Seconded the motion.

Representative Klein, Let the subcommittee figure this out and then we will proceed from there.

Representative Devlin, It really doesn't matter to me who does the audit as long as it's done.

Change "provide" to "required" and take out by the state auditor. Line 21, leave it at "shall" also require regular audits of the fund and periodic recording of transactions by the entity.

Representative Klein, Lets go back to the subcommittee to wrangle this out and come back with words that say what we want it to.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4010

House Government and Veterans Affairs Committee

Conference Committee

Hearing Date 3-19-1999

Tape Number	Side A	Side B	Meter #
1	X		13.8 - 29.9
Committee Clerk Signature <i>James L. McWilliams</i>			

Summary of the Resolution: Relating to authorizing the legislative assembly to provide that public moneys may be paid over to certain entities if the legislative assembly provides for regular audits and reports.

Minutes: Chairman Klein instructed the committee to take out SCR 4010 and asked Representative Klemin to go over the amendment that he had worked on.

Representative Klemin, Going over the amendment with committee members. We talked to the state auditor and couple of people on his staff and also with Beth Baumstark of the attorney generals office. The state auditor told us that apparently nobody ever talked with them about doing all of these audits and they are not in favor of having the state auditor doing regular audits. Instead they would prefer to stay with what their doing now by doing some audits and other private auditors do some audits and they get copies of those audits. This would cause a major



increase in the auditors staff. To take care of that situation, we prepared this amendment.

Basically to remove the state auditor out of this.

Representative Klemin, Made a motion to move the amendments.

Representative Brekke, Seconded the motion.

Motion Passes: Yes (vocal).

Representative Thoreson, Made a motion for a Do Pass as amended.

Representative Grande, Seconded the motion.

Representative Winrich, I am going to oppose the do pass on this one. I think some of the testimony that we heard yesterday really misrepresents the situation with this particular resolution. There is not problem with the sales tax (Supreme Court decision). There is no problem with the Game and Fish department, I printed out a copy of the bill we passed relating to that and it provides the auditor to appoint agents to deal with game and fish licenses. The fee (sales of licenses) doesn't need to be remitted to the state. It appears that about the only thing this really affects is the stockmen's association. I asked the treasurer's office how would the stockmen's association get their money out of that account. They told me when those money's come into the treasurer's office they would be recorded and receded. Then they are transferred that day to the fund in the BND. They would then transfer it electronically to whatever account the stockmen's association designates. There is no need for extra paper work etc. The way it is now, we have a record of all this in the treasurer's office and can account for it there. I believe that is the best way to handle it and therefore oppose a do pass on this legislation.

Representative Devlin, I don't have a strong feeling for this bill, because some of the problems that were discussed earlier in the session have be remedied with the passage of other bills. If those bills had gone down in defeat, then I would have a very strong feeling for it.

Representative Klemin, Regardless of whether or not this resolution passes, they have got to do something like this to take care of the "billy problem". If this resolution was to be passed by the legislature and approved by the voters, then the legislature would have the ability to look at all of this and decide do we want to keep it that way or do we want to change it or do something else. This would provide future flexibility in that regard and also take care of any "billy problems" that we didn't find at this time.

Representative Kroeber, This is going to be a very difficult one to simplify and get on a ballot so that the people can understand it and also vote for it. Here we have an association that's handling in excess of \$600,000 a year and we "might" audit them. I can't support this bill.

Representative Winrich, If this became part of the constitution, that would not automatically take care of the "billy problem". In each one of these instances there would have to be further legislation identifying the entity and how those funds and what funds would be used. Currently they are now set up where the funds are transferred electronically. It seems to me that this would make it even more complicated by having two different systems whereby were dealing with these state funds.

Motion Passes: Do Pass as Amended 9-6.

Representative Klemin, Is the carrier for the bill.

VJR  
3/19/99

GVA 3-22-99

HOUSE AMENDMENTS TO ENGROSSED SENATE CONCURRENT  
RESOLUTION NO. 4010

Page 1, line 21, replace "also provide for" with "require that entity to be subject to"

Page 1, line 22, remove "by the state auditor" and remove "by the entity"

Renumber accordingly

Date: 3-19-99

Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 4010

House GOVERNMENT AND VETERANS AFFAIRS Committee

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

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

Action Taken Do Pass Amended

Motion Made By THORESON Seconded By GRANDE

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP. WINRICH		✓
VICE-CHAIR KLINISKE	✓				
REP. BREKKE	✓				
REP. CLEARY		✓			
REP. DEVLIN	✓				
REP. FAIRFIELD		✓			
REP. GORDER		✓			
REP. GRANDE	✓				
REP. HAAS	✓				
REP. HAWKEN	✓				
REP. KLEMIN	✓				
REP. KROEBER		✓			
REP. METCALF		✓			
REP. THORESON	✓				

Total (Yes) 9 No 6

Absent 0

Floor Assignment KLEMIN

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

**REPORT OF STANDING COMMITTEE**

**SCR 4010, as engrossed: Government and Veterans Affairs Committee (Rep. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (9 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SCR 4010 was placed on the Sixth order on the calendar.**

Page 1, line 21, replace "also provide for" with "require that entity to be subject to"

Page 1, line 22, remove "by the state auditor" and remove "by the entity"

Renumber accordingly

1999 TESTIMONY

SCR 4010

Senator Solberg:

OFFICE OF ATTORNEY GENERAL

2001

Charles



STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE  
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(701) 328-2210 FAX (701) 328-2228

Heidi Heitkamp  
ATTORNEY GENERAL

MEMORANDUM

TO: Gary J. Nelson, Senate Majority Leader  
 Tim Mathern, Senate Minority Leader  
 John Dorso, House Majority Leader  
 Merle Boucher, House Minority Leader  
 Chair, Senate Appropriations Committee  
 Chair, House Appropriations Committee  
 John D. Olsrud, Director, Legislative Council

FROM: Heidi Heitkamp, Attorney General *Heidi*

RE: Legislative Review of Statutes Which May Be  
 Unconstitutional Based On Supreme Court's Opinion In Billey  
 v. North Dakota Stockmen's Association

DATE: December 2, 1998

---

In Billey v. North Dakota Stockmen's Association, the North Dakota Supreme Court declared portions of N.D.C.C. §§ 36-09-18, 36-22-03, and 36-22-08 unconstitutional because they authorized public moneys to be deposited in a separate account rather than being sent to the State Treasurer as required by Article X, Section 12 of the North Dakota Constitution.

Article X, Section 12 provides in pertinent part:

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; . . .

This constitutional amendment shall not be construed to apply to fees and moneys received in connection with the licensing and organization of physicians and surgeons, pharmacists, dentists, osteopaths, optometrists, embalmers, barbers, lawyers, veterinarians, nurses, chiropractors, accountants, architects, hairdressers, chiropodists, and other similarly organized, licensed trades and professions; and this constitutional amendment shall not be construed to amend or repeal existing laws or Acts amendatory thereof concerning such fees and moneys.

The Court held that "all fees collected by an officer or agent of the state for a state-wide purpose, by authority of law" constituted "public moneys" which under the constitution must be paid to the State

December 2, 1998  
Page 2

Treasurer and spent only by specific appropriation. The judgment in the Billey case is stayed through the next legislative session to allow the Legislature time to amend the statutes to conform to Article X, Section 12 of the North Dakota Constitution.

The Supreme Court's opinion in this case is significant because other statutes also allow a portion of what the Supreme Court would almost certainly find to be public moneys to be processed in a manner other than being deposited through the State Treasurer. The constitutional provision does exempt from its provisions the fees and moneys received from statutorily created trade and licensing boards.

On September 1, 1998, I sent a letter to all state agencies recommending that each agency identify any funds that are collected by the agency or its agents, which are not sent to the State Treasurer for deposit. I further recommended that the agency identify any statutes that authorized any disposition of funds other than depositing them with the State Treasurer. As a result I have received inquiries from several agencies regarding statutes that have been identified as possibly vulnerable to constitutional attacks. These statutes can be classified into two categories.

The first category contains those statutes that provide that only net proceeds need to be deposited with the State Treasurer or that provide that certain expenses can be withheld from funds prior to depositing the funds with the State Treasurer. Statutes that fall within this category include:

- 20.1-03-17 (relating to sale of hunting, fishing, and fur-bearer licenses),
- 34-15-07 (relating to civil money penalties),
- 39-12-20 (relating to proceeds from sales of motor vehicles),
- 47-30.1-23 (relating to funds received from the sale of abandoned property),
- 54-44-04.6 (relating to the sale or transfer of surplus property), and
- 57-01-13 (relating to the collection of delinquent taxes).

The second category contains those statutes that provide that public money is to be deposited other than with the State Treasurer. Statutes that fall within this category include:

- 11-17-04 (relating to filing fees charged by clerks of court),
- 11-17-05 (relating to fees for clerk of court services),
- 14-09-25 (relating to funds collected under child support orders),
- 28-32-17 (relating to payment for preparation and filing of the record in administrative hearings), and
- 54-06-08.1 (relating to accounts for clearing and cashing of checks, but which allow checks to be written on the account to transfer money to the Bank of North Dakota as well as to the State Treasurer).

Another area of concern is the manner in which certain state business is conducted. The State Investment Board and the State Land Board, for instance, both receive dividends, interest, and proceeds from the sale of stock that do not go through the State Treasurer. Similarly,



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Page 3

bond proceeds typically are not deposited with the State Treasurer. The Bank of North Dakota receives loan payments that are not deposited with the State Treasurer. In each of these cases there are no state statutes which detail how the funds are to be handled.

It could be argued that some of the funds referenced in the statutes are not public funds within the contemplation of the constitutional provision. For instance, it may be argued that the funds collected under child support orders or bond proceeds do not constitute public funds since they are impressed with a trust and the equitable title may not be held by the state. The same could be argued for pension funds such as the PERS Retirement Fund, TFFR, etc. If these funds do not fall under the constitutional provision, then perhaps no statutory changes would need to be made. However, one of the factors which the Supreme Court took into consideration in determining that the funds received by the Stockmen's Association were public funds was that the Legislature had appropriated the funds, thereby evidencing the Legislature's belief that the funds were public money. Consequently, the provision in N.D.C.C. § 14-09-27 appropriating the funds collected under child support orders should be repealed if these are not believed to be public funds subject to the constitutional provision.

These concerns could be resolved through legislation addressing each of the statutes on a statute-by-statute basis. Another way to address the concerns would be to amend the constitution. This would address the constitutionality of the statutes and the practical problems posed with the Supreme Court's interpretation of the constitutional provision. For example, enactment of a resolution to amend Article X, Section 12 to include the words "Unless otherwise provided by law" at the beginning of subsection one would resolve the issues of both the net proceeds statutes and the statutes which authorize deposits other than with the State Treasurer. If this is the route that the Legislature decides to follow, it may be necessary to only pass interim legislation to be effective until the constitutional amendment can be passed. Interim legislation, at least for the statutes directly involved in the Billey case, would be necessary because the Supreme Court in Billey stayed the holding in that case only until the Legislature could amend the statutes to comply with the constitution. Consequently, the decision in Billey will take effect when the Legislature adjourns if no legislation is passed or on the effective date of any legislation passed.

Because different approaches could be used to resolve these issues, the Office of Attorney General has advised agencies to consult with the Legislature to determine the best approach to take.

Assistant Attorney General Beth Baumstark and I are available to answer any questions you may have regarding this matter.

cc: Edward T. Schafer, Governor  
Robert R. Peterson, State Auditor  
Rod Backman, Director Office of Management and Budget  
William G. Goetz, Office of the Governor

SCR 4010

This opinion is subject to  
petition for rehearing. Filed 6/4/98 by Clerk of Supreme Court

[Download as WordPerfect]

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
1998 ND 120

Post-It® Fax Note	7671	Date	6-4-98	# of pages	12
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Fax #	701-223-2587	Fax #			

James Billey and Pete Peterson, Plaintiffs and Appellees  
v.  
North Dakota Stockmen's Association, Defendant and Appellant

Civil No. 970332

Appeal from the District Court for Burleigh County, South Central Judicial District, the  
Honorable Benny A. Graff, Judge.  
AFFIRMED.

Opinion of the Court by Sandstrom, Justice.  
Lynn M. Boughey, of Boughey Law Firm, P.O. Box 1206, Minot, N.D. 58702-1206, for  
plaintiffs and appellees.

Gordon W. Schnell, of Mackoff, Kellogg, Kirby & Kloster, P.C., P.O. Box 1097, Dickinson,  
N.D. 58602-1097, and Robert F. Williams (on brief), Rutgers University School of Law, Fifth &  
Penn Streets, Camden, N.J. 08102, for defendant and appellant.

Billey v. North Dakota Stockmen's Association

Civil No. 970332

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 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,(1) 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 livestock and have registered brands. They brought this declaratory judgment action challenging the constitutionality of the brand inspection, brand recording, and stray 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

[¶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).

[¶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

[¶10] The Stockmen's Association asserts the trial court erred in holding portions 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 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; . . ." (2)

[¶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, if the Stockmen's Association is acting as an agent for the state in providing these 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 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 Livestock 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. . . .

"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 of 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 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 moneys 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."

[¶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 429 (N.D. 1988), this Court upheld a continuing appropriation of marriage dissolution 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 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 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 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.

[¶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.

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

[¶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."

9 C.F.R. § 201.4(a) (1998). This is a clear indication the Act, and the 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); *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.*, 26 N.W.2d 39, 44 (Iowa), 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.

[¶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.

[¶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 Canners & 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 case, we believe the state and federal statutory schemes can be interpreted so 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."

Stafford v. Wallace, 258 U.S. 495, 514-15, 42 S.Ct. 397, 401, 66 L.Ed. 735, 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 those 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 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.

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

[¶43] Dale V. Sandstrom  
William A. Neumann  
Mary Muehlen Maring  
Herbert L. Meschke  
Gerald W. Vandewalle, C.J.

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Footnotes:

1. "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."

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

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North Dakota  
**STATE LAND DEPARTMENT**  
1707 N 9th Street  
PO Box 5523  
Bismarck, ND 58506-5523



Robert J. Olheiser  
COMMISSIONER

**TESTIMONY OF ROBERT OLHEISER**  
**State Land Commissioner**

**IN PROPOSED AMENDMENT OF**  
**SCR 4010**  
**Senate Government and Veteran's Affairs Committee**

**January 21, 1999**

Amend the wording on lines 14-17 to read as follows:

Public moneys are to be paid over to the state treasurer as required by section 12 of article X, unless specifically provided otherwise by the legislative assembly.

~~Whenever the legislative assembly authorizes a nongovernmental entity to perform any governmental function, including assessment and collection of fees for services, the legislative assembly may provide that the fees assessed and collected are not required~~  
Public moneys are to be paid over to the state treasurer as required by section 12 of article X, unless specifically provided otherwise by the legislative assembly.

Mr. Chairman, Members of the House Government and Veterans Affairs  
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 opposition to SCR 4010. This proposed constitutional amendment is before you because of the court decisions in *Billey/Peterson v. North Dakota Stockman's Association*. Copies of these decisions are included with my statement so you can read them yourself.

If you are not familiar with these decisions, 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.

It would be appropriate to consider the history of these statutes now. In 1949 the Legislature enacted statutes designating the North Dakota Stockman's Association, a private non-profit corporation, as the only group responsible for conducting brand inspections and handling estrays. The Livestock Sanitary Board (Board of Animal Health) was empowered to set the administrative regulations and establish the fees. The laws also directed that these fees be paid directly into the Association's private bank account. In addition, the chief brand inspector and two fieldmen were given police powers to enforce these laws.

This was a "sweet heart deal" in my opinion for the Association because it gave them the opportunity to collect fees on every head of cattle sold by Association members and non-members. In 1993 a group rammed a bill through this body to move brand recording to the Association from the State Agriculture Department. Public questions of constitutionality were raised at the time but disregarded by the Legislature and Governor. Over the last four years the *Billey/Peterson* case has been progressing through the court system culminating in the Supreme Court decision last June.

If you recommend approval of this Concurrent Resolution and the rest of the Legislature votes for it, the public will have to vote on it next year. While it may solve



some of the Association's current problems, obtaining a yes vote will require the Association to spend additional amounts of brand and registration fees ( public funds) to win a state wide election. They have already spent from 10 to 20,000 dollars of public monies to defend this lawsuit. One must ask why is the Association willing to expend these funds and put forth such an effort. The answer has to be MONEY. The financial business of the Association is small compared to the brand inspection, registration, estray, and interest on reserve collections. Based on the 1997 Financial Report filed with the State Auditor more than 85% of their receipts are now public monies.

Attached to this statement is a copy of p. 16 from the 1997 Report containing the Schedule of Expenses. I have placed a dark box around the "Salaries and Wages" break down. 95.6% of the total of salaries and wages is allocated to brand inspection and brand registration. With only \$30,240 allocated to the salaries and wages of the Association one can only conclude that a very high percentage of the Executive Director's salary is allocated to the cost of brand inspection and registration. The Executive Director is a professional lobbyist for the Association attending as many legislative hearings as possible as well as interim committee meetings between sessions. How can you justify this program to the 11 to 12,000 cattle and dairy producers who are not members of the Association and are required by law to have their animals inspected prior to sale. This "sweet heart deal " has been kept from the general public long enough.

Incidentally, the breakdown shown in the box has been replaced in the 1998 Report with just three figures: Salaries and Wages-Brand Inspection \$642,993; Brand Registration \$10,980; and Office \$36,090. The State Auditor has approved this deletion so maybe you would like to ask the Association why the public doesn't have the right to know the Executive Director's salary when such a large part of his salary is paid from public monies.

The members of the Association in the Legislature and other supporting witnesses claim that "It's our Money". WRONG! In this biennium there are more than \$30,000,000 in other fees and collections just like the brand inspection, registration and estray funds. They are all public monies and the belong to everybody. Just read the court decisions!

In Committees we've heard Association members argue, "If the system ain't broke, don't fix it." Well the system is broken! The current system violates more than one section of our Constitution. Just read the court decisions!

Some of you may have also heard, "We have the most efficient, lowest cost brand registration and inspection system of the 17 states and the only one not run by a state agency." Well they didn't tell you that our system is the only one that violates the basic law of our State. Just read the court decisions!



I believe the first eight words of this amendment which states, "Unless otherwise specifically provided by the legislative assembly" is the key language. It takes the mandatory language in Section 12, Article 10 and makes it discretionary with the Legislature. How many sessions of the Legislature will it take to exempt every agency, department, board or fund from complying with the need for public funds to be deposited with the State Treasurer? This amendment should be placed in Article 10, Finance and Public Debt and not Article 11. Even with this change I do not believe the public will ever surrender this requirement to legislative discretion.

If you accept this proposal and do not clear up the statutory problems addressed in S-2187 with brand inspection, brand registration, estrays, and the Association, how long before another special interest group will seek to take over a program, obtain police powers and receive public funds?

The Legislature created these problems, they ignored advice from members of the executive branch when it wasn't what they wanted to hear and the court system is patiently waiting for you, the House Agriculture Committee, and rest of the Legislature to take corrective action.

As you can see I'm against this amendment and urge you to send it to the floor with a DO NOT PASS!

Thank you for allowing me to appear before you today.

NORTH DAKOTA STOCKMEN'S ASSOCIATION  
SCHEDULE OF EXPENSES  
For the Years Ended December 31, 1997 and 1996

	<u>1997</u>	<u>1996</u>
<u>Salaries and Wages</u>		
Executive Vice-President	\$ 48,000	\$ 44,000
Chief Brand Inspector	34,183	31,200
Brand Inspectors & Patrol	478,627	474,454
Local inspectors	79,754	78,493
Office	<u>41,100</u>	<u>40,172</u>
	681,664	668,319
Less share to Brand Inspections	(630,068)	(615,671)
Less share to Brand Recording	<u>(21,356)</u>	<u>(19,953)</u>
Total	<u>\$ 30,240</u>	<u>\$ 32,695</u>

Travel

Executive Vice-President	\$ 3,019	\$ 5,735
Chief Brand Inspector	3,341	2,353
Brand Inspectors	32,859	30,252
Patrol	10,085	11,103
Local inspectors	<u>4,634</u>	<u>1,353</u>
	53,938	50,796
Less share to Brand Inspections	<u>(51,229)</u>	<u>(45,635)</u>
Total	<u>\$ 2,709</u>	<u>\$ 5,161</u>

Convention

Badges & supplies	\$ 1,401	\$ 2,081
Entertainment	424	176
Meals	10,073	8,314
Speakers	5,685	3,983
Resolutions	534	1,287
Trade show	2,544	1,259
Prizes & miscellaneous	<u>1,192</u>	<u>1,050</u>
Total	<u>\$ 21,856</u>	<u>\$ 18,150</u>

(Continued on following page)

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

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60k168.5 Rights and remedies of taxpayers.  
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

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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

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360k18.11 Congressional intent.  
N.D. 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.

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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

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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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the 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 of 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 427 (N.D.1988), this Court upheld a continuing appropriation of marriage dissolution 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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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 \*178 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 evidences 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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er, 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 case, 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 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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received by the "department, agency, or association performing such  
ice." 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."

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



*For your information*

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, the Executive Director’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 the Executive Director’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 the Executive Director, 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