

Opinion No. 53-5864

December 7, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. George Ledbetter, Secretary Cattle Sanitary Board of New Mexico P. O. Box 1296 Albuquerque, New Mexico

{*287} This is in answer to your request for an opinion upon the question of whether or not the Cattle Sanitary Board of New Mexico has authority to take up and impound livestock with legally recorded brands running at large on State or Federal highways with either fenced or unfenced rights of way, and either within or without Herd Law Districts.

The Cattle Sanitary Board was created by Laws 1889, Chapter 106, § 2, et seq., § 49-201, N.M.S.A., 1941 Comp., as amended, et seq. Amongst its other duties, the Cattle Sanitary Board is made the agency for the registration of brands and for the maintenance of records upon brands of cattle in this State, and provides that any unbranded cattle shall be subject to seizure by any peace officer or any duly authorized cattle inspector appointed by the Cattle Sanitary Board to be disposed of as provided in the statute. (§ 49-903, N.M.S.A., 1941 Comp., as amended.) The enforcement of the branding provisions of the law is reposed in the Cattle Sanitary Board.

Laws 1907, Ch. 80, § 1, et seq., and amendments thereto, § 49-1501 et seq., N.M.S.A., 1941 Comp., as amended, define "estrays" animals and the proper procedures for taking up and disposing of such stray animals. Sec. 49-1508, N.M.S.A., 1941 Comp., provides as follows:

"49-1508. TAKING UP ESTRAY -- FAILURE TO NOTIFY BOARD -- PENALTY. -- It shall be unlawful for any person other than an authorized inspector of the cattle sanitary board to take up or retain possession of any stray animal or animals, except as provided in this article, and any person who shall take up and retain possession of any stray animal or animals without notifying the cattle sanitary board, within the time as provided in this article, shall be guilty of a misdemeanor, and upon conviction may be fined not more than five hundred (\$ 500) for each and every offense. (Laws 1907, Ch. 80, § 8; {*288} Code 1915, § 164; C.S. 1929, § 4-1508)."

It would appear from the above that an authorized inspector of the Cattle Sanitary Board has the authority to take up or retain possession of any astray animal. Also, private persons have the authority to take up or impound stray animals as provided for under § 49-1502 et seq., N.M.S.A., 1941 Comp., as amended. As to the power of official police officers of the State of New Mexico, acting within the scope of their authority, under this provision for and on behalf of the State of New Mexico, such officers may take up and notify the Cattle Sanitary Board as provided for in this section concerning

such estray animals for their disposition as provided in this section. The question, therefore, is what is an "estrays" animal.

At common law an estray animal was an animal whose owner was unknown or any beast, not wild, found wandering or lost or straying from its home. 2 Kent Comm. 359, Cowell; 1 Bl. Comm. 297; **Campbell v. Hamilton**, 172 N.W. 810, 42 N.D. 216; Black's Law Ed., 3d Ed., defines "estrays" as follows:

"Estray must be understood as denoting a wandering beast whose owner is unknown to the person who takes it up. An estray is an animal that has escaped from its owner, and wanders or strays about; usually defined, at common law, as a wandering animal whose owner is unknown. An animal cannot be an estray when on the range where it was raised, and permitted by its owner to run, and especially when the owner is known to the party who takes it up. *Walters v. Galtz*, 29 Iowa 439; *Roberts v. Barnes*, 27 Wis. 425; *Kinney v. Roe*, 70 Iowa 509, 30 N.W. 776; *Shepherd v. Hawley*, 4 Ore. 208; *Yraceburn v. Cape*, 60 Cal. App. 374, 212 P. 938; *Lyman v. Gipson*, 18 Pick. (Mass.) 426."

It is to be noted that under § 49-1501, N.M.S.A., 1941 Comp., as amended, Laws 1907, Ch. 80, § 1, our Legislature defined what an estray animal was and that such legislation is comparable to California and North Dakota.

"49-1501. DEFINITION OF 'ESTRAY'. -- Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an 'estrays', and it shall be unlawful for any person, persons, corporation or any company, or their or either of their employees or agents to take up any such estray and retain possession of same, except as provided in this article. (Laws 1907, Ch. 80, § 1; Code 1915, § 157; C.S. 1929, § 4-1501.)"

It can be seen from the above statute that in New Mexico an animal is an estray when either (1) its owner is unknown in the section where found, **or** (2) the animal shall be fifty miles or more from the limits of its usual range or pasture, **or** (3) that is branded with a brand which is not on record in the office of the Cattle Sanitary Board of New Mexico. Therefore, an animal found upon the right of way or highways of the State of New Mexico, which {*289} does not have a positive means of identification available at that time to the person taking up the said animal enabling him at that time to identify the owner of the animal or its range, would be an estray animal.

The provisions of the statute as to branded animals, providing that an animal that has a brand on it in order to be an estray must have a brand not on record in the office of the Cattle Sanitary Board, **would not** preclude the further requirement that where the beast was branded and the brand was of record in the office of the Cattle Sanitary Board, such beast could not be taken up as an estray. Laws 1953, Ch. 18, §§ 1 and 2, which

appear as § 49-1503 and § 49-1504, N.M.S.A., 1951 Comp., as amended, would substantiate the position that an animal which is branded and whose brand was on record with the Cattle Sanitary Board can be an estray animal. These two sections of law provide the manner and the means for the Cattle Sanitary Board, once being notified of the taking up of branded cattle, for the notification of the record owner of the animal and upon failing to have a record owner of the animal, the procedure for publication and notice of such unrecorded brand. The Supreme Court of this State, in the case of State v. Miller, 41 N.M. 618, construed the definition of an estray animal on page 620 of the report; that once the brand of an animal was properly ascertained to have been recorded (and it appears that the animal was not fifty miles or more from its usual range) and ownership established, the animal ceased to be an "estrays". This case would appear to substantiate the above interpretation that once the ownership of an animal had been clearly established, it can no longer be interpreted to be an estray, but until such time as such ownership is clearly established, whether the animal be branded or not branded, or whether the brand be recorded or not recorded, it is deemed to be an estray animal when found wandering and the procedures for disposing of estray animals, as provided for in the statute, shall be followed.

Therefore, from a reading of these cases and statutes, it would appear that a brand inspector may impound animals roaming on the highways or rights of way, and any other agent of the Cattle Sanitary Board or the State of New Mexico by its State Policemen may impound such animals upon the compliance with the notification to the Cattle Sanitary Board and other provisions of the statute setting out the provisions for publication, notice and sale of such animals.

The above proceedings would dispose of the problem of getting the animal off the highway or right of way and returning it to its owner, if any.

Secs. 41-2304 and 41-2305, Laws of 1937, Ch. 173, §§ 1 and 2, as amended by Laws of 1929, Ch. 172, §§ 1 and 2, provide that any owner of any cattle, horses, mules, burros, swine, sheep, goats, or other livestock permitted or allowed to run at large on any public highways which are fenced, upon conviction thereof, may be punished by a fine of not more than \$ 200.00. This office in an opinion dated June 23, 1939, Opinion No. 3188, directed to the Chief of the New Mexico State Police, summed up prior opinions in this matter upon the question of the criminal liability and stated that regardless of the knowledge of the owner, the negligence of the owner in allowing any animal to be upon the highways, was such to make him subject to the punishment as cited in the statute.

{*290} As to the question of fenced or unfenced lands, § 49-1801, N.M.S.A., 1941 Comp., Laws of 1909, Ch. 70, § 1, requires every gardener, farmer, planter or other person having lands or crops to make a sufficient fence about his land. It is to be noted that the application of the fencing act does not apply to territory within an incorporated city, town or village, nor does it affect any rights or liabilities under §§ 49-1607 to 49-1623, N.M.S.A., 1941 Comp. The latter sections provide for a procedure for impounding

animals in irrigation districts, which procedure would not appear to be in conflict with the Cattle Sanitary Board's power over estray animals throughout the State.

As to your question of whether such animals running upon the highways or right of way in reference to Herd Law Districts, § 49-1311, N.M.S.A., 1941 Comp., provides a penalty against any owner or holder of livestock in a Herd Law District who shall permit such livestock to run at large on any public road within such Herd Law District. It is also to be noted that a Herd Law District must contain land which is contiguous. (Opinions of the Attorney General, page 174, 1931-32). And clearly, State and Federal highways and the rights of way upon which they are built would be public roads subject to the jurisdiction of the State of New Mexico and its agents, and therefore would not be land lying within a Herd Law District.

It is therefore the opinion of this office that the Cattle Sanitary Board of New Mexico does have the authority to take up and impound livestock, in accordance with the statutes providing the manner therefor, with a legally recorded brand on them which are found running at large upon State or Federal highways or upon public roads within Herd Law District areas.

If we can be of further assistance to you, do not hesitate to call upon us in this matter.

By: William J. Torrington

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