

Opinion No. 35-851

January 12, 1935

BY: FRANK H. PATTON, Attorney General

TO: Mr. J. R. Poe, State Dairy Commissioner, State College, New Mexico.

{*32} This will acknowledge receipt of your letter of January 9th in which you ask us for an opinion as to whether or not the provisions of Section 125-103, New Mexico Statutes Annotated, 1929 Compilation, give you and your deputies the power and right to search through milk trucks without a search warrant in order to ascertain whether or not the provisions of Section 7 of Chapter 51 of the Session Laws of 1931 have been violated.

Your attention is called to the last paragraph of Section 7 of Chapter 51 of the Laws of 1931, providing for the issuance of search warrant upon affidavit of any person to the effect that he has reason to believe and does believe that the provisions of said act are being violated. In our opinion, this applies to persons other than the State Dairy Commissioner and his deputies.

The provision against unreasonable searches and seizures is guaranteed by the Constitution of the United States and by Section 10 of Article II of the New Mexico Constitution and has been strictly construed as a personal guaranty against unreasonable searches and seizures of the persons, papers, homes and effects of the people of the State of New Mexico. The question, therefore, naturally arises as to whether or not such search as you are in the habit of making of milk trucks is an unreasonable search. We believe that it is not.

Another well defined theory of our constitutional laws is that under the police power of the people in order to protect the peace and health of the people of the State, the legislature can authorize acts to safeguard said health and safety of the people. We believe that the provisions of Chapter 51 of the Laws of 1931 are proper as an exercise of this police power in allowing and authorizing inspections of dairies to see that they are not violating any of the provisions of the act.

Since the New Mexico Supreme Court has not passed upon this question and we have no authority whatever to go on, we can only advise you as to our interpretation of the laws and as to what the probable {*33} decision of the Court would be in the event that the case would come before them.

Under the foregoing principles we believe that such inspection is authorized and constitutional and that under the authority granted you by Section 125-103 of the New Mexico Statutes, Compilation of 1929, you are authorized to inspect the milk trucks, or the premises where the milk is bottled, for the purpose of ascertaining whether or not the law as to bottling the milk is being violated.

You state in your letter that it is your custom to get the consent of the milk truck driver before inspecting milk trucks. You are advised that although this practice is probably a good one, if the search is unconstitutional, the fact that the driver of the truck has consented to your inspection does not legalize the inspection if immunity is claimed by the dairyman himself, as his servants and employees have no right to waive a constitutional guaranty. However, any evidence obtained under such a search, even if the court should later hold it an illegal search and seizure of evidence, is admissible as evidence in a prosecution of the owner of the dairy. The Supreme Court of New Mexico has definitely passed on this latter point in the case of State vs. Dillon, 34 N.M., 366; 281 Pac. 474.

By J. R. MODRALL,

Assistant Attorney General