

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

NEBRASKA BEEF PRODUCERS  
COMMITTEE

Plaintiff,

v.

NEBRASKA BRAND COMMITTEE, and  
WILLIAM BUNCE, in his official capacity  
as Executive Director of the Nebraska  
Brand Committee

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

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The Nebraska Beef Producers Committee, through counsel, states as follows:

**NATURE OF ACTION**

1. This action is a challenge to the validity of the Nebraska Livestock Brand Act, NEB. REV. STAT. §§ 54-170 *et seq.* (REISSUE 2010) (“Brand Act”) under the dormant Commerce Clause and the Equal Protection Clause of the United States Constitution.

2. Pursuant to 42 U.S.C. § 1983, Plaintiff seeks a declaration that the Brand Act violates the dormant Commerce Clause, Art. I § 8, and the Equal Protection Clause, Amend. XIV.

3. Plaintiff also seeks injunctive relief prohibiting the future enforcement of the Brand Act, as well as any other appropriate relief, including attorneys’ fees under 42 U.S.C. §§ 1988 and 12205.

**PARTIES**

4. The Nebraska Beef Producers Committee (“NBPC”) is a non-profit, mutual benefit corporation organized pursuant to the laws of the State of Nebraska. NBPC members include cattle

producers operating registered feedlots within Nebraska. NBPC asserts the claims contained herein on behalf of its members.

5. The Nebraska Brand Committee (“Brand Committee”) is the agency of the State of Nebraska authorized to implement and enforce the provisions of the Brand Act. NEB. REV. STAT. § 54-191.

6. William Bunce is the Executive Director of the Brand Committee, “the executive officer of the brand committee, ...the chief brand inspector, the chief investigator, and, for administrative purposes, the brand committee head.” NEB. REV. STAT. § 54-192.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over NBPC’s claims pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201, and 2202.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1), as all the Defendants reside in the State of Nebraska or have an interest in property in the State of Nebraska. Venue is also proper in this district under 28 U.S.C. § 1391(b)(2) as the events giving rise to the claim occurred in this district and the property involved is located in this district.

### **BACKGROUND**

#### **The Brand Act and the Nebraska Brand Committee**

9. The Brand Committee was created by the Nebraska Legislature in 1941 to protect livestock producers and investigate missing and/or stolen cattle.

10. “The purpose of the Nebraska Brand Committee is to protect Nebraska brand and livestock owners from the theft of livestock through established brand recording, brand inspection, and livestock theft investigation.” NEB. REV. STAT. § 54-191.

11. At the time the Brand Committee was formed, theft of cattle was a serious concern. Cow-calf operations were often located in large, open, rural settings with limited human oversight.

Cattle were vulnerable to theft in these large open spaces and could easily become lost during bad weather or as a result of damage to fence lines.

12. The only effective means to determine ownership of cattle was by branding the animals with the owner's unique design.

13. Around this time, stock trucks were first emerging as a means to transport livestock. Refrigerated trucks did not become a reliable method for transporting meat products over long distances until the 1960's.

14. Without a safe and effective method to transport finished meat products, cattle producers were forced to transport livestock across multiple state boundaries, in order to reach a population base where the animal could be processed and purchased for consumption. Cattle producers in some parts of Nebraska were required to move cattle over fairly large and remote areas of the state in order to reach the nearest rail line or meat processing facility.

15. Cattle were vulnerable to theft during this transport process as well, whether moved by cattle drives or railcar transport.

16. It was not until after World War II that truck transport of live cattle began to emerge as an alternative to cattle drives or rail transport. In fact, it was not until the 1980s that the trucking industry completely replaced railcars as the preferred method for transporting livestock.

17. In order to address the vulnerability to theft of cattle, the Legislature designated a portion of the state as a brand inspection area ("Brand Area"). The Brand Area largely comprises counties in the western two-thirds of Nebraska.<sup>1</sup> A map identifying the counties included in the Brand Area is attached as Exhibit A.

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<sup>1</sup> NEB. REV. STAT. § 54-1,109 provides, "The brand inspection area of Nebraska consists of the following land area of counties and parts thereof: Arthur, Banner, Blaine, Box Butte, Boyd, Brown, Buffalo, Chase, Cherry, Cheyenne, Custer, Dawes, Dawson, Deuel, Dundy, Franklin, Frontier, part of the south half of section 1, township 3 north, range 21, on railroad right-of-way in the west part of Oxford Town called Burlington addition in Furnas, Garden,

18. The Brand Act requires a brand inspection for any cattle moved “from a point within the brand inspection area to a point outside the brand inspection area. . . .” NEB. REV. STAT. § 54-1,110. An inspection is also required for most sales and trades conducted within the Brand Area. See NEB. REV. STAT. § 54-1,111.

19. The Brand Act defines a “brand inspector” as one who “identif[ies] brands, marks, or other identifying characteristics of livestock to determine the existence of such brands, marks, or identifying characteristics and from such determinations attempts to establish correct and true ownership of such livestock. . . .” NEB. REV. STAT. § 54-176. It is clear from the Legislature’s definition of “brand inspector” that they were intended to conduct actual inspections of the livestock to ensure the chain of custody of an animal had not been sullied by theft or loss.

20. In addition to requiring brand inspections, the Brand Act also imposes certain fees and surcharges on cattle producers to cover the cost of brand inspectors to perform their duties. Cattle producers that do not operate a “registered feedlot” are assessed a fee at the rate of \$1.00 per head plus an additional \$10.00 surcharge per stop. A copy of the Fee Schedule published by the Brand Committee is attached as Exhibit B.

21. When a cattle producer within the Brand Area has cattle ready for slaughter, the producer must notify a brand inspector of his intent to transport such cattle. The producer must then wait until the brand inspector confirms the producer’s ownership of the cattle before sending the cattle to the meat processor.

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Garfield, Gosper, Grant, Greeley, all of lots 1, 7, and 8 in block 48 in original town of Grand Island, and all of the southeast quarter lying south of the Union Pacific Railroad Company's right-of-way in section 24, township 11 north, range 10, in Hall, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Kearney, Keith, Keya Paha, Kimball, all of Knox except Eastern, Dolphin, Dowling, Columbia, Morton, Peoria, Addison, Herrick, Frankfort, and Lincoln townships, Lincoln, Logan, Loup, McPherson, Morrill, Perkins, Phelps, Red Willow, Rock, Scotts Bluff, Sheridan, Sherman, Sioux, Thomas, Valley, the existing livestock auction markets in Blue Hill, all of lots 1 to 6, and lots 7 and 8, except twenty-two feet of the east side of lot 8, all in block 6, original town of Blue Hill, and Red Cloud, part of lot A, Roats subdivision to Red Cloud, lots 1 and 2 and the south one-half of block 32 in original town of Red Cloud, and all of annex lot 21, Red Cloud, in Webster, and all of Wheeler.”

22. Cattle producers are paid for their cattle based on the weight of the cattle, multiplied by the market price.

23. During transport, cattle lose weight due to stress and withdrawal of water and food. This weight loss is called “shrinkage”.

24. Shrinkage increases the longer cattle are forced to endure stress or other factors foreign to them.

25. Shrinkage resulting from waiting on brand inspectors has a significant impact on the health and welfare of the livestock, the quality of the meat product the animal will produce, and the amount of profits the cattle producer will obtain from the animal.

26. In some instances, cattle producers have been forced to wait three days for cattle to be inspected and approved for transport to a meat processing facility. In addition to shrinkage, undue delays could result in a producer’s failure to make a timely delivery and therefore lose a contract.

27. Cattle producers can avoid some of the delays that cause unnecessary stress on the animals and lost profits by becoming a registered feedlot under the Brand Act.

28. “Registered feedlots” are assessed a fee based on a one-time average annual inventory total multiplied by the current per head inspection fee (\$1.00) which is assessed in increments. The Brand Committee assesses the registered feedlot-fee at the rate of \$1,000.00 per one thousand (1,000) head of cattle, plus \$250.00 for each increment of two hundred fifty (250) head above the one thousand (1,000) head total of the one-time capacity of the lot. A copy of the application used for registration of feedlots is attached as Exhibit C.

29. A brand inspection is not required or conducted for each head of cattle brought into or out of a registered feedlot. Instead, the Brand Committee conducts a paper audit at registered feedlots on a semi-annual basis.

30. Not all transfers of cattle from registered feedlot are exempt from the inspection fees. Transport of cattle from a registered feedlot to a meat processing facility outside the Brand Area are covered under the registered feedlot fees.

31. But inexplicably, cattle transferred from feedlots in the Brand Area to a backgrounding lot outside of the Brand Area are not covered under the registered feedlot fees. NEB. REV. STAT. § 54-1,121.

32. Cattle forced to wait for brand inspection prior to transfer out of the Brand Area from registered feedlots endure the same shrinkage suffered by cattle at nonregistered feedlots.

#### **Modern Cattle Production Operations and the Brand Area**

33. The evolution of the cattle industry has rendered the regulatory scheme codified in the Brand Act ineffectual and obsolete in its ability to protect the interests originally intended by the Legislature. Several factors contribute to the Brand Act's waning relevance, namely the emergence of security measures and advancements in the facilities used in cattle production operations.

34. Members of the NBPC have implemented multiple means of improving cattle security, reducing the risk of theft or loss, and identifying cattle beyond the branding process.

35. NBPC members commonly use one or more methods, including, but not limited to, electronic identification devices (EIDs), ear tags, and brands, to track and identify their animals. By employing these methods in pairs (i.e. ear tags and branding, or EIDs and ear tags), cattle producers reduce the risk that a thief could pass stolen cattle off as their own.

36. In particular, EIDs and other identification methods have enabled a thorough inventory system with detailed records of each animal including origin, location on the facility, health issues, statistics, and other pertinent information.

37. NBPC members' cattle are typically penned in both a pen fence and a perimeter fence. By implementing a layered enclosure, cattle producers are able to reduce the risk of fencing breaches. This dual fencing both prevents the escape of NBPC members' cattle and the inadvertent intrusion of estray cattle. In addition, operating within a smaller geographic area substantially reduces the likelihood that a fence breach goes unnoticed.

38. Condensing the cattle operation also makes the cattle easier to monitor, which increases the effectiveness of security cameras and personnel.

39. The reduced risk of lost or stolen cattle is evidenced in the Brand Committee's records.

40. Annual Cattle Recovery Reports are available for FY2007-2008 through FY2016-2017 on the Nebraska Brand Committee's website. A review of all electronically available reports shows a steady decline in the total number of recovered cattle. In FY2009-2010, the Brand Committee claimed credit for 2,422 head of cattle recovered. In FY2016-2017, only 910 head of cattle were recovered. These records indicate more than a 60% drop in cattle recovery in less than a decade, a trend that has been consistent over the last six (6) fiscal years.

41. Of the available reports, only FY2015-2016 and FY2016-2017 specifically note whether the recovered cattle were stolen cattle or estray cattle. However, in both reports, all recovered cattle were estray, not stolen.

42. NBPC members are unaware of any cattle recovered from or on behalf of registered feedlots.

### **Impact of the Brand Act on the NBPC and Its Members**

43. NBPC comprises cattle producers operating registered feedlots within Nebraska, both inside and outside the Brand Area.

44. For members of the NBPC, brand inspections come at a high cost: cattle operations owned by members of the NBPC vary in size, with some members paying between \$75,000.00 and \$90,000.00 in brand inspection fees for 2016.

45. There is no benefit derived by NBPC members from these fees.

46. Further, the greater public derives no benefit from the Brand Act's application to registered feedlots.

47. It is clear from the text of the Brand Act that the Legislature intended for brand inspectors to conduct physical inspections of the cattle in order to ascertain whether the markings on the animal corresponded to the paperwork provided to the purchaser.

48. In practice, brand inspectors have little contact with the actual livestock in registered feedlots. Instead, "brand inspections" largely consist of auditing paperwork that is maintained at the time and expense of the purchaser.

49. This paperwork audit would not identify lost or stolen livestock and without a physical inspection, there is really no way for the brand inspections to effectuate the purpose of the Brand Act.

50. The Brand Committee urges cattle feeders to become registered feedlots as "an alternative to brand inspection as is presently done." Exhibit C.

51. The Registered Feedlot Application states: "The program offers the convenience of not having to have a brand inspection on fat cattle at time of shipment, either at origin or destination." Exhibit C.



52. The Brand Committee's statements reflect the challenging position in which cattle producers are placed by the requirements of the Brand Act.

53. Under the Brand Act, a cattle producer can accept the undue burden of physical inspection at the risk of delaying shipments of fat cattle—a delay that will result in lost revenues either by lowering the value of the cattle or preventing the producer from fulfilling its contract.

54. Alternatively, the producer can become a registered feedlot which relieves it of the burden and time delay associated with physical inspections, but obtain nominal benefits from the paper inspections despite being assessed similar fees.

55. The Brand Committee has encouraged cattle producers to become registered feedlots in order to reduce the strain on its resources. But the registered feedlot program devalues the benefits sought by the Legislature in creating the Brand Committee and enacting the Brand Act.

56. While the Brand Act may have provided a local benefit in the past, changes in technology and management of cattle production operations have reduced the local benefits derived from the Brand Act while continuing to impose a costly burden on interstate commerce.

57. Moreover, registered feedlot operators enjoy no benefit from the excessive burdens imposed by the fee structure and inspection procedures contained in the Brand Act.

## COUNT I

### **The Brand Act Violates the Dormant Commerce Clause of the United States Constitution.**

58. Plaintiffs re-allege paragraphs 1-57 of this Complaint as if fully set forth herein.

59. This Count seeks a declaration that the Brand Act violates the dormant Commerce Clause of the United States Constitution, (Art. I, § 8, cl. 3), and an injunction prohibiting enforcement of the Brand Act.

60. NBPC members routinely purchase and sell cattle both in and outside of the Brand Area. At least one NPBC member purchases calves from many of the 48 contiguous states. Many of NPBC members' calves are sold to meat processing facilities in Colorado, Iowa, Kansas, and South Dakota. The Brand Act requirements clearly burden NBPC members who are buying and selling in interstate commerce with little or no local benefit.

61. Further, any local purpose of the Brand Act could be promoted with a lesser impact on interstate activities by reducing costs, increasing efficiency, and refocusing on the original goal of preventing theft and fraud. Kansas, Texas, and Iowa, for example, have cattle industries that are remarkably similar to Nebraska, yet only Nebraska requires mandatory brand inspections for all of the state's beef producers in a particular portion of the state.

62. In Kansas brand inspections are voluntary, except in the three counties whose citizens have chosen to opt in to mandatory brand inspections by becoming part of the "brand area". KAN. STAT. ANN. § 47-435. Even then, registered feedlots are excluded from mandatory inspection, and a county's residents have the option to withdraw from the "brand area," *Id.*; KAN. STAT. ANN. § 47-441.

63. Texas requires brands to be registered with the counties, TEX. AGRIC. CODE ANN. § 144.041, but does not require mandatory brand inspection. Instead, the Texas and Southwestern Cattle Raisers Association employs special rangers to aid law enforcement in both Texas and Oklahoma investigating agricultural crimes and conducting market inspections at Texas livestock markets.

64. Iowa requires that livestock brands be recorded with the Iowa Department of Agriculture, IOWA CODE 169A.3, but there is no overarching brand organization or any brand inspections required by state law.

65. It is clear that there is no longer a legitimate local purpose—whether preventing theft or protecting sources of food supplies—to justify the burden placed on interstate commerce by Defendants.

66. The burden which the Brand Act imposes in interstate commerce is excessive in relation to its putative local benefits.

67. The discriminatory effect of the Brand Act unlawfully burdens interstate commerce.

## COUNT II

### **The Brand Act Violates the Equal Protection Clause of the United States Constitution.**

68. Plaintiff re-alleges paragraphs 1-57 of this Complaint as if fully set forth herein.

69. This Count seeks a declaration that the Brand Act violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. It also seeks an injunction prohibiting enforcement of the Brand Act.

70. The state's classification of cattle feedlots based on their location in the state is arbitrary and unreasonable.

71. Although the so-called "cattle and range" area of Nebraska may have once required the protection of the Brand Act, cattle raised in feedlots in the Brand Area no longer require such protection.

72. Cattle raised in feedlots in the Brand Area are no longer more vulnerable to theft than cattle raised in feedlots outside of the Brand Area.

73. NBPC and its members are accorded unfavorable treatment under the classifications contained in the Brand Act and the Brand Act denies the plaintiff equal protection of the law in violation of the Equal Protection Clause.

74. An actual controversy exists between the parties as to the constitutionality of the Brand Act.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests this Court to render judgment on this Complaint in their favor and grant the following relief:

- A. Declare the Brand Act interferes with interstate commerce in violation of the dormant Commerce Clause of the United States Constitution;
- B. Declare the Brand Act deprives Plaintiff of the equal protection of the law in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- C. Declare the Nebraska Brand Committee and William Bunce by virtue of fulfilling the duties under the Brand Act, are depriving Plaintiff's members of their rights under the dormant Commerce Clause and Equal Protection Clause in violation of 42 U.S.C. § 1983;
- D. Enter an order permanently enjoining the Defendants from enforcing, or taking any steps to enforce, the Brand Act;
- E. Award Plaintiff its costs incurred in this action, including reasonable attorneys' fees, as permitted by 42 U.S.C. §§ 1983, 1988, and 12205; and
- F. Grant Plaintiff such additional and further relief as this Court deems just and proper.

DATED this 30<sup>th</sup> day of May, 2017.

Respectfully submitted,

NEBRASKA BEEF PRODUCERS  
COMMITTEE, Plaintiff

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