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September 16, 2002

James Connelley, Administrator
Department of Agriculture, Elko Office
1351 Elm Street
Elko, Nevada 89801

Dear Mr. Connelley:

This letter is in response to your inquiry whether state brand inspectors must issue brand inspection clearance certificates to Bureau of Land Management (BLM) agents who have impounded livestock and sell them at public auction pursuant to 43 C.F.R. §§ 4150.1-4150.5. This is in regard to the planned impoundment by the BLM of livestock owned by the Dewey Dann Estate. The opinion in this letter is not intended as an official opinion of the Office of the Attorney General. I have reviewed all of the pertinent law and facts pertaining to this matter and I am providing the following information in order to advise you of my findings.

Pursuant to NRS 565.100:

It is unlawful for any person to consign for slaughter, or slaughter at an approved plant, or transfer ownership of any animals by sale or otherwise within any brand inspection district created under the provisions of this chapter, until the animals have been inspected by an inspector of the department and a brand inspection clearance certificate issued covering the animals.

Prior to any sale of an animal in Nevada, the persons selling the animals must obtain a brand inspection clearance certificate from a brand inspector. NRS 565.130(1) outlines when a brand inspector must refuse to issue a brand inspection clearance certificate. It states in pertinent part:

The department or its authorized inspector shall refuse to issue brand inspection clearance certificates...not bearing brands or brands and

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ASSEMBLY NATURAL RES., AGRICULTURE & MINING
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SUBMITTED BY: David Schumann

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marks of legal record in the name of the person claiming lawful possession of and applying for inspection of the animals, until satisfactory evidence of the right to legal possession of the animals . . . has been supplied to the department or its authorized inspector.

In the instant matter, the animals being presented for inspection will not bear brands and marks of legal record of the BLM agents that are presenting the animals for inspection. Under NRS 565.130(1), the Department of Agriculture (DOA) must be supplied with satisfactory evidence that the BLM agents have a right of legal possession of the animals in question.

In response to requests by the DOA, the BLM has provided the DOA with documentation relating to the due process requirements outlined in 43 C.F.R. §§ 4150.1-4150.5. The owners of the livestock in question were issued several Trespass Notices and Notices of Intent to Impound. The owners were personally served with the most recent Trespass Notices and Notices of Intent to Impound. A Notice of Intent to Impound was published in the Elko Daily Free Press. The Notice of Intent to Impound was also posted at the Crescent Valley Justice Court, Eureka County, and Crescent Valley Post Office located in Crescent Valley, Eureka Post Office, and Eureka County Court House, both located in Eureka. Notice was also posted in the Elko United States Post Office and Elko County Court House.

The Trespass Notice gave the owners the opportunity to end the trespass or to present evidence to the BLM to show that they are not in trespass. The Notice of Intent to Impound provides that if the livestock are impounded, the owners are permitted to redeem and regain possession of the livestock upon the fulfillment of certain conditions.

Through the documentation, BLM has shown that prior to impounding the livestock they followed all of the procedural requirements set out in 43 C.F.R. §§ 4150.1- 4150.5. The question then becomes is this satisfactory evidence that the BLM is in lawful possession of the livestock?

There are a number of federal court decisions that address whether BLM has the authority to impound and sell livestock. The courts have stated, "Congress has the authority to control the occupancy and use of public land and to protect that land from trespass and injury." *Bradshaw v. United States*, 47 Fed. Cl. 549, 555 (2000) (citing *Klump v. United States*, 38 Fed. Cl. 243, 248 (1997)). In reference to the regulatory scheme set out in 43 C.F.R. §§ 4150.1-4150.5 for the impound and sale of trespassing cattle, the courts have held that the regulations are narrowly tailored to meet the goal of protecting public lands from trespass and injury. *Id.* An identical regulation for the protection of National Forest land was found to be constitutional by a federal court. *McVay v. United States*, 481 F.2d 615 (1973). There are no cases that have held that the impoundment and sale by the BLM of livestock trespassing on public lands was unlawful, in violation of due process rights or unconstitutional.

Based on 43 C.F.R. §§ 4150.1-4150.5 and on federal case law, the BLM will be in legal possession of the livestock impounded and have the legal authority to sell the livestock at public

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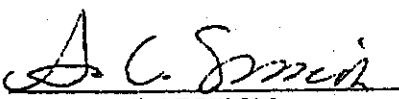
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auction. The only basis for the DOA to refuse to issue Brand Inspection Clearance Certificates is if the BLM were unable to produce proof of legal possession. As set forth above the BLM has produced sufficient evidence of legal possession. Under the circumstances, the DOA is required by law to issue Brand Inspection Clearance Certificates to enable the BLM to sell the impounded livestock at auction.

If you have any further questions, please do not hesitate to contact me.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: 
GINA C. SESSION
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