

Opinion No. 38**Livestock Sanitary Board—Indemnity—
Rules and Regulations—Animals—
Slaughter of—Diseased Animals—
Bang's Disease**

Held: The Livestock Sanitary Board may not provide by rule or regulation that no indemnity shall be paid for cattle slaughtered when disclosed to be reactors upon the initial test for Bang's disease.

May 14, 1945

Dr. W. J. Butler
Livestock Sanitary Board
State Capitol
Helena, Montana

Dear Dr. Butler:

You have requested my opinion on the following questions:

1. Does the Livestock Sanitary Board have authority to provide indemnity shall not be paid for reactors disclosed on the initial test of any herd presented for test for bovine brucellosis (Bang's disease)?

2. Does the Montana Livestock Sanitary Board have power to discriminate and provide indemnity shall not be paid for reactors disclosed on the initial test of any herd presented for test for bovine brucellosis (Bang's disease), excepting where such a test is required and ordered on dairy herds?

You have advised me that in the use of *Brucella Abortus* vaccine there is a very serious drawback where indemnity is paid for reactors. That drawback is due to the fact that the blood of an animal which has been vaccinated with the

vaccine will give a positive reaction to a blood test for bovine brucellosis (Bang's disease) just the same as if the animal had been naturally infected.

You further advise that "at the present time there is no known method of differentiating between the positive reaction that follows vaccination from the positive reaction that follows natural infection. In young animals this positive reaction usually disappears in from six to eight months or before the animal becomes of breeding age. Where adult animals are vaccinated with *Br. abortus* vaccine, the positive reaction that follows vaccination may persist for several years."

There is no question your board has authority to make rules and regulations designed to carry out the laws which the legislature has created for you to administer. But such rules and regulations must be reasonable and must not be contrary to the specific provisions of the statute. Your board has no lawmaking power. This is a function of the legislature and cannot be delegated by it to any administrative board or commission.

In the case of *McFatrige et al. v. District Court, et al.*, 113 Mont. 81, 88, 122 Pac. (2d) 834, wherein the question of authority of the Montana Liquor Board to make rules and regulations was considered, the Supreme Court said:

"The board has undertaken to supplement the law by rules and regulations of its own adoption, vesting in itself the discretionary power it has attempted to exercise. This, of course, it cannot do. The board is an administrative body, functioning as a bureau of the executive department of the state government. It has no lawmaking power. Any attempt to create for itself authority and discretion not given by the legislature must fail. The board is authorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law . . . The power to enact statute law was not, and could not, be delegated to the board. The provisions in the regulations adopted by the board by which the discretionary power here in question is assumed and created for itself by the board, are all void and or no effect. All these articles of

regulations undertake to widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment..”

The authority given for the payment of compensation for animals slaughtered by direction of your board, is found in Section 3271, Revised Codes of Montana, 1935. In no place in this, or any other statute, can be found authority to slaughter animals without the payment of compensation therefor as provided by the statute.

A rule or regulation adopted by your board giving you authority to slaughter animals disclosed to be reactors on the initial test of any herd presented for test for bovine brucellosis (Bang's disease), excepting where such a test is required and ordered on dairy herds, would, in my opinion, be an assumption of authority and discretion not given by the legislature. Such a rule or regulation would, in the words of the Supreme Court in the case cited herein, “widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment,” and for that reason would be “void and of no effect.”

It is therefore my opinion that the Livestock Sanitary Board may not provide by rule or regulation that no indemnity shall be paid for cattle slaughtered when disclosed to be reactors upon the initial test for Bang's disease.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General