

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 26

AGRICULTURAL PRODUCTS - Inspection and viral indexing of nursery stock by state agencies;
DEPARTMENT OF AGRICULTURE - Responsibility for viral indexing of nursery stock;
SEED - Inspection and viral indexing of nursery stock by state agencies;
UNIVERSITY SYSTEM - Responsibility of Montana State University for inspection and viral indexing of nursery stock;
ADMINISTRATIVE RULES OF MONTANA - Section 4.12.1406;
MONTANA CODE ANNOTATED - Title 80, chapter 7, part 1; Title 80, chapter 5, part 3.

- HELD: 1. Neither the Department of Agriculture nor Montana State University is required to conduct viral indexing of nursery stock.
2. The Department of Agriculture is authorized to provide viral indexing services to nurserymen under sections 80-7-132, MCA.

16 July 1981

W. Gordon McOmber, Director
Department of Agriculture
Capitol Station
Helena, Montana 59620

Dear Mr. McOmber:

You have requested my opinion on the following question:

Which agency--Montana State University or the Department of Agriculture--has the duty to inspect nursery stock intended for export and issue a document certifying its genetic purity and freedom from pests and diseases, including viral diseases?

Nurserymen in Montana are attempting to enter the market for export to Canada of "nursery stock," which is statutorily defined to include "botanically classified hardy perennial or biennial plants, trees, shrubs, vines, either domesticated or wild plants, cuttings, grafts, scions, buds, bulbs, rhizomes, or roots of them,

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and other plants and plant parts for or capable of propagation," but not including "vegetable, field, or flower seed or corms and tubers." § 80-7-101(1), MCA, see also ARM § 4.12.1406(2). Canadian authorities prohibit the importation into Canada of nursery stock which is not "virally indexed," i.e., which is not certified by a state agency to be free of significant viral infection. No Montana agency currently issues such a certificate, and Montana nurserymen therefore find themselves excluded from the Canadian market. Montana law establishes the Department of Agriculture ("the Department") as the agency responsible for inspection of nursery stock for "diseases and pests". Title 80, ch. 7, pt. 1, MCA. However, the responsibility for "seed certification" is vested in Montana State University ("the University"). Title 80, ch. 5, pt. 3, MCA. Your question is whether the authority granted to these agencies extends to require issuance of the viral indexing certification demanded by the Canadian authorities.

A review of Title 80, chapter 5, MCA, leads to the conclusion that the University's seed certification responsibilities do not extend to certification of freedom from viral infection in nursery stock. Title 80, chapter 5, MCA, pertains to certification of "Agricultural seed," "Vegetable seed," and "Flower seed," all of which appear to be excluded from the statutory definition of the term "nursery stock" in section 80-7-101(1), MCA. More significantly, the definitions of "certifying agency" in section 80-5-102(12), MCA, and "Montana certified seed grower" in section 80-5-201(3), MCA, strongly suggest that the "certification" performed by the University under Title 80, chapter 5, part 3, MCA, pertains to maintenance of "genetic purity and variety identity," and not to freedom from disease. This conclusion is buttressed by the pertinent administrative regulations, which refer to tests for "purity" and "germination," and to the University's responsibility under "Plant Variety Protection Acts," but make no mention of inspection for freedom from disease. I therefore conclude that the University's seed certification responsibilities do not obligate the University to conduct viral indexing and issue a certificate of freedom from viral infection in nursery stock.

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Title 80, chapter 7, part 1, MCA, relates explicitly to "Control of Diseases and Insects in Nurseries." The Department has construed the reach of the statutes broadly in ARM section 4.12.1406(1), by defining insect pests and diseases to include "[i]nsect pests [sic] and diseases injurious to plants and plant products of this state, including any of the stages of development of such insect pests and diseases." However, your letter informs me that the Department has never construed the definition to reach viral diseases, and that the Department lacks the facilities and expertise to inspect for such diseases. An administrative agency's construction of its authorizing statute is entitled to substantial weight. Montana Power Co. v. Cremer, ___ Mont. ___, 596 P.2d 483 (1979). This statutory scheme is not without ambiguity. Section 80-7-111(1), MCA, requires the Department to certify nursery stock which is sold or delivered and which is "free from diseases and pests." Section 80-7-119(1), MCA, on the other hand, requires the Department to certify nursery stock "before it is packed for delivery" if it is "clean and free from insects and fungi pests." (Emphasis added.) While the Department's duty under section 80-7-111(1), MCA, may arguably be said to reach viral diseases, the term "insects and fungi pests" in section 80-7-119(1), MCA, would seem to exclude such diseases. In resolving such ambiguity, I defer to the expertise of the Department and conclude that its statutory duty does not require inspection of nursery stock for viral infection.

Although neither the University nor the Department is statutorily required to conduct viral indexing on nursery stock, it does not follow that Montana nurserymen may not secure a certificate from the State that nursery stock exported to Canada is free from viral disease. Section 80-7-112, MCA, provides:

Any person may request, upon the payment of actual costs to the department, the services of a horticultural inspector to inspect and certify plant products. Subsequent to inspection such horticultural inspector may issue to the person a certificate of inspection signed by him covering any plant product in compliance with rules of the department.

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This section authorizes the Department to promulgate rules governing viral indexing and to provide viral indexing services for nursery stock upon request from a nurseryman at the nurseryman's expense. If expertise and facilities are lacking in Montana, section 80-7-132, MCA, authorizes the director of the Department to enter into agreements with agencies of other states or the federal government to effectuate this goal.

THEREFORE, IT IS MY OPINION:

1. Neither the Department of Agriculture nor Montana State University is required to conduct viral indexing of nursery stock.
2. The Department of Agriculture is authorized to provide viral indexing services to nurserymen under sections 80-7-132, MCA.

Very truly yours,

MIKE GREELY
Attorney General