

VOLUME NO. 36**Opinion No. 84**

DEPARTMENT OF AGRICULTURE—Apiaries, grant of restricted registration. Section 3-3103(6), Revised Codes of Montana 1947; Montana Administrative Code 4-2.34(1)-S3410.

HELD: 1. The Department of Agriculture may refuse to grant a "restricted registration" under MAC 4-2.34(1)-S3410, with petitioned amendments, if the establishment of such apiaries would constitute a danger of the spread of disease or interfere with the proper feeding and honey flow of established registered apiaries.

2. Consideration should be given by the Department, in determining the maximum number of apiaries allowable under a restricted registration, to the general danger of disease spread and feeding interference which might be caused by a given number of hives per acre.

June 2, 1976

Mr. George Lackman, Commissioner
Department of Agriculture
Airport Way Building West
1300 Cedar Street
Helena, Montana 59601

Dear Commissioner Lackman:

You have requested my opinion on the legality of a petitioned amendment to the present MAC 4-2.34(1)-S3410 regarding its concurrence with section 3-3103(6), R.C.M. 1947.

The rule, in pertinent parts, with the petitioned amendments, is as follows (petitioned amendments underlined):

Rule 4-2.34(1)-S3410 LIMITATIONS OF REGISTRATION (1) Each apiary granted registration for the first time since the establishment of the Apiculture Law, shall not be allowed to be registered for locations at a distance closer than three (3) miles from any other apiary location which has been established by a previous registration if the owner of that registration objects. The above registration, however, is subject to the following exceptions:

(a) A person or persons owning, renting or leasing an entire ranch or farm unit **and using the same for other than apiculture purposes**, shall not be subject to the three (3) mile limitation, if they themselves own the apiary. These persons may be granted a "restricted registration". The Department of Agriculture may grant such a restricted registration which is not transferable and is limited to as few colonies as possible but in no case is it to exceed (15) [sic] **thirty five (35)** colonies of bees for each **160 acres owned, rented or leased by the applicant up to a maximum of one hundred fifty (150) colonies for the entire ranch or farm unit. Provided that an applicant whose farm or ranch unit consists of less than 160 acres of land may be granted one colony per acre, but not to exceed thirty-five (35) colonies.**

Section 3-3103(6), R.C.M. 1947, provides:

Certificates of registration may not be issued for new locations of apiaries which are within such close proximity to established registered apiaries that there is or may be danger of spread of disease, or that the proximity will or may interfere with the proper feeding and honey flow of established apiaries."

You ask the following specific questions:

(1) Can the Department refuse to allow a landowner and/or leaseholder of property used primarily for non-apiculture activities to have bee hives owned by himself on such property by granting a "restricted registration" if it may be determined that one or more bee hives would be a danger to the spread of disease or the proper feeding and honey flow of established registered apiaries?

2) If your conclusion to question one is negative can a maximum number of hives allowed within a "restricted registration" be predetermined and adopted without the Department being able to give consideration to the danger of spread of disease or interference with proper feeding and honey flow of established registered apiaries as noted in Section 3-3103(6), R.C.M. 1947, for each application for a "restricted registration?"

The clear language of Section 3-3103(6), R.C.M. 1947, gives the Department of Agriculture the authority to set reasonable distance limits between bee colonies so as to prevent the spread of disease and not interfere with the proper feeding habits of the bees. In its properly delegated discretion, the Department has set a limit of three miles distance between registered apiaries.

The Department has, by regulation, determined that certain classes of non-professional bee-keepers may receive "restricted registrations" which are not subject to the three mile limit. MAC 4-2.34(1)-S3410.

By rule, these non-professional bee-keepers **may** receive such "restricted registration". No right to such a registration is included in the regulatory language, as would be the case had the word "shall" been used rather than the word "may". The Department maintains discretion on whether to grant such "restricted registrations".

In determining whether to issue a restricted registration the Department has the statutory duty, contained in Section 3-3103(6), R.C.M. 1947, to be reasonably certain these hives would not be a danger to the spread of disease or the proper feeding and honey flow of the established registered apiaries. This would be a proper exercise of the State's police power as held by the Montana Supreme Court in **Colville v. Fox**, 51 Mont. 72, 149 P. 496 (1915).

In furtherance of its statutory direction to control the spread of disease and sustain the proper feeding and honey flow of established registered apiaries, any administrative procedure leading to a regulation making an exception to the established three mile limit must give general consideration to the danger of spread of disease and interference with feeding habits when setting the number of hives per acre which may be granted "restricted registration".

The rule, with petitioned amendments, sets a maximum per acre and per farm or ranch unit. A lesser number may be set under the rule on a case by case basis, if the Department reasonably believes the rule's maximum limit would be a danger to the spread of disease or interference with established registered apiaries' feeding and honey flow.

THEREFORE, IT IS MY OPINION:

1. The Department of Agriculture may refuse to grant a "restricted registration" under MAC 4-2.34(1)-S3410, with petitioned amendments, if the establishment of such apiaries would constitute a danger of the spread of disease or interfere with the proper feeding and honey flow of established registered apiaries.

2. Consideration should be given by the Department, in determining the maximum number of apiaries allowable under a restricted registration, to the general danger of disease spread and feeding interference which might be caused by a given number of hives per acre.

Very truly yours,

ROBERT L. WOODAHL
Attorney General