

VOLUME NO. 38

OPINION NO. 69

ADMINISTRATIVE PROCEDURE - Requirement for hearing on change of Department of Livestock policy;
LIVESTOCK - Responsibility of Department of Livestock in registering security interest in livestock;
SECURED TRANSACTIONS - Identification of security interests in livestock;
MONTANA CODE ANNOTATED - Sections 2-3-104(2), 2-4-302(2), (4) 2-4-305(1), 2-4-306(2), 81-1-102, 81-8-301;
1972 MONTANA CONSTITUTION - Article II, section 8.

- HELD: 1. The Department of Livestock may adopt a new policy interpreting its responsibilities under section 81-8-301, MCA.
2. This policy need not provide the markets with tally sheets giving the state of title of individual animals or groups of animals.
3. In adopting a new policy, the Department must comply with the Montana Administrative Procedure Act.

28 February 1980

Les Graham, Administrator
Brands Enforcement Division
Department of Livestock
State Capitol
Helena, Montana 59601

Dear Mr. Graham:

You have requested my opinion regarding the duties of the Department of Livestock (hereafter "the Department") under section 81-8-301, MCA, which provides:

Notice of security agreements. The Department of Livestock shall accept and file notices of security agreements, renewals, assignments, and satisfactions covering livestock owned by a person, firm, corporation, or association and bearing its recorded brand and shall list the notices on the official records of marks and brands kept by it. The department shall also list the notices in the offices of the stock inspectors employed by the department and stationed at the central livestock markets where records are kept of marks and brands. All forms on which notices are given shall be prescribed by the department and furnished by the secured party who gives the notice. A livestock market to which livestock is shipped may not be held liable to any secured party for the proceeds of livestock sold through the livestock market by the debtor unless notice of the security interest is filed as hereinbefore provided.

Pursuant to this statute, the Department has established a system whereby a list of security interests filed against branded livestock is compiled and sent weekly to the stock inspectors at major livestock market centers. The stock inspectors then index the security interests by brand. When livestock are sold, a "tally sheet" is prepared by the stock inspector. The inspector compares the brand of the cattle sold with his record of security interest and states on the tally sheet whether the proceeds of the sale should be paid to the seller alone or to the seller and a secured party jointly. This policy has been in effect since the enactment of the predecessor to section 81-8-301, MCA, in 1935.

Your letter informs me that the Department has recently learned that it may be exposing itself to liability in cases

where livestock markets rely on information provided in the tally sheets which turns out to be erroneous. The Department therefore wishes to alter its policy by providing indexed information and tally sheets only to those markets which execute an agreement exonerating the Department from liability for errors in the information. You raise three questions:

1. May the Department alter a policy which it has adhered to for over forty years?
2. Does section 81-8-301, MCA, require the Department to give markets actual notice of the existence of security interests in branded livestock through indexes and tally sheets?
3. If the policy may be altered, what procedures must be followed in adopting a new policy?

In response to your first inquiry, I am aware of no statutory or constitutional impediment to the adoption of a new policy, provided the policy adopted conforms to the statute. An agency which performs gratuitous services does not, with the passage of time, incur a legal obligation to continue to do so, absent the applicability of estoppel principles to specific cases. If the provision of indexes and tally sheets was not statutorily required, the fact that the Department had provided them for forty years does not create a legal duty to continue to do so. I conclude that the Department may substitute for the present policy a properly adopted policy which complies with the Department's statutory duty.

The Department's duties under section 81-8-301, MCA, are basically two-fold. The first sentence of the statute requires the Department to record security interests in livestock on its official records of marks and brands. The proposed policy will make no change in current practice in this area. The second sentence of the section requires the Department to "list the notices in the offices of the stock inspectors employed by the Department and stationed at the central livestock markets where records are kept of marks and brands." In my opinion, this second statutory duty is satisfied if the Department requires stock inspectors to provide the market with records from which the existence of a security interest in cattle bearing a particular brand may readily be determined. In Montana Meat Co. v. Missoula Livestock Auction Co., 125 Mont. 66, 230 P.2d 955 (1951), the Montana Supreme Court discussed the nature of the pro-

cedure of gaining notice of security interest in livestock under the predecessor to section 81-8-301, MCA. The Court noted that livestock markets are highly regulated at both the federal and state levels, and that this regulation inhibits their ability to investigate title to the livestock they sell. The legislature provided section 81-8-301, MCA, as a means of making less onerous the burden of the livestock markets. The Legislature did not, however, require the Department to act as an insurer of title to livestock. Rather, the intent of the legislation was to provide a clearing house at each major market where title information on branded livestock would be readily available. Clearly, the statute does not require the Department to evaluate the title of each animal sold and certify its title status to the market. The Department's statutory duty is to "list the notices." In my opinion this duty is fulfilled if it provides the markets with access to title information in usable form.

The Department must provide constructive notice of title. The question of whether this requirement may be met without indexing the material at the office of the local stock inspector depends on whether the unindexed material is sufficient to allow the market with reasonable effort to ascertain the state of title of the cattle sold.

Since this question is one of fact, I express no opinion. The determination as to what steps are necessary to give adequate constructive notice is within the particular expertise of your Department, and within the Department's rulemaking authority under section 81-1-102, MCA.

Your final inquiry concerns the procedures which must be followed in adopting a new policy in this area. Article II, section 8 of the 1972 Montana Constitution affords citizens of this State the right to "reasonable opportunity for citizen participation" in affairs of government. The Montana Administrative Procedure Act fulfills this constitutional mandate in the context of a rulemaking proceeding by providing for notice and hearing. See § 2-3-104(2), MCA. The procedures for rulemaking are set forth in Title 2, chapter 4, part 3, MCA. Briefly, the rulemaking agency is required to publish notice in the Montana Administrative Register of its intention to promulgate a rule on a particular subject. § 2-4-302(2), MCA. Interested parties must be afforded the opportunity to testify or present in writing their views on the proposed rule. § 2-4-302(4), MCA. The agency must consider the evidence presented and

adopt or reject the proposed rule, stating the reasons for its action. § 2-4-305(1), MCA. An adopted rule must then be filed with the Secretary of State. § 2-4-306(2), MCA. This brief overview is not an exhaustive analysis of the Department's duties in a rulemaking proceeding. However, the statutes explicitly set forth the steps which must be taken. See, J. McCrory, Administrative Procedures in Montana: A View After Four Years With The Montana Administrative Procedure Act, 38 Mont. L. Rev. 1 (1977).

THEREFORE, IT IS MY OPINION:

1. The Department of Livestock may adopt a new policy interpreting its responsibilities under section 81-8-301, MCA.
2. This policy need not provide the markets with tally sheets giving the state of title of individual animals or groups of animals.
3. In adopting a new policy, the Department must comply with the Montana Administrative Procedure Act.

Very truly yours,

MIKE GREELY
Attorney General