

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 53

LIENS - Whether notice of right to claim construction lien must be acknowledged;

PROPERTY, REAL - Whether notice of right to claim construction lien must be acknowledged;

REAL ESTATE - Whether notice of right to claim construction lien must be acknowledged;

TITLE TO PROPERTY - Whether notice of right to claim construction lien encumbers;

MONTANA CODE ANNOTATED - Title 70, chapter 21; sections 70-21-201, 70-21-203, 70-21-301, 71-3-521 to 71-3-542, 71-3-522, 71-3-523, 71-3-526, 71-3-531, 71-3-532, 71-3-535, 71-3-536;

MONTANA LAWS OF 1987 - Chapter 202.

HELD: A notice of right to claim a lien filed with a county clerk and recorder pursuant to section 71-3-531, MCA, is not subject to the acknowledgment requirements of section 70-21-203, MCA.

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11 January 1988

Harold F. Hanser
Yellowstone County Attorney
Yellowstone County Courthouse
Billings MT 59101

Dear Mr. Hanser:

You have requested my opinion concerning the following question:

Is a notice of right to claim a lien sought to be filed pursuant to section 71-3-531, MCA, required to be acknowledged in accordance with section 70-21-203, MCA, before a county clerk and recorder may accept it for such filing?

I conclude that such notice need not be acknowledged as a condition to filing.

The 1987 Legislature substantially revised Montana statutes dealing with mechanics' liens and established a new procedure for perfecting a "construction lien." 1987 Mont. Laws, ch. 202 (codified in §§ 71-3-521 to 542, MCA); see generally Joint Interim Committee on Lien Laws, Creditor's Rights v. Debtor's Shields: A Report to the 50th Legislature 8-12 (1986). A construction lien is, as a general matter, one against real property which arises from the furnishing of services or materials used to produce a change in the physical condition of that property. §§ 71-3-522(2), 71-3-522(5), 71-3-523, MCA. The amount of the lien is limited to the unpaid portion of the amount agreed upon by the contracting owner, defined as "a person who owns an interest in real estate and who, personally or through an agent, enters into an express or implied contract for the improvement of the real estate[,]" and the person furnishing the services or materials. §§ 71-3-522(3), 71-3-522(4), 71-3-526, MCA. A notice of right to claim a lien must ordinarily be delivered or mailed to the contracting owner and, within five business days of such delivery or mailing, filed with the clerk and recorder of the county in which the improved property is located as a condition precedent to filing a construction lien. §§ 71-3-531(2), (4), (5), MCA. The notice's content is statutorily prescribed and intended to warn the property owner that a lien may attach as a result of the services or supplies furnished and that the owner should take precautions to avoid the possibility of double payments with respect to the improvements. § 71-3-532(3), MCA. The statutory form

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of the notice does not provide for acknowledgement. The contents of and filing requirements for the actual construction lien are separately set forth in sections 71-3-535 and 71-3-536, MCA.

Title 70, chapter 21, MCA, deals broadly with the recordation of instruments or judgments affecting title to or possession of real property. See § 70-21-201, MCA. Section 70-21-203, MCA, mandates that all such instruments, with specified exceptions inapplicable here, be acknowledged as provided under Title 1, chapter 5, parts 1 through 3, before recordation by a county clerk and recorder. I need not determine whether a clerk and recorder's obligation to accept a notice of right to claim a lien for "filing" constitutes a duty to "record" such document since, for those reasons stated below, I conclude the notice is not an "instrument" subject to the acknowledgment requirements of section 70-21-203, MCA.

It must be emphasized that the recordation provisions in Title 70, chapter 21 are intended to govern the recordation of only certain kinds of instruments or judgments and therefore do not control, or even authorize, the recordation of other documents. The types of instruments subject to these provisions are described more fully in section 70-21-301, MCA, which defines the term "conveyance" to include "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected, except wills." Although this term appears only in sections 70-21-301 to 309, MCA, it seems clearly intended to have a meaning coterminous with that of "instrument" in section 70-21-201, MCA; any other interpretation would necessarily limit the provisions in Title 70, chapter 21, part 3, which detail the effects of recordation, to a lesser group of instruments than otherwise allowed to be recorded under such chapter--a result directly at odds with the object of those provisions. When the meaning of the term "instrument" is so amplified, it becomes obvious a notice of right to claim a lien does not fall within its scope because such notice has no impact, either as an encumbrance or in some other manner, on title to or possession of the involved real property. A notice instead serves merely to alert a property owner that construction services or supplies have been, or are being, furnished and that the owner should take various steps to ensure payments he makes to one contractor, which are to be used in whole or in part to satisfy obligations to a subcontractor, are actually utilized for their intended purposes.

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THEREFORE, IT IS MY OPINION:

A notice of right to claim a lien filed with a county clerk and recorder pursuant to section 71-3-531, MCA, is not subject to the acknowledgment requirements of section 70-21-203, MCA.

Very truly yours,

MIKE GREELY
Attorney General