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Montana Legislative Services Division
Legal Services Office

December 18, 2009

To: DSA Comments
Animal Health Division
Department of Livestock

From: Bart Campbell
Staff Attorney
Legislative Services Division

Re: Procedures used in adopting Official Order NO. 09-02-D

Attn: Christian Mackay, Executive Director, Dept. of Livestock and Martin A. Zaluski,
State Veterinarian

Dear Sirs;

I am writing to you in order to comment on the proposed order No. 09-02-D as the Legislative Services staff attorney assigned to the Economic Affairs Interim Committee (EAIC). Under 5-5-223, MCA, the EAIC is charged with program evaluation and monitoring functions for several agencies including the Department of Livestock. In reviewing the procedures taken with respect to the order it is my conclusion that the procedures used are not in conformance with Montana law.

The proposed order is ordered by the state veterinarian and is to be approved by the Board of Livestock. The order states that the authority for the order is 81-2-102(1)(d), MCA, and ARMs 32.3.103, 32.3.104, 32.3.105, and 32.3.116. The problem is that 81-2-102(1)(d) does not authorize any action by the Board or the state veterinarian. 81-2-102(1) begins "(1) The department may:" and nowhere in state law is the department authorized to delegate the authority given to it by the legislature to an employee appointed by the Board. In order to be valid the order must be made by the department as only it has the authority to act in the area described in 81-2-102(1)(d), MCA.

The administrative rules referred to in the proposed order contain language authorizing or requiring the state veterinarian to take certain actions including issuing orders to prevent diseases. Again the problem is that the rules cite 81-2-102, MCA, and 81-20-101, MCA, as the authorizing and implemented sections. Both of those statutes are specifically limited to giving the department the authority to act in those areas. The language in the rules given authority to the board and the state veterinarian is not supported by statutory law .

Sincerely,

Bart Campbell
Staff Attorney