

LEGAL REVIEW NOTE

LC#: LC0439, To Legal Review Copy, as of
November 16, 2012

Short Title: Separate agisters' liens from
mechanics liens

Attorney Reviewer: Todd Everts

Date: November 26, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0439, as drafted, may raise potential constitutional issues associated with the due process provisions of Article II, section 17, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution. Article II, section 17, of the Montana Constitution provides "No person shall be deprived of life, liberty, or property without due process of law." Section 1 of the Fourteenth Amendment to the United States Constitution provides "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

LC0439, Section 1 (2)(b) as drafted, authorizes that a person holding an agister's lien may retain possession of livestock until the amount due on the lien is paid. If payment on the agister's lien is not made within 30 days, the person entitled to the lien may enforce the lien through a sheriff's sale of the livestock covered by the lien (Section 3). Under Section 3, the sheriff is required to give notice, 10 days prior to the sale of the livestock, to the person that is subject to the lien.

LC0439, as drafted, does not provide the person subject to the lien an opportunity to be heard prior to the sale of the property subject to the lien. The United States District Court for the District of Montana has held that constitutional due process in the enforcement of an agister's lien requires both notice and an opportunity to be heard. (*Cox v. Yellowstone County*, 795 F.

Supp. 2d 1128, 2011). Consequently, a potential issue is whether denying the person subject to the agister's lien an opportunity to be heard violates the constitutional due process provisions.

Requester Comments: None

Dear Todd Everts,

This letter sets forth the responses to the comments contained in your letter dated November 16, 2012, relating to legal concerns of SB 86. The comments are set forth in bold, italicized text and our responses are set forth in plain text immediately beneath each comment.

Whether SB 86, as written, violates the due process clause:

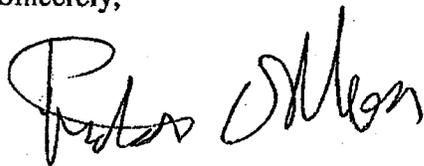
SB 86 distinguishes an agister's lien from other liens for service because of the unique issues that arise when dealing with livestock. The opinion in Cox v. Yellowstone County shows us why this distinction is necessary. In Cox, the United States District Court for the District of Montana articulated the balancing test required when there has been a deprivation of property:

"[C]onsideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third...***principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.***" Emphasis added.

In Cox the Court held that due process rights are not violated when a state foregoes a hearing if there is a justification for doing so. In Cox, Yellowstone County did not offer any justification; however, Montana has substantive justification to support the expedited process outlined in this bill. Taking care of another person's livestock is a costly, time consuming task. A party seeking an agister's lien for nonpayment has already sustained a loss. It would be unreasonable and unfair to Montana's caretakers to suffer detrimental losses because of another person's nonpayment. A prolonged hearing and notice process, even if a few weeks, could be long enough to cause irreparable monetary harm. Montana has a substantial interest in making sure caretakers don't go out of business because of the losses involved in enforcing a lien for nonpayment. The substantial cost and commitment involved in taking care of livestock makes an

agister's lien different than the typical liens for service (e.g. lien on a car) and that is why SB 86 is needed and constitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Olson". The signature is written in a cursive style with a large initial "P" and "O".