

TO: SENATE COMMITTEE ON AGRICULTURE, LIVESTOCK AND IRRIGATION
FROM: WILLIAM B. HANSON, ATTORNEY FOR COUNTRY CLASSIC DAIRIES, INC.
DATE: JANUARY 29, 2009
RE: SB 286 – REVISE MILK CONTROL LAWS

* * *

Country Classic Dairies opposes the Bill because it is poor public policy and because a simpler administrative solution exists. SB 286 is not a mere clarification of existing law.

It would be poor public policy to change the current division of responsibility for price fixing and enforcement.

Under current law, the Board of Milk Control enacts pricing rules, while the Department of Livestock, "enforces and audits" rules adopted by the Board of Milk Control. [81-23-302]

Under current law, the function of the Board of Milk Control is to enact pricing rules. On the other hand, the Department of Livestock is mandated to "supervise, regulate, and control the milk industry of this state, including the production, processing, storage, distribution, and sale of milk sold for consumption in this state." [81-23-103]

Under current law, the Legislature wisely recognized that the public agency charged with adopting fair pricing rules should be different from the agency charged with enforcing the pricing rules and controlling the milk industry.

This division of responsibility puts the price fixing agency in a position where it remains neutral and does not get involved in resolving disputes about the enforcement of price rules. This instills confidence and trust in the milk industry community, and the public, that the pricing rules are adopted by a true neutral. This is similar to the Legislature adopting laws that are enforced by the Executive branch. Thus, a system of "checks and balances" is the basis of current law.

It would be poor public policy to make broad, sweeping changes in a valid statutory scheme because the Milk Control Bureau Chief and the Board of Milk Control want the Board of Milk Control to enforce its pricing rules.

The Milk Control Bureau is an administrative bureau of the Department of Livestock. [Exhibit I.] The Bureau has traditionally audited compliance with milk pricing rules adopted by the Board of Milk Control.

In 2007, Country Classic Dairies contested the Board of Milk Control's authority under 81-23-

302(17) to enforce certain pricing rules when the Milk Control Bureau alleged violations and the Board of Milk Control sought to enforce them. [See Exhibit G.]

The issue was referred to two attorneys in the Agency Legal Services Bureau of the Attorney General's office. They agreed with Country Classic Dairies' position. [See Exhibit G.] The matter was then dropped by all concerned.

In 2008, the issue of jurisdiction to enforce pricing rules came up again.

When the Board of Milk Control appeared ready to go forward with enforcement action under its minimum pricing rule, Country Classic Dairies filed a suit in Gallatin County.

Country Classic Dairies asked the District Court to declare that the statutory scheme, especially 81-23-302(17), empowered only the Department of Livestock to enforce the Board of Milk Control's pricing rules.

Country Classic Dairies' attorneys learned the Milk Control Bureau Chief proposed legislative changes in the Spring, 2008. [See Exhibit C.] These changes were substantially the same as those now proposed in SB 286. [See Exhibits A – E.]

Country Classic Dairies also learned that the Department of Livestock and the Governor's office declined to support the proposed legislative changes because the Department of Livestock felt the issue of jurisdiction could be solved by the Department of Livestock delegating issues to the Board of Milk Control. [See Exhibit F.]

The Gallatin County suit is being resolved. The Milk Control Bureau and the Board of Milk Control moved to dismiss with prejudice their claim against Country Classic Dairies that alleged that the minimum pricing rule was violated. They also moved to dismiss Country Classic Dairies' claims without prejudice. Country Classic Dairies is not objecting to these motions.

Country Classic Dairies also submitted to the Board of Milk Control a proposed rule concerning enforcement jurisdiction. [See Exhibit H.] This rule would, if adopted, permit either the Board of Milk Control or a Hearing Examiner to hold a contested case hearing, at the election of the alleged violator. This contested case hearing would determine whether a violation of pricing rules occurred. The Department of Livestock would receive proposed findings of fact from either the Board of Milk Control or the Hearing Examiner. The Department would make the final enforcement decision.

An administrative solution to the issue of jurisdiction is before the Board of Milk Control. Therefore, there is no need to change existing law. This is not a matter of simply clarifying existing law; SB 286 would fundamentally change a wise balance of power. Price rule making, and milk industry control (including rule enforcement) should be kept separate as a matter of sound policy.

**TABLE OF EXHIBITS
COUNTRY CLASSIC DAIRIES, INC.
January 29, 2009 Hearing- SB 286**

A.	Letter Country Classic counsel to Milk Control Bureau Chief	June 23, 2008
B.	Memo from Milk Control Bureau Chief to Country Classic Counsel	June 24, 2008
C.	Email from Bureau Chief with Proposed Statutory Changes	April 29, 2008
D.	Email from Bureau Chief with Proposed Statutory Changes	May 9, 2008
E.	Memo from Bureau Chief about Proposed Statutory Changes	June 14, 2008
F.	Memo to Milk Control Board re: Proposed Statutory Changes	June 20, 2008
G.	DOJ Legal Memorandum re: Milk Board's Jurisdiction	October 1, 2007
H.	Proposed Rule Change for Jurisdiction submitted	January 22, 2009
I.	ARM 32.1.101 Organization Rule - Department of Livestock	As of January 29, 2009

KASTING, KAUFFMAN & MERSEN, P.C.
A T T O R N E Y S A T L A W

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JUN 23 2008

MILK CONTROL BUREAU

June 23, 2008

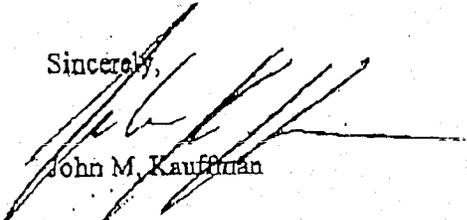
VIA FACSIMILE (406) 444-1432
Monte Nick, Chief
Montana Milk Control Bureau
PO Box 202003
Helena, MT 59620-2003

Re: Legislative Work on Milk Control Bureau or Board of Milk Control

Dear Monte:

I understand that the you or someone acting with the Milk Control Bureau or Board of Milk Control have drafted or working on drafting some proposed legislation that would either change an existing statute or add a new statute related to the Board of Milk Control. Please send me a copy of any proposed legislation that you have or have worked on regarding the Board of Milk Control or the Milk Control Bureau for the upcoming legislative session. Thank you.

Sincerely,


John M. Kauffman

c: Country Classic Dairies, Inc.
Bernard Hubley (by fax only) (406) 449-4849

Exhibit A

Memo

To: John M Kauffman, Attorney at Law
From: Monte Nick, Bureau Chief *MN*
Date: June 24, 2008
Re: Your Letter dtd June 23, 2008 - Legislative Changes

There has been no statute changes submitted to the upcoming legislative session by the Milk Control Bureau. The deadline for submitting any changes was April 14th, 2008.

c. Country Classic Dairies
Bernie Hubley

Bernie Hubley

From: Nick, Monte (LIV) [monick@mt.gov]
Sent: Tuesday, April 29, 2008 11:04 AM
To: Bernie Hubley; Gary Parker (mparker@3wires.net); Larry Vandyke (lavandyke@montana.com); Michael F Kleese (mkleese@firstam.com); R Clyde Greer (cgmgreer@yahoo.com)
Subject: Revised MCA
Attachments: MCA New.doc

Attached is a quick re-write of the MCA. Cross-outs is text to be deleted while underlines are additions. Please review and let me know what you think, especially 81-23-406. I'll send a hard copy to Jim.
Thanks,
Monte

Exhibit C

DRAFT

Montana Code Annotated

Title 81 – Chapter 23

DRAFT

81-23-101. Definitions. (1) Unless the context requires otherwise, in this chapter, the following definitions apply:

(a) "Board" means the board of milk control provided for in 2-15-3105.

(b) "Bureau" means the Milk Control Bureau

~~(b)~~ (c) (i) "Class" refers to the classes of utilization of milk that the department board shall define by rule.

(ii) In adopting rules under this subsection (1)~~(b)~~(c), the department board shall use the current definitions of classes of utilization of milk that are found in Title 7 CFR, part 1000.40, except that the department board may combine any of the classes of milk provided for in the federal definitions into a single class.

~~(c)~~ (d) "Consumer" means a person or an agency, other than a dealer, who purchases milk for consumption or use.

~~(d)~~ (e) "Dealer" means a producer, distributor, producer-distributor, jobber, or independent contractor.

(e) (f) "Distributor" means a person purchasing milk from any source, either in bulk or in packages, and distributing it for consumption in this state. The term includes what are commonly known as jobbers and independent contractors. The term, however, excludes a person purchasing milk from a dealer licensed under this chapter, for resale over the counter at retail or for consumption on the premises.

(f) (g) "Licensee" means a person who holds a license from the department.

~~(g)~~ (h) "Market" means an area of the state designated by the department as a natural marketing area.

~~(h)~~ (i) "Milk" means the lacteal secretion of a dairy animal or animals, including those secretions when raw and when cooled, pasteurized, standardized, homogenized, recombined, concentrated fresh, or otherwise processed and all of which are designated as grade A by a constituted health authority and including those secretions that are in any manner rendered sterile or aseptic, notwithstanding whether they are regulated by any health authority of this or any other state or nation.

(i) (j) "Person" means an individual, firm, corporation, or cooperative association or the dairy operated by the department of corrections at the Montana state prison.

(j) (k) "Producer" means a person who produces milk for consumption in this state, selling it to a distributor.

~~(k)~~ (l) "Producer prices" means those prices at which milk owned by a producer is sold in bulk to a distributor.

(l) (m) "Producer-distributor" means a person both producing and distributing milk for consumption in this state.

~~(m)~~ (n) "Retailer" means a person selling milk in bulk or in packages over the counter at retail or for consumption on the premises and includes but is not

limited to retail stores of all types, restaurants, boardinghouses, fraternities, sororities, confectioneries, public and private schools, including colleges and universities, and both public and private institutions and instrumentalities of all types and description.

(2) The department board may assign new milk products to the class that the department board considers proper.

History: En. Sec. 3, Ch. 204, L. 1939; amd. Sec. 1, Ch. 192, L. 1959; amd. Sec. 3, Ch. 4, L. 1967; amd. Sec. 1, Ch. 107, L. 1971; amd. Sec. 89, Ch. 431, L. 1975; R.C.M. 1947, 27-403; amd. Sec. 2, Ch. 274, L. 1981; amd. Sec. 1, Ch. 56, L. 1993; amd. Sec. 1, Ch. 242, L. 1995; amd. Sec. 2, Ch. 333, L. 1995; amd. Sec. 557, Ch. 546, L. 1995; amd. Sec. 1, Ch. 135, L. 2003; amd. Sec. 1, Ch. 23, L. 2007.

81-23-102. Policy (Remains Un-Changed)

81-23-103. General powers of department the board (1) The department board shall supervise, regulate, and control the milk industry of this state, including the production, processing, storage, distribution, and sale of milk sold for consumption in this state. This chapter does not affect the status, force, or operation of any provision of public health laws, county board of health rules, or municipal ordinances for the promotion or protection of the public health. The department board may cooperate with the department of public health and human services, a county or city board of health, or the department of agriculture in enforcing this chapter.

(2) The department board shall investigate all matters pertaining to the production, processing, storage, distribution, and sale of milk in this state and shall conduct hearings on any subject pertinent to the administration of this chapter. The department board may subpoena milk dealers, their records, books, and accounts, and any other person from whom information may be desired or considered necessary to carry out the purposes and intent of this chapter. The department board may take depositions of witnesses who are sick or absent from the state or who cannot otherwise appear in person before the department board at its offices. The department board shall give at least 10 days' notice to the proposed witness.

History: En. Sec. 5, Ch. 204, L. 1939; amd. Sec. 3, Ch. 192, L. 1959; amd. Sec. 4, Ch. 4, L. 1967; amd. Sec. 1, Ch. 267, L. 1975; amd. Sec. 90, Ch. 431, L. 1975; amd. Sec. 1, Ch. 19, L. 1977; R.C.M. 1947, 27-405; amd. Sec. 3, Ch. 333, L. 1995; amd. Sec. 359, Ch. 418, L. 1995; amd. Sec. 558, Ch. 546, L. 1995.

81-23-104. Rules and orders. The department board may adopt and enforce rules and orders necessary to carry out the provisions of this chapter and any orders adopted under it by the department or the board. A rule or order shall be posted for public inspection in the main office of the department of livestock for 30 days, and a copy shall be filed in the office of the department of livestock. A

copy shall also be sent by registered or certified letter to the secretary of each area, except in the case of an order directed only to a person or persons named in it, which shall be served by personal delivery of a copy or by mailing a copy to each person to whom the order is directed or, in the case of a corporation, to any officer or agent of the corporation upon whom a summons may be served in accordance with laws of this state. The posting, in the main office of the department of livestock, of a rule or order not required to be personally served as provided in this section and the filing in the office of the department of livestock is sufficient notice to all persons affected by the rule or order. A rule or order when properly posted and filed or served, as provided in this section, has the force of law.

History: En. Sec. 13, Ch. 204, L. 1939; amd. Sec. 97, Ch. 431, L. 1975; R.C.M. 1947, 27-413.

81-23-105. Testing of milk. (1) For the purpose of determining the value of milk supplied by producers during routine audits of milk processing plants that receive raw milk directly from producers, the department of livestock may establish a program of testing raw milk.

(2) The department of livestock may levy an assessment on licensed producers to secure the necessary funds to administer this program. This assessment is in addition to those provided in 81-23-202.

(3) All personnel employed in the sampling and testing program must be licensed by the animal health division of the department of livestock.

(4) The department of livestock may conduct all types of sampling, grading, and testing techniques that the department of livestock considers necessary to carry out the intent of this section.

81-23-106. Application (Remains Un-Changed)

81-23-201. Licenses to producers, producer-distributors, distributors, and jobbers. In any market where the provisions of this chapter apply, it is unlawful for a producer, producer-distributor, distributor, or jobber to produce, transport, process, store, handle, distribute, buy, or sell milk unless the dealer is properly licensed as provided by this chapter. It is unlawful for a person to buy, sell, handle, process, or distribute milk which he knows or has reason to believe has been previously dealt with or handled in violation of any provision of this chapter. The department board may decline to grant a license or may suspend or revoke a license already granted, upon due cause and after hearings.

History: En. Sec. 8, Ch. 204, L. 1939; amd. Sec. 4, Ch. 107, L. 1971; amd. Sec. 93, Ch. 431, L. 1975; R.C.M. 1947, 27-408.

81-23-202. Licenses -- disposition of income. (1) A producer, producer-distributor, distributor, or jobber may not engage in the business of producing or selling milk subject to this chapter in this state without first having obtained a

license from the department of livestock, milk and egg inspection bureau as provided in 81-22-202, and the bureau or, in the case of milk entering this state from another state or foreign nation, without complying with the requirements of the Montana Food, Drug, and Cosmetic Act and without being licensed under this chapter by the department of livestock and the bureau. The annual fee for the license from the department bureau is \$2 and is due before July 1 and must be deposited by the department bureau in the general fund. The license required by this chapter is in addition to any other license required by state law or any municipality of this state. This chapter applies to every part of the state of Montana.

(2) In addition to the annual license fee, the department board shall, in each year, before April 1, for the purpose of securing funds to administer and enforce this chapter, levy an assessment upon producers, producer-distributors, and distributors as follows:

(a) a fee per hundredweight on the total volume of all milk subject to this chapter produced and sold by a producer-distributor;

(b) a fee per hundredweight on the total volume of all milk subject to this chapter sold by a producer;

(c) a fee per hundredweight on the total volume of all milk subject to this chapter sold by a distributor, excepting that which is sold to another distributor.

(3) The department board shall adopt rules fixing the amount of each fee. The amounts may not exceed levels sufficient to provide for the administration of this chapter. The fee assessed on a producer or on a distributor may not be more than one-half the fee assessed on a producer-distributor.

(4) (a) In addition to the fees established in subsections (1) through (3), the department of livestock shall assess a fee per hundredweight on the volume of all classes of milk produced and sold by a person licensed by the department of livestock and/or the bureau to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department of livestock. The fee must be established pursuant to 81-1-102(2).

(b) A person licensed by the department bureau shall report to the department bureau on a monthly basis the volume of milk produced. All reporting documentation must be submitted on forms approved or provided by the department bureau.

(5) The assessments upon producer-distributors, producers, and distributors must be paid quarterly before January 15, April 15, July 15, and October 15 of each year. The amount of the assessments must be computed by applying the fee designated by the department board and the fee established in subsection (4) to the volume of milk sold in the preceding calendar quarter.

(6) Failure of a producer-distributor, producer, or distributor to pay an assessment when due is a violation of this chapter, and a license under this chapter automatically terminates and is void. A terminated license must be reinstated by the department bureau upon payment of a delinquency fee equal to 30% of the assessment that was due.

(7) All assessments required by this chapter must be deposited by the department bureau in the state special revenue fund. All costs of administering

chapter 22 and this chapter, including the salaries of employees and assistants, per diem and expenses of board members, and all other disbursements necessary to carry out the purpose of chapter 22 and this chapter, must be paid out of the board money in that fund.

(8) The department board may, if it finds the costs of administering and enforcing this chapter can be derived from lower rates, amend its rules to fix the rates at a less amount on or before April 1 in any year.

History: Ap. p. Sec. 9, Ch. 204, L. 1939; amd. Sec. 6, Ch. 192, L. 1959; amd. Sec. 157, Ch. 147, L. 1963; amd. Sec. 5, Ch. 107, L. 1971; amd. Sec. 2, Ch. 127, L. 1974; amd. Sec. 94, Ch. 431, L. 1975; Sec. 27-409, R.C.M. 1947; Ap. p. Sec. 23, Ch. 204, L. 1939; amd. Sec. 106, Ch. 431, L. 1975; Sec. 27-423, R.C.M. 1947; R.C.M. 1947, 27-409, 27-423(part); amd. Sec. 1, Ch. 277, L. 1983; amd. Sec. 1, Ch. 566, L. 1993; amd. Sec. 3, Ch. 242, L. 1995; amd. Sec. 5, Ch. 333, L. 1995; amd. Sec. 2, Ch. 135, L. 2003.

81-23-203. Application for licenses. An applicant for license to operate as a producer, producer-distributor, distributor, or jobber shall file a signed application upon a blank prepared by the department bureau and containing the information required by the department bureau. The application must certify the applicant to be the holder of all licenses required by the department bureau for the conduct of the applicant's business or, in the case of milk entering this state from another state or foreign nation, compliance with the requirements of the Montana Food, Drug, and Cosmetic Act. The application must be accompanied by the license fee required to be paid.

History: En. Sec. 10, Ch. 204, L. 1939; amd. Sec. 7, Ch. 192, L. 1959; amd. Sec. 6, Ch. 107, L. 1971; amd. Sec. 95, Ch. 431, L. 1975; R.C.M. 1947, 27-410; amd. Sec. 6, Ch. 333, L. 1995.

81-23-204. Declining, suspending, and revoking licenses -- penalties in lieu of suspension or revocation. (1) The department board may refuse to grant a license or may suspend or revoke a license already granted for due cause upon due notice and after hearing. The violation of any provisions of this chapter or of any lawful order or rule of the board or ~~department~~, the failure or refusal to make required statements or reports, or failure to pay license or assessment fees are causes for which the department board may suspend or revoke a license.

(2) In place of suspension or revocation of a license, the department board may assess a civil penalty not to exceed \$500 per day for each daily failure to comply with or each daily violation of the provisions of this chapter or of any lawful order or rule of the ~~department~~ or board. If the person against whom a civil penalty is assessed fails to pay the civil penalty immediately, the department board shall collect the civil penalty by a civil proceeding in the district court of the first judicial district. This penalty shall be construed as civil and not criminal in nature. Any moneys received by the department bureau as a result of collection

of civil penalties shall be paid into the state special revenue fund as provided by 81-23-403.

History: En. Sec. 11, Ch. 204, L. 1939; amd. Sec. 7, Ch. 107, L. 1971; amd. Sec. 96, Ch. 431, L. 1975; R.C.M. 1947, 27-411; amd. Sec. 3, Ch. 23, L. 1983; amd. Sec. 1, Ch. 277, L. 1983.

81-23-205 Repealed

81-23-301 Repealed

81-23-302. Establishment of minimum prices. (1) The board shall, by adopting rules, fix minimum producer prices for classes of utilization of milk as defined by the department board.

(2) The board shall establish prices by means of flexible formulas that must be devised so that the formulas bring about automatic changes in all minimum prices that are justified on the basis of changes in production, supply, processing, distribution, and retailing costs.

(3) The board shall consider the balance between production and consumption of milk, the costs of production and distribution, and prices in adjacent and neighboring areas and states so that minimum prices that are fair and equitable to producers and consumers may result.

(4) The board shall, when publishing notice of proposed rulemaking under authority of this section, set forth the specific factors that must be taken into consideration in establishing the formulas and, in particular, in determining costs of production and of the actual dollars and cents costs of production that preliminary studies and investigations of auditors or accountants in the department of livestock's employment indicate will or should be shown at the hearing so that all interested parties will have an opportunity to be heard and to question or rebut the considerations as a matter of record.

(5) Specific factors may include but are not limited to the following items:

(a) current and prospective supplies of milk in relation to current and prospective demands for milk for all purposes;

(b) the cost factors in producing milk, which must include among other things the prices paid by farmers generally, as used in parity calculations of the United States department of agriculture, prices paid by farmers for dairy feed in particular, and farm wage rates in this state;

(c) the alternative opportunities, both farm and nonfarm, open to milk producers, which must include among other things the prices received by farmers for all products other than milk, the prices received by farmers for beef cattle, and the percentage of unemployment in the state and nation as determined by appropriate state and federal agencies;

(d) the prices of butter, nonfat dry milk, and cheese;

(e) the need, if any, for freight or transportation charges to be deducted by distributors from producer prices for bulk milk.

(6) If the board at any time proposes to base all or part of an official order

establishing or revising milk pricing formulas upon facts within its own knowledge, as distinguished from evidence that may be presented to it by the consuming public or the milk industry, the board shall, when publishing notice of proposed rulemaking under authority of this section, notify the consuming public and the milk industry of the specific facts within its own knowledge that it will consider so that all interested parties will have an opportunity to be heard and to question or rebut the facts as a matter of record.

(7) The board, after consideration of the evidence produced, shall make written findings and conclusions and shall fix by official rule the formula under which minimum producer prices for milk must be computed.

(8) This section may not be construed as requiring the board to promulgate a specific number of formulas, but it must be construed liberally so that the board may adopt a reasonable method of expression to accomplish the objective set forth in subsection (7).

(9) Each rule establishing or revising milk pricing formulas must classify milk by forms, classes, grades, or uses as the board considers advisable and must specify the minimum prices for the forms, classes, grades, and uses.

(10) Distributors who have processing facilities in this state shall, whenever possible, purchase milk from Montana producers for the processing of products to be sold in this state if milk is available from Montana producers at the price set by the board.

(11) The board shall adopt rules to regulate transportation rates that distributors, contract haulers, and others charge producers for interplant transportation of milk. An allowance for transportation of milk between plants may not be permitted unless it is found by the board to be necessary to permit the movement of milk in the public interest. The board may promulgate rules regarding the requirement for first call on Montana milk supplies, as provided in subsection (10). Rules must be coordinated with those adopted pursuant to fair trade practices under 81-23-303.

(12) All milk purchased by a distributor must be purchased on a uniform basis. The basis to be used must be established by the board after the producers and the distributors have been consulted.

(13) The board may amend a rule in the same manner provided in this section for the original establishment of milk pricing formulas. The board may in its discretion, when it determines that the need exists, give notice of and hold statewide public hearings affecting establishment or revision of milk pricing formulas.

(14) Upon petition of a distributor or a majority of a distributor's producers, the board shall hold a hearing to receive and consider evidence regarding the advisability and need for a base or quota plan as a method of payment by that distributor of producer prices. If the board finds that the evidence presented at the hearing warrants the establishment of a base or quota plan, the board shall proceed by order to establish the base or quota plan.

(15) (a) Upon petition by 10% or 20 of the licensed producers in Montana, whichever is less, or upon petition by a licensed producer-distributor or distributor, the board shall hold a hearing to receive and consider evidence

regarding the advisability and need for a statewide pooling arrangement as a method of payment of producer prices, provided that at the hearing, the board shall, among other things, specifically receive and consider evidence concerning production and marketing practices that have historically prevailed statewide. If the board finds that the evidence presented at the hearing warrants the establishment of a statewide pooling arrangement, the board shall proceed by order to establish the arrangement. An order is not effective until it is approved in a referendum conducted by the board by mail among affected producers, producer-distributors, and distributors. The order must be approved by a majority of the producers, producer-distributors, and distributors voting, representing more than 50% of the milk produced in Montana that is to be included in the proposed pool, based on each producer's average monthly production for the 12 months immediately preceding the referendum. If the board finds it necessary, the board may conduct more than one referendum on any order.

(b) The order of the board establishing the statewide pooling arrangement may include other provisions that the board considers necessary for the proper and efficient operation of the pool. These provisions may include but are not limited to:

(i) a statewide base or quota plan contemplated in subsection (14);

(ii) the establishment of a pool settlement fund to be administered by the department bureau for the purpose of receiving payments from pool distributors or making payments to them as necessary in order to operate and administer the statewide pool; and

(iii) the establishment of a pool expense fund for the purpose of offsetting the costs to the department bureau of administering the pool, funded by a special levy assessed against each pool producer.

(c) During the initial startup of a statewide pool, the department bureau may draw from existing cash reserves to fund a pool settlement fund and a pool expense fund, but withdrawals from the cash reserve must be reimbursed.

(d) An order of the board establishing a statewide pooling arrangement that has been approved in a referendum may be rescinded in the same manner as provided for approval of the order under subsection (15)(a). The order may be amended without a referendum if, prior to amending the order, the board gives written notice of its intended action and holds a public hearing.

(16) The requirements of this section concerning notices of hearings for the establishment of milk pricing formulas apply to any hearings regarding base or quota plans or statewide pooling arrangements or abandonment of base or quota plans or statewide pooling arrangements.

(17) Rules adopted pursuant to this section must be audited for compliance by the bureau and enforced and audited for compliance by the department board.

History: En. Sec. 7, Ch. 204, L. 1939; amd. Sec. 5, Ch. 192, L. 1959; amd. Sec. 5, Ch. 4, L. 1967; amd. Sec. 3, Ch. 107, L. 1971; amd. Sec. 1, Ch. 127, L. 1974; amd. Sec. 92, Ch. 431, L. 1975; amd. Sec. 2, Ch. 19, L. 1977; R.C.M. 1947, 27-407; amd. Sec. 2, Ch. 274, L. 1981; amd. Sec. 4, Ch. 23, L. 1983; amd.

Sec. 1, Ch. 274, L. 1987; amd. Sec. 4, Ch. 242, L. 1995; amd. Sec. 7, Ch. 333, L. 1995; amd. Sec. 17, Ch. 416, L. 1999; amd. Sec. 2, Ch. 23, L. 2007.

81-23-303. Rules of fair trade practices. The ~~department~~ board may adopt reasonable rules governing fair trade practices as they pertain to the transaction of business among licensees under this chapter and among licensees and the general public. Except for provisions regarding the requirement for first call on Montana milk supplies, as provided in 81-23-302(10), and rules adopted pursuant to 81-23-302(11), fair trade practice rules must contain but are not limited to provisions prohibiting the following methods of doing business that are unfair, unlawful, and not in the public interest:

(1) the payment, allowance, or acceptance of secret rebates, secret refunds, or unearned discounts by a person, whether in the form of money or otherwise;

(2) the giving of milk, cream, dairy products, services, or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of a customer;

(3) the extension to certain customers of special prices or services not available to all customers who purchase milk of like quantity under like terms and conditions;

(4) the payment of a price lower than the applicable producer price, established by the board, by a distributor to a producer for milk that is distributed to any person, including agencies of the federal, state, or local government.

History: En. Sec. 14, Ch. 204, L. 1939; amd. Sec. 8, Ch. 192, L. 1959; amd. Sec. 98, Ch. 431, L. 1975; R.C.M. 1947, 27-414; amd. Sec. 5, Ch. 23, L. 1983; amd. Sec. 5, Ch. 242, L. 1995; amd. Sec. 75, Ch. 7, L. 2001.

~~**81-23-304. Limitation on extension of credit to retailers.** A sale or delivery may not be made by a producer distributor, distributor, or jobber to a retailer, except for cash or payment within 15 days after regular billings, and all producer distributors, distributors, and jobbers shall bill retailers at least monthly. A producer distributor, distributor, or jobber may not extend more than 15 days' credit after billing to a retailer. A retailer may not receive delivery of milk without agreement to pay for it in cash within 15 days after regular billing. A correctly dated check which is honored upon presentment is cash within the meaning of this section. An extension or acceptance of credit in violation of this section shall be construed as rendering or receiving financial assistance. The licenses of producer distributors, distributors, or jobbers involved in violation of this section shall be suspended or revoked as determined by the department after a hearing pursuant to the Montana Administrative Procedure Act.~~

History: En. Sec. 8, Ch. 107, L. 1971; amd. Sec. 99, Ch. 431, L. 1975; R.C.M. 1947, 27-414.1; amd. Sec. 6, Ch. 23, L. 1983.

Repeal 305

81-23-305. Financing prohibitions — producer and retailer. (1) A producer, producer distributor, distributor, or jobber licensed under this chapter may not advance or loan money or credit to or furnish money or credit for or refinance or assign or guarantee promissory notes, security agreements, conditional sales contracts, or other commercial paper for or on behalf of a retailer. A producer, producer distributor, distributor, or jobber may not be financially interested, either directly or indirectly, in the conduct or operation of the business of a retailer. A producer distributor, distributor, or jobber licensed under this chapter may not advance or loan money or credit to or furnish money or credit for or refinance or assign or guarantee promissory notes, security agreements, conditional sales contracts, or other commercial paper for or on behalf of a producer. A producer distributor, distributor, or jobber may not be financially interested, either directly or indirectly, in the conduct or operation of the business of a producer. This section does not prohibit a producer from belonging to, participating in, or patronizing a cooperative corporation or a producer, producer distributor, distributor, or jobber from operating his own wholly owned dairy products or other retail store or home delivery retail routes.

—(2) This section does not prohibit a producer from requesting and a distributor from granting an advance payment for milk before the regular date of payment for milk or limit in any way the right of a producer to assign part or all of moneys which are or may become due to him from a distributor.

History: En. Sec. 9, Ch. 107, L. 1971; amd. Sec. 100, Ch. 431, L. 1975; R.C.M. 1947, 27-414.2.

81-23-401. Entry, inspection, and investigation. The department bureau may enter, at all reasonable hours, all places where milk is produced, processed, bottled, handled, or stored or where the books, papers, records, or documents relative to those transactions are kept, and may inspect and copy them in any place in this state. The department board may administer oaths and take testimony for the purpose of ascertaining facts which, in the judgment of the department board, are necessary to administer this chapter.

History: En. Sec. 15, Ch. 204, L. 1939; amd. Sec. 6, Ch. 4, L. 1967; amd. Sec. 101, Ch. 431, L. 1975; R.C.M. 1947, 27-415.

81-23-402. Reports of dealers -- accounting system -- records. (1) The department bureau may require licensees to file with it reports at reasonable or regular times which the department bureau may require, showing the licensee's production, sale, or distribution of milk and any information considered by the department board necessary which pertains to the production, sale, or distribution of milk, either under oath or otherwise, as the department board may direct. Failure or refusal to file a report when directed to do so is grounds for the revocation of the license and is a violation for which the licensee may be fined as provided by this chapter, one or both, at the discretion of the department board.

(2) The department board shall adopt a uniform system of accounting to be

used by the distributor to account for the usage of all milk received by the distributor.

(3) A distributor and producer-distributor shall keep:

(a) a record of all milk, cream, or dairy products received, detailed as to location, names and addresses of suppliers, prices paid, deductions or charges made, and the use to which the milk or cream was put;

(b) a record of the quantity of each kind of milk or dairy product manufactured and the quantity and price of milk or dairy products sold;

(c) a complete record of all milk, cream, or dairy products sold, classified as to kind and grade, showing where sold, and the amount received in payment;

(d) a record of the wastage or loss of milk or dairy products;

(e) a record of the items of handling expense;

(f) a record of all refrigeration facilities sold for storage purposes to any person, showing types, sizes, and location of the facilities and the original or duplicate original of all agreements covering sales for them;

(g) other records which the department board considers necessary for the proper enforcement of this chapter.

History: En. Sec. 16, Ch. 204, L. 1939; amd. Sec. 9, Ch. 192, L. 1959; amd. Sec. 102, Ch. 431, L. 1975; R.C.M. 1947, 27-416.

81-23-403. Disposition of fines. (1) All fines assessed by a court other than a justice's court for violation of this chapter shall be paid by the court to the department bureau.

(2) All fines received by the department bureau shall be deposited with the state treasurer and shall be placed by him in the state special revenue fund. Fines assessed for violations of this chapter are earmarked for the purposes of this chapter.

History: En. Sec. 17, Ch. 204, L. 1939; amd. Sec. 158, Ch. 147, L. 1963; amd. Sec. 103, Ch. 431, L. 1975; R.C.M. 1947, 27-417; amd. Sec. 1, Ch. 277, L. 1983; amd. Sec. 58, Ch. 557, L. 1987.

81-23-404. Cooperation with other governmental agencies. In order to secure a uniform system of milk control, the department bureau shall confer and cooperate with the proper authorities of other states and of the United States, including the secretary of agriculture of the United States, and for those purposes, the department board may conduct joint hearings, issue joint or concurrent orders, and exercise all its powers under this chapter.

History: En. Sec. 21, Ch. 204, L. 1939; amd. Sec. 104, Ch. 431, L. 1975; R.C.M. 1947, 27-421.

81-23-405. Violations made misdemeanors -- penalties. (1) A person who produces, sells, distributes, or handles milk in any way, except as a consumer, without a license from the department bureau as required by this chapter or who

violates a lawful rule of the department bureau or board is guilty of a misdemeanor punishable by a fine not exceeding \$600. Each day's violation is a separate offense.

(2) The district courts have original jurisdiction in all criminal actions for violations of this chapter and in all civil actions for the recovery or enforcement of penalties provided for in this chapter. All of those actions, both criminal and civil, shall be tried in the district court.

(3) The county attorneys, in their respective counties, shall diligently prosecute all violations of this chapter.

History: En. Sec. 22, Ch. 204, L. 1939; amd. Sec. 105, Ch. 431, L. 1975; R.C.M. 1947, 27-422.

81-23-406. Additional remedies. The department board may begin any proceeding at law or in equity as may appear necessary to enforce compliance with this chapter or to enforce compliance with an order or rule of the board or department bureau adopted under this chapter or to obtain a judicial interpretation of any of them. In addition to any other remedy, the department board may apply to the district court of the district where the action arises for relief by injunction, mandamus, or any other appropriate remedy in equity without being compelled to allege or prove that an adequate remedy at law does not otherwise exist. The department board may not be required to post bond in an action to which it is a party whether upon appeal or otherwise. All legal actions may be brought by or against the board or department bureau in the name of the department of livestock, and it is not necessary in an action to which the department board is a party that the action be brought by or against this state on relation of the department. The department board may sue by its own attorney, and it may also call upon a county attorney to represent it in the district court of the county attorney's county or the attorney general to represent it on appeal to the supreme court, or it may associate its own attorney with either in court.

History: En. Sec. 24, Ch. 204, L. 1939; amd. Sec. 107, Ch. 431, L. 1975; R.C.M. 1947, 27-424; amd. Sec. 2, Ch. 274, L. 1981; amd. Sec. 8, Ch. 333, L. 1995.

2-15-3105. Board of milk control -- membership -- allocation -- quasi-judicial. (1)

There is a board of milk control.

(2) The board consists of five members. A member may not be connected in any way with the production, processing, distribution, or wholesale or retail sale of milk or dairy products. A member may not have held an elective or appointive public office during the 2 years immediately preceding appointment, and a member may not hold a public office, either elective or appointive, during a term on the board. Not more than three members may be of the same political party.

(3) The board is allocated to the department of livestock for administrative purposes only as prescribed in 2-15-121.

(4) The board is designated as a quasi-judicial board for purposes of 2-15-124.

(5) The board shall have jurisdiction over all matters covered in Title 81 – Chapter 23 – 101 thru 406 except where explicitly designated as a Department of Livestock function.

History: En. 82A-406 by Sec. 1, Ch. 272, L. 1971; amd. Sec. 143, Ch. 431, L. 1975; R.C.M. 1947, 82A-406; amd. Sec. 2, Ch. 52, L. 1993; amd. Sec. 1, Ch. 333, L. 1995; Sec. , MCA 1993; redes. , Sec. 9, Ch. 333, L. 1995.

Bernie Hubley

From: Nick, Monte (LIV) [monick@mt.gov]
Sent: Friday, May 09, 2008 2:21 PM
To: Bernie Hubley
Subject: Statute Change
Attachments: Statute 2-15-3105.doc

See what you think.

Exhibit D

2-15-3105. Board of milk control -- membership -- allocation -- quasi-judicial. (1)

There is a board of milk control.

(2) The board consists of five members. A member may not be connected in any way with the production, processing, distribution, or wholesale or retail sale of milk or dairy products. A member may not have held an elective or appointive public office during the 2 years immediately preceding appointment, and a member may not hold a public office, either elective or appointive, during a term on the board. Not more than three members may be of the same political party.

(3) The board is allocated to the department of livestock for administrative purposes only as prescribed in 2-15-121.

(4) The board is designated as a quasi-judicial board for purposes of 2-15-124.

(5) The board shall have jurisdiction over all matters covered in Title 81 – Chapter 23 – 101 thru 406 except where explicitly designated as the Department of Livestock

History: En. 82A-406 by Sec. 1, Ch. 272, L. 1971; amd. Sec. 143, Ch. 431, L. 1975; R.C.M. 1947, 82A-406; amd. Sec. 2, Ch. 52, L. 1993; amd. Sec. 1, Ch. 333, L. 1995; Sec. , MCA 1993; redes. , Sec. 9, Ch. 333, L. 1995.

Memo

To: Milk Control Board Members

From: Monte Nick, Bureau Chief *MN*

Date: June 16, 2008

Re: Statute Changes

I met with George Harris, our administrator, last week. I asked him about the status of the changes I submitted regarding the jurisdiction of the Milk Board, he said Christian told him the "board", (board of livestock) didn't want to do anything with it at this time. I think the "board" is Christian and Bill Hedstrum, the chairman. I told George I wanted a meeting with Christian, our attorney and I, he said he would try and schedule something. For some reason, I'm not real surprised this happened. If George and/or Christian attend the meeting on the 23rd, I would like one of you have them get up and explain the reason for doing nothing about the problem. Also, on the legislative bill site, there is a bill in the draft process, LC 0026, which "revises the Department of Livestock". I haven't been able to get anything more on this and I certainly have not been informed anything about it by the administration, although I bet it does involve the bureau and the MCB.

Exhibit E

MEMORANDUM

TO: Milk Control Board

FROM: Bernie Hubley

DATE: June 20, 2008

SUBJECT: Board of Livestock Meeting - June 20, 2008

On June 20, 2008, Christian Mackay and George Harris, Executive Director and Administrative Officer, Montana Board of Livestock, were contacted at the Montana Board of Livestock building. Present during this meeting was Monte Nick, Bureau Chief, Montana Milk Control Board.

The purpose of this meeting was to advise the Board of Livestock of the lawsuit filed by Country Classics Dairies, Inc. in Gallatin County against the Montana Board of Milk Control and the Milk Control Bureau. He was advised that the Board of Livestock may be joined.

Mackay and Harris are completely familiar with the jurisdictional question continually raised by Country Classics Dairies through its attorney John Kauffman. Christian Mackay advised that he had a brief discussion with Viv Hammill, attorney, Governor's staff, and was informed that no legislative proposal would be considered to clarify jurisdictional boundaries between the Montana Board of Livestock and the Milk Control Board. The apparent reason for lack of seeking a legislative clarification is the belief by the Governor's staff that the Board of Livestock can simply delegate issues to the Board of Milk Control/Bureau for handling.

This brings to an end any thought by the Bureau Chief that the easiest solution to the continual jurisdictional challenge is a statutory change. While the frustration of the Bureau Chief is certainly understandable and while a statutory change might eliminate any challenge if clearly stated, the position of Livestock/Governors Office is likewise understandable.

Courtesy notifications of the filing of this law suit were made to Attorney Hammill and Bill Gianoulas, Department of Administration, Tort Division.

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

FILE COPY

Mike McGrath
Attorney General



1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

MEMORANDUM

CONFIDENTIAL
ATTORNEY WORK PRODUCT

TO: Christian Mackay, Executive Officer, MT Dept. of Livestock
Monte Nick, Bureau Chief, Milk Control Bureau
Gary Parker, Chairman, Board of Milk Control

FROM: Jim Scheier and Clyde Peterson ^{NSP}
JMS

RE: Board of Milk Control

DATE: October 1, 2007

The Board of Milk Control requested this Bureau to research the issue of whether the Board of Milk Control (the Board) has jurisdiction or authority to hold contested case hearings on several issues presented by Country Classics Dairies, Inc. (Country Classics).

The issue of jurisdiction arose at a June 26, 2007, meeting of the Board of Milk Control where Country Classics presented its oral argument regarding the possible lack of granted authority for the Board of Milk Control to hear and rule upon several issues and petitions that had been or were to be presented to the Board. After considerable discussion, and upon advice of Clyde Peterson, a member of this Bureau, the Board ordered, based upon agreement of the Board, counsel for Country Classics, counsel for Meadow Gold Dairies (Meadow Gold), and counsel for the Montana Milk Producers Association (Milk Producers) that the parties would have the opportunity to brief the issue of authority prior to the Board of Milk Control acting on the various petitions before the Board. Clyde Peterson would then review the briefs and present his legal opinion to the Board regarding the issue.

During the time briefs were being formulated and submitted, the Department of Livestock also requested this Bureau to research its authority as regards to Milk Control issues. Mr. Peterson has been providing upon request, and pursuant to a contract between

Memorandum – Peterson
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this Bureau and the agencies in question, advice to both the Board of Milk Control and the Department of Livestock since neither entity employs full time counsel.

Given that the Department and the Board may have different issues or interests, Clyde Peterson requested that Agency Legal Services Bureau Chief Jim Scheier conduct a separate and independent review of the briefs and additional materials that had been submitted such as the Board of Milk Control authorizing legislation in its various legislative bill forms, and to do further research as needed.

Attorneys Scheier and Peterson, following their independent review and research, arrived at the same conclusion, which is presented below. The opinions expressed are those of this Bureau and the named attorneys, and is not an opinion of the Attorney General of Montana, or the Office of Attorney General.

Country Classics has raised several issues before the Board:

1. Country Classics has filed a petition regarding credits and/or refunds related to surplus milk;
2. Country Classics raised the issue regarding whether it can charge the pool for storage of milk and whether the freight rule applies;
3. Country Classics questions the propriety of Meadow Gold's freight charges for surplus milk when Meadow Gold has no surplus milk.

Country Classics contends that while the Board has statutory authority to hold hearings and exercise its power with respect to the establishment and modification of milk pricing formulas by rule, the Board has no authority to hold contested case hearings to consider the three issues set forth above.

After carefully reviewing the briefs and conducting research on this question, this office agrees with the arguments presented by Country Classic. Administrative boards and agencies have no common law or inherent powers. They have only the jurisdiction, authority, and powers expressly granted to them by the laws under which they were created, and they can only act when they are empowered to do so. State ex rel. Anderson v. Board of Equalization, 133 Mont. 8, 16, 319 P.2d 221, 226-27 (1957). See also McDaniel v. West Virginia Div. Of Labor, 591 S.E. 2d 277, 285 (W. Va. 2003); Acosta v. Nat'l Beef Packing Co., L.P., 44 P.3d 330, 339 (Kan. 2002); City of Klamath Falls v. Env'tl. Quality Comm'n, 870 P.2d 825, 833 (Or. 1994). An agency or board may not

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exercise authority inconsistent with the legislatively enacted administrative structure, even to address what are perceived as serious problems. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 91 (2002). Absent express statutory authority, a regulatory agency may not impose remedial measures. Davidson v. D.C. Board of Medicine, 562 A.2d 109, 112 (D.C. 1989).

Both Meadow Gold and the Milk Producers rely on: (1) Mont. Code Ann. § 2-15-3105(4), which states that the Board “is designated as a quasi-judicial board for purposes of 2-15-124”; and (2) Mont. Code Ann. § 2-15-102 (10), which defines “quasi-judicial function:”

(10) “Quasi-judicial function” means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes but is not limited to the functions of:

- (a) interpreting, applying, and enforcing existing rules and laws;
- (b) granting or denying privileges, rights, or benefits;
- (c) issuing, suspending, or revoking licenses, permits, and certificates;
- (d) determining rights and interests of adverse parties;
- (e) evaluating and passing on facts;
- (f) awarding compensation;
- (g) fixing prices;
- (h) ordering action or abatement of action;
- (i) adopting procedural rules;
- (j) holding hearings; and
- (k) any other act necessary to the performance of a quasi-judicial function.

However, Mont. Code Ann. § 2-15-124 simply lists the appointment, qualifications, membership, and operational requirements of quasi-judicial boards. The statute does not confer any specific authority on the Board of Milk Control or on any other quasi-judicial board. Likewise, the definition does not comprise a grant of specific authority. It simply defines what a quasi-judicial agency may do when exercising specifically granted authority.

Country Classics, on the other hand, submits argument with respect to the language in Mont. Code Ann. § 2-15-121(1)(a) which this office finds convincing. The statute states that an agency allocated to a department for administrative purposes only (such as the

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allocation of the Board of Milk Control to the Department of Livestock) shall “exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department” (emphasis added)

Country Classics argues that the word “its” in Mont. Code Ann. § 2-15-121(1)(a) is important, because the word suggests that a particular agency with quasi-judicial functions must derive those functions from some other statute. Country Classics’ argument appears to be compelling. An agency cannot exercise “its” quasi-judicial functions unless it has some quasi-judicial functions. In the opinion of this office, nothing in Mont. Code Ann. §§ 2-15-121, 2-15-124, or 2-15-3105 confers any specific quasi-judicial authority or functions on the Board. Any such authority would have to be found in some other statute.

In the opinion of this office, Country Classics correctly points out that the powers granted by the legislature to the Board are primarily those listed in Mont. Code Ann. § 81-23-302. That statute authorizes the Board to establish, by rule, minimum prices for milk by devising and applying flexible formulas that take into account various factors, and to regulate transportation rates. The statute also authorizes the Board to adopt by rule a quota plan for distributor and producer prices, and under certain circumstances to establish a statewide pooling arrangement. To the extent that the authority granted to the Board by this statute may be characterized as quasi-judicial authority (see, e.g., Mont. Code Ann. § 2-15-102(10)(g), “fixing prices”), the functions described appear for the most part to be rulemaking functions, rather than contested case functions.

Based on this office’s reading of the statute, none of the three issues raised by Country Classics, listed above, appear to fall within the Board’s authority described in Mont. Code Ann. § 81-23-302. Obviously, others may disagree.

This office conducted research regarding the legislative history of the Board of Milk Control, and believes it ultimately supports the conclusion that the Board does not have jurisdiction or authority to conduct contested case hearings on the three issues listed above.

It appears that the Board was first created in 1935, by Chapter 189 of the Laws of 1935. § 2639.4, R.C.M. 1935 established the “Milk Control Board,” and § 2639.5, R.C.M. 1935 gave the Board the power to “supervise, regulate, and control the distribution and sale of milk for consumption within the state” That same statute stated that, for purposes of administering the act, the Board had the power to “conduct hearings, subpoena and examine under oath dealers with their records, books, and accounts and any other person

from whom information may be declared to carry out the purpose and intent of this act . . .” The statute also gave the Board the power to “act as mediator or arbitrator to settle any controversy or issue among or between producers, dealers, and consumers”

In 1939 an act was passed that again created a Milk Control Board, and gave the Board similar powers and responsibilities, including the power to conduct hearings. Chapter 204, Laws of 1939. These statutes were later codified in §§ 27-401 through 27-425, in R.C.M. 1947. Section 27-405, R.C.M. 1947 specifically gave the Board the power “to conduct hearings upon any subject pertinent to the administration of this act.”

The laws relating to milk control and the powers and responsibilities of the Milk Control Board were amended in 1957 and 1959, expanding and clarifying the authority of the Board somewhat. However, the Board retained the authority “to conduct hearings upon any subject pertinent to the administration of this act.” See Chapter 249, Laws of 1957, and Chapter 192, Laws of 1959. The laws were slightly amended in 1967, but again the Board retained the authority to conduct hearings pursuant to the language quoted above. See Chapter 177, Laws of 1967.

In 1971, as part of an extensive executive reorganization, § 82A-406, R.C.M. 1947 was enacted, which stated that the Milk Control Board, created in title 27, chapter 4, R.C.M. 1947, “is continued and renamed the Board of Milk Control.” Chapter 272, Laws of 1971. The Board was transferred to the Department of Business Regulation for administrative purposes only. Significantly, subsection (3) of the statute provided:

The board retains *only* the quasi-judicial functions contained in § 27-407, R.C.M. 1947 (pertaining to setting milk prices). [Emphasis added].

82A-403(2), R.C.M. 1947, which was also enacted at that time, stated that “the functions of the [Board], except the quasi-judicial functions contained in 27-407, R.C.M. 1947 (pertaining to fixing minimum prices of milk) . . . are transferred to the department [of Business Regulation].” 27-407, R.C.M. 1947 was amended by Chapter 107, Laws of 1971, to add the language regarding establishment of minimum milk prices and other provisions that has, in amended form, been carried over to and recodified in what is now Mont. Code Ann. § 81-23-302. Interestingly, 27-405, R.C.M. 1947, which granted the Board supervisory, regulatory, and hearing authority over the milk industry, was not affected by the 1971 legislation.

In 1975, however, the provisions dealing with milk control were substantially revised. In the process, a number of the powers formerly given to the Board in § 27-405, R.C.M.

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1947, were transferred to the Department of Business Regulation, including the power to “supervise, regulate, and control the milk industry” and the power to “conduct hearings upon any subject pertinent to the administration of this act.” Chapter 431, Laws of 1975.

In 1981 the Department of Business Regulation was merged with another department and renamed the Department of Commerce. The Department of Commerce retained the supervisory and regulatory responsibilities that had formerly been assigned to the Department of Business Regulation, as well as the authority to conduct hearings. Chapter 274, Laws of 1981.

In 1995 legislation reallocated the Board from the Department of Commerce to the Department of Livestock, and transferred responsibilities for milk control to the Department of Livestock. Chapter 333, Laws of 1995. The Board has been attached to the Department of Livestock ever since the 1995 amendments.

The powers and responsibilities regarding milk control that were formerly codified in § 27-405, R.C.M. 1947, including the power to conduct hearings, are now codified in Mont. Code Ann. § 81-23-103. That statute states, in relevant part:

General powers of the department. (1) The department shall supervise, regulate, and control the milk industry of this state, including the production, processing, storage, distribution, and sale of milk sold for consumption in this state. . . .

(2) The department shall investigate all matters pertaining to the production, processing, storage, distribution, and sale of milk in this state and shall conduct hearings on any subject pertinent to the administration of this chapter. . . .

The statute is quite specific in its grant of powers and its direction as to the Department’s authority to investigate and hold hearings regarding the administration of the subject matter.

As noted, and in contrast to the broad supervisory, regulatory, and hearing authority assigned to the Department, the Board’s authority is specifically and fairly narrowly described in Mont. Code Ann. § 81-23-302.

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In conclusion, as to this issue, in the opinion of this Bureau, under existing law the Board of Milk Control does not have the authority to conduct contested case hearings to consider and rule on the three issues raised by Country Classics.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EMILK ISSUES] 8/26/08 NCP

Given the subject matter, we believe the Board of Livestock should seriously consider having some other person or body with more knowledge of the subject matter sit and hear any pending matters.

It is an accepted and customary procedure for those entities authorized to hear similar matters to delegate that authority to either persons in the agency qualified to make such decisions based on their knowledge and experience, or to a professional hearing examiner with the proper knowledge and experience who may make appropriate rulings and make final recommendations. See MCA § 2-15-112 (2)(b), a Department head can delegate

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duties. See also MCA § 2-4-611 of the Administrative Procedure Act that allows agencies to appoint hearings officers as needed, with due regard to the expertise needed.

In this case, the Board of Livestock clearly has the authority to delegate to the Board of Milk Control the hearing of the pending matters; or to delegate to a professional hearing examiner with the appropriate experience and knowledge, the hearing of the pending matters. In the latter case, the Board of Milk Control could indicate its agreement to the appointment and process.

In either case, the matters could proceed and the Board of Livestock could be assured that persons with the necessary knowledge to consider the questions would be hearing the matter.

[REDACTED]

PROPOSED RULE RE: JURISDICTION

In the event the Department contends that a party has violated a rule established by the Board of Milk Control (the "Board") pursuant to the Board's authority under 81-23-302, MCA, the Department shall provide the party with written notice of such alleged violation. In such Notice the Department shall further notify such party that (i) it has 30 days within which to contest the alleged violation and request a contested case hearing under the Montana Administrative Procedure Act 2-4-101 MCA et seq. ; and (ii) within such 30-day period, it may elect to have the alleged violation heard by the Board or by a hearing examiner, as such is defined in 2-4-611, MCA. In the event the party requests a contested case hearing, but fails to make an election as between the Board and the hearing examiner, the Department will appoint a hearing examiner.

Once the party notifies the Department of its desire to have a contested case hearing, the Department shall send out a notice in compliance with 2-1-601, MCA. Thereafter, the parties shall comply with the administrative procedures for contested cases, as described in 2-1-601, MCA et seq. Following the hearing, the Board or a hearing examiner, as the case may be, shall submit a proposal for decision subject to and in compliance with 2-4-621, MCA to the Department. The Department shall render the final agency decision on the matter, subject to the rights and obligations set forth in 2-4-621 through 2-4-631, MCA and the right of judicial review.

32.1.101 ORGANIZATIONAL RULE

(1) Organization of the Department of Livestock.

(a) History. The Department of Livestock was reorganized under the Executive Reorganization Act of 1971 by executive order of the governor on November 22, 1971.

(b) Divisions. The department consists of five divisions: Animal Health Division; Brands Enforcement Division; Centralized Services Division; Diagnostic Laboratory Division; and the Meat, Milk, and Egg Inspection Division. Each division is further broken down into bureaus and sections. (See functional chart.)

(c) The Director is the Board of Livestock.

(d) The Board of Livestock consists of seven members appointed by the governor for six year terms. The chairman is named by the governor.

(e) Attached boards.

(i) Livestock Crimestoppers Commission.

(ii) Board of Milk Control.

(iii) Board of Horse Racing.

(2) Functions of the Department of Livestock.

(a) The Animal Health Division consists of the following bureau:

(i) The Disease Control Bureau functions are to provide for the diagnosis, prevention, control, and eradication of animal diseases and disorders; maintain a disease surveillance system; provide education and information on animal diseases and disorders to the livestock industry, the veterinary profession, and the public at large; conduct applied research into the causes, transmissibility, and control of animal disease and disorders; enforce sanitary standards, and inspect animals at livestock auction markets; monitor and enforce import export requirements applied to livestock; assist the Department of Public Health and Human Services in the control of animal diseases transmissible to man; to protect livestock and human health from rabies by controlling wildlife, especially skunks, known to be vector species of rabies; and provide information, education, and regulation of game farms. These functions are accomplished by state level programs and by cooperation with counties, private groups, other government agencies, and individuals.

(b) The Meat, Milk, and Egg Inspection Division consists of the following bureaus:

(i) The Milk and Egg Bureau functions are to ensure that eggs, milk, and milk products sold or manufactured in Montana are fit for human consumption. This function is accomplished through licensing, sampling, laboratory testing, product and site inspection and is done in cooperation with other state and federal agencies. The bureau supervises the enforcement of state and federal law.

(ii) The Meat and Poultry Inspection Bureau functions are to ensure that meat and poultry products processed, manufactured, or sold in Montana are handled in a sanitary manner thereby assuring a clean and wholesome product for human consumption. This function is accomplished through licensing, premise inspection, slaughter inspection, process inspection, sampling, and laboratory testing. This is done in cooperation with other state and federal agencies. The bureau enforces state and federal laws.

(c) The Diagnostic Laboratory Division functions are to provide laboratory support for the Disease Control, Milk and Egg, and the Meat and Poultry Inspection bureaus; provide laboratory diagnostic support to veterinarians and livestock producers; protect the public health by testing dairy products and performing diagnostic tests on suspected rabies cases and other zoonotic diseases; and provide test services to enhance the marketability of livestock. Testing on wildlife and small animals is performed upon request.

(d) The Centralized Services Division provides the following services to the

Department of Livestock: accounting, budgeting, payroll, personnel, purchasing, general services, duplicating, and communications. The division is responsible for the administering of the Milk Control Bureau, which is responsible for supervising, regulating, and controlling the milk industry of the state.

(e) The Brands Enforcement Division consists of the following bureaus:

(i) The Investigation Bureau functions are to protect and foster the state's livestock industry by enforcing livestock laws, inspecting livestock for brands, and conducting theft investigations; and to regulate livestock markets, and strive for a good uniform inspection at markets. The Predator Control Section functions are to protect the livestock industry from damage caused by predatory animals. This is accomplished by state level programs and by cooperation with counties, private groups, other government agencies, and individuals.

(ii) The Brands and Records Bureau functions are to issue and record brands, receive and file notices on livestock security agreements, regulate livestock dealers and markets, and maintain the Brands Enforcement Division's records.

(3) Functions of the attached boards.

(a) Livestock Crimestoppers Commission is administratively attached to the department in accordance with 2-15-121 and 2-15-3104, MCA.

(b) Board of Milk Control is administratively attached to the department in accordance with 2-15-121 and 2-15-3105, MCA.

(c) Board of Horse Racing is administratively attached to the department in accordance with 2-15-121 and 2-15-3106, MCA.

(d) Livestock Loss Reduction and Mitigation Board is administratively attached to the department in accordance with House Bill 364 of the 2007 Legislative Session.

(4) Information or submissions.

(a) General and specific inquiries regarding a division may be addressed to the supervisor or administrator.

(b) All requests for hearings, declaratory rulings, and for participation in rulemaking may be addressed to either the Executive Officer or to the Board of Livestock.

(c) Parties interested in notices of hearings, declaratory rulings, and proposed rules should refer to notices in the Montana Administrative Register. Interested parties can also log onto the department web site at www.mt.gov/liv and click on public notices

(5) Personnel Roster. The following are those of key personnel in the Department of Livestock. All are located in the Scott Hart building, P.O. Box 202001, Helena, MT 59620, unless otherwise indicated.

(a) Board of Livestock. The telephone number is (406)444-9321.

(i) William Hedstrom, chairman, Kalispell, MT; term expires March 2011.

(ii) Janice French, vice chairman, Hobson, MT; term expires March 2011.

(iii) Stan Boone, Ingomar, MT; term expires March 2013.

(iv) Rebecca Weed, Belgrade, MT; term expires March 2013.

(v) Linda Nielsen, Nashua, MT; term expires March 2011.

(vi) George Hammond, Hardin, MT; term expires March 2009.

(vii) Meg Smith, Glen, MT; term expires March 2009.

(b) Executive Officer to the Board of Livestock. The telephone number is (406)444-9321.

(c) Animal Health Division. The telephone number is (406)444-2043.

(i) administrator and state veterinarian;

(ii) assistant state veterinarian;

(iii) supervisor, import export section.

(d) Meat, Milk, and Egg Inspection Division. The telephone number is (406)444-

2043.

(i) administrator.

(e) Diagnostic Laboratory Division. The telephone number is (406)994-4885.

(i) administrator;

(ii) assistant administrator.

(f) Brands Enforcement Division. The telephone number is (406)444-2045.

(i) administrator.

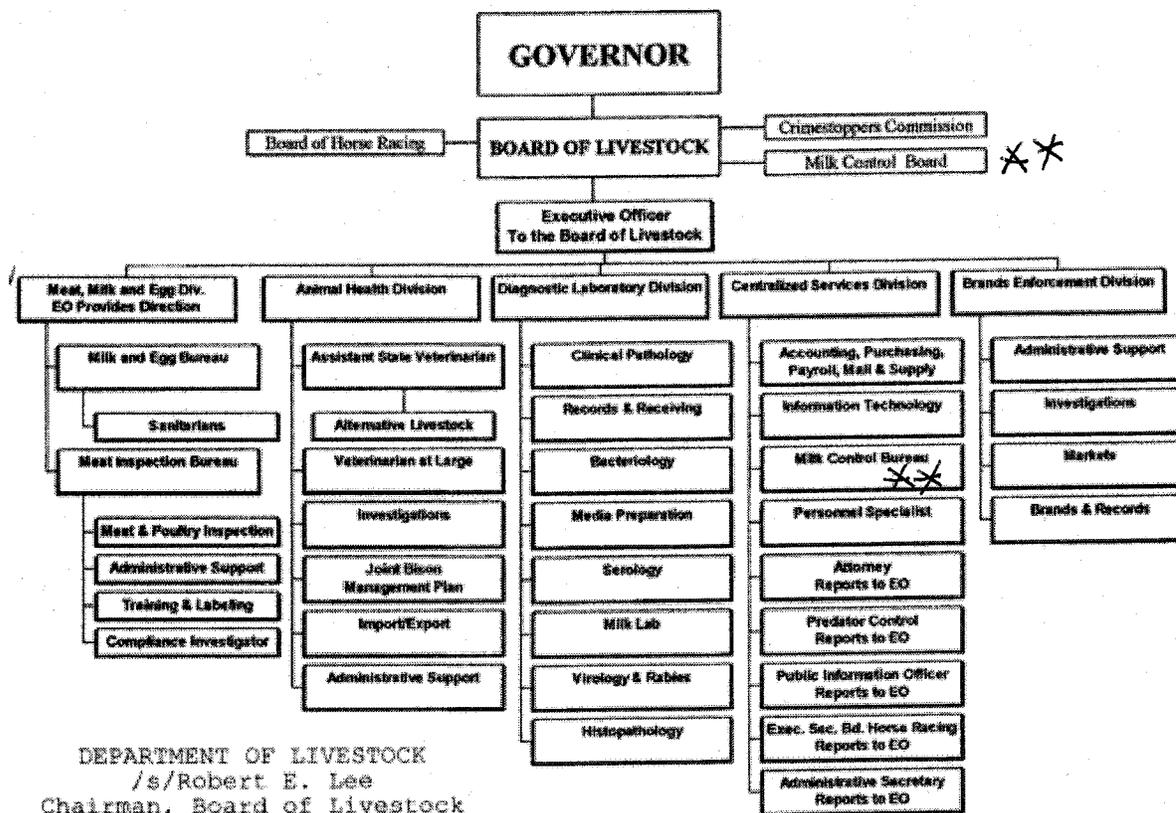
(g) Centralized Services Division. The telephone number is (406)444-4994.

(i) administrator;

(ii) public information officer.

(6) Chart of Department of Livestock Organization. A descriptive chart of the Department of Livestock is attached as the following page of this rule and by this reference is herein incorporated.

DEPARTMENT OF LIVESTOCK



DEPARTMENT OF LIVESTOCK
 /s/Robert E. Lee
 Chairman, Board of Livestock
 /s/Judy Martz
 Governor

History: 2-4-201, MCA; Eff. 12/31/72; AMD, Eff. 2/28/78; AMD, Eff. 10/31/78; AMD, Eff. 7/2/79; AMD, Eff. 9/30/81; AMD, Eff. 6/30/84; AMD, Eff. 3/29/85; AMD, Eff. 6/30/96; AMD, Eff. 12/31/99; AMD, Eff. 6/30/02; AMD, Eff. 9/30/07.