



# *Legislative Background Brief*

*for the*  
*Economic Affairs Interim Committee*

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## **Montana's Milk Policies**

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What started as a subcommittee of the 2013-2014 Economic Affairs Interim Committee to look into Montana's 12-day "sell-by" milk rule evolved after one subcommittee meeting to a white paper overview of how Montana regulates milk sales now and how regulation occurred in the past. However, this white paper is not a study of the milk industry in Montana. Rather, the paper builds on a staff document provided to the subcommittee in March 2014--entitled "Review of Other States' Milk Policies and Other Background Information for Discussion of Montana's 12-Day Sell-By Rule"--and includes the following additional information:

- what Idaho and Wyoming require in terms of milk sell-by or use-by labeling. Neither has anything in statute requiring a sell-by or use-by date on Grade A milk, which means by default that any date on the packages is put there by the processor.
- some history on milk price controls, which were dropped from retail, wholesale, and jobber (distribution) sales in 1995.

The report includes the following information from the March 2014 document:

- information regarding Montana's sell-by dates for Grade A milk and current responses to that approach;
- how other neighboring states handle milk sales; and
- various benefits and costs of the current process. For example, one question asked was how food banks or food pantries in Montana handle milk distribution since according to administrative rule they cannot "sell" milk after the sell-by date.

By nature of this white paper being a latecomer to the Economic Affairs Interim Committee schedule and not a full-blown study, this report is not in-depth but addresses only limited questions related to the complicated subject of Montana's milk policies.

### **Montana milk sales "now" as compared with "then"**

Montana regulates milk sales in two major ways: producer price regulation through a pooling system and retail sell-by dates. Price regulations ultimately help to maintain the dairy industry in Montana by preventing price cutting or unfair market practices. The retail sell-by dates also help to maintain the local dairy industry, protect sales in rural areas off the main distribution channels, and protect sellers and buyers from milk that has soured.

Montana's controls prior to 1995 on milk sales are explained, in part, in the policy statement in 81-23-102, MCA. Underlying that statement are situations that existed in the 1930s, including illnesses from milk-borne bacteria, among other things such as competition in the market with potential underpricing, referenced in the statute as disturbances in the industry, demoralizing

trade practices, or chaotic conditions. The policy statement, passed in 1939 and last amended in 1995, declares that:

- (1)(a) milk is a necessary article of food for human consumption;
- (1)(b) the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare;
- (1)(c) the production, transportation, storage, distribution, and sale of milk in the state of Montana is an industry affecting the public health and interest:
- (1)(d) unfair, unjust, destructive, and demoralizing trade practices have been and are now being carried on in the production, transportation, processing, storage, distribution, and sale of milk and products manufactured from milk, which trade practices constitute a constant menace to the health and welfare of the inhabitants of this state and tend to undermine the sanitary regulations and standards of content and purity of milk;
- (1)(e) health regulations alone are insufficient to prevent disturbances in the milk industry and to safeguard the consuming public from further inadequacy of a supply of this necessary commodity;
- (1)(f) it is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of milk and cream and products manufactured from milk and cream, to eliminate speculation and waste, and to make the distribution of milk and cream and products manufactured from milk and cream between the producer and consumer as direct as can be efficiently and economically done, and to stabilize the marketing of those commodities;
- (1)(g) investigations have revealed and experience has shown that, due to the nature of milk and the conditions surrounding the production and marketing of milk and due to the vital importance of milk to the health and well-being of the citizens of this state, it is necessary to invoke the police powers of the state to provide a constant supervision and regulation of the milk industry of the state to prevent the occurrence and recurrence of those unfair, unjust, destructive, demoralizing, and chaotic conditions and trade practices within the industry which have in the past affected the industry and which constantly threaten to be revived within the industry and to disrupt or destroy an adequate supply of pure and wholesome milk to the consuming public and to the citizens of this state;
- (1)(h) milk is a perishable commodity that is easily contaminated with harmful bacteria, that cannot be stored for any great length of time, that must be produced and distributed fresh daily, and the supply of which cannot be regulated from day to day but, due to natural and seasonal conditions, must be produced on a constantly uniform and even basis;
- (1)(i) the demand for this perishable commodity fluctuates from day to day and from time to time making it necessary that the producers and distributors shall produce and carry on hand a surplus of milk in order to guarantee and ensure to the consuming public an adequate supply at all times, which surplus must of necessity be converted into byproducts of milk at great expense and often at a loss to the producer and distributor;

- (1)(j) this surplus of milk, though necessary and unavoidable, unless regulated, tends to undermine and destroy the milk industry, which causes producers to relax their diligence in complying with the provisions of the health authorities and often to produce milk of an inferior and unsanitary quality;
- (1)(k) investigation and experience have further shown that, due to the nature of milk and the conditions surrounding its production and marketing, unless the producers are guaranteed and ensured a reasonable profit on milk, both the supply and quality of milk are affected to the detriment of and against the best interest of the citizens of this state whose health and well-being are thereby vitally affected;
- (1)(l) where no supervision and regulation are provided for the orderly and profitable marketing of milk, past experience has shown that the credit status of both producers and distributors of milk is adversely affected to a serious degree, thereby entailing loss and hardship upon all within the community with whom these producers and distributors carry on business relations;
- (1)(m) due to the nature of milk and the conditions surrounding its production and distribution, the natural law of supply and demand has been found inadequate to protect the industry in this and other states and in the public interest it is necessary to provide state supervision and regulation of the milk industry in this state.

The statute further explains in subsection (2) that the police powers of the state are being used to protect and promote public welfare and to eliminate unfair and "demoralizing" trade practices in the milk industry.

A legislative audit in December 1976 looked at whether milk price regulation was needed in Montana and noted:

The widespread belief and theory then, and now, was that government involvement through price control would protect producers by orderly marketing and stability, thereby assuring the production of an adequate supply of milk. The general theory was that open price competition over such a perishable product would result in excessively low prices which would force many producers out of business, thereby reducing the supply of drinking milk which in turn would be followed by excessive price increases to the consumer. ...As a general rule, the theory has not been tested since a real shortage of milk has not recently occurred. Nevertheless this theory and industry fear of cutthroat competition, whether real or imagined, remain as the major justifications for government involvement in the milk marketing processes.

The audit also noted that changes were happening nationwide and that direct federal price regulation was short-lived, evolving to Federal Milk Market Orders, which set minimum but not maximum producer prices. Federal Milk Market Orders continue today in some areas as a way of preventing wild price fluctuations.(See

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateO&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=FMMOProgramObjectives>) See map. (Shading differences are to delineate areas.)

The 1976 legislative audit further reported "strong evidence that milk in Montana is overpriced" and indicated that milk price controls at the resale level "are no longer in the public interest and ... may have an adverse effect upon both consumers and dairy farmers...". At that time Montana regulated the minimum price level of milk sales from producer to retailer.

Changes that occurred in Montana in 1983 and what happened in 1995 to trigger the end of retail, wholesale, and jobber price controls was not examined. What is known is that In 1995 the Legislature removed price controls on milk sold at retail and wholesale and through "jobbers" or independent contractors but retained the quota system handled by the Board of Milk Control. There remains a statute that fixes "minimum producer prices for classes of utilization of milk as defined by the [milk control] board", 81-23-302, MCA. Although the bill history and explanation for passage of Senate Bill No. 364 in 1995 is not part of this report, the preamble to SB 364, which eliminated the Board of Milk Control's other pricing authority, gives an indication of why the one price control remained and the others were targeted for termination:

The Legislature encourages the use of Montana milk by Montana processors and the elimination of practices that encourage the purchase of Montana milk out of state for subsequent resale in Montana at a price lower than that established by the Board.

The similar contention of out-of-state milk being cheaper than milk sold in Montana also was raised during a March 27, 2014, subcommittee meeting on the milk sell-by rule. That administrative rule, adopted by Montana's Board of Livestock in 1980, says that milk must be sold within 12 days of being pasteurized. Note that the Board of Livestock and NOT the Board of Milk Control is responsible for the 12-day milk rule, which remains in effect today.

In essence, the Board of Livestock is responsible for milk quality and safety, including inspections of dairies, while the Board of Milk Control deals more with regulating producer prices and compensation to the producers, monitoring market fairness, and establishing and assessing fees on the distribution of milk and milk products. Between 1935 when it was created and a reorganization of state agencies in the 1960s, the Board of Milk Control was free-standing. With reorganization the board became administratively attached to the Department of Business Regulation, which then evolved to the new Department of Commerce in 1981. The Board of Livestock became the administrative entity for the Board of Milk Control in 1995.

### Background Information on the 12-Day Sell-By Date

All milk past the 12-day "sell-by" period must be destroyed or given away, which is the practical effect of the statement in [32.8.202 ARM](#) (Administrative Rules of Montana) that "when 12 days or

more have passed following pasteurization of a unit of grade A milk, there will be no quantities of that unit of milk sold or otherwise offered for public consumption". The theory is that a consumer will know that milk sold by a certain date still has another week or 12 days of palatability so that rather than sell milk that potentially could go bad a day after purchase, stores, milk processors, and consumers all benefit by having a sell-by date that implies longer refrigerator life in the consumer's home rather than in a store for the grade A milk. The person who offers the milk for sale to the public is responsible for removing the milk before or upon the expiration date unless other arrangements are agreed to. The administrative rule has been amended in 1986, 1987, and 2000.

Exceptions to the rule include:

- milk sold by the dairy run by the state prison system or any other licensed grade A processor if the milk is not sold or distributed to the public;
- milk processed in Montana for sale out of state; and
- by the definition of milk in [32.8.101 ARM](#) the following are excluded: buttermilk, eggnog, and ultra-pasteurized or aseptic processed milk products.

For some consumers, the sell-by date is confusing in part because of the exceptions to the rule. Some consumers purchase milk that may have a stamped date of more than a month out from purchase; other consumers think the stamped "sell-by" date is a use-by date.

- Those buying milk with a date past 12 days from the purchase are buying milk that likely is ultra-pasteurized or processed aseptically (organic milk is usually handled in one of those ways). For that milk, the 12-day sell-by date does not apply and the stamped date is more like a suggested use-by date.
- Others think the stamped date on Grade A milk is a "use by" date when in fact it is the sell-by date (for milk that is not ultrapasteurized or organic). If these consumers dump the carton of milk into the sink on the "sell-by" date, they most likely are tossing milk that is still good for at least another week. Educating these consumers is considered one way of maintaining the current sell-by date with less waste of good milk.

## **Lawsuit on 12-day Milk Sell-By Date is Under Review**

Efforts to bring about a rule change to the 12-day sell-by date through a lawsuit--Core-Mark v. Board of Livestock--is under review by a five-justice panel in the Montana Supreme Court under case number [DA 13-0595](#). The case includes Dean Foods doing business as Meadow Gold Dairies and the Montana Milk Producers Association as intervenors on behalf of the Board of Livestock. Friends of Montana Retailers also are among the parties involved in the case.

Core-Mark filed its first case against the Board of Livestock in federal court in 2008 and later agreed to dismiss without prejudice with a stipulation that the state further review the issue. The next steps are part of the lawsuit regarding whether subsequent hearings (using a hearings officer) were part of a contested case hearing or a two-part process that included an evidentiary administrative hearing with public comment. The hearings officer's proposed decision included a recommendation that the Board of Livestock repeal the 12-day rule and adopt rules permitting

processors to set the date on the milk label. It was also recommended that the Board of Livestock consider rules setting minimum standards for testing methodologies. When the Board of Livestock upheld the current 12-day sell-by rule, Core-Mark appealed to the District Court, which upheld the Board's decision. Core-Mark then appealed to the Montana Supreme Court, where the issue now is pending a decision. Part of the lawsuit claims the Board of Livestock did not follow the rulemaking process appropriately. Another part contends the 12-day sell-by date "is not consistent with its stated purpose or reasonably necessary to effectuate that purpose". (p. 29 of Core-Mark International Inc.'s initial brief.)

## What Do Other States Do Regarding Milk Labeling?

Table 1 shows that neither Idaho, one of the nation's largest milk processors, nor Wyoming require by statute any specific type of sell-by or use-by label. Other states in Table 2 were among those listed as having date labeling for processed milk or milk products in a September 2013 Natural Resources Defense Council - Harvard Food Law and Policy Clinic Report: "The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America". Some states may have general requirements that include milk, but if the state is not specifically listed in Table 2, that means the state has no milk-specific labeling statutes.

**Table 1: Montana's Neighboring States' Treatment of Milk Sales**

State	Approach
Wyoming	No specific law describes "sell-by" or "use-by" labeling. Wyoming has adopted the U.S. Public Health Service/Food and Drug Administration Pasteurized Milk Ordinance, except for Section 9, and the procedures governing the cooperative state-Public Health Service/FDA Program of the National Conference on Interstate Milk Shipments. Also adopted the USDA's Agriculture Marketing Service "Milk for Manufacturing Purposes and its Production and Processing".
Idaho	No specific law describes "sell-by" or "use-by" labeling. The Department of Agriculture has authority to pull products from shelves (and has done so) if the products are considered contaminated.

**Table 2: General Overview of States' Milk Labeling Directives**

State	Directive
California	Date labeling is required to inform consumers of the date established by the processor that is most likely to ensure quality, after which the product is normally removed from the shelf. There is no restriction on sales of milk after the listed date.
Connecticut	Date labeling required regarding a "last sale date", but sales after that date are not restricted for milk.

Florida	Allows either the date of "manufacture" of the product or the last day the product may be offered for sale. No milk or milk product may be offered for sale as a "grade A product" after the shelf-life expiration date approved by the department.
Georgia	Milk and milk products must be marked with a sell-by date, which is said to be synonymous with an expiration date, best-by date, and best-before date. The date is the last day milk can be sold at retail or wholesale.
Hawaii	Date labeling by the processor is required, but there is no restriction on sales after that date.
Kentucky	Requires an "open date" as the period during which the milk product is acceptable for consumption. Products not sold during the open date period are to be removed from shelves and returned to the processing plant of origin for destruction.
Maryland	Requires a sell-by date and establishes limits on commercial or institutional use within 4 days of the sell-by date.
Michigan	Requires the processor to put sell-by dates on milk container and limits sales after the sell-by date to only products advertised as being beyond the recommended last day of sale.
Montana	Sell-by date of 12th consecutive day after pasteurization of milk. Milk may not be sold after the sell-by date. The person offering the milk for sale is responsible for removing milk at or near the 12th day unless otherwise stated. Montana adopts the federal PMO except sections 9 (milk/milk products that may be sold), 15 (enforcement), 16 (penalty), and 17 (repeal and effective date) under <a href="#">32.8.101, ARM</a> . The same rule adopts the 1997 edition of the Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program for Certification of Interstate Milk Shippers.
Nevada	Requires the processor to put a date on which the product is to be removed from sale. Actual sales after that date are not prohibited.
New Hampshire	Requires a date label for cream as determined by the manufacturer. Sales after the date are not prohibited.
New Jersey	Requires a date label such as "not to be sold after" or "sell by" along with the name of processor or plant. Product may not be sold after 11:59 p.m. of sell-by date, but may be consumed after that date.
New Mexico	Allows processors of pasteurized products to determine the "pull" date. Sales after the pull date are prohibited.
Pennsylvania	Limits sell-by date to 17 days beginning after midnight on the day the milk is pasteurized. Requires a label and prohibits sales after that date.

Virginia	Milk is not listed among dairy products, which must be labeled. (Sweetened skim milk is listed.) Label of sell-by date is required. Product may not be sold after sell-by date.
Washington DC	Pull date for pasteurized fluid milk is required. Sales are not permitted after the pull date unless the product is isolated and there is a prominent display noting the product is at risk of spoilage or loss of palatability.

## **General Background Data on Dairies, Milk Production, and Distribution**

### ***Number of Montana Dairy Farms***

- A 2013 graduate thesis on Montana dairy farms by Laura Ginsburg noted that the number of dairy producers in Montana had dropped from 218 in 1990 to 70 in 2012.

### ***What is meant by quotas and how does that impact milk sales in Montana?***

- There is both pooling of milk and a quota system. State law allows for a petition by 10% or 20 licensed producers in Montana, whichever is less, to seek a statewide pooling arrangement. That pooling arrangement has been in effect for some time and provides a uniform price to dairy farmers based on how the processors use the milk (in terms of whether the milk is fluid or used for cottage cheese, butter, etc., or shipment out of state). In addition there are quotas, which are intended to discourage over production because the price in the quota is larger (\$1.50 per hundredweight more) than milk sold in excess of quota. This complicated process is not part of the white paper and would require far more explanation than is available here.

### ***Amount of Milk Produced in Montana***

- In 2012, Montana dairy cows produced 293 million pounds of milk. This was the highest since 2009 but lower than the 368 million pounds in 2005, which was a high in the 2002-2012 period. Official statistics from 2011 indicate 281.8 million pounds of milk from Montana dairy farms.

### ***How much milk is processed in Montana?***

- Montana production of packaged Class I fluid milk sold in-state amounted to 191.6 million pounds in 2011. The amount processed in Montana and sold out-of-state, primarily to Wyoming, was 21.35 million pounds.

### ***How much milk is exported from Montana for processing?***

- In 2011 the amount of raw milk exported for processing was 118.87 million pounds.

### ***Is the more milk imported for processing than is exported as packaged milk to out-of-state markets?***

- Yes. More milk is imported for processing from out of state (39,673,629 lbs) than is exported as packaged milk to out-of-state markets from Montana processors. Exported packaged milk was 21,353,324 lbs. in 2011.

### ***How much milk is sold in Montana that is processed out-of-state?***

- The Department of Livestock reported data for 2011 that included all classifications of milk. Montana processors generally handle Class I fluid milk and Class II fluid products,



like cream. Out-of-state processors generally ship in the nonfluid Class II products, like ice cream, and the Class III products, like butter and cottage cheese. For 2011 the Department of Livestock reported the following imports:

	Total	Imported by Pool Processors	Imported by Out-of-State Distributors	
			portion by Core-Mark	portion by others
Class 1 Fluid Milk (lbs)	17,636,175	2,166,518	3,938,045	11,531,612
Class II Fluid Products (lbs)	10,217,341	4,468,334	415,032	5,333,975
Class II Products (lbs milk equivalent*) e.g. ice cream	39,360,557	17,596,139	106,600	21,657,818
Class III Products (lbs milk equivalent) e.g. butter, cheese	53,990,417	0	177,521	53,812,896
Total dairy products sold in Montana, processed out of state in (lbs milk equivalent)	121,204,490	24,230,991	4,637,198	92,336,301

\*Pounds of milk equivalent is converted as 1 pound of cheese to 10 pounds of milk.

#### ***Number of Processing Plants***

- There are three private processing plants: one in Bozeman operated by the Seattle-based cooperative Darigold and two Meadow Gold plants in Great Falls and Billings. Meadow Gold is a subsidiary of Texas-based Dean Foods. The state also has a processing plant as part of the Montana Correctional Enterprises farm. Efforts to learn more from Meadow Gold and Darigold about their sales and labeling in other states were futile. Executives for both companies did not return repeated phone messages.

#### ***Number of Distributors/Jobbers***

- Distributors/jobbers may be interstate regional, like Core-Mark, or intrastate regional.
- Distributors also may be contracted to handle only one type of store or one type of product (for example Chobani has a licensed distributor that handles Montana).
- Of the 79 distributors/jobbers licensed in Montana, 49 are out-of-state and 30 are in-state. Overlap (both in-state and out-of-state distributors under the same name) exists for Associated Food Stores, Darigold, Inc., and Food Services of America. Another big operator, Sysco, has just a Billings licensee.

#### ***Major Sellers - Where do they get their milk?***

- Costco and WalMart both have contracts with the Bozeman Darigold plant.

#### ***How do distributors/retailers handle milk approaching its sell-by date?***

- As milk cartons approach the sell-by date, distributors may pull the products from shelves and send those products for remanufacturing into other dairy products that do

not have a 12-day sell-by date requirement. Some retailers offer discounts on milk as the product approaches the 12-day sell-by date. If there is storage space, some retailers might delay putting out the freshest milk if cartons approaching the sell-by date are still on the shelves.

***What impact would a later sell-by date have on rural areas in terms of distribution of products?***

- Distributors now service areas approximately once a week. There is the prospect that a longer sell-by date or best-if-used by date might mean less frequent distribution, which may be not only for milk but for all products delivered to that store.

***What impact would a later sell-by date have on food banks or food pantries?***

- A representative of the Montana Food Bank Network said that milk sent to food pantries and food banks on or before its sell-by date has a better chance of being used and that if a later sell-by date were used, then there would be less milk sent to food banks or food pantries and a shorter shelf-life for that milk (either at the food pantry or the recipient's home).

***How are distributors assessed and licensed?***

- Distributors must be licensed whether they also produce or just distribute (under 81-23-201, MCA). The annual license fee is \$2 and is due before July 1. The money is distributed in the general fund. To run the department and the program, 81-23-202, MCA, provides that distributors, producers, and producer-distributors pay assessments on a quarterly basis. Distributors pay a fee assessed per hundredweight on the volume of all classes of milk produced and sold, unless sold to another distributor. Producers pay a similar assessment (as do producer-distributors). An additional fee is to be paid by the producers, distributors, and producer-distributors to help operate the department's milk inspection program and milk diagnostic laboratory function (which is done in the Veterinary Diagnostic Laboratory). The statute states that failure to pay an assessment results in automatic termination of a license. To be reinstated, the board must approve and the licensee must pay a delinquency fee equal to 30% of the assessment that was due. (81-23-202(6), MCA).

**Concerns**

The following concerns have been raised regarding changes to the sell-by date in Montana:

- Potential loss of dairy processors, which in turn may lead to a loss of dairy farms if out-of-state processors rely on nearby production rather than shipments of Montana milk.
- Waste of palatable milk and the costs of disposal.
- Major sellers may sway the market, again by directing purchases of milk products outside of Montana, if there is a long sell-by date.

The following concerns have been raised regarding assessments levied on distributors, producers, and distributor-producers:

- Basing the assessments on product weight, requiring conversion charts for weight, is

problematic for some distributors that deal with a wide range of products. For them, a flat fee may be easier to pay. One distributor noted that the cost of reconfiguring software to make the assessments would be more in at least the first year than the assessment itself.

### **Lessons Learned in Reviewing Montana Rule on Milk Sell-By Date**

- The "milk police" under the authority of the Department of Livestock do not have authority vis-a-vis police departments.
- Rural consumers seem more savvy about the meaning of a "sell-by" date than urban consumers, based on responses emailed or otherwise sent to the EAIC. The emails and letters are available to view at the Economic Affairs Interim Committee [website](#).
- Under 81-21-103, MCA, the Department of Public Health and Human Services does not have authority to license a facility engaged in the production, storage, or transportation of dairy products but DPHHS does have authority over retail facilities and products offered for sale or sold at those facilities.
- Use-by dates are dependent on an individual consumer's treatment of the milk once purchased. For example, did the consumer leave the milk in a warm car during transport instead of putting the milk in a cooler? Did the milk stay out of the refrigerator for longer than necessary for its immediate use?
- Federal regulations are more about what additives are in milk and whether milk has been pasteurized than about milk quality and shelf life. The definition of milk is in 21 CFR 131.110 and specifies milk solids not fat and milkfat percentages plus quantities of added vitamins or flavoring ingredients. Pasteurization requirements are in 21 CFR 131.3, which also recognizes ultra-pasteurized milk as that milk thermally processed at or above 280-degrees Fahrenheit for at least 2 seconds.
- The Pasteurized Milk Ordinance<sup>1</sup> requires labeling for Grade "A" milk to include:
  - the milk plant where pasteurized or otherwise processed.
  - the words "keep refrigerated after opening";
  - the name of what type of mammal produced the milk if other than a cow;
  - the words "Grade "A" "
- Dairy inspections are done by the state regulator under the requirements of the Pasteurized Milk Ordinance, with plants and dairy farms inspected every 6 months.

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<sup>1</sup><http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM291757.pdf>