

DEAN & STERN LLC

Attorneys at Law

JAMES B. ("JIM") DEAN

4155 EAST JEWELL AVENUE, SUITE 703
DENVER, COLORADO 80222

RYAN M. STERN

(303) 756-6744

FAX (303) 756-7231

E-MAIL: firm@deanandstern.com

April 16, 2004

Board of Health
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530

RE: Proposed Raw Milk Regulation

Dear Board Members:

This law firm is special legal counsel to Guidestone Farm in connection with its dairy operations. Guidestone Farm has been the custodian of dairy cows under a cow share program with the acknowledgement of the Board of Health in mid-1995.

Guidestone Farm seeks to have the Consumer Protection Division enter into serious examination of all the alternatives to a total ban on raw milk and requests this Board to direct the Division to explore all of the alternative approaches from a majority of the states and develop with Guidestone Farm and others a registration and regulated system which can permit the availability of raw milk to those informed and consenting consumers who desire it within a closed herd and closely monitored system between a farm and the consumer. This is the paradigm which has been developed by Guidestone Farm and which exists in a number of states. It should be permitted in Colorado.

It is not the purpose of this letter to discuss in any detail whatsoever legal issues. We do believe neither the Consumer Protection Division or the Attorney General's office has neither thoroughly identified nor explored the issues raised by the proposed regulation which are listed below.

1. The Department does not have statutory authority to prohibit the availability of raw milk in Colorado. Colorado's statutes do not prohibit the sale of raw milk. The statutes only say sales of raw milk "*for other than human consumption*" must be treated with a dye approved by the Department. Sec. 25-1-114(1)(i), Colorado Revised Statutes ("CRS").
2. The proposed regulation is overbroad. As drafted, the proposed regulation could be applied to every herd of cattle containing a cow in the State of Colorado.
3. In other ways, the proposed regulation is narrow and does not accomplish its purported purpose. It does not ban existing arrangements but only prohibits transfers of ownership in existing arrangements.

4. The proposed regulation may constitute a taking of property without just compensation or due process of law. By prohibiting transfers of existing personal property interests without providing any means of compensation, the proposed reduces the value of existing cow share interests without providing a means for the owners to be properly compensated for the loss of value and making their investments in a cow share non-transferable.

5. The proposed regulation is an unlawful interference with private property rights. There is no statutory authority for the Department or this Board to prohibit the sale of the entirety of ownership in property or undivided interests in property where the property itself is not a real, immediate and definitive threat to the public health and safety. That cannot be shown here. There has been no statutory, factual or other change (except a change in Department personnel) which would support a change of position by the Department at this time from that the Consumer Protection Division (with the blessing of the Attorney General's office) took in mid-1995.

6. The proposed regulation in seeking to reverse a prior position of the Board and the Department cannot be supported by adequate findings in connection with its potential issuance. For the Department to change its ruling of nearly nine years ago, it must be required to show concrete findings of why there is a basis for reversing its ruling. This is contemplated by the State Administrative Procedure Act, Article 4 of Title 24, C.R.S. Guidestone Farm has not seen compliance by the Consumer Protection Division with all the requirements of Section 24-4-103, C.R.S., and other relevant provisions of Article 4 of Title 24. An examination of the Division's file prior to submissions by Guidestone Farm showed little but policy statements of the federal government and certain medical associations and some news reports. There are no copies of studies or other scientific materials which support the position of the Division.

The Colorado Supreme Court has found that rules must be based on a record in a lengthy and well-reasoned discussion in *Citizens for Free Enterprise v. Department of Revenue*, 49 P.2d 1054, 1061-1065 (Cob. 1982). In this instance, it is not enough for the Department to simply say it is defining a "statutory term" as was done in *Colorado Auto & Truck Wreckers Ass'n v. Department of Revenue*, 618 P.2d 646 (Cob. 1980), as explained in *Citizens for Free Enterprise v. Department of Revenue, supra*. The purported definition of "sale" in the proposed regulation goes far beyond a mere definition of a statutory term. It reverses a prior Department position and directly affects the rights and property of people who have relied on the prior interpretation for a number of years.

7. The proposed rule is not reasonably designed to promote and protect the public health. There have been no major outbreaks of any epidemic, widespread diseases or other health concerns substantially traced to raw or natural milk during the last nine years. There has been no study, which stands uncontested, showing increased hazards

from raw or natural milk today as opposed to eight years ago. There has been no public health crisis which has arisen in Colorado from raw or natural milk during the last decade although there have clearly been crises from other food sources produced, marketed and distributed in Colorado. The Wisconsin circumstances upon which the Department has apparently relied do not, offer sufficient grounds for changing the "rules of the game" in Colorado. The Administrative Procedure Act requires the Department to make the case for adopting a new rule or changing an old one. As stated above, Colorado's courts have acknowledged this. The United States District Court for the District of Colorado has stated in effect, prior to amendments to the Administrative Procedure Act making findings required, that even if no study or findings were required, the reasoning process leading to a rule must be defensible. *Colorado Health Care Ass'n v. Dept. of Social Services*, 598 F.Supp. 1400 (D.Colo. 1984). None of this is present in the current situation.

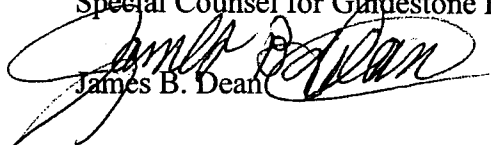
8. The proposed rule denies Colorado residents their freedom to choose among different types of foodstuffs in violation of their fundamental federal and state constitutional rights of choice and privacy. There is a developing body of constitutional law at the federal and state level regarding freedom of choice and right to privacy. This body of law requires a full examination and balancing of the rights and interests of private citizens and the community at large as represented by government entities. We have seen no effort to balance those rights and interests by the Division despite its stakeholder meetings or as a result of them.

Conclusion and Request

For the reasons described, the Board should not adopt the proposed rule. It should (1) leave matters as they are and have been for nine years, or (2) direct the Division to engage in more study, or (3) direct the Division to engage in meaningful discussions with all interested parties to develop a sound system for making raw milk available to those in Colorado who desire to access it thereby permitting Colorado to be a recognized part of the majority of states that permit raw milk in one form or another.

Very truly yours,

Dean & Stern LLC
Special Counsel for Guidestone Farms


James B. Dean

JBD/tr