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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

CORE-MARK INTERNATIONAL, INC.,
Petitioner and Appellant,

v.

MONTANA BOARD OF LIVESTOCK
and MONTANA DEPARTMENT OF
LIVESTOCK,

Respondents and Appellees,

and

DEAN FOODS d/b/a MEADOW GOLD
DAIRIES and MONTANA MILK
PRODUCERS ASSOCIATION,

Intervenors.

Cause No.: ADV 2012-517

**ORDER ON PETITION
FOR JUDICIAL REVIEW**

On June 27, 2012, Appellant Core-Mark International, Inc. (Core-Mark) petitioned the Court for judicial review of the Montana Board of Livestock's administrative decision upholding the "12-day rule" prohibiting the sale in Montana of grade A milk twelve days or more after pasteurization. Core-Mark wholesales and distributes milk and other consumer products to retail stores located in the State of

1 Montana. Respondents in this matter are the Montana Board of Livestock (Board) and
2 the Montana Department of Livestock (Department). Pursuant to section 2-15-3101,
3 MCA, the Board is head of the Department. Dean Foods, d/b/a Meadow Gold Dairies
4 (Meadow Gold), a domestic dairy processor in Montana, and the Montana Milk
5 Producers Association (MMPA) intervened on behalf of the Respondents. William K.
6 VanCanagan and Trent N. Baker represent Core-Mark. Robert Stutz represents the
7 Board and the Department. Mark D. Meyer represents the MMPA. Jock O. Anderson
8 represents Meadow Gold.

9 The Court heard oral argument on May 14, 2013. Upon review of the
10 administrative record and parties' arguments, the Court denies Core-Mark's petition
11 for judicial review and affirms the Board's decision rejecting Core-Mark's request to
12 repeal and replace the "12-day" rule.

13 **BACKGROUND**

14 The Montana Legislature authorizes the Department to "adopt rules and
15 orders it considers necessary or proper for the supervision, inspection, and control of
16 the standards and sanitary conditions of . . . milk." Section 81-2-102(1)(f), MCA. In
17 1980, the Board enacted a rule prohibiting the sale of grade A milk (milk) in Montana
18 twelve days or more after pasteurization. Admin. R. Mont. 32.8.202(3). The "12-day
19 rule," as it is commonly known, requires milk producers to mark their milk with a
20 "sell-by" date (no more than twelve days from the date of pasteurization) and remove
21 their milk from retail shelves on or before the end of those twelve days. Mont.
22 Admin. R. 32.8.202(3) and 32.8.203. The Department may seize and destroy milk left
23 on the shelf of a retail establishment after the sell-by date. Violators are subject to
24 criminal penalties. Mont. Admin. R. 32.8.206 and section 81-23-405, MCA.

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1 The Department interprets the 12-day rule to prohibit “dual dating.”

2 Dual dating is the procedure in which a producer stamps milk with a sell-by date and
3 another date (e.g. an expiration, best-by, or shelf-life date). In Montana, out-of-state
4 milk producers cannot stamp an expiration date or best-by date of the state where the
5 milk originated on the milk it distributes in Montana. Milk produced in Montana for
6 sale outside the state is exempt from the 12-day rule. Mont. Admin. R. 32.8.204(2).
7 The definition of “milk” does not include buttermilk, egg-nog, or ultra-pasteurized
8 milk products. Mont. Admin. R. 32.8.101(1)(c). These products have a longer shelf
9 life than milk. (Mont. Dept. Livestock’s Response Br. 13 (Oct. 31, 2012); 11 Mont.
10 Admin Register 1604 (June 12, 1980)).

11 In 2002, Inland Dairies of Spokane, Washington, requested and received
12 an exemption from the rule prohibiting dual-dating for purposes of selling milk in
13 retail stores in parts of western Montana. The exemption allowed Inland Dairies to
14 mark their milk products with a sell-by date and an expiration date or best-by date. In
15 2006, Core-Mark acquired Inland Dairies’ Montana market. Core-Mark continued to
16 sell milk under the dual-date exemption. Since then, Core-Mark has expanded its
17 milk distribution in Montana beyond that of Inland Dairies. In 2008, the Department
18 revoked Core-Mark’s exemption. Core-Mark filed suit against the Department in
19 federal court challenging the 12-day rule. The case was dismissed without prejudice
20 when the parties agreed Core-Mark would petition the Department to repeal and
21 replace the 12-day rule. Pursuant to the agreement, Core-Mark petitioned the Board
22 under section 2-4-315, MCA, to amend the rule. The Department reinstated Core-
23 Mark’s exemption from the dual-dating prohibition pending a final decision in the
24 administrative process.

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1 After Core-Mark petitioned the Board to amend the 12-day rule, Hearing
2 Examiner John Sullivan conducted an evidentiary hearing in the matter. Separately,
3 Sullivan also conducted a public hearing on Core-Mark's petition to amend the rule.
4 The administrative record contains 1,180 pages and includes oral testimony,
5 arguments from counsel, post-hearing legal briefs, and proposed findings of fact and
6 conclusions of law. Sullivan concluded the 12-day rule is an invalid exercise of the
7 Department's authority to establish standards regulating milk freshness. Sullivan
8 recommended the Board repeal the 12-day rule and adopt a rule permitting milk
9 processors to establish an appropriate code date for the sale of milk.

10 Upon consideration of the hearing examiner's recommendation and
11 public comment, the Board voted unanimously on May 30, 2012 to deny the petition
12 and retain the 12-day rule. On June 26, 2012, Core-Mark filed a petition for judicial
13 review of the Board's decision.

14 Milk is pasteurized to destroy all harmful pathogens contained in therein,
15 making it safe to drink. Pasteurization is the process by which dairy products are
16 heated to 161 °F or more for fifteen seconds. Pasteurization also destroys most of the
17 other microorganisms slowing the degradation of milk and extending its shelf life.
18 (Meenderink, Hrg. Transcr. 902-904 (Apr. 26, 2010).) The quality of milk begins to
19 degrade immediately upon pasteurization and continues to degrade until it becomes
20 unfit to consume. The degradation rate of milk depends primarily on the temperature
21 at which it is stored. Higher storage temperatures increase the growth of
22 microorganisms which increase the rate of milk degradation. (Meenderink, Hrg.
23 Transcr. 906-911 (Apr. 26, 2010).) Processing advancements in recent years have
24 gradually improved the shelf life of milk. (Depo. Kiilsgaard 17-19 (Feb. 23, 2010);
25 Bodyfelt, Hrg. Transcr. 51-54, 119-122 (Mar. 3, 2010).) Under reasonable storage

1 conditions, it is generally agreed milk should be fit to drink for a period of time
2 approximately sixteen to twenty-one days. (Depo. Lewis 52 (Mar. 2, 2010); *see*
3 Bodyfelt, Hrg. Transcr. 40-185 (Mar. 3, 2010); *see* Meenderink, Hrg. Transcr.
4 900-944 (Apr. 26, 2010); *see* Adamson, Hrg. Transcr. 945-968, 973-1034, 1102-1174
5 (Apr. 26-27, 2010, Nov. 15, 2010); Burrows, Hrg. Transcr. 229-231 (Mar. 3, 2010).)
6 Although milk may still be fit to consume, individual consumers experience varying
7 points at which palatability of milk is affected. The palatability of milk decreases
8 over time. When milk is no longer fresh, consumers with dissimilar taste sensitivity
9 notice degradation at different times. Accordingly, milk becomes unpalatable to
10 consumers over a period of time. (Depo. Lewis 25-26 (Mar. 2, 2010); Depo.
11 Kiilsgaard 39, 42, 45 (Feb. 23, 2010); Meenderink, Hrg. Transcr. 908-909
12 (Apr. 26, 2010).)

13 The rationale for the 12-day rule is that it assures consumers who
14 purchase milk will still enjoy a reasonable amount of shelf life when they take it
15 home, i.e. it allocates a portion of the milk's shelf life to the consumer. (Mackay,
16 Hrg. Transcr. 759-760 (Apr. 26, 2010).) Most states surrounding Montana use an
17 open code dating system in which the processor determines and applies its own
18 expiration date for the milk it produces. (Meenderink, Hrg. Transcr. 917-918
19 (Apr. 26, 2010).) Typically, milk sold under an open code dating system is labeled
20 with an expiration date varying sixteen to twenty-one days after pasteurization. (Id.,
21 921-922) To determine the appropriate expiration date for milk, processors complete
22 rigorous testing taking into consideration the milk's quality, freshness and palatability.
23 (Burrows, Hrg. Transcr. 190-198 (Mar. 3, 2010); Kragt, Hrg. Transcr. 384-394
24 (Mar. 4, 2010); Meenderink, Hrg. Transcr. 913, 919-922 (Apr. 26, 2010); Sullivan,
25 Proposed Dec. 12 (Oct. 27, 2011).) The purpose of code dating (open code dating or

1 sell-by code dating) is to provide a quality product to the consumer. Although code
2 dating addresses freshness and palatability of milk, it does not directly relate to human
3 health or safety. (Bodyfelt, Hrg. Transcr. 126 (Mar. 3, 2010); Nygaard, Hrg. Transcr.
4 326 (Mar. 4, 2010); Mackay, Hrg. Transcr. 779 (Apr. 26, 2010); Meenderink, 912-913
5 (Apr. 26, 2010); *contra* Depo. Kiilsgaard 42-44 (Feb. 23, 2010).)

6 Core-Mark favors open code dating and advances several arguments in
7 favor of adopting an open code dating system: (a) the processor is in the best position
8 to determine the shelf life of its milk because when a processor chooses an expiration
9 date, the consumer receives the most accurate information about the product; (b) the
10 12-day rule discriminates against foreign business and inhibits out-of-state milk
11 producers from selling milk in Montana because twelve days is an insufficient time
12 period in which to distribute and sell milk; (c) the 12-day rule results in unnecessary
13 waste to retail stores; (d) the 12-day rule is misleading because consumers often
14 mistake the sell-by date for an expiration date; (e) the 12-day rule results in increased
15 costs to consumers because it limits competition, requires frequent delivery, and
16 causes waste; and (f) the 12-day rule creates a disincentive to Montana farms and
17 dairies to improve facilities, equipment and procedures so as to improve milk quality.
18 (*See generally* Pet. Brs. & Test.)

19 Respondents disagree with Core-Mark's characterization of the 12-day
20 rule and advance the following arguments in support of the sell-by code dating
21 system: (a) the 12-day rule assures consumers who purchase milk at Montana retail
22 businesses will still enjoy a reasonable shelf life for the product after purchase; (b) the
23 12-day rule, unlike open code dating, provides a more consistent measure of freshness
24 to a consumer because the sell-by code date always indicates a date twelve days after
25 pasteurization; (c) the 12-day rule eliminates the temptation for processors to stretch

1 their code dates for competitive reasons; (d) the 12-day rule better accommodates
2 rural consumers who shop less frequently than urban residents; and (e) changing the
3 12-day rule to an open code dating system will confuse Montana consumers who are
4 used to purchasing milk with a sell-by date. (*See generally* Respts.’ Brs. & Test.)

5 Processors test their products to determine quality and freshness.
6 (Burrows, Hrg. Transcr. 190-198 (Mar. 3, 2010); Kragt, Hrg. Transcr. 384-394
7 (Mar. 4, 2010); Meederink, Hrg. Transcr. 913, 919-922 (Apr. 26, 2010); Sullivan,
8 Proposed Dec. 12 (Oct. 27, 2011).) Core-Mark maintains individual processors are
9 in the best position to provide consumer information about their products. (*See*
10 *generally* Pet. Brs. & Test.; *see* Kragt, Hrg. Transcr. 393-394 (Mar. 4, 2010); *see*
11 Meenderink, Hrg. Transcr. 926 (Apr. 26, 2010); *see* Adamson, Hrg. Transcr. 1105
12 (Nov. 15, 2010); *see* Sullivan, Proposed Dec. 12 (Oct. 27, 2011).) Although
13 processors often use the stress test/Mosely test to evaluate their milk, some processors
14 use varying criteria to establish code date length, resulting in a lack of uniformity
15 among processors regarding code dating. (*see* Kragt, Hrg. Transcr. 386-390
16 (Mar. 4, 2010); *see* Meenderink, Hrg. Transcr. 909-911 (Apr. 26, 2010); *see*
17 Adamson, Hrg. Transcr. 1106 (Nov. 15, 2010); Depo. Kiilsgaard 12-15
18 (Feb. 23, 2010); Depo. Lewis 13-15 (Mar. 2, 2010).) The stress test or Mosely
19 test requires a processor to test milk stored at 45 °F (a relatively high temperature
20 for milk which encourages bacteria growth) for eighteen to twenty-one days after
21 pasteurization, depending on the code date length. (Bodyfelt, Hrg. Transcr. 65-66
22 (Mar. 3, 2010); Burrows, Hrg. Transcr. 203 (Mar. 3, 2010); Kragt, Hrg. Transcr.
23 386-390 (Mar. 4, 2010); Meenderink, Hrg. Transcr. 904-906, 908-909 (Apr. 26,
24 2010).) As a result of recent innovations in milk processing, milk producers conclude
25 today’s milk has a longer shelf life than it had in 1980. (Depo. Kiilsgaard 17-19

1 (Feb. 23, 2010); Bodyfelt, Hrg. Transcr. 52-54 (Mar. 3, 2010); Meenderink, Hrg.
2 Transcr. 924 (Apr. 26, 2010); Sullivan, Proposed Dec. 10 (Oct. 27, 2011).)

3 The shelf life for milk depends on a variety of factors which occur after
4 milk leaves a processing plant. An important factor affecting milk shelf life is the
5 temperature at which a consumer stores it. Because milk processors cannot control
6 these factors, the open code dating system does not always accurately determine how
7 long the product may remain fresh. (Meenderink, Hrg. Transcr. 907-908 (Apr. 26,
8 2010); Depo. Lewis 13-15 (Mar. 2, 2010).)

9 Many of the arguments Core-Mark advances are not supported by the
10 record. First, the record contains conflicting evidence as to whether the 12-day rule
11 results in greater waste than an open code dating system. Although the 12-day rule
12 at times requires destruction of good milk, there is no factual basis to conclude more
13 waste occurs under the 12-day rule. Two convenience store operators testified they
14 incurred more waste under the 12-day rule. However, representatives from Meadow
15 Gold testified the company experiences less waste comparatively in Montana than
16 Wyoming, which has a 16-day code dating system. There is insufficient evidence
17 in the record to conclude the 12-day rule results in more waste than an open code
18 dating system. (Stein, Hrg. Transcr. 445-448, 453, 467-468, 491-492 (Mar. 5, 2010);
19 Roylance, Hrg. Transcr. 722-723 (Mar. 5, 2010); Adamson, Hrg. Transcr. 964-965
20 (Apr. 26, 2010).) Second, there is no substantial evidence in the record demonstrating
21 the 12-day rule is confusing to consumers. (Mackay, Hrg. Transcr. 770-774 (Apr. 26,
22 2010); Adamson, Hrg. Transcr. 965, 1108 (Apr. 26, 2010, Nov. 15, 2010); Depo.
23 Kiilsgaard 26, 49-50 (Feb. 23, 2010).) In fact, the Board enacted the 12-day rule in
24 1980 because consumers rejected open code dating as too confusing. (Mackay, Hrg.
25 Transcr. 895-897 (Apr. 26, 2010).) Third, there is no substantial evidence in the

1 record demonstrating either the 12-day rule discourages innovation or the performance
2 qualities of Montana dairy farms and milk processing facilities are inferior to the
3 performance qualities elsewhere. (Bodyfelt, Hrg. Transcr. 127-131 (Mar. 3, 2010);
4 Depo. Lewis 47-48 (Mar. 2, 2010).) Although the 12-day rule does not guarantee
5 milk quality beyond the sell-by date, evidence in the record indicates the shelf life of
6 milk is typically sixteen to twenty-one days. (Depo. Lewis 52 (Mar. 2, 2010); *see*
7 Bodyfelt, Hrg. Transcr. 40-185 (Mar. 3, 2010); *see* Meenderink, Hrg. Transcr.
8 900-944 (Apr. 26, 2010); *see* Adamson, Hrg. Transcr. 945-968, 973-1034, 1102-1174
9 (Apr. 26-27, 2010, Nov. 15, 2010); Burrows, Hrg. Transcr. 229 (Mar. 3, 2010).)
10 Finally, there is no substantial evidence in the record establishing the 12-day rule
11 disadvantages out-of-state distributors and inhibits their ability to sell milk in
12 Montana. In fact, there is no surplus of milk in the state as Montana is a net importer
13 of milk. Evidence in the record indicates the 12-day rule inhibited Organic Valley, an
14 out-of-state distributor, in selling milk in the state. As a result, Organic Valley only
15 sells its extended life milk products in Montana. Nonetheless, evidence also indicates
16 Organic Valley does not process its own milk and must contract with other processors,
17 subjecting it to the constraints of the processing schedules of its competitors.
18 (Adamson, Hrg. Transcr. 1119-1124 (Nov. 15, 2010); Kragt, Hrg. Transcr. 397-400,
19 438-439 (Mar. 4, 2010); Meadow Gold Ex. 1; Burrows, Hrg. Transcr. 267 (Mar. 3,
20 2010) (modified by Bennett); Bennett, Hrg. Transcr. 517 (Mar. 5, 2010).)

21 Core-Mark presented no evidence the 12-day rule affects its milk
22 distribution in Montana. Although Core-Mark is operating under an exception to the
23 dual date prohibition, it has expanded its market to the entire state and increased its
24 sale volume. (Adamson, Hrg. Transcr. 1119, 1124 (Nov. 15, 2010); Kragt, Hrg.
25 Transcr. 397-400, 438-439 (Mar. 4, 2010); Meadow Gold Ex. 1; Burrows, Hrg.

- 1 (i) in violation of constitutional or statutory provisions;
2 (ii) in excess of the statutory authority of the agency;
3 (iii) made upon unlawful procedure;
4 (iv) affected by other error of law;
5 (v) clearly erroneous in view of the reliable, probative, and
6 substantial evidence on the whole record;
7 (vi) arbitrary or capricious or characterized by abuse of
8 discretion or clearly unwarranted exercise of discretion; or
9 (b) findings of fact, upon issues essential to the decision, were
10 not made although requested.
11

12 The Montana Supreme Court adopted a three-part test to determine if a
13 finding is clearly erroneous. *Weitz v. Mont. Dep't of Natural Res. & Conserv.*, 284
14 Mont. 130, 943 P.2d 990 (1997). First, the court must review the record to see if the
15 findings are supported by substantial evidence. Second, if the findings are supported
16 by substantial evidence, the court is to determine whether the agency misapprehended
17 the effect of the evidence. Third, even if substantial evidence exists and the effect of
18 the evidence has not been misapprehended, the court can still determine that a finding
19 is clearly erroneous when, although there is evidence to support it, a review of the
20 record leaves the court with the definite and firm conviction that a mistake has been
21 committed. *State Personnel Div. v. Child Support Investigators*, 2002 MT 46, ¶ 19,
22 308 Mont. 365, 43 P.3d 305, 309 (citing *Weitz*, 284 Mont. at 133-34, 943 P.2d at 992).
23 Conclusions of law, on the other hand, are reviewed to determine if the agency's
24 interpretation of the law is correct. *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470,
25 474, 803 P.2d 601, 603 (1990).

21 DISCUSSION

22 Nothing in the background is to be construed as a determination that
23 either open code dating or the 12-day rule is superior to the other. Both have
24 advantages and disadvantages. The Board carefully considered each system and
25 assessed differing opinions and conflicting facts in the record. Both code dating

1 systems have a rational basis in fact. The Board’s selection of either would not be
2 arbitrary or capricious or characterized by abuse of discretion. To that end, this Court
3 finds the Board acted within its lawful discretion by selecting one policy choice over
4 the other.

5 The underlying administrative proceeding was not a contested case
6 proceeding under the Montana Administrative Procedure Act. Section 2-4-601 to
7 2-4-631, MCA. A contested case is “a proceeding before an agency in which a
8 determination of legal rights, duties, or privileges of a party is required by law to be
9 made after an opportunity for a hearing.” Section 2-4-102(4), MCA. Core-Mark
10 initiated an administrative proceeding to amend or repeal the 12-day rule pursuant to
11 section 2-4-315, MCA. The statute provides an interested person “may petition an
12 agency requesting the promulgation, amendment, or repeal of a rule” and states “[a]n
13 agency may, but is not required to, conduct a hearing or oral presentation on the
14 petition in order to develop a record and record evidence and to allow the petitioner
15 and interested persons to present their views.” According to the plain language of the
16 statute, the administrative proceedings in this matter do not meet the requirements of a
17 contested case. Although the Department held a hearing, it was not required to make
18 a final determination of legal rights, duties, or privileges of a party in the proceeding.
19 Section 2-4-102(4), MCA. Core-Mark filed a petition asking the Board to repeal and
20 replace the 12-day rule. Core-Mark did not ask the Board to determine its “legal
21 rights, duties, or privileges” as necessary in a contested case. See *Hobble Diamond
22 Ranch, LLC v. State*, 2012 MT 10, ¶ 21, 363 Mont. 310, 268 P.3d 31.

23 As stated above, the standard of review for an administrative proceeding
24 is whether the Board’s decision was “arbitrary, capricious, unlawful, or not supported
25 by substantial evidence.” *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 21,

1 363 Mont. 310, 208 P.3d 31 (citing *Clark Fork Coalition v. Mont. Dept. of Env'tl.*
2 *Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482; *Skyline Sportsmen's Assn.*
3 *v. Bd. of Land Commrs.*, 286 Mont. 108, 113, 951 P.2d 29, 32 (1997)). When making
4 the factual inquiry whether an agency decision was arbitrary or capricious, the
5 standard of review is a narrow one. *N. Fork Preservation Assn. v. Dept. of State*
6 *Lands*, 238 Mont 451, 465, 778 P.2d 862, 871 (1989) (quoting *Citizens to Preserve*
7 *Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823 (1971)). The court must
8 “consider whether the decision was based on a consideration of the relevant factors
9 and whether there has been a clear error in judgment.” *N. Fork Preservation Assn.*,
10 238 Mont at 465, 778 P.2d at 871 (quoting *Citizens to Preserve Overton Park*, 401
11 U.S. at 416, 91 S. Ct. at 823). A court “cannot substitute [its own] judgment for that
12 of the [agency] by determining whether its decision was correct.” *N. Fork*
13 *Preservation Assn.*, 238 Mont. at 465, 778 P.2d at 871.

14 The Montana Legislature authorizes the Department to “adopt rules and
15 orders that it considers necessary or proper for the supervision, inspection, and control
16 of the standards and sanitary conditions of . . . milk.” Section 81-2-102(1)(f), MCA.
17 Under the plain language of the statute, the Department has the authority to adopt
18 rules to control the quality of milk sold in Montana, including the power to adopt a
19 code dating system to ensure milk is fresh.

20 An agency’s interpretation of its rule is afforded great weight. A court
21 should defer to the agency’s interpretation unless it is plainly inconsistent with the
22 spirit of the rule. The agency’s interpretation of the rule will be sustained so long as
23 it lies within the range of reasonable interpretation permitted by the wording. *Clark*
24 *Fork Coalition v. Mont. Dept. of Env'tl. Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197,
25 202, 197 P.3d 482, 487. An administrative agency’s interpretation of a statute under

1 its administration is entitled to great deference. *Norfolk Holdings, Inc. v. Mont. Dept.*
2 *of Revenue*, 249 Mont. 40, 44, 813 P.2d 460, 462 (1991) (citations omitted).

3 A person or interested party challenging an agency rule has the burden of
4 proving the rule invalid. Deference to the agency is warranted when the challenger
5 has not satisfied that burden. *Lohmeier v. State*, 2008 MT 307, ¶ 27, 346 Mont. 23,
6 32, 192 P.3d 1137, 1144. Because Core-Mark failed to satisfy its burden proving the
7 12-day rule invalid, deference to the Board’s decision is appropriate. Additionally,
8 “[d]eference to agencies is most appropriate when the agency interpretation has stood
9 unchallenged for a considerable length of time, thereby creating reliance in the public
10 and those having an interest in the interpretation of the law.” *Mont. Trout Unlimited*
11 *v. Mont. Dept. of Nat. Resources & Conserv.*, 2006 MT 72, ¶ 37, 331 Mont. 483, 494,
12 133 P.3d 224, 231 (citing *Mont. Power Co. v. Mont. Pub. Servs. Comm’n.*, 2001 MT
13 102, 305 Mont. 260, 26 P.3d 91). While this deference is not always binding, courts
14 give “long-standing administrative interpretations ‘respectful consideration.’” *Mont.*
15 *Power Co.*, ¶ 25. Because the 12-day rule is long-standing and has remained in effect
16 since 1980, this Court gives respectful consideration by deferring to the Board’s
17 decision.

18 A rule is not valid or effective unless it is “(a) consistent and not in
19 conflict with the statute, and (b) reasonably necessary to effectuate the purpose of
20 the statute.” Section 2-4-305, MCA. Additionally, for a rule to be valid it (1) must
21 not join additional and contradictory requirements on the statute; and (2) must not
22 join additional non-contradictory requirements on the statute which the legislature did
23 not contemplate. *Bick v. State*, 224 Mont. 455, 458-459, 730 P.2d 418, 421 (1986)
24 (citations omitted). The 12-day rule does not join additional or contradictory
25 requirements on the statute. Similarly, the rule does not join additional

1 non-contradictory requirements on the statute which the legislature did not
2 contemplate. In the years since the Board adopted the 12-day rule in 1980, the
3 Montana Legislature has made no effort to abolish or modify it. The 12-day rule
4 is reasonably necessary to effectuate the purpose of the statute. Core-Mark has
5 presented no evidence upon which the Court could determine otherwise.

6 Even though there are other means to control the quality and freshness
7 of milk, (e.g. open code dating), the 12-day rule remains reasonably necessary and
8 proper to control the standards or quality of milk sold in Montana.

9 A court should not reverse an agency's decision merely because there is
10 inconsistent evidence in the record or because the record might support a different
11 conclusion. *Kiely Const. v. Red Lodge*, 2002 MT 241, ¶ 69, 312 Mont. 52, 76, 57
12 P.3d 836, 851. In order to find a decision arbitrary or capricious, the Board's decision
13 "must appear to be random, unreasonable, or seemingly unmotivated, based on the
14 existing record." *Id.* (citing *Silva v. Columbia Falls*, 258 Mont. 329, 335, 852 P.2d
15 671, 675 (1993)). The Board's decision to reject Core-Mark's petition to repeal and
16 replace the 12-day rule was not random, unreasonable, or seemingly unmotivated
17 based on the record. The Board considered all the evidence and reached its decision
18 based upon the record. Its decision was not arbitrary or capricious.

19 Core-Mark failed its burden to establish the Board was arbitrary or
20 capricious by denying Core-Mark's petition to repeal or replace the 12-day rule.
21 Core-Mark cites cases which are distinguishable and do not establish a basis upon
22 which to overturn the Board's decision. *See Bd. of Barbers of Dept. of Prof'l &*
23 *Occupational Licensing v. Big Sky College of Barber-Styling, Inc.*, 192 Mont. 159,
24 626 P.2d 1269 (1981); *see Bell v. Dept. of Prof'l & Occupational Licensing*, 182
25 Mont. 21, 594 P.2d 331 (1979); *see Michels v. Dept. of Social and Rehab. Servs.*, 187

1 Mont. 173, 609 P.2d 271 (1980); *see Yanzick v. Sch. Dist. No. 23*, 196 Mont. 375,
2 641 P.2d 431 (1982). Accordingly, Core-Mark's petition for judicial review must be
3 denied. The Board adopted and retained the 12-day rule in accordance with Montana
4 law and within its scope of authority granted by the Montana Legislature. The
5 Board's decision denying Core-Mark's petition under section 2-4-315, MCA, is
6 supported by substantial evidence and is not arbitrary or capricious. The Court
7 affirms Montana Board of Livestock's decision to deny Core-Mark's petition to repeal
8 and replace the 12-day rule.

9 **IT IS HEREBY ORDERED** the petition for judicial review is DENIED
10 and the Montana Board of Livestock's decision to deny Core-Mark's request to repeal
11 and replace the 12-day rule is AFFIRMED.

12 DATED this 14th day of August 2013.

13
14 
15 MIKE MENAHAN
16 District Court Judge

17
18 c: William K. VanCanagan/Trent N. Baker
19 Robert Stutz
20 Mark D. Meyer
21 Jock O. Anderson

22 MM/d