

Alaska State Legislature

House Resources Committee

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MEMO

To: House Resources Members
Fr: Rep. Geran Tarr, Co-Chair, House Resources Committee *JS*
Re: Research from Attorney Pete Kennedy for Food Security Subcommittee
Date: September 28, 2018

The Food Security Subcommittee met in Anchorage on June 4, where we heard from Attorney Pete Kennedy, a national expert on laws involving food freedom and raw milk. At my request, Mr. Kennedy has provided research that I am summarizing and sharing in this memo. I will distribute this memo at the October 1 meeting in Palmer and it will be available to the public on BASIS.

After the June 4 meeting we had a question about Alaska's herd share program (a herd share is when a farmer enters into a contract with consumers to "own" a cow for the purposes of raw milk from a cow, goat or sheep). The question was whether a farmer could also make other products for those owners such as cheese, yogurt, butter, etc. Mr. Kennedy's professional opinion is yes, because it is an issue of property rights. See below for more information.

According to Mr. Kennedy, the states with herd share laws are:

- Alaska legal by regulation
- Colorado legal by statute
- Idaho legal by statute
- Maryland illegal by regulation
- Michigan legal by written policy
- Nevada illegal by statute
- North Carolina legal by statute; had a statute for 14 years banning herd shares but earlier this year the legislature passed a bill expressly legalizing them
- North Dakota legal by statute
- Ohio legal by court decision
- Tennessee legal by statute
- Utah legal by statute for micro dairies (2 cows, 10 goats and 10 sheep)
- West Virginia legal by statute
- Wyoming legal by regulation; also, subsequently passed a law allowing the unregulated sale of raw milk from producer direct to consumer so I'm not sure there are any herd-share programs currently operating in the state.

There might be a state or two, such as Washington which allows the licensed sale of raw milk and has something in its law requiring herd-share programs to be licensed as well; I did not include it in this list because all the licensed farmers--as far as I know--sell raw milk instead of operating herd-share programs.

Case Study: Tennessee Property Rights Issue

Tennessee statute (TCA 53-3-119) provides that no law "shall be construed as prohibiting the independent or partial owner of any hooved mammal from using the milk from the animal for the owner's personal consumption or other personal use."

After this law went into effect, the Tennessee Department of Agriculture (TDA) claimed that the owner could only obtain raw milk from his or her dairy animal, not any other dairy products. State Representative Frank Niceley sought an opinion on the matter from the state attorney general. The AG opinion held that someone who has an ownership interest in a dairy animal can obtain not only raw milk but also other raw dairy products processed from that animal's milk.

I don't agree with the opinion's use of the word "sale" to describe the distribution of raw milk to dairy animal owners but the result in the opinion is the right one. Owners, who have the property right to the milk from the dairy animal they own, also have the right to obtain other raw dairy products made from that milk.

Attachments: Copy of the Tennessee Attorney General opinion as well as a copy of the Tennessee herd share statute.

Case Study: Michigan Raw Milk Property Rights Issue

In 2013 the Michigan Department of Agriculture and Rural Development (MDARD) issued Policy 1.40 (see attached) in which MDARD waived enforcement of the law prohibiting raw milk sales and distribution by allowing raw milk to be distributed through herd share contracts.

Policy 1.40 states that for the distribution of any other dairy product the farmer would need to be licensed; the catch is that producers cannot sell raw dairy products like butter and cream even with the license.

A Grade A dairy that also happened to operate a herd share program enabled its members to obtain raw butter and cream. An MDARD inspector confiscated raw dairy products from the farm several times and eventually MDARD obtained an injunction prohibiting the farm from violating Michigan's food and dairy laws. While the injunction was in place, the MDARD inspector found more raw butter and cream on the farm; MDARD petitioned the court to find the farmer in contempt. The court ruled that the farmer was not in contempt; attached is a transcript in the case.

If you look at the transcript from the farmer's court hearing, most of the testimony was not about whether the farmer was violating the Michigan dairy laws but rather was about determining the property rights of the shareholders. The milk used in making butter and cream is the property of the shareholders, not the farmer; if they want the farmer to process their milk into another dairy product, that should be their prerogative. This is different from the dairy farmer processing his milk into another dairy product for commercial sale. In that instance the Michigan dairy laws should apply.

Case Study: Pennsylvania Raw Milk Herd Share Program

Licensed raw milk farmers in Pennsylvania had become frustrated because their license only allowed them to sell milk and cheese, but they had customers wanting butter and cream. So, they entered into an agreement to take the raw milk the customer had already purchased and process that milk into another raw dairy product. The Pennsylvania Department of Agriculture has never officially approved this contract but also has never taken an enforcement action against any licensed farmer using the contract.

Attachment: Draft labor contract that a herd share farmer can use as an agreement to process a shareholder's raw milk into other dairy products.

Case Study: Virginia Herd Share Programs Thriving

To give you some background on Virginia, herd share programs are thriving there even though--unlike Alaska, Michigan and Tennessee--there is no statute, regulation, written policy recognizing their legality. Many of the Virginia herd share dairies are distributing raw dairy products besides raw milk. The Virginia Department of Agriculture and Consumer Services (VDACS) this year made the department's policy official with the following statement:

“The agency has currently taken a hands-off approach to herd shares as long as there is a legitimate contractual relationship conveying ownership between the consuming individual and the animal/herd. Value added products such as yogurt, etc. (in the context of a contractual relationship between owner and consumer) are still on the table and I’m not sure where we are going with that, but the agency is not taking any action regarding those types of products at this time.”

Report: Raw Milk Safety

Attached is a recent research article on raw milk outbreaks, legalization and consumption in the U.S.

Results: The rate of unpasteurized milk-associated outbreaks has been declining since 2010, despite increasing legal distribution. Controlling for growth in population and consumption, the outbreak rate has effectively decreased by 74% since 2005.

This mirrors my own experience working on foodborne illness outbreaks attributed to the consumption of raw milk. As the demand for raw milk has gone up, the number of outbreaks blamed on raw milk has either remained the same or gone down. I can tell you that the only cases of alleged foodborne illness from raw dairy I've worked on involved raw milk and raw cheese, and not a single case involved raw butter, cream, yogurt, or kefir.

Attachment: Recent Trends in Unpasteurized Fluid Milk Outbreaks, Legalization, and Consumption in the United States – PLOS Currents Outbreaks

Case Study: Raw Butter

The Farm-to-Consumer Legal Defense Fund (FTCLDF) has filed a petition with FDA requesting that the agency lift the interstate ban on raw butter. Three main take-aways from the petition:

1. **Raw butter is one of the safest foods to consume.** The CDC's foodborne illness database goes back twenty years to 1998; during that time, there has not been a single case of illness attributed to the

consumption of commercially produced raw butter. There was one foodborne illness outbreak for which raw butter was listed as a possible cause as was raw milk and raw soft cheese; given the fact that the other two foods have been implicated in other foodborne illness, the likelihood is that raw butter was not responsible for the outbreak.

The sale of raw butter has been legal in California since its statehood in 1850. During its history there has not been any case of foodborne illness attributed to the consumption of butter. Organic Pastures Dairy Company (OPDC) in Fresno has sold over two million pounds of raw butter without any complaints over the past 15 years.

2. The interstate ban on raw butter violates the Federal Food, Drug and Cosmetic Act. A federal statute 21 USC 341 specifically states that FDA cannot issue a standard of identity for butter. Requiring butter to be pasteurized amounts to a standard of identity regulation. There is a federal definition of butter found in 21 USC 321a that does not require it to be pasteurized.

3. The lawsuit filed by Public Citizen that led to the ban was aimed at fluid raw milk products, not manufactured dairy products such as butter and cheese. FDA did not follow the court order when it included butter in the raw dairy ban.

Bio of Pete Kennedy, Esq.

For the past fifteen years Pete Kennedy has worked on issues governing raw milk production and distribution. From 2004 to the present he has worked with the Weston A. Price Foundation (WAPF), a 501(c)(3) nonprofit dedicated to restoring nutrient-dense foods to the American diet; it is the leading raw milk advocacy group in North America. He compiled a summary of raw milk laws in each of the fifty states and is currently a consultant on, among other things, policies and laws regarding raw milk.

From 2007 to 2017, he worked as an attorney for the Farm-to-Consumer Legal Defense Fund (FTCLDF), a 501(c)(4) nonprofit designed to protect the right of farmers and consumers to engage in direct commerce. For FTCLDF he consulted on and drafted raw milk legislation and on drafting herdshare agreements for members. He has also worked on embargo, seizure and recall cases involving raw dairy products; and on foodborne illness outbreaks attributed to raw milk consumption, in most of which raw milk did not turn out to be the cause of illness.