

Opinion No. 17**Ice Cream, Ice Cream Mix—Milk Sherbet, Milk Sherbet Mix—Dairy Division—Department of Agriculture**

Held: Under the provisions of Section 3-2404, Revised Codes of Montana, 1947, Milk sherbet mix, when manufactured and sold as such, must contain at least 0.35% of acid.

May 11th, 1951.

Mr. Thomas A. McMaster, Chief
Dairy Division
Department of Agriculture
Helena, Montana

Dear Sir:

You have requested my opinion on the following question:

Under the provisions of Section 3-2404, Revised Codes of Montana, 1947, milk sherbet must contain at least 0.35% acid. Under the provisions of the same statute ice cream and ice cream mix must meet the same requirements and must have at least 10% butterfat and at least 33% total solids. The mix used in the manufacture of milk sherbet is the same as ice cream mix except that acid is added to the sherbet mix and the sherbet mix contains a very low percentage of butterfat. Do the provisions of Section 3-2404, Revised Codes of Montana, 1947, require that sherbet mix contain 0.35% acid in order to be sold as such in the State of Montana?

Section 3-2404, Revised Codes of Montana, 1947, contains no specific definition of milk sherbet mix and makes no specific requirement as to its manufacture and sale. Milk sherbet is defined in Section 3-2404, Revised Codes of Montana, 1947, as:

"9. Milk sherbet means the pure, clean, frozen produce made from milk product, water and sugar, with harmless fruit or fruit juice flavoring and with or without harmless coloring, which must contain not less than 0.35 of one per centum of acid, as determined by titrating with standard alkali and expressed as lactic acid, and with or without added stabilizer composed of wholesome edible material.

It must contain not less than four per centum by weight of solids."

Ice cream is defined by Section 3-2404, Revised Codes of Montana, 1947, as:

"5. Ice cream is a frozen product made with pure, sweet milk, cream, skim milk, evaporated or condensed milk, evaporated or condensed skim milk, dry milk, dry skim milk, pure milk fat, or wholesome sweet butter, or any combination of any such products, with or without sweetening, clean wholesome eggs or egg products, and with or without the use of harmless flavoring and coloring. Ice cream must contain not less than ten per centum of milk fat, not less than thirty-three per centum total solids, and may or may not contain pure and harmless edible stabilizer. Ice cream may contain not to exceed one per centum gelatin. No frozen milk or milk product shall be manufactured or sold unless it contains at least ten per centum butterfat, excepting sherbets and ices and other exceptions shown in this same section. All ice cream must be manufactured from pasteurized ice cream mix."

Subsection 8 of Section 3-2404, Revised Codes of Montana, 1947, provides that: "Ice cream mix is a pasteurized, unfrozen product used in the manufacture of ice cream and must comply with all the requirements for ice cream as set forth herein." Thus, ice cream mix is required to contain at least 10% butterfat and at least 33% total solids.

The mix used in the manufacture of milk sherbet is exactly the same as the mix used in the manufacture of ice cream except that it does not contain 10% butterfat and does not contain 33% total solids, but does contain at least 0.35% acid. In other words, milk sherbet is made from regular ice cream mix which has been thinned or diluted by the addition of water and at least 0.35% of acid. If milk sherbet mix were frozen without the addition of acid the resulting product would be a very low grade ice cream, that is, ice cream containing less than 3% butterfat. The legislature enacted the provisions of Section 3-2404, Revised Codes of Montana, 1947, requiring that milk sherbet contain 0.35% acid in order to

make milk sherbet distinguishable from ice cream. Without the addition of acid to the sherbet mix the low butterfat ice cream could easily be sold to the public as ice cream. This is especially true where ice cream is used in milk shakes, malted milks, parfaits and similar frozen milk deserts. With the addition of acid to the ice cream resulting milk sherbet is easily distinguishable even in milk shakes, malted milks, parfaits, etc., because the acid gives the product a sour flavor.

If milk, cream, sugar, eggs and the other products mentioned in Subsection 5 of Section 3-2404, Revised Codes of Montana, 1947, are mixed together, the resulting product in an unfrozen state is ice cream mix and when the product is frozen the resulting product is ice cream. In order to distinguish ice cream mix or ice cream from sherbet mix or sherbet it is necessary that acid be added to the ingredients of the product. If acid is not added, in an unfrozen state the product is ice cream mix and must meet the requirements of Section 3-2404, Revised Codes of Montana, 1947, that is, contain 10% butterfat and at least 33% total solids.

It would be impossible to enforce the provisions of Section 3-2404, Revised Codes of Montana, 1947, relative to ice cream and ice cream mix if milk sherbet is manufactured and sold without at least 0.35% acid being added. It is impossible to distinguish milk sherbet mix from low butterfat ice cream mix except for the acid content. Therefore, to prevent the public from being defrauded by unscrupulous operators the Legislature enacted the provisions of Section 3-2404, Revised Codes of Montana, 1947, to insure that the public could distinguish between milk sherbet and low butterfat ice cream and milk sherbet mix and low butterfat ice cream mix by requiring that acid be added to milk sherbet and to the mix used to make milk sherbet.

Therefore, it is my opinion that Section 3-2404, Revised Codes of Montana, 1947, requires that milk sherbet mix must contain at least 0.35% acid when manufactured or sold as such in the State of Montana.

Very truly yours,
ARNOLD H. OLSEN
Attorney General