

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**Agricultural Marketing Service**  
**(Dairy Programs)**

Milk in the Central	)	Dkt AO 313-A48
Marketing Area	)	DA 04-06
7 C.F.R Part 1032	)	

**POST-HEARING BRIEF ON ‘POOLING STANDARD’ PROPOSALS**

This brief is submitted on behalf of Central Equity Milk Cooperative, Associated Milk Producers, Inc., Land O’Lakes, Inc., Foremost Farms USA, First District Association – cooperative associations who represent 2,400 dairy farmers producing over 360 million pounds of milk per month on Order 32 (Gulden, Tr. 777). The cooperatives are joined by Wells Dairy, Milnot Holding Company, and National All-Jersey.

**I. INTRODUCTION**

Five groups of rulemaking proposals are before the Secretary: (1) “Pooling standards” proposal 1 by DFA, et al., to shrink the pool, limit the volume of milk that may be pooled, or restrict access for some “distant” milk that may seek to associated with the Central Market pool in the future, (2) A series of proposals (Nos. 4-5 and 9-12) by Dean Foods intended to further limit pool access, edging towards Dean’s “ideal” regulatory policy of individual handler pooling,<sup>1</sup> (3) Proposals 2 and 6-8 to limit depooling and repooling of manufacturing use milk, (4) Proposals for transportation credits

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<sup>1</sup> Testimony of Evan Kinser, Dean Foods, Transcript (“Tr. ”) pp. 642-43. Transcript pages in four volumes for the three days of hearing, December 6 - 8, 2004, are numbered consecutively. It is therefore unnecessary to refer herein to the date of the testimony of a witness.

to offset some of the disproportionate costs incurred by handlers and producers who perform services of market-wide benefit by supplying milk for Class I use, and (5) a producer-settlement fund payment date revision proposed by the Market Administrator.

As acknowledged by interested parties and in prior decisions of USDA, the depooling and pooling standard proposals are of national interest, respond to conditions experienced in several markets, and would have national impact if adopted. This brief on behalf of “Central Equity, et al.” is submitted in opposition to “pooling standard” proposals in the first and second groups of proposals described above. Separate briefs will be filed in support of the market-wide service proposals, and in opposition to depooling proposals.

## **II. THE RESPONSIBILITIES OF PROPONENTS AND OF USDA.**

Before proceeding with proposed findings of fact and argument on legal issues, we will summarize the responsibilities of the parties and of USDA that we believe govern in this proceeding.

### **A. Proponents’ Burden of Proof Under the APA**

Section 7(c) of the Administrative Procedure Act says that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. §556(d). For several decades after passage of the APA, courts and agencies believed “burden of proof” to mean only the burden of production or “going forward” with evidence. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983). However, only a decade ago, in *Greenwich Collieries* the Court concluded that the “burden of proof” in § 7(c) was more demanding, and additionally meant “the burden of persuasion.” *Director, Office of Workers' Comp. Programs v. Greenwich*

*Collieries*, 512 U.S. 267, 276 (1994). It is now understood that combination of “burden of proof” and “substantial record evidence” standards in formal “on the record” hearings under the APA – as is the case for this hearing -- impose a traditional “preponderance of evidence” burden on the party or agency proposing a rule or order. Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* §10.7 (3d ed. 1994). In other words, if a rule is to be promulgated or amended, proponents must provide the Secretary with essential facts proving their case, *Fairmont Foods v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971), or Dairy Programs must come forward in the hearing with its own evidence to support the rule. *Abbotts Dairies Div. v. Butz*, 389 F. Supp. 1, 8-9 (E.D. Pa. 1975).

As described below, proponents of the pooling standard proposals fail to meet this burden on the merits of the proposals because (1) the essential ‘facts’ they rely upon are not facts at all, but rather speculation about what might happen in the future<sup>2</sup>, (2) proponents refused to disclose relevant evidence of their own current activities in the regulated market, and (3) their objectives run contrary to legislative policy.

**B. USDA’s Reasoned Decision-Making Responsibilities.**

Even under ordinary circumstances, standards for reasoned administrative action are “strict and demanding.” *Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 28, 48 (1983). An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it - for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot

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<sup>2</sup> Speculation based on conclusory assertions of a similar nature was fatal to the pricing rule reviewed by the 7<sup>th</sup> Circuit in *Borden, Inc., v. Butz*, 544 F 2d 312 (1976).

be attributed to a difference of opinion or the application of agency expertise. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43; *Rhode Island Higher Educ. Assistance Auth. v. Secretary of Educ.*, 929 F.2d 844, 855 (1st Cir. 1991). Milk Marketing Order rulemaking standards are further constrained because the Secretary “does not have ‘broad dispensing power’.” *Zuber v. Allen*, 396 U.S. 168, 183 (1969).

**C. USDA’s Special Responsibility to Small Businesses.**

As explained in the Notice of Hearing, 69 Fed. Reg. 56725, 56726 (Sept. 22, 2005), USDA has a special responsibility to consider the impact of proposed rules on small businesses. Dairy farmers are considered small businesses if their gross revenue is less than \$750,000 per year. Farms with less than 500,000 pounds of milk production per month are generally expected to meet this small business standard. 70 Fed. Reg. 4932 (Jan. 31, 2005). Most of the 6,000 farms pooled in Order 32, particularly in the northern and eastern parts of the Central Order milkshed, are small businesses by this standard. Exhibit 32. The average producer in New Mexico, Colorado or Idaho would not meet the definition, however. *Id.*

A February 2005 report to Congress by the Chief Counsel for Advocacy, Small Business Administration, explains agency rulemaking obligations to small businesses under the 1980 Regulatory Flexibility Act (5 U.S.C. §601, et seq.), the 1996 Small Business Regulatory Enforcement Fairness Act (5 U.S.C. § 604), and Executive Order 13272,<sup>3</sup> as follows:

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<sup>3</sup> Executive Order 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002), is not mentioned in the Notice of Hearing. USDA’s Office of Budget and Program Analysis’ previously adopted specific *Regulatory Decisionmaking Requirements* (Mar. 1997) for USDA agencies’ compliance with the RFA, <http://www.ocio.usda.gov/directives/files/dr/DR1512-001.pdf>.

Before Congress enacted the Regulatory Flexibility Act in 1980, federal agencies did not recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulations could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Similarly, agencies did not appreciate that small businesses were restricted in their ability to spread costs over output because of their lower production levels. As a result, *when agencies implemented “one-size-fits-all” regulations, small businesses were placed at a competitive disadvantage with respect to their larger competitors. This problem was exacerbated by the fact that small businesses were also disadvantaged by larger businesses’ ability to influence final decisions on regulations.* Large businesses have more resources and can afford to hire staff to monitor proposed regulations to ensure effective input in the regulatory process. As a result, consumers and competition were undercut while larger companies were rewarded.

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The Small Business Regulatory Enforcement Fairness Act of 1996 amended the RFA in several critical respects. First, the SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process. \*\*\*\*

Most significantly, SBREFA authorized judicial review of agency compliance with the RFA, and strengthened the authority of the SBA’s Chief Counsel for Advocacy to file *amicus curiae* briefs in regulatory appeals brought by small entities.

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In 2002, President George W. Bush signed Executive Order 13272, titled “Proper Consideration of Small Entities in Agency Rulemaking.” The E.O. requires agencies to place emphasis on the consideration of potential impacts on small entities when promulgating regulations in compliance with the RFA.

The RFA requires each federal agency to review its proposed and final rules to determine if the rules will have a “significant economic impact on a substantial number of small entities.” Section 601 of the RFA defines small entities to include small businesses, small organizations, and small governmental jurisdictions. Unless the head of the agency can certify that a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment. If the analysis is lengthy, the agency may publish a summary and make the analysis available upon request. This initial analysis must describe the impact of the proposed rule on small entities. It must also contain a comparative analysis of alternatives to the proposed rule that would minimize the impact on small entities and document their comparative effectiveness in achieving the regulatory purpose.

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA) unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities and provides a statement containing the factual basis for the certification. The final regulatory flexibility analysis must:

- provide a succinct statement of the need for, and objectives of, the rule;
- summarize the issues raised by public comments on the IRFA and the agency's assessment of those issues;
- describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available;
- describe the compliance requirements of the rule, estimate the classes of entities subject to it and the type of professional skills essential for compliance;
- describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and
- give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, and explain why other alternatives were rejected.

<http://www.sba.gov/advo/laws/flex/04regflx.html>, Report on the Regulatory Flexibility Act (February 2005, footnotes omitted, italics supplied).

In this proceeding, the principal proponent for new regulatory burdens are DFA, the nation's largest milk cooperative with one-third of the nation's milk supply in its control, and DFA's largest customer, Dean Foods, which is also the nation's largest milk processor. To paraphrase the SBA's Chief Counsel for Advocacy: Central Equity, et al., are struggling to avoid proposed "one size fits all" rules that would benefit DFA and Dean but uniquely burden their small business competitors. Central Equity, et al., must also struggle in this case to offset DFA and Dean's superior "ability to influence final decisions on regulations."

### III. FINDINGS OF FACT AND CONCLUSIONS.

Central Equity, et al., propose the following findings and conclusions, and request the Secretary make a ruling on each proposed finding as required by law. 5 U.S.C. §557(c); 7 C.F.R. §§900.12(b)(2) and .13a(b).

#### A. DFA, et al., Proposal 1 – Proponents’ Objectives and Evidence

1. Proposal 1 would, if adopted, is intended to increase regulatory costs borne by handlers and by hundreds of small business dairy farmers, directly or through their cooperatives, by increasing handling, transportation and logistical burdens to market milk as pool producers under Order 32, including: (1) increasing by 20-25% the volume of milk that must be shipped to distributing plants by supply plants, whether such milk is needed or not; (2) reducing the volume of milk that can be diverted; (3) limiting the locations to which milk may be diverted; (4) requiring milk to be delivered to a pool plant by each and every producer in each of six months during the year, whether needed or not.

2. Proponents’ principle reason for advancing Proposal No. 1 is admittedly not supported by “current” marketing conduct or current marketing conditions. Rather, it is to prevent the *possibility* of distant milk from pooling in Order 32 *if* proposals by DFA and others to foreclose distant milk from pooling in the Upper Midwest, for which a hearing was held in August 2004, are adopted by the Secretary. DFA testified in this hearing:

While "distant milk" is *not a current issue in the Central order*, we have demonstrated that it could *very possibly* become a costly issue for producers. Our proposed changes in performance standards would greatly *reduce the potential* for negative blend impact from milk that did not perform, would help the order to have a more reasonable reserve supply, and provide changes that will help attract milk to markets when needed.

Hollon, Tr 301-01 (italics supplied), summarizing reasons for pooling proposals; Tr. 464-65.

3. Echoing DFA's speculation of future events as reason for the proposed amendments, the witness for co-proponent Prairie Farms testified:

With the elimination of the Western Order 135, it seems logical that milk located in Utah and Idaho will eventually seek a market in a nearby state. Proposal 1 will provide a safeguard that producer milk, which was formerly pooled on Order 135, will not be able to seek a platform on which to "ride" Order 32.

Lee, Tr. 528.

4. The regulatory cause of distant milk being attracted to federal markets is the structure of regulated producer blend prices in Order 32 and other markets – i.e., the absence of any zone-out of producer prices reflecting the lower value, to the pooling market, of milk delivered to distant plants.

Hollon, Tr. 461-62. Since pricing provisions are not included for alternative consideration in USDA's Notice of Hearing,<sup>4</sup> Proposal No. 1 is advanced to

5. DFA also complained that the Order 32 blend price is lower than it should be, which is the result of either a too low Class I price, or too much milk pooled on the order:

Either [the] price is not high enough or more milk is blending down the returns than was anticipated when the differentials were established. While we have opinions about the first option, the remedies for that option are much more limited and are not available to us here. So we are focusing our efforts here on the second remedy of reducing the milk that can be pooled and may be pooled in the future.

Hollon, Tr. 257-58. DFA's policy focus on soliciting the Secretary's help in removing milk from the market, to increase blend prices for producers with

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<sup>4</sup> Consideration of zoned-out producer pricing for Order 32 as an alternative remedy for possible distant milk attraction is precisely the kind of alternative that should be considered under the RFA to minimize burdens on small businesses. Zone-out producer pricing, expressly authorized by the AMAA, would (if necessary) strike with target precision at distant milk supplies – and the supplies in Idaho would probably be from large business dairy farmers. Proposal No. 1 would instead directly burden *all* local small business farmers with the hope of incidentally discouraging some distant milk from pooling in Order 32.

enough ‘pooling base’ to remain in the market, is the same philosophy advocated by DFA in other proceedings. Tr. 453-54, 455-56; Ex. 25.

6. DFA’s desire to gerrymander the blend price by booting milk from the pool through restrictive performance provisions is contrary to long-term USDA policy. As explained by the Secretary after the previous national hearing review and reform process in 1990:

Producers make their production and marketing adjustments on the basis of changes in blend prices and differences in blend prices among orders. It is not uncommon for supply areas of individual orders to expand or contract in response to blend price changes over time. Also, because milk is free to move to handlers regulated under different orders, it is not uncommon for milk to shift from one order to another in response to blend price differences that result from changes in supply and demand conditions under different orders.

59 Fed. Reg. 42422, 42426 (August 17, 1994). In his Second Amplified Decision, the Secretary reemphasized:

Blend price changes (and differences in blend prices among orders) provide the economic signal for producers to make production decisions and for making marketing adjustments.

61 Fed Reg. 49081, 49086 (Sept. 18, 1996). DFA’s vision of the system would stop many a producer in his marketing tracks even if blend prices alone signaled a market shift would be desirable. Provisions such as proposed by DFA would make the alternative market unattainable to many small business dairy farmers and their cooperative representatives.

**B. DFA Arguments for Emergency Rulemaking on Proposal 1.**

7. As a necessary consequence of conjecture about future facts to support Proposal 1 on the merits, DFA, et al., rely on speculation to argue that USDA should adopt their proposals on an emergency basis, omitting the

benefits to the industry, small businesses and the agency from comments on a recommended decision. The DFA witness testified:

The record showed that California milk moved very easily through the order system shifting from one market to the next as regulation changed. The producers in Order 32 have no desire to experience the blend damage that producers in Order 30 have and emergency action will greatly help that desire. \*\*\*\* [D]istant milk issue is also I think of an emergency scenario. And it will certainly play out as the other -- as the Order 30 decision, for example, at some point we would expect a rather soon decision in that hearing, and *if that plays out* the way that we hope and expect it to, then *we would have concerns* that *some of the problems* with distant milk there would find their way to Order 32 *just like the California milk did* when it was foreclosed to Order 30.

Hollon Tr 303, 307 (italics supplied).<sup>5</sup> See also, Lee, Tr. 528.

### **C. Dean Foods Objectives for Proposals 4-5 and 9-12.**

8. Dean Foods' pooling standard proposals take to the extreme DFA's philosophy of limiting the volume of milk that can or will be pooled in Order 32. Dean's "ideal world" solution would be individual handler pools, effectively excluding hundreds of small business producers of surplus and reserve milk from the benefit of the federal milk order program. Kinser, Tr. 642-43. Dean recognizes that USDA disfavors individual handler pooling, and all of its proposals therefore represent a search for another way to skin the cat. "The Secretary has rejected individual handler pools. Thus, I will introduce the proposals with modifications." Kinser, Tr. 643.

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<sup>5</sup> In order for distant milk to pool, it must acquire a pooling base by deliveries to a distributing plant. DFA and Prairie Farms, who control a substantial portion of the supply to Order 32 distributing plants, did not explain how or through whom distant milk might associate with Order 32. DFA, of course, has the ability to associate its distant milk as it previously had the ability to associate its California milk. But DFA currently seems to prefer associating distant milk from southern New Mexico rather than milk of comparable distance from its Idaho producer members.

9. Perhaps Dean is merely serving a “bad cop” role to encourage USDA to view DFA’s proposals with greater favor. Our comments on the DFA proposals, in any event, apply many times over to the Dean proposals.

10. Even DFA urged caution against Dean’s over-enthusiastic effort to bar large numbers of producers and Grade A milk production from access to the federal milk order program. DFA opposed Dean’s 4-day per month touch base proposal as cost prohibitive. Hollon, Tr. 305, 894. DFA opposed Dean proposals to eliminate supply plant pooling as an option for producers, and also opposed a proposal to make supply plant deliveries less transportation efficient. Hollon, Tr. 895.

**D. About the Interested Parties and Marketing on Order 32.**

We pause here to observe that both DFA/Prairie Farms and Dean pooling standard proposals are unsupported by concrete and current facts. Proponents rely on speculative facts rather than preponderance of evidence. Proponents, therefore, have failed to meet the first part of the “burden of proof” requirement set forth in 5 U.S.C. §556(d) and *Greenwich Collieries*. If necessary to look deeper into the record, proponents’ failure to produce proof and persuasion is compounded by failure and outright refusal to present relevant facts about their own operations and to offer witnesses with knowledge of relevant facts.

11. DFA is the nations’ largest milk cooperative. In 2003, DFA marketed 56.5 billion pounds of milk – a third of the nation’s 170.3 billion pounds of milk production. Hollon, Tr. \_\_\_\_; NASS, Milk Production Disposition & Income, (Apr. 2004)(“NASS-MPDI”); DFA website excerpts attached, p.6 (Facts About DFA’s Central Area).<sup>6</sup>

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<sup>6</sup> Excerpts from DFA’s website – www.dfamilk.com -- are attached, totaling 17 pages. Reference herein to “DFA website attach. p \_\_” will refer to the page (1 through 17) of

12. DFA's share of milk production is greater in the east, and less in the west. DFA's 2003 member production in the Western and Mountain Areas, and Arizona, was 9.3 billion pounds, or 15% of total milk production of 60.2 billion pounds in those states. NASS-MPDI; DFA website attach. pp 2, 6-17. For the central and eastern states, DFA's market share of 47.2 billion pounds (56.5 total – 9.2 Western & Mountain) represents 43% of all milk (110 billion pounds) produced. *Id.*

13. Milk marketed by DFA includes not only DFA member milk, but also milk of federations and marketing agencies under DFA's management control. For example, DFA controls the Southwest Agency, which includes milk produced by Select, Lone Star, and Arkansas Dairy Coop. For marketing purposes, like DMS milk, this is "part of DFA." Seiler, Tr. 393-94; Hollon, Tr. 447-48; Metzger, Tr. 831-32.

14. In many areas of the market, like Kansas, eastern Oklahoma and western Missouri, DFA and its DMS or Southwest Agency partners, is the only market for milk; producers have "no choice whom to market [their] milk through and no competition for it." Bob Seiler, Tr. 393-94; Metzger, Tr. 829-31. Adoption of DFA's Proposal No. 1 would further reduce choices and competition. Metzger, Tr. 842-43.

15. In support of Proposal No. 1, DFA complains about possible distant milk from Idaho associating with the Order 32 pool. Since January 2000, there has consistently been a small quantity -- about one to three million pounds per month -- of Jerome County Idaho milk pooled on Order 32. Ex. 9, pp 44, 50; 56. This milk is consistently delivered to a Colorado distributing plant and not diverted for nonpool plant manufacturing (Ex. 10

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these attachments, though they are not separately numbered. These documents are submitted per official notice taken by the presiding ALJ. Tr. 434, 909-912.

pp 33, 37; Ex. 12 pp 5-13, 15, 24, 34, 44), notwithstanding DFA's lengthy analysis explaining why a regular milk supply from this location to Colorado would be cost-prohibitive, "absurd" and "never take place in the real world." DFA Ex. 18, pp 26 – 35; Hollon, Tr. 209-11, 251-54, 262-267; Ex. 19 pp. 21-25.<sup>7</sup>

16. Within the past two years, DFA has pooled large quantities of Class III and IV milk in Order 32 originating from distant farms in southern New Mexico counties of Chaves, Donna Ana, Eddy, and Lea. These counties are near the DFA butter-powder plant in El Paso, Texas, and the DFA cheese plant in Lovington, New Mexico. In December 2003, 88.5 million pounds of milk from these counties was pooled in Order 32; *no* milk from these counties was pooled on Order 32 in December 2000 or 2001. Ex. 9 pp. 61-83; Hollon, Tr. 447-48 (all New Mexico milk is part of the Southwest Agency).

17. During 2000 and 2001, an average of 25 million pounds and 13 million pounds, respectively, was pooled in Order 32 from New Mexico (from eastern rather than southern New Mexico). Ex. 9 pp 47, 79.

18. During 2003 – 2004, New Mexico milk pooled on Order 32 ranged between 80 – 90 million pounds per month when there was no incentive to depool Class III milk. *Id.* pp. 53, 58. Much of the New Mexico production pooled in Order 32 is in Class IV use, and this milk remained pooled when Class III milk was depooled. Ex. 14, pp. 7-9.

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<sup>7</sup> DFA's arithmetic is based on an exaggerated distance of 686 miles between Idaho and Denver. Ex. 19, p 22. Actually, the distance between Jerome County (Twin Falls), Idaho, and Denver, is only 536 miles. [www.symsys.com](http://www.symsys.com). By contrast, DFA's milk supplies in Donna Anna (Las Cruces), New Mexico, are located 563 miles and 604 miles from the nearest distributing plants in Norman and Chandler, Oklahoma. *Id.*

19. Milk from southern New Mexico counties of Chaves (Roswell), Donna Ana (Las Cruces), Eddy (Artesia), and Lea (Eunice) is located approximately 400 to 600 miles from the nearest Order 32 distributing plants in Norman and Chandler, Oklahoma, through which the milk may touch base to qualify for pooling. Ex. 9; [www.symsys.com](http://www.symsys.com). The out-of-area New Mexico milk is otherwise qualified as diversions through shipments of in-area 9(c) milk to distributors, and is not shipped to in-area plants. Ex. 10 pp. 36, 38; Ex. 12, pp 13,21,30,40,51; Ex. 14, pp. 7-9.

20. DFA is committed to supply milk to a number of distributing plants in Order 32, and thus opportunity to build pooling base. Its customers include: Dean Foods (which has 9 plants in the Order), Hiland Dairy plants, Roberts Dairy plants, Sinton Dairy and National Dairy Holdings. DFA website attach. pp. 3, 5, 7, 11, 13; Lee, Tr. 524; Kinser, Tr 674, 682-83.

21. Mr. Hollon, DFA's witness, is not responsible for and has little knowledge concerning the day-to-day milk supply to DFA's fluid milk customers. Hollon, Tr. 181. When asked to identify specific plants supplied by DFA, market share, plant share, or any concrete supply circumstance at DFA-supplied plants relevant to its proposals, the DFA witness refused to answer. Hollon, Tr. 478-84.<sup>8</sup>

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<sup>8</sup> Hearing participants have the option to withhold relevant proprietary evidence, or to disclose it to help the Secretary make an informed on-the-record decision. However, when a proponent places adequacy of supply at issue, a claim of proprietary privilege is not persuasive as a matter of law where the proponent witness is examined as to facts relevant to supply failure or supply performance. When litigants place their health at issue, for example, the doctor-patient privilege is deemed waived as a matter of law on facts relevant to the claim. *3 J. Weinstein & M. Berger, Weinstein's Federal Evidence* §504.07[8] (2d ed 1997). USDA's regulatory experience reveals that voluntary disclosure of arguably proprietary information at a hearing produces better results and often (as it should be) is essential to a conclusion that a proponent has met its burden of proof. See 41 Fed. Reg. 12436 (March 25, 1976) (relying on detailed evidence of supply arrangements, market share, and availability or loss of pooling base to create a remedy);

22. Dean Foods was, if possible, even less forthcoming about disclosing facts within its control concerning Dean's experience relevant to prove or disprove the merits of its own proposals. Dean did not offer a witness who had any specific knowledgeable about the relevant supply to Dean plants, or about problems (if any) with supply, to support its general assertions. Kinser, Tr. 688-90.

23. Dean and DFA have a milk supply agreement with a severe penalties to Dean if procures milk from others (Ex 36), but Mr. Kinser did not have knowledge of the contents of the agreement. Although Mr. Kinser was questioned about this very same supply agreement in Minneapolis, four months earlier, the Dean witness had acquired or sought no further knowledge about it, or its application to Order 32 plants. Tr 690 – 91, 707-08.<sup>9</sup> The witness didn't know if the Dean plant in O'Fallon, Il (St. Louis area), had to ask DFA's permission to receive a small volume of milk from Central Equity Milk Producers. Although a Dean official with knowledge of these facts attended the hearing (Tr.691), the official was not called by Dean to testify, nor was he asked by the Dean witness to provide information in answer to questions. Rather, counsel objected to the inquiry as "proprietary." Tr 708.

24. Central Equity, et al., in contrast, not only presented proprietary details of their activities in Order 32 through an expert witness, they also

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46 Fed. Reg. 21958 (April 14, 1981)(promulgating an Order for SW Idaho after previously denying relief due to inadequate facts offered in the earlier proceeding to demonstrate marketing disorder).

<sup>9</sup> Dean paid DFA \$28 million for a modification of the supply contract, as disclosed in the SEC filing, but the consequence or significance of those changes elude this record. (Ex. 36, last page; Kinser, Tr. 731-732), Dean did not explain what modifications were made or how those may relate to supplies of milk required to be purchased by Dean's Order 32 plants from DFA. Id.

made available in the hearing room representatives of the principal parties, without hiding relevant facts behind a façade of privilege, to be called and answer questions any opposing party might have. Metzger, Tr 873-75.

None of the proponents took Central Equity up on this offer.

25. While complaining in the abstract about reluctance of unidentified suppliers to furnish milk to distributing plants when more money could be made from other uses (Tr. 451-52), the DFA witness eventually admitted that he was not aware of any one failing to meet a commitment to supply milk to a distributing plant even when incentives to withhold milk were greatest:

“Q Reluctance is not the same as not shipping. Was there any contracted for milk where there's a long-term commitment that was not supplied, to your knowledge, by anybody during the month with a negative PPD?

A. I don't think there was.”

Hollon, Tr. 453. In short, Central Market milk suppliers have responsibly fulfilled their regulatory, public interest, and contract obligations to keep distributors supplied with adequate milk. There is no evidence to the contrary.

## **CONCLUSION**

There is no reasoned basis for amendments that would remove from the pool, or create extraordinary new expense for, small business dairy farmers who have historically been associated with the Central Milk Marketing Area.

Over the course of several decades, the federal milk order program has consistently embraced policies of dairy farmer inclusion, and of marketing efficiency, in creating and adjusting pooling standards, as illustrated by dozens of decisions excerpted in Exhibit 49. Although

compulsory inefficiency or farmer exclusion may have resulted from rules where adequacy of supply for fluid use in danger, proponents have not made the case for exclusion or inefficiency in this case.

For the foregoing reasons, and those advanced by testimony on behalf of Central Equity et al in the course of the hearing, the Secretary should deny Proposals 1, 4-5 and 9-12.

Respectfully submitted,

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**Excerpts from DFA’s website – [www.dfamilk.com](http://www.dfamilk.com)**

Description of Document	page(s)
DFA – Who We Are	1
2003 DFA Member Milk Production Footprint	2
Operating Structure	3
Partners – DFA’s Fluid Milk and Ice Cream Partners	4
Who We Are – Central Area Council Summary	5
Facts About DFA’s Central Area	6-7
Southwest Area Council Summary	8
Facts About DFA’s Southwest Area	9-10
Mountain Area Council Summary	11
Facts About DFA’s Mountain Area	12-13
Facts About DFA’s Southeast Area	14-15
Facts About DFA Western Area	16-17



# Who We Are

- Co-op
- Milkshed
- Plants
- Products
- Brands
- Biographies

## Our Actions Have Caused Quite A Reaction



**Dairy Farmers of America** is all about milk and the 22,924 dairy farm families who produce it. **We are** proud to be a cooperative, owned and operated by the dairy farmers whom we serve. **We are** one of the country's most diversified U.S. manufacturer of dairy products, food components and ingredients. **We are** a leader in

formulating and packaging shelf-stable dairy products in can and glass.

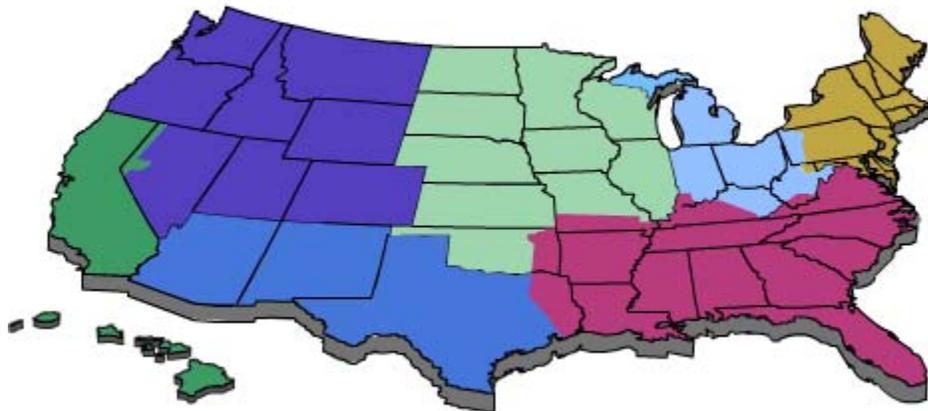
[Learn more about DFA's History](#)  
Get the facts on DFA



**We are** one of the most vertically-integrated and future-focused co-op and food companies in the industry. **We are** an organization with over 3,500 employees.

**We are DFA**—the premium provider of market opportunities for farmers and a value-added supplier of innovative dairy products and food components for customers around the world.

- MyDFA
- Who We Are
- Members
- Newsroom
- Partners
- Farm & Family
- DFA Mart
- Join DFA



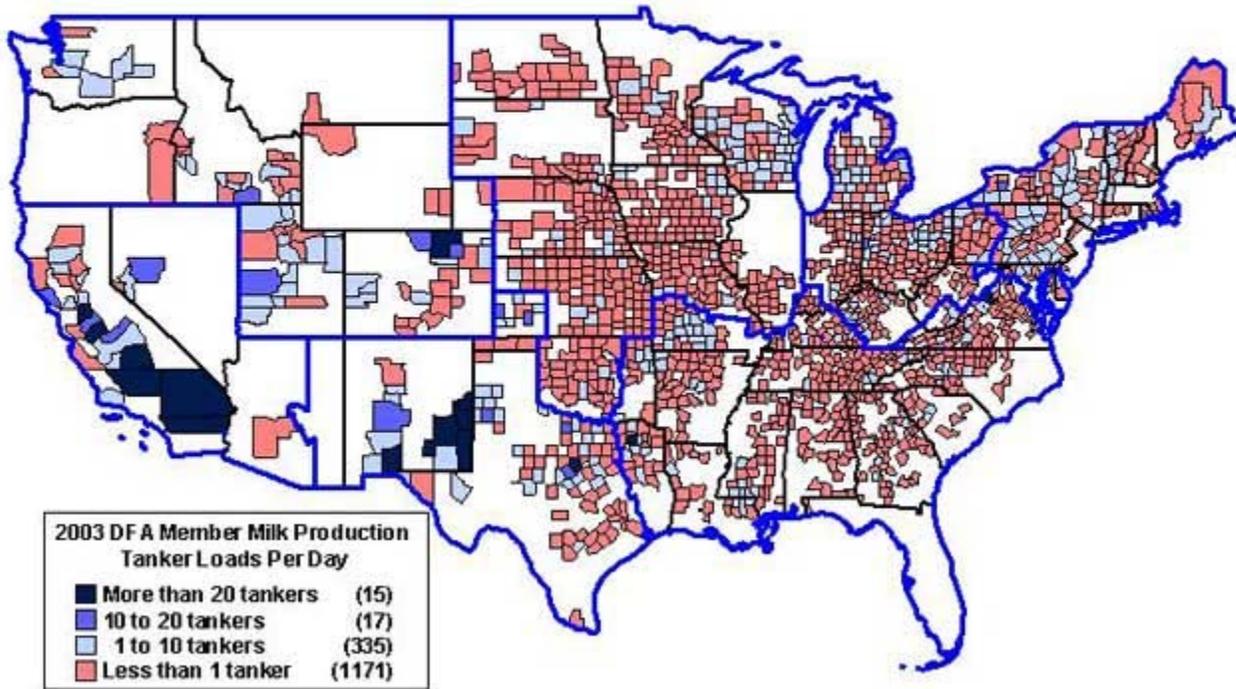
Click on an Area for a brief overview.

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# 2003 DFA Member Production



# Operating Structure





# Partners

Joint Ventures | R&D | Opportunities

## DFA's Fluid Milk & Ice Cream Partners

On behalf of its member-owners, DFA is the proud investor in 13 joint ventures with fresh milk and ice cream processing companies strategically located coast to coast.

These relationships allow members to share in the profits and increase their access to higher value Class I fluid milk markets. DFA member milk moves into important consumer markets under the following partner companies and their regional brands:



[Dairy Fresh of Louisiana](#)



[Hiland Dairy Company](#)



[Hiland-Roberts Ice Cream](#)



[Ideal American Dairy](#)



[Melody Farms](#)



[Roberts Dairy Company](#)



[Sinton Dairy Foods](#)



[Stremicks-Heritage Foods](#)



[Turner Holdings](#)



[Wilcox Dairy Farms](#)



[National Dairy Holdings](#)



[Southern Belle](#)

- [Western Quality Foods](#)

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# Who We Are

- Co-op
- Milkshed
- Plants
- Products
- Brands
- Biographies

## Our Actions Have Caused Quite A Reaction

- MyDFA
- Who We Are
- Members
- Newsroom
- Partners
- Farm & Family
- DFA Mart
- Join DFA




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formulating and packaging shelf-stable dairy products in can and glass.

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**We are** one of the most vertically-integrated and future-focused co-op and food companies in the industry. **We are** an organization with over 3,500 employees.

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For more detailed information click on the council name in blue.

**Central Area Council**

Kansas City, Mo.  
Phone: 816-801-6200

**About our Milkshed**

Member Farms:	3,879
Annual Milk Production:	5.1 billion lbs.
Average production per member:	1.3 million lbs.

**Fluid Milk Operations**

Joint Ventures

- DairiConcepts
- National Dairy Holdings
- Hiland Dairy
- Hiland-Roberts Ice Cream Company
- Roberts Dairy
- Melrose Dairy Protein

DFA Plants

- Winthrop, Minn.
- Zumbrota, Minn.
- Plymouth, Wis.

[close](#)

Click on an Area for a brief overview.

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# Facts About DFA's Central Area



*Fulfilling the promise in every  
drop of milk.*

*Bringing fresh dairy quality to  
America's dinner table.*

*Growing new markets for  
America's dairy industry.*

*Putting muscle in milk market-  
ing programs.*

## Who Is Dairy Farmers of America?

Dairy Farmers of America (DFA) is proud to be owned and operated by the 22,924 dairy farmers whom it serves. In 2003 DFA marketed and processed 56.5 billion pounds of milk and dairy products - 33 percent of the U.S. milk supply - on behalf of its member owners.

DFA provides its dairy-farmer members cost effective marketing and movement of milk, global market opportunities, access to branded and value-added markets, expanded product manufacturing capabilities, cost efficient services and programs and long-term value.

DFA's structure maintains seven geographic marketing and membership areas designed to enhance the grassroot representation of dairy farmers in their cooperative.

### Central Area

10220 N. Ambassador Dr.  
Kansas City, MO 64153  
Phone: 816-801-6200  
FAX: 816-801-6201

## About the Central Area

The Central Area of Dairy Farmers of America, Inc. (DFA) serves a milkshed extending into 10 states. DFA's Central Area represents 3,879 member farms that markets 5.1 billion pounds of milk cooperatively. The Area also markets about 4 billion pounds of milk annually from 1,250 non-member farms.



**Randy McGinnis**  
*Chief Operating Officer*



**DAIRY FARMERS of AMERICA**

To learn more about DFA, contact us at 888-DFA-MILK (888-332-6455), or visit our Web site at [www.dfamilk.com](http://www.dfamilk.com).



**Steve Matthees**  
Area Council Chair

## Central Area Council Governance Structure

The Central Area Council is made up of three regions with a total of 47 districts. The members in each district select one representative each to serve on the Area Council and the Area resolutions committee. The Area Council monitors the marketing of member milk and provides advice to the Corporate Board of Directors in matters pertaining to the Area. From these 47 council representatives, 11 members are elected to serve on the DFA Board of Directors. The 47 elected Area resolutions committee members help determine policy guidelines for the Board and select 11 members to serve on DFA's corporate resolution's committee. Members also chose Delegates to represent them when a member vote is necessary. One delegate is sent for every fifty farms, to vote on necessary matters at the DFA Annual Meeting.

## About Our Milkshed

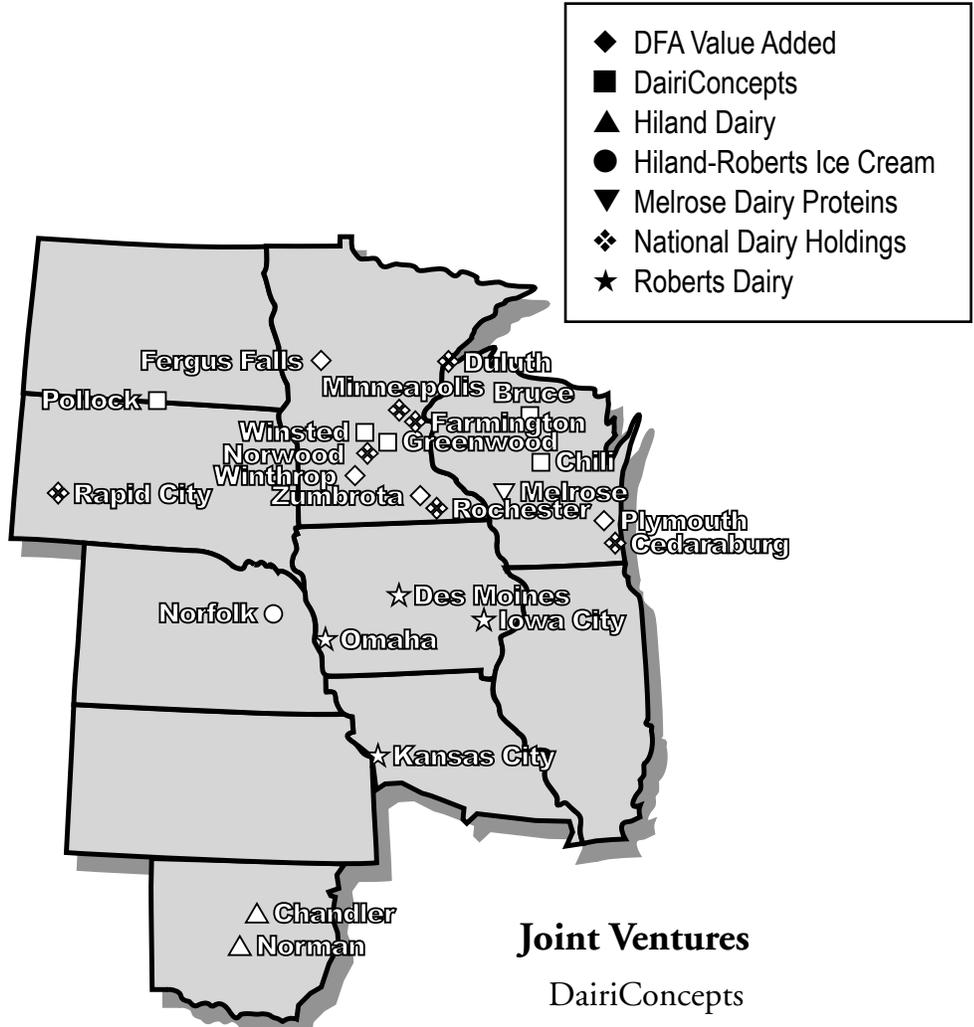
**Member Farms**  
**3,879**

**Annual Milk Production**  
**5.1 Billion Lbs.**

**Average Production Per Member**  
**1.3 Million Lbs**

## Services and Programs

Professional On-Farm Field Service • Direct Deposit • Market for all Milk  
DFA Member Insurance Program • Premiums for Quality Milk • Disaster Benefit Program • Accurate Weights and Tests • Suspect and Abnormal Milk Program • Active Government Relations Program • Member Communications • Milk Check Assignments • Young Cooperator Program • Loans through DFA Dairy Financing Services • 24-Hour Toll-Free Quality & Market Information • Forward Contracting Program



## Ten Largest Customers

1. DFA Dairy Foods Group
2. Foremost Farms USA
3. Hiland Dairy
4. Land O' Lakes
5. Leprino Foods
6. Marigold Foods
7. Roberts Dairy
8. Saputa Cheese USA
9. Borden/Meadow Gold
10. Twin County Dairy

## Joint Ventures

- DairiConcepts
- National Dairy Holdings
- Hiland Dairy
- Hiland-Roberts Ice Cream
- Roberts Dairy
- Melrose Dairy Protein

## Manufacturing Facilities

- Winthrop, Minn.
- Zumbrota, Minn.
- Plymouth, Wis.

For more detailed information click on the council name in blue.

## Southwest Area Council

Grapevine, Texas

Phone: 817-410-4500

### *About our Milkshed*

Member Farms:	568
Annual Milk Production:	8.1 billion lbs.
Average production per member:	14.3 million lbs.

### *Fluid Milk Operations*

Joint Ventures

DairiConcepts

National Dairy Holdings

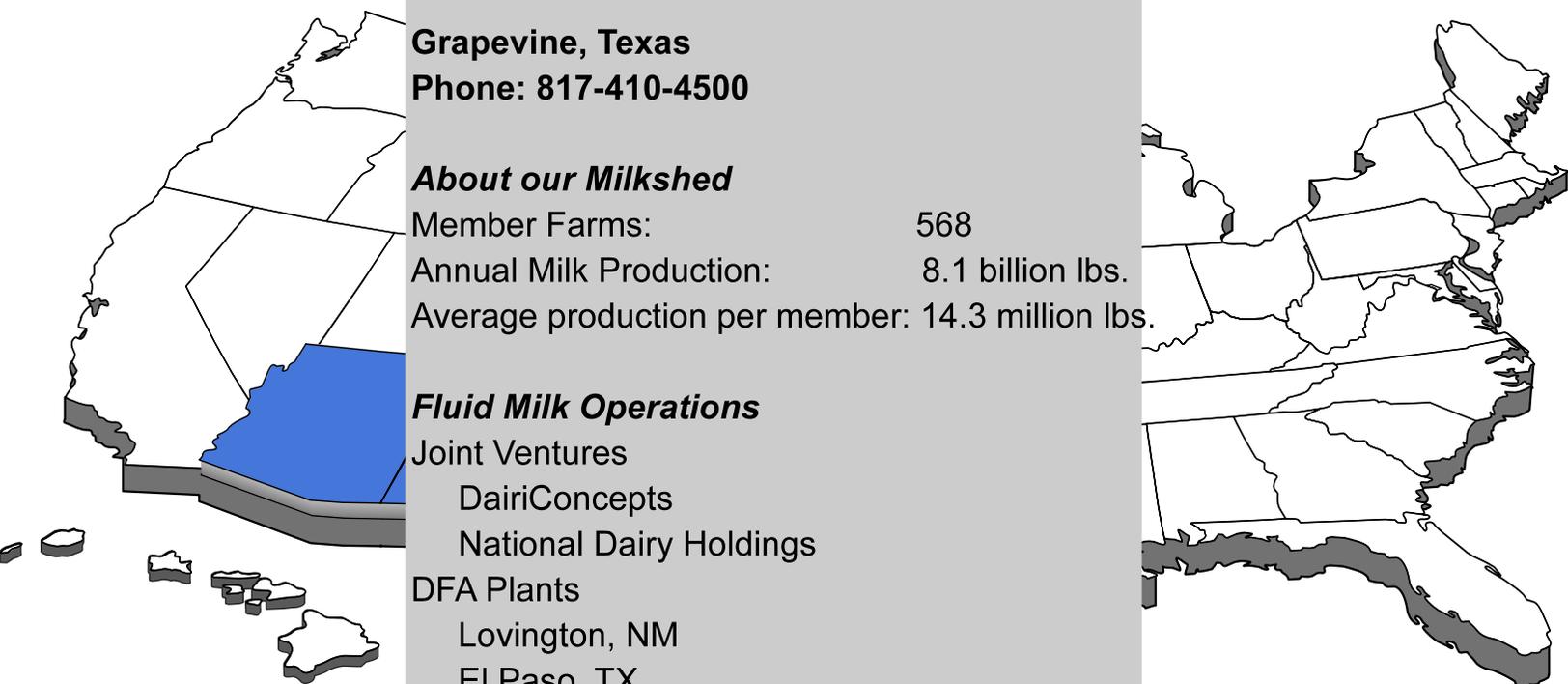
DFA Plants

Lovington, NM

El Paso, TX

Schulenburg, TX

[close](#)



# Facts About DFA Southwest Area



*Fulfilling the promise in every  
drop of milk.*



*Bringing fresh dairy quality to  
America's dinner table.*



*Growing new markets for  
America's dairy industry.*

*Putting muscle in milk  
marketing programs.*



## Southwest Area

3500 William D. Tate Avenue  
Suite 100  
Grapevine, TX 76051-7102  
Phone: 817-410-4500  
FAX: 817-410-4501

## Who Is Dairy Farmers of America?

Dairy Farmers of America (DFA) is proud to be owned and operated by the 22,924 dairy farmers whom it serves. In 2003 DFA marketed and processed 56.5 billion pounds of milk and dairy products - 33 percent of the U.S. milk supply - on behalf of its member owners.

DFA provides its dairy-farmer members cost effective marketing and movement of milk, global market opportunities, access to branded and value-added markets, expanded product manufacturing capabilities, cost efficient services and programs and long-term value.

DFA's structure maintains seven geographic marketing and membership areas designed to enhance the grassroot representation of dairy farmers in their cooperative.

## About the Southwest Area

The Southwest Area of Dairy Farmers of America, Inc. (DFA) serves a milkshed extending into 4 states. DFA's Southwest Area represents 568 member farms that market 8.1 billion pounds of milk cooperatively. Average production per member farm is 14.3 million pounds of milk per year.



**David Jones**  
*Senior Vice President &  
Chief Operating Officer*



**DAIRY FARMERS of AMERICA**

To learn more about DFA, contact us at 888-DFA-MILK (888-332-6455), or visit our Web site at [www.dfamilk.com](http://www.dfamilk.com).



**Wayne Palla**  
*Area Council Chair*

## Southwest Area Council Governance Structure

The Southwest Area Council is made up of 18 districts. The members in each district select one representative each to serve on the Southwest Area Council and the Southwest Area resolutions committee. The Area Council monitors the marketing of member milk and provides advice to the Corporate Board of Directors in matters pertaining to the Area. From these 18 Council representatives, five members are elected to serve on the DFA Board of Directors. The 18 elected Area resolutions committee members help determine policy guidelines for the Board and select five members to serve on DFA's corporate resolution's committee. Members also chose Delegates to represent them when a member vote is necessary. The Southwest Area sends one delegate for each fifty farms to vote on necessary matters at the DFA Annual Meeting.

## About Our Milkshed

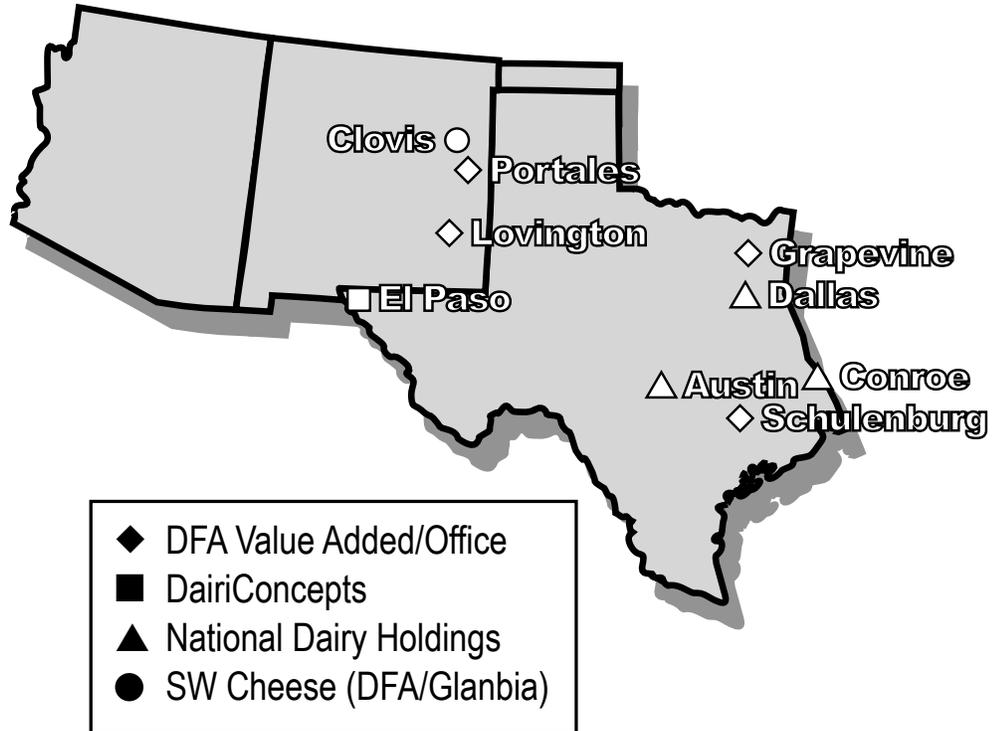
**Member Farms**  
**568**

**Annual Milk Production**  
**8.1 Billion Lbs.**

**Average Production Per Member**  
**14.3 Million Lbs.**

## Services and Programs

Professional On-Farm Field Service • Quality and Volume Payment Programs • Services Custom Laboratory • Milk Quality and Component Testing • Dairy Operating Loans from DFA Dairy Financing Services, Inc. • Local Governance Structure Information and Young Cooperator Program • 24-Hour Toll-Free Quality & Market Information



### *Joint Ventures*

DairiConcepts

National Dairy Holdings

### *Largest Customers*

1. Leprino
2. Milk Products LLC
3. Deans
4. Lea County
5. F&A Cheese
6. HEB
7. Dannon
8. Blue Bell
9. Superbrand

### *DFA Manufacturing Facilities*

Lovington, NM

El Paso, Texas

Schulenburg, Texas

For more detailed information click on the council name in blue.

## Mountain Area Council

Salt Lake City, Utah  
Phone: 801-977-3000

### ***About our Milkshed***

Member Farms: 562  
Annual Milk Production: 4.3 billion lbs.  
Average production per member: 7.7 million lbs.

### ***Fluid Milk Operations***

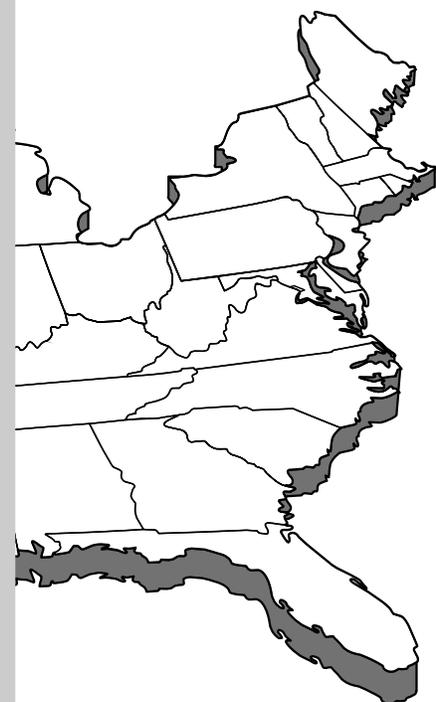
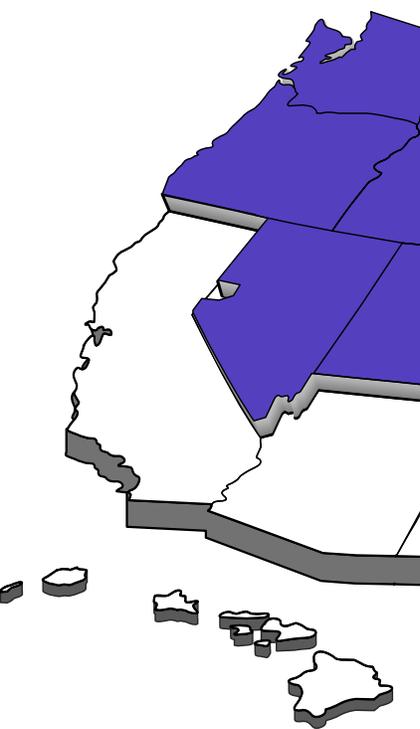
#### Joint Ventures

National Dairy Holdings  
Sinton Dairy  
Stremicks Heritage Foods  
Wilcox Dairy

#### DFA Plants

Smithfield, Utah  
Beaver, Utah  
Fort Morgan, Colo.

[close](#)



# Facts About DFA Mountain Area



*Fulfilling the promise in every  
drop of milk.*



*Bringing fresh dairy quality to  
America's dinner table.*



*Growing new markets for  
America's dairy industry.*



*Putting muscle in milk  
marketing programs.*



Mountain Area  
1140 South 3200 West  
Salt Lake City, UT 84104  
Phone: 801-977-3000  
FAX: 801-977-3090  
or  
9775 East 97th Place  
Henderson, CO 80640  
Phone: 720-356-3100  
FAX: 720-356-3101

## Who Is Dairy Farmers of America?

Dairy Farmers of America (DFA) is proud to be owned and operated by the 22,924 dairy farmers whom it serves. In 2003 DFA marketed and processed 56.5 billion pounds of milk and dairy products - 33 percent of the U.S. milk supply - on behalf of its member owners.

DFA provides its dairy-farmer members cost effective marketing and movement of milk, global market opportunities, access to branded and value-added markets, expanded product manufacturing capabilities, cost efficient services and programs and long-term value.

DFA's structure maintains seven geographic marketing and membership areas designed to enhance the grassroots representation of dairy farmers in their cooperative.

## About the Mountain Area

The Mountain Area of Dairy Farmers of America, Inc. (DFA) serves a milkshed extending into 9 states. DFA's Mountain Area represents 562 member farms that market more than 4.3 billion pounds of milk cooperatively. Average production per member farm is 7.7 million pounds of milk per year.



**David Jones**  
*Senior Vice President &  
Chief Operating Officer*



To learn more about DFA, contact us at 888-DFA-MILK (888-332-6455), or visit our Web site at [www.dfamilk.com](http://www.dfamilk.com).



**Tom Camerlo**  
*Area Council Chair*

## Mountain Area Council Governance Structure

The Mountain Area Council is made up of 19 districts. The members in each district select one representative each to serve on the Mountain Area Council and the Mountain Area resolutions committee and two more are elected "at-large." The Area Council monitors the marketing of member milk and provides advice to the Corporate Board of Directors in matters pertaining to the Area. From these 21 council representatives, 4 members are elected to serve on the DFA Board of Directors. The 21 elected Area resolutions committee members help determine policy guidelines for the Board and select 4 members to serve on DFA's corporate resolution's committee. Members also chose Delegates to represent them when a member vote is necessary. The Mountain Area sends one delegate for each fifty farms to vote on necessary matters at the DFA Annual Meeting.

## About Our Milkshed

**Member Farms**  
**562**

**Annual Milk Production**  
**4.3 Billion Lbs.**

**Average Production**  
**Per Member**  
**7.7 Million Lbs.**

## Services and Programs

Professional On-Farm Field Service • Direct Deposit • Market for all Milk • Member Insurance Program • Premiums for Quality Milk • Accurate Weights and Tests • Member Communications • Equipment Loans • Active Government Relations Program • 24-Hour Toll-Free Quality & Market Information



## Largest Customers

1. Leprino Foods
2. Suiza Fluid Dairy Group (MeadowGold)
3. DFA Smithfield (Cache Valley Cheese)
4. Smith's (Kroger)
5. Avonmore
6. Cream O'Weber (Dean Foods)
7. Safeway
8. Sinton
9. DFA Beaver
10. Snelgrove Ice Cream
11. Russell's Ice Cream
12. Dannon Yogurt

## Joint Ventures

National Dairy Holdings  
Sinton Dairy  
Stremicks Heritage Foods  
Wilcox Dairy

## DFA Manufacturing Facilities

Smithfield, Utah  
Beaver, Utah  
Fort Morgan, Colo

# Facts About DFA's Southeast Area



*Fulfilling the promise in every  
drop of milk.*



*Bringing fresh dairy quality to  
America's dinner table.*



*Growing new markets for  
America's dairy industry.*



*Putting muscle in milk market-  
ing programs.*

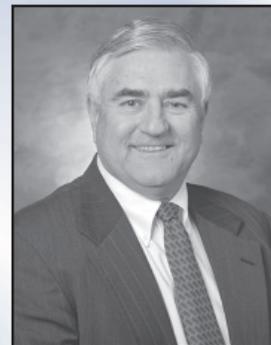


## Southeast Area

10411 Cogdill Road  
Knoxville, TN 37932  
Phone: 865-218-8500  
FAX: 865-218-8501

## About the Southeast Area

The Southeast Area of Dairy Farmers of America, Inc. (DFA) serves a milkshed extending into 15 states. DFA's Southeast Area represents 3,558 member farms that market 5.8 billion pounds of milk cooperatively. Average production per member farm is 1.6 million pounds of milk per year.



**John Collins**  
*Senior Vice President &  
Chief Operating Officer*



**DAIRY FARMERS of AMERICA**

To learn more about DFA, contact us at 888-DFA-MILK  
(888-332-6455), or visit our Web site at [www.dfamilk.com](http://www.dfamilk.com).



**Randy Mooney**  
*Area Council Chair*

## Southeast Area Council Governance Structure

The Southeast Area Council is made up of five regions with a total of 46 districts. The members in each district select one representative each to serve on the Area Council and the Area resolutions committee, except for one heavily concentrated district that elects three councilmen and three resolutions committee members. The Area Council monitors the marketing of member milk and provides advice to the Corporate Board of Directors in matters pertaining to the Area. From these 48 council representatives, 11 members are elected to serve on the DFA Board of Directors. The 48 elected Area resolutions committee members help determine policy guidelines for the Board and select 11 members to serve on DFA's corporate resolution's committee. Members also chose Delegates to represent them when a member vote is necessary. The Southeast Area sends one delegate for every fifty farms to vote on necessary matters at the DFA Annual Meeting.

## About Our Milkshed

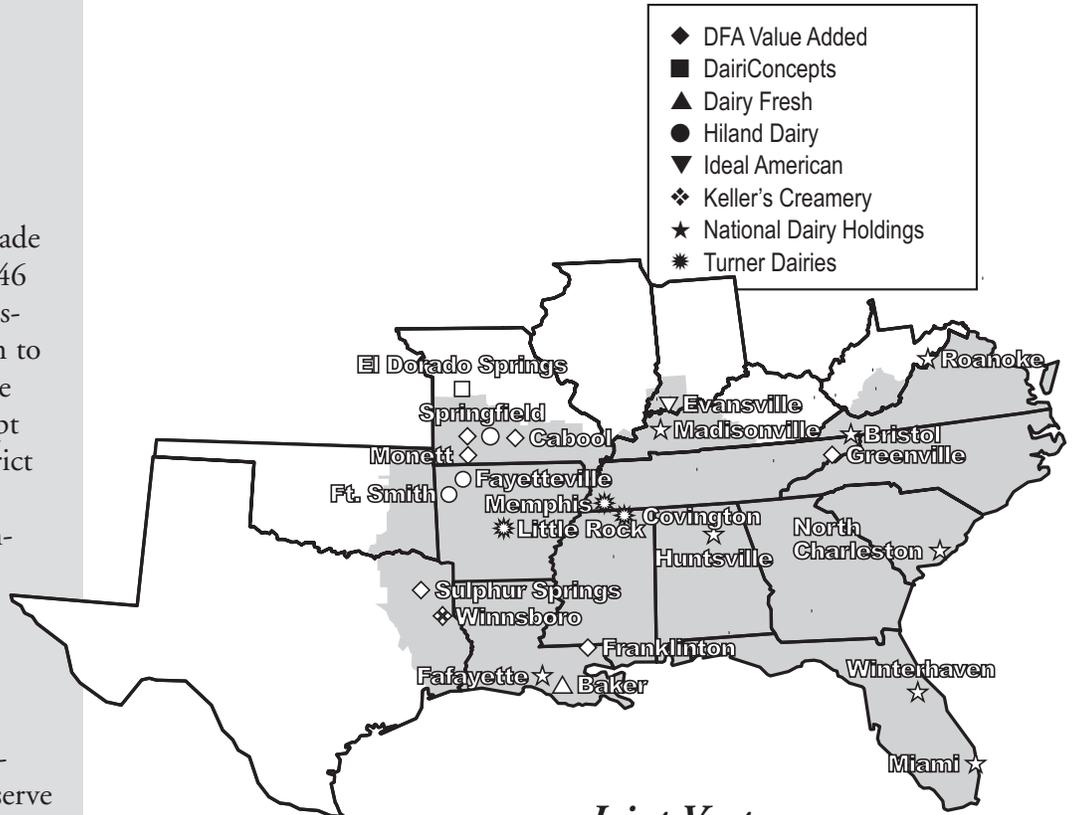
**Member Farms**  
**3,558**

**Annual Milk Production**  
**5.8 Billion Lbs.**

**Average Production**  
**Per Member**  
**1.6 Million Lbs**

## Services and Programs

Professional On-Farm Field Service • Milk Quality and Component Testing  
• Quality and Volume Pricing Programs • Quality Assurance (Voluntary Dump) Program • Disaster Benefits Program • Member Insurance Program  
• Local Governance Structure • DFA/Southeast Dairy Partners Farm Supply Program • Direct Deposit • Member Communications • 24-Hour Toll-Free Quality & Market Information



## Largest Customers

1. Dean Foods
2. National Dairy Holdings
3. DFA Facilities
4. Turner Dairies
5. Hiland
6. Kroger
7. Kraft

## Joint Ventures

- Hiland Dairy
- Turner Dairies
- Ideal American
- National Dairy Holdings

## DFA Manufacturing Facilities

- Sulphur Springs, Tx.
- Franklinton, La.
- Cabool, Mo.
- Monett, Mo.
- Springfield, Mo.

# Facts About DFA Western Area



*Fulfilling the promise in every  
drop of milk.*



*Bringing fresh dairy quality to  
America's dinner table.*



*Growing new markets for  
America's dairy industry.*

*Putting muscle in milk  
marketing programs.*



Western Area  
170 N. Mape Street  
Suite B106  
Corona, CA 92880  
Phone: 909-493-4900  
FAX: 909-493-4901

## About the Western Area

The Western Area of Dairy Farmers of America, Inc. (DFA) serves the entire California milkshed and extends into parts of Nevada. DFA's Western Area represents 339 member farms that market 4.9 billion pounds of milk cooperatively. Average production per member farm is 14.5 million pounds of milk per year.



**Dave Parrish**  
*Chief Operating Officer*



**DAIRY FARMERS of AMERICA**

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**Ray Veldhuis**  
*Area Council Chair*

## **Western Area Council Governance Structure**

The Western Area Council is made up of nine districts. The members in each district elect two representatives to serve on the Western Area Council and two to serve on the Western Area resolutions committee. The Area Council monitors the marketing of member milk and provides advice to the Corporate Board of Directors in matters pertaining to the Area. From these 18 council representatives, four members are selected to serve on the DFA Board of Directors. The 18 elected Area resolutions committee members help determine policy guidelines for the Board and select four members to serve on DFA's corporate resolution's committee. Members also chose Delegates to represent them when a member vote is necessary. The Western Area sends one delegate for each fifty farms to vote on necessary matters at the DFA Annual Meeting.

## **About Our Milkshed**

**Member Farms**  
**339**

**Annual Milk Production**  
**4.9 Billion Lbs.**

**Average Production Per  
Member**  
**14.5 Million Lbs.**

## **Services and Programs**

Professional On-Farm Field Service • Quality Assurance Program • Sample Testing from Independent Laboratories • Economical Hauling Rates • Monthly Bonus Program • Local Governance Structure



## **Joint Ventures**

Stremicks Heritage Foods

## **Ten Largest Customers**

1. DFA Corona
2. Leprino Foods
3. Western Milk Marketing Agency
4. Sunnyside Farms
5. DFA Hughson
6. DFA Turlock
7. DFS Petaluma
8. Dean Foods
9. Land O' Lakes
10. Model Dairy

## **DFA Manufacturing Facilities**

Corona, Calif.  
 Hughson, Calif.  
 Petaluma, Calif.  
 Turlock, Calif.  
 Ventura, Calif.  
 Willows, Calif.