

## **John H. Vetne**

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September 29, 2005

Hon. Mike Johanns  
Secretary of Agriculture  
200-A Whitten Building  
U.S. Department of Agriculture  
12<sup>th</sup> St. and Jefferson Dr., SW  
Washington, DC 20250

Hon. William T. Hawks  
Under Secretary of Agriculture,  
Marketing and Regulatory Programs  
228 W. Whitten Building  
U.S. Department of Agriculture  
12<sup>th</sup> St. and Jefferson Dr., SW  
Washington, DC 20250

Re: Pending Decision before the Secretary of Agriculture, on Review of the Interim Decision of the Acting Administrator, AMS, amending Mideast Federal Milk Order Rules, Hearing Clerk, OALJ, Docket No. AO 166-A72; and, Request for investigation by the Department's Capper-Volstead Act Committee.

Dear Secretary Johanns and Under Secretary Hawks:

The Secretary of Agriculture, as agency head, has a critical responsibility, vested by 5 U.S.C. §557 and 7 C.F.R. §900.13a, to review and make final decisions on regulations recommended by subordinate officials in the Agricultural Marketing Service after formal hearings on commodity marketing orders, including milk orders. The Attorney General's Manual on the APA (at p 81) states that this section of law "provides for intermediate and final decisions, prescribes who shall make them, and defines the decisional relationship between the agency heads and presiding officers." The decisional relationship between the Administrator and the Secretary in formal rulemaking is similar to the relationship between administrative law judges and the Judicial Officer in adjudication, which is likewise governed by 5 U.S.C. §557. The Secretary's final milk order decision functions have traditionally been exercised by the Under Secretary or Assistant Secretary for Marketing and Regulatory Programs. *E.g.* 61 Fed. Reg. 60639 (Nov. 29, 1996); 61 Fed. Reg. 37628 (July 18, 1996). USDA has not, unfortunately, followed these procedures in federal milk order rulemaking during the past four years.

A final decision is currently pending before the Secretary following a milk order hearing in Ohio last March, and a subordinate decision signed by the Acting Administrator of AMS in July. On behalf of my client milk cooperative associations and handlers, I transmit, for the exercise of your responsibilities under 7 C.F.R. §900.13a and 7 U.S.C. §557, our Exceptions to the Acting Administrator's decision, filed with the Hearing Clerk on Monday, September 26, 2005. The complete public record is available on the AMS Dairy Programs website at: [http://www.ams.usda.gov/dairy/me\\_pool\\_prov/me\\_pool\\_prov.htm](http://www.ams.usda.gov/dairy/me_pool_prov/me_pool_prov.htm).

We ask that the Secretary's office assume and exercise its decision making responsibilities in substance as well as form, not simply because the APA requires it. The AMS decision now before the Secretary, like some others in the recent past, also implicate regulatory policies and competitive practices broader than mere milk order rule amendment, and threaten to undermine the integrity of, and public confidence in, the milk order program. These issues, summarized below, are addressed in greater detail in my clients' Exceptions, Post-hearing Brief, and testimony in the hearing.

1. Anticompetitive practices. Issues hotly contested in the course of the hearing include: (1) domination of the milk supply side of the market by one supply organization, rule proponent Dairy Farmers of America and Dairy Marketing Services, (2) market domination of the fluid milk processing side by a few large companies such as Dean Foods and National Dairy Holdings, and (3) supply arrangements between the large suppliers and large distributors that effectively foreclose access to fluid milk markets by small cooperatives and independent farmers, small business entities who choose to sell milk outside of DFA marketing channels. The rules proposed by DFA, and adopted by the Acting Administrator, aggravate lack of market access for the market's independent supply organizations and provide a significant government-granted tool by which these dominant organizations may gain even greater market control and further restrict market access for competing suppliers. None of this was discussed in the Acting Administrator's decision. These issues address the Secretary's general responsibilities in marketing orders to balance the interests of producers, consumers, and the public (7 U.S.C. §§602, 608c), as well as specific responsibility to avoid trade barriers (§608c(5)(G)), prevent unfair trade practices (§608c(7)(A)), and to "determine whether or not there has been any abuse of the privilege of exemptions from antitrust laws" (§608d(1)). These issues overlap with the Secretary's responsibilities under section 2 the Capper-Volstead Act, 7 U.S.C. §292, and under the Agricultural Fair Practices Act, 7 U.S.C. 2301-2306, each of which deals with anticompetitive practices. The Chief Economist for U.S.D.A. is designated as chairman of the Capper-Volstead Act Committee within the Department. 7 C.F.R. §2.29(a)(9).

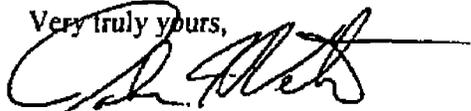
2. The Secretary's reserved responsibility to review new principles and departure from established principals, 7 C.F.R. 2.11. In 1999, USDA completed comprehensive reform of federal milk orders, as mandated by Congress. 64 Fed. Reg. 16026 (Apr1999)(decision by Under Secretary for Marketing and Regulatory Programs). Since that time, federal order rules have been periodically amended to undo the results of the reform process, or to fix alleged problems caused by the reform decision. The most significant change of policy and direction in these post-reform decisions has been a radical departure from established principles of producer inclusion to producer exclusion from participation in the benefits of the program – a process continued in the Acting Administrator's Mideast milk order decision. It does not appear from the rulemaking records or Federal Register notices that any of these decisions were brought to the attention of the Secretary. This new policy was most flagrantly applied in a recent decision by the AMS Administrator to exclude from participation in the Western milk order a large number of local milk producers who did not have access to limited fluid milk markets due to market domination of supplies and distribution by a few, large companies. 68 Fed. Reg. 49375 (Aug. 18, 2003). However, DFA (proponent of the exclusionary rules) believed that the Administrator's decision did not go far enough in excluding milk supplies of its competitors from participation in the Western milk revenue pool, so it voted against continuing federal order regulation of the Western Market, and the program was consequently terminated. 69 Fed. Reg. 8327 (Feb. 24, 2004).

The federal milk order program exists only at the pleasure and with the consent of dairy farmers who benefit from the program. If more than one-third of producers in any market disapprove of amended rules proposed by USDA, the program must be terminated for that market, as described in the Western Market termination order, *supra*. If a majority of producers so request, even in the absence of a hearing or agency recommendations, a milk order must also be terminated. 7 U.S.C. §608c(16)(B). If more than one-third of producers request a hearing on lawful proposals, USDA must hold a hearing, with limited exceptions. 7 U.S.C. §608c(17). This unique influence of the majority of beneficiaries of regulation on the continued existence of a large regulatory bureaucracy brings with it a danger that rulemaking decisions could be influenced by the wishes of dominant producer groups, upon whose continued favor the professional future of career civil servants depends.

This concern is heightened by recent consolidation of cooperatives and federation alliances in most markets who are now in a position to exercise this influence, as illustrated by DFA's recent shot-across-the-bow vote to terminate the Western Order when the Administrator's decision was not to its liking. In light of this new reality, there is even greater need for the Secretary and Under Secretary to review and make final decisions, after subordinate AMS officials and employees have made recommendations, to assure that (1) the interests of minority producers, small businesses, consumers, and the general public are not overlooked, and (2) the integrity of the decision-making procedure, as well as public perception of it, is protected.

Thank you for your consideration of this request.

Very truly yours,



John H. Vetne  
Attorney for: White Eagle Milk Marketing  
Federation, Inc., et al.

CC/EC  
Keith Collins, Chief Economist, USDA  
Lloyd C. Day, Administrator, AMS  
Hearing Clerk, OALJ



United States  
Department of  
Agriculture

Agricultural  
Marketing  
Service

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South Building  
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Mr. John H. Vetne  
Attorney at Law  
103 State Street #6  
Newburyport, Massachusetts 01950

Dear Mr. Vetne:

Thank you for your letter of September 29, 2005, to Secretary Johanns and Under Secretary Hawks regarding an Interim Final Rule for milk in the Mideast marketing area. Secretary Johanns and Deputy Under Secretary Lambert have asked me to respond on their behalf.

As you are aware, we are currently in litigation regarding the issues outlined in your letter. Accordingly, we will not address your opinions in this reply.

As you are also aware, matters that speak to the merits of the Mideast decision are prohibited from discussion on the basis of rules regarding *ex parte* communication. Your letter, together with this reply, will be forwarded to the Office of the Hearing Clerk as an *ex parte* communication.

The exceptions submitted on behalf of White Eagle Federation, et al., will be taken into account in preparation of a Final Decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Lloyd C. Day".

Lloyd C. Day  
Administrator  
Agricultural Marketing Service