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Dana Coale, Deputy Administrator
Dairy Programs, AMS, USDA
1400 Independence Ave NW
Washington, DC 20250-0225
Dana.Coale@usda.gov

Re: Pacific Northwest and Former Western Milk Marketing Areas – proposals.

Dear Deputy Administrator Coale:

On August 17, 2007, Dairy Programs, AMS, gave notice that a proposal to expand the Pacific Northwest (PNW) Milk Marketing Area, dated July 13, 2007, had been received by the agency from Dairy Farmers of America and Northwest Dairy Association (DFA-NDA). The August 17 notice indicated that the joint DFA-NDA proposal was under consideration for possible hearing, and invited additional proposals to be considered in the event a hearing is called. In response to requests by interested parties, agency staff prepared statistical data relevant to marketing area expansion issues and to the claims by DFA-NDA supporting its proposals for market expansion. We appreciate the agency's efforts and assistance in assembling this data. Much of the significant information that might possibly support regulation of the Utah and Idaho markets as part of an expanded PNW Marketing Area, however, is unavailable or is available only to DFA-NDA, which have declined to make their collective marketing information available to other interested parties.

Glanbia Foods, Inc., Jerome Cheese, Inc. and Lactalis American Group ("Unregulated Idaho Milk Handlers"), hereby submit their comments and alternative proposals in response to the agency's invitation. Glanbia Foods, Inc operates dairy manufacturing plants in Twin Falls, Gooding, and Richfield Idaho. Jerome Cheese, Inc. operates a plant in Jerome Idaho. Lactalis American Group, Inc., or Lactalis currently operates six cheese plants in US, including one in Nampa, Idaho. Country Classic Dairies, Inc., a Montana producer cooperative association and

operator of a milk processing plant with distribution in Utah, joins in these comments by the Unregulated Idaho Milk Handlers.

Summary of Position of Unregulated Idaho Milk Handlers.

For reasons explained below, Unregulated Idaho Milk Handlers submit that the July 13 hearing request from DFA-NDA fails to make a prima facie case, under long-established criteria and standards employed by USDA, for expansion of the PNW market. The available information responsive to established standards for definition of a federal milk marketing area and promulgation of a milk marketing order persuasively demonstrates that federal regulatory intrusion is unwarranted at this time because there is only minimal overlap of fluid milk sales, and little (if any) overlap of milk procurement areas serving the fluid milk markets for the Pacific Northwest and the Utah and Idaho markets. The milk revenue pool envisioned by proponents for the expanded area is designed to exclude from participation about one-half billion pounds of Grade A milk produced in Idaho each month, equal to roughly half of Idaho milk production and contrary to the statutory objectives of “market-wide” pooling of milk revenues, and aggravating the conditions claimed by proponents to result in “disorderly” marketing. For each of these reasons, the agency should deny the request by DFA-NDA for a hearing.

Among the conditions claimed by proponents to present problems for the Utah and Idaho dairy industry is lack of transparency in milk pricing, and lack of information to producers. There is also little information for the unregulated Utah and Idaho markets about distribution of fluid milk, and competition for fluid milk sales. For these reasons, USDA should alternatively consider promulgation of an order providing for market information of the kind typically available in federally-regulated markets, and establishing certain minimum standards for trade practices pursuant to 7 U.S.C. §608c(7)(A) and (D). The information and experience gathered from an information Order will allow the agency, in the future, to better evaluate whether marketing conditions warrant more intrusive forms of regulation.

If the agency decides to call a hearing notwithstanding the apparent absence of a prima facie case, and the persuasive presence of evidence against expansion of the PNW market, Unregulated Idaho Milk Handlers request the agency to include in the Notice of Hearing a proposal for re-regulation of the former Western Marketing Area under terms and provisions effective as of January 1, 2004. The provisions of the former Western Order will, we believe – in the words of DFA-NDA

– better “accommodate, in an orderly fashion, the explosive growth of milk production in Idaho” (DFA-NDA July 13, 2007, Request for Hearing at 4). The former Western Order would accommodate this production growth without deliberate exclusion of, or discrimination against, Grade A Idaho producers who do not belong to DFA or NDA and who have very limited access to the fluid milk markets of Idaho and Utah that are overwhelmingly controlled by proponents.

Detailed facts and analysis in support of our position on the DFA-NDA proposals are stated below, following a brief summary of regulatory alternatives available to USDA and description of the responsibility of the agency and of proponents in justifying a notice of hearing for expansion or promulgation of a milk marketing order.

I – Milk Marketing Regulatory Intervention Alternatives Available to USDA.

The Agricultural Marketing Agreement Act specifically authorizes four kinds of government intervention in milk marketing, with progressively higher standards and justification for such intervention:

1. A marketing agreement negotiated between producers and handlers and developed in agency-sponsored hearings. 7 U.S.C. §608b. The terms of such agreement (without an Order) are not limited to those contained in 7 U.S.C. §608c.
2. An agency-supervised mediation or arbitration of disputes between producers and handlers, with results limited to terms authorized for milk marketing orders. 7 U.S.C. §671.
3. A marketing order with a marketing agreement approved by handlers developed by formal rulemaking procedures. 7 U.S.C. §608c(8).
4. A marketing order without marketing agreement, following formal hearing, supported by additional evidence and findings that an order without handler agreement “is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy” of the AMAA. 7 U.S.C. §608c(9).

Marketing orders, with or without agreements among handlers, are further very flexible in the degree of government intrusion that may be incorporated by regulation. For orders regulating the handling of milk, rules adopted by the agency may contain “one or more” of provisions

authorized by 7 U.S.C. §§608c(5) and 608c(7). This flexibility allows the agency to vary, by market, the degree of regulatory intrusion in relation to the degree of marketing disorder (if any) stemming from competitive markets.

We observe, initially, that DFA-NDA has proposed the most comprehensive and most intrusive form of regulation for the currently unregulated markets of Idaho and Utah, and the most costly type of procedure, without any apparent effort to address the problems alleged to exist by less intrusive regulation for the expanded areas. Such less intrusive remedies are particularly appropriate in this case since the problems addressed by DFA-NDA for the Utah and Idaho markets are largely limited to marketing or pooling practices of (and conflicts between) the two proponents. The desirability of a DFA-NDA solution to their internal problems is underscored by a proposed regulatory solution that is limited to inclusion of DFA and NDA producer milk in the expanded area, and contemplates the exclusion of most milk from other cooperatives and non-member producers located in Idaho. The proposals are also advanced without any apparent effort by DFA and NDA to address the existing problems of opportunistic pooling and depooling on the current PNW Order (Request for Hearing at 5-6) by pool performance amendments limited to the current marketing area.

II – Proponents’ Obligation to Make a Prima Facie Case for Regulation, and USDA’s Obligation to Investigate and Verify a Prima Facie Need for Hearing.

A federal milk marketing order hearing is an expensive and time-consuming event. Before resources of the agency and interested parties are invested in a hearing, the proponent should be required to demonstrate and the agency should be able to confidently conclude that a hearing is necessary.

Under the Administrative Procedure Act, which governs milk marketing order hearings, “the proponent of a rule or order has the burden of proof,” and a rule or order may only be adopted only if supported by “reliable, probative, and substantial evidence.” 5 U.S.C. §556(d). Applied to a request for hearing on a proposed rule, this provision, along with the agency’s Rules of Practice, requires that a proponent lay its cards on the table or at least show enough of its hand to permit the agency, and other interested parties, to determine whether facts alleged support regulatory intervention, and whether the proposal made addresses the problems identified in a manner consistent with statutory authority and administrative policy.

The agency's threshold responsibility on receipt of a proposal is to conduct an "investigation" of the need for regulation. 7 C.F.R. §900.3. The Rules of Practice describe two possible outcomes of such an investigation:

(a) "If the investigation and consideration lead the Administrator to conclude that the proposed marketing agreement or marketing order will not tend to effectuate the declared policy of the act, or that for other proper reasons a hearing should not be held on the proposal, he shall deny the application, and promptly notify the applicant of such denial, which notice shall be accompanied by a brief statement of the grounds for the denial."

OR

(b) "If the investigation and consideration lead the Administrator to conclude that the proposed marketing agreement or marketing order will tend to effectuate the declared policy of the act, or if the Secretary desires to propose a marketing agreement or marketing order, he shall sign and cause to be served a notice of hearing, as provided in this subpart."

The requirement of facts and reasons underlying a hearing proposal is also confirmed by Dairy Program's August 17, 2007, notice and invitation for additional proposals on the DFA-NDA hearing request: "Each proposal should be accompanied by a *comprehensive statement on the need for the proposal*. The statement will be evaluated to determine whether the proposal will be accepted if a hearing to amend the order is held."

The agency's publication, AMS, USDA, *The Federal Milk Marketing Order Program* (Marketing Bulletin No. 27), at pages 14-15, describes the investigatory process as follows:

When USDA receives a proposal for a new order, it is handled by the dairy division of the Agricultural Marketing Service. This division is responsible for investigating each hearing proposal and recommending that a hearing on the proposal be called or denied. One or more marketing specialists are assigned to study the proposal and the marketing conditions in the proposed area.

During the course of most pre-hearing investigations, the marketing specialist consults with handlers and producers and is available for consultation upon request of any interested party.... Whether in connection with a proposal for a new order, or an amendment to an existing order, it is helpful to have discussions between industry members and USDA representatives about the marketing problems.

The post-proposal investigation allows USDA to examine the milk market under established criteria for marketing disorder (*id.* at 13), and make an essential preliminary determination on the

merits of a proposal – i.e., that “marketing conditions in the area could be improved by a milk order.” *Id.* p. 15. A decision to deny a hearing, pursuant to 7 C.F.R. §900.3(a), should be made by the agency upon application of these standards to the DFA-NDA proposal.

III – DFA-NDA’s Request Fails to Establish a Prima Facie Case for Expansion of Regulation Into the Former Western Milk Marketing Area.

The AMAA authorizes regulation to establish and maintain “orderly market” conditions for various agricultural commodities. 7 U.S.C. §§601 and 602. The DFA-NDA Request for Hearing freely and frequently applies the term “disorderly” to its descriptions of milk markets in Idaho and Utah, apparently expanding the term to include most competitive market practices. The AMAA’s pursuit of orderly markets, however, was not intended to protect businesses from competition, but rather to describe corrections to market failures that characterized much of the country’s agricultural production in the Great Depression. The term “disorderliness” applied to milk markets is described in Erba and Novakovic, *The Evolution of Milk Pricing and Government Intervention in Dairy Markets*, <http://www.cpdmp.cornell.edu/>, (Cornell University 1995):

Disorderliness, which refers to the lack of a predictable, sustainable, and efficient flow of a product to a specific market, ultimately led to the breakdown of dairy markets. If fluid milk markets were to have orderly supply, orderly production was required which further depended on orderly provisions for assembly and distribution.

See also, Agricultural Marketing Service, USDA, *the Federal Milk Marketing Order Program* (Marketing Bulletin No. 27) pp. 7 – 8, and “The Concept of Orderly Marketing” in Nourse et al, *Report to the Secretary of Agriculture by the Federal Milk Order Study Committee* (USDA, April 1962), at A14 – 16. Proponents cite no facts or conditions that constitute “disorderly markets” or that threaten breakdown of markets and shortage of milk supplies under these historical standards.

Whether there are disorderly conditions in Idaho of the type and degree necessary to justify federal intervention in the form of a milk marketing order has long been a close question. In 1979, the Administrator, AMS, recommended *against* federal regulation of milk marketed in Southwestern Idaho and Eastern Oregon because evidence did not show that dairy farmers were “experiencing disorderly marketing conditions to an extent that warrants the adoption of a milk order for the area.” 44 Fed. Reg. 48128 (Aug. 16, 1979). After further hearing on the proposals, revealing that proponent cooperatives bore a disproportionate share of surplus milk, that some cooperatives had lost their share of the market’s Class I sales, that distributing plants had cut off producers during flush production periods, and that growing milk supplies with limited Class I

outlets threatened the bargaining power of cooperatives to retain Class I sales, an order was promulgated. 46 Fed. Reg. 21944 (April 14, 1981). The conditions justifying the 1981 promulgation of the former SW Idaho Order, however, do not now exist and are not cited by proponents. Indeed, the situation is now reversed. Although there are even fewer Class I plant outlets for the region's milk production, proponents enjoy full supply contracts with all major Class I plants, to the exclusion of non-member producers and smaller cooperative associations. Proponents provide no facts on marketing conditions, by any individual or collective measure, that demonstrate a "Need for an Order" in the Utah and Idaho markets according to criteria long employed by USDA. *The Federal Milk Marketing Order Program, supra*, at 11-12.

The factors employed consistently by USDA in defining the marketing area to be regulated, if evidence of marketing disorder is proved, are summarized in *The Federal Milk Marketing Order Program, supra*, at 19 – 20. These standards were reinforced by the Final Decision on Federal Milk Marketing Order Reform, 64 Fed. Reg. 16026 (April 2, 1999), as well as by the more recent decision denying merger of the Appalachian and Southeast Marketing Orders, 70 Fed. Reg. 55457, 55460 – 70 (Sept. 21, 2005). The most important factors are:

1. Is there significant overlap of distribution and sales by distributors, and if so, what marketing or competitive problems result from such overlap?
2. Is there significant overlap of milk procurement or supply for the market, and if so, what marketing or competitive problems result from such overlap?

On these two factors alone, the hearing request by DFA and NDA for an expansion of the PNW Marketing Area should be denied.

Concerning the issue of Class I distribution overlap, the DFA-NDA Request for Hearing is remarkably unrevealing in its description of the quantity and quality of such overlap. The Request merely states that there is some distribution overlap:

--- "We expect the hearing record to show that there is handler competition in the expanded marketing area, as proposed. A simple review of the current Order 124 handler list indicates overlap" – an apparent reference to partially regulated plants with distribution in Order 124. [Request p. 1].

--- Identifying four partially regulated plants selling into the PNW market from Utah and Idaho, and three PNW plants with distribution into the former Western Market, petitioners believe "it is reasonable to expect that all these plants engage in competition with some subsets of one another." *Id.* p. 3

No distributing plant in the PNW market, to our knowledge, has complained of disadvantage or disorder resulting from competition with distributing plants that might become regulated under a PNW Market expanded to include Utah and Idaho. Thus even if there is overlap, there is no inter-market issue of competition that needs to be addressed by market expansion or merger. And although one might infer from page 3 of the Request that PNW handlers have enjoyed increased distribution into southern Idaho since 2004, no Idaho or Utah distributor has complained about competitive disadvantage from fully-regulated PNW handlers.

The most telling facts on the question of overlap, however, is the very small volume of sales overlap demonstrated by, or reasonably inferred from, available data. According to data published or prepared by the Market Administrator, total sales of about 3.5 to 4.5 million pounds per month were made into the PNW market by partially-regulated distributing plants during 2006-2007, representing only 2% – 3% of in-area Class I sales. Of this volume, an average of less than 800,000 pounds was distributed into the PNW market from plants in Utah, Nevada and four other states combined. An average of less than 3 million pounds was sold from partially regulated plants in Idaho, Oregon and Montana combined. For partially-regulated plants subject to Section 76(b), in which obligations (if any) are based upon the plant blend versus federal order blend, an average of 4% of the plants' total distribution to all markets was made on in-area PNW routes.

For distribution flowing out of the PNW market, sales are also small. All regulated plants in the PNW market sold an average of 12.7 million pounds per month to unregulated areas – i.e., including California, Nevada, Utah, Idaho, and more distant states – during 2005-2007 (through October), representing 7.1% of total distribution by pool distributing plants. A somewhat larger portion of such sales were from plants located in the State of Oregon, which adjoins California and Southern Idaho. Oregon pool distributing plants sold an average of 9% of their total distribution on out-of-area routes. Such sales have increased modestly since the termination of the Western Order, demonstrating that deregulation of Utah and Idaho has not placed PNW distributors at a disadvantage outside of the regulated market.

In the recent Southeast-Appalachian decision, the Secretary concluded that a 12% share of in-area Southeast market sales by Appalachian handlers was “minimal,” and represented insufficient overlap to warrant a merger of the two markets. 70 Fed. Reg. at 55466. The far smaller

overlap of sales between the PNW market and the former Western market deserves a similar conclusion – no expansion is justified.

NDA commented on this very fact in a post-hearing brief filed in 2001, in Docket No. AO-368-A29 < http://www.ams.usda.gov/dairy/pnw_briefs.htm > as follows:

One of the other factors that led USDA to retain the Pacific Northwest Order area virtually intact during the "Reform Consolidation" process, was that “*There is almost no relationship between the Pacific Northwest Area and Southwestern Idaho-Eastern Oregon marketing areas, and no basis for a consolidation*” (quoting the Final Decision at page 138). Little has changed since 1999.” (Emphasis in original).

If there has been any significant change of facts since NDA made this argument, it does not appear in data prepared by the Market Administrator, nor is it alleged in proponents’ hearing request.

There is likewise no significant or genuine overlap of milk procurement areas for the PNW market and the former Western Market. NDA’s 2001 comments, *supra*, did refer to opportunistic pooling of milk on the PNW by DFA, emphasizing that this milk was not part of the normal PNW milkshed. More recently, there has been similar opportunistic pooling on the PNW Order of Idaho milk in Class IV use by NDA. Again, this milk is not needed by the PNW Market, and tends to drop to zero pounds when the price incentive for pool association with the regulated market is not favorable. The DFA-NDA Request for Hearing carefully avoids any claim that the Idaho milk pooled on the PNW Market was shipped to, or needed by, any PNW distributing plant.

Data from "The Compilation of Statistical Material - Pacific Northwest Federal Milk Marketing Order" for both 2006 and 2007 to date shows that over the past two years, up to 94.1 million pounds milk from southern Idaho counties was pooled monthly on the PNW Order. These deliveries on the PNW order were discontinued this past April when it became uneconomical to pool Class IV milk on the PNW, due to a negative differential for the FMMO blend relative to Class IV.

While the statistics do not tell us who was specifically pooling this milk, the only supply pool plant in Idaho listed under FMMO 124 is the Darigold Class IV plant in Caldwell, Idaho, which has qualified as a Pool Supply Plant under the PNW order since April 2004 – the first month following termination of the Western Order. This plant is well known as a milk drying plant that manufactures Class IV products. Clearly this pooled milk from southern Idaho was not part of a marketing practice to meet any Class I needs, but simply an understandable effort to draw money

from the PNW pool to benefit the cooperative pooling the milk. But it does not reflect any PNW market need for milk from Idaho.

There is good reason why Idaho milk does not make it to PNW distributing plants. There is a large reserve supply of milk within the PNW Order that already serves the market needs.

The large supply of Idaho milk used for Class III and IV, along with significant distance makes milk movements into the PNW from Idaho impractical to meet any meet market needs. There simply are no distributing plants in the regulated under the PNW order that would logically take significant milk deliveries from Idaho. The closest distributing plant is Eberhard Dairy in Redmond, Oregon, 306 miles from Caldwell, a plant served by the Oregon Milk Marketing Federation. The next two closest distributing plants are in Spokane, WA - over 380 miles from Caldwell, Idaho.

These distributing plants have large quantities of Grade A milk normally used for manufacturing available to them from within the current PNW Marketing area and much closer than Southwestern Idaho. The closest PNW plant to the southern Idaho milk shed of any size is the Darigold cheese plant in Sunnyside WA, 295 miles by interstate from Caldwell. The *Dairy Market News*, Volume 74, Report 43 published an announced Class I Price for Seattle of \$0.72, including rBST premium. This is the second lowest premium for any market published by USDA, implicitly reflecting the lack of demand at PNW distributing plant locations for supplemental milk supplies.

Even though the individual factors for regulation are not regarded in isolation “as a ‘prima facie’ indication of the need for an order” (*The FMMO Program* at 12), a hearing should not be entertained where proponents’ claims support *none* of the factors for regulation. In short, “proponents have not demonstrated that the current marketing conditions are disorderly.” 70 Fed. Reg. at 55465. USDA should therefore deny the DFA-NDA hearing request.

III – If a Hearing is Called, a Limited Order Providing Market Information and Regulating any Disorderly Trade Practices Should be Considered.

Some of the alleged problems with the Idaho and Utah markets, as described by DFA-NDA, deal not with lack of regulated milk prices but lack of milk pricing transparency and marketing information. Unregulated Idaho Milk Handlers also found that there has been a lack of information about the market since the Western Federal Order was terminated. These problems

can be corrected by regulation designed to provide useful market information without intrusive economic regulation, as proposed herein.

The information function of a Federal Milk Order is described in *The Federal Milk Marketing Order Program* (p. 12) as follows:

In the marketing system for fluid milk, payments are normally prearranged, but are not made until several weeks after producers have made deliveries. Thus, confidence of buyers and sellers is essential to the smooth functioning of such a system. Lack of information about the market and absence of an impartial agency to appraise buying practices used may leave a void in which mistrust in the marketing system leads to practices that disrupt orderly marketing.

An information order would contain all of the classification provisions, reporting requirements, and administrative provisions of conventional milk orders, but omit price and pooling regulation. An information order would opt instead for “an impartial agency to appraise buying practices.” In lieu of regulated minimum prices fixed by USDA, each handler could be required to post its minimum pricing terms with the Market Administrator, including applicable butterfat and protein prices, for each class of milk or all classes, on a specific date during the month in which milk is marketed, or shortly thereafter. The prices and component values so posted would be enforceable by USDA if a handler did not make payment according to posted terms. Producers may also elect to have the Market Administrator verify weights and tests. Such an order, containing “one or more” of provisions authorized by 7 U.S.C. §608c(5) and (7), would address the complaints of DFA-NDA that the unregulated market lacks transparency in pricing, uncertainty in payments, and insufficiency in useful market information. The information order would also provide, over time, experience to test the efficiency and effectiveness of a milk market relying more on competition and less on government intrusion.

Detailed proposed rules for an information-only Western Mountain Milk Order will be submitted in a separate document.

III – If a Hearing is Called, Separate Regulation of Utah and Idaho under Terms and Provisions of the Former Western Milk Order Should Also be Considered.

DFA-NDA’s proposal would, admittedly lead to exclusion from the pool of about 500 million pounds of Grade A milk used to produce cheese in Idaho, while NDA’s considerable supply of Class IV milk would be pooled simply because it is produced by a cooperative that enjoys a share

of the very limited access to Class I markets. Because the proposal would create classes of “have” and “have not” producers, it is more inclined to create than to cure marketing disorder.

The proponents of the expanded order contend that the Idaho and Utah markets currently face disorderly marketing conditions. However, the conditions cited are not “disorderly” in any sense of market failure or prospective market failure. Instead, both the proponents face internal marketing problems due to a lack of diversity of plant product mix for one of the proponent of FMMO expansion (NDA) and significant loss of Class I markets by one proponent (DFA) to the other. They point to a disconnect between the Cheese Yield price and the FMMO Class III price in recent months as evidence of disorderly marketing. But the disconnect was in fact was due primarily to the difference in value of whey products produced by the majority of Idaho cheese plants, and reflects problems with the federal Class III price formula under active consideration in another hearing rather than any inherent problem in the cheese yield pricing formula commonly employed by many Idaho plants.

It is common knowledge that NDA has struggled with the value of milk used in its NFDM plants in Idaho – a state that is primarily a cheese market. Since the termination of the Western order and until spring 2007, NDA’s manufacturing company, Darigold, has faced significant differences in product value from its drying plants, compared to the Cheese/whey product plants that dominate the Idaho market. That has changed this year, with NDA/Darigold enjoying a strong market for dry milk products, and a comparative advantage for its Class IV plants relative to cheese plant competitors

Nearly all milk produced in Idaho is used for manufacturing of cheese or dry milk products. Cheese dominates milk utilization in the state. According to NASS, Idaho cheese production totaled 8.04 million pounds in 2006, up 11.9% since 2004, the year the Western Federal Order was terminated. Total Idaho milk production increased 11.5% over the same two years to reach 10.90 billion pounds in 2006. If one assumes a simple 10% cheese yield for milk at test, Idaho cheese production would account for about 74% of the total Idaho milk supply during 2006. The rest of the milk supply would either have served other product markets, including NFDM and Class I sales, or left the state for further processing. NDM use can be estimated from published expanded order pool estimates and Class IV utilization in the PNW order, less the Class IV milk distant pooled from Idaho. In 2006, an average of 231 Million pounds of Class IV milk was pooled on the PNW order. When adjusted for milk pooled from southern Idaho during 2006, the Class IV from within the current PNW order is estimated at 163 million per month.

Class I sales in Idaho are even smaller. Since the Western Federal Order was terminated in April 2004, we are not aware of any new distributing plants opened in the area proposed for re-regulation, although two plants – both in Idaho – have closed.

Class I Handlers on the Western Order still in business, March 2004:

Country Classic Dairies, Inc.	Belgrade	Gallatin	MT
Cream o'Weber Dairy, Inc.	Salt Lake City	Salt Lake	UT
Gossner Foods, Inc.	Logan	Cache	UT
Meadow Gold Dairies, Inc.	Boise	Ada	ID
Meadow Gold Dairies, Inc.	Salt Lake City	Salt Lake	UT
Stoker Wholesale, Inc.	Burley	Cassia	ID
The Kroger Co., Layton Dairy	Layton	Davis	UT
Western Quality Foods	Cedar City	Iron	UT
WestFarm Foods (Darigold)	Boise	Ada	ID
Winder Dairy, Inc.	Salt Lake City	Salt Lake	UT

Class I Handlers on the Western Order that have closed since March 2004:

Falconhurst Dairy, Inc.	Buhl	Twin Falls	ID
Meadow Gold Dairies, Inc.	Pocatello	Bannock	ID

Pay price disparity exists in a healthy competitive market and will not be “cured” by regulation, but could well be aggravated by the expansion of the PNW as proposed by the Proponents. In their request, the Proponents note that 1.2 billion pounds of milk would likely be pooled on an expanded PNW order. Total milk production for the four states covered by the new order averaged over 1.7 billion pounds per month during the first half of 2007. By their own assumptions, the Proponents therefore expect the new order to leave 500 million pounds of local milk out of the new FMMO pool – an excluded volume equal to or exceeding all of the milk pooled in each of the markets for Florida, Arizona and Appalachia. It is hard to conceive how keeping nearly 30% of the milk supply from the proposed order – and over half the current Idaho milk supply - can lead to orderly marketing. Producers shipping directly to distributing plants or the organizations that supply them will receive any benefits from a blend price, while producers without any access to limited Class I markets will garner the return from their other market options. In regards to more equal pay distribution across all dairy producers, the regulated scenario differs only in degree from the current unregulated market, where suppliers to the different markets may have different revenues depending on market price relationships and supply agreements. And the difference in degree would be greater disparity among Idaho farmers since some producers (DFA and NDA members) would reap the benefit of a blend price in Idaho that (unlike the unregulated

market) applies a fiction that milk delivered to an Idaho plant is worth only 30 cents less than milk delivered to Salt Lake City.¹

What could really be different under the proposed expansion is that the proposed regulations themselves will aggravate in the very disorderly marketing the proponents are proposing to minimize.² When participating in the Federal Order pool has financial value due to phantom freight rewards or other reasons, access to that market pool also has value. Organizations that have access to distributing plant sales in the old Western FMMO sold rights to pooling based on these sales, and they would likely do it again to increase income and improve their competitive advantage through a de-facto sale of a government-created incremental value for pooled milk.

These issues are certainly not new. They were articulated well in the NDA brief regarding pooling rights on the Western Order – the hearing that resulted in the termination of the Western order because USDA did not go as far as DFA wanted in limiting pool access to competing producers. < http://www.ams.usda.gov/dairy/w_pnw_briefs.htm > Post-Hearing Brief of NDA, August 21, 2002. In its brief, at pp. 30-32, NDA noted that limited pool access creates increased value in pooling rights, leading to their sale, which is disorderly marketing in its own way.

The turn-around by NDA in the hearing request before the Secretary is curious, and is in any event inconsistent with the history of the AMAA (as described in NDA's 2002 Brief) providing for marketwide pooling to producers having only manufacturing outlets in order to avoid cutthroat competition among producers for Class I sales.

Proponents give lip service on the need to “accommodate, in an orderly fashion, the explosive growth of milk production in Idaho” (DFA-NDA July 13, 2007, Request for Hearing at 4). If a hearing is called, a proposed order should allow for maximum participation in the pool by all producers involved in this production growth who are ready, willing and able to serve the market's very limited fluid needs, whether they have current access to that market or not. To this end, the hearing should include a proposal for regulation of the former Western Marketing Area

¹ NASS all milk price data for Utah and Idaho reveal an actual difference of \$0.60 to \$0.80/cwt between prices paid to producers in Utah and Idaho from 2003 through 2006.

² Some of the additional problems addressed by proponents do not exist at all in the unregulated market, but would be created by regulation; and more regulation, in turn, would be required to mitigate the result. For example, there is no “depooling,” no sale of pooling rights, nor opportunistic pooling of unregulated Grade A milk the unregulated market. Nor is there any price stress caused by packaged fluid milk sales from plants that have no federally regulated minimum prices because no plant in the unregulated market is burdened by federal minimum prices. The need to regulate prices for sale from unregulated plants, or partially regulated plants, in order to protect the market arises only from the introduction of price regulation for some group of plants in the first instance.

under terms of the former Western Marketing Order, as adopted and justified by the Secretary in the course of Federal Milk Marketing Order reform.

Conclusion

The DFA-NDA Request for a hearing on proposals to expand the PNW Market to include Utah and Southern Idaho should be denied. If a hearing is nevertheless called, the Secretary should include alternative proposals for an information-only milk order, and for a separate Western Order containing all provisions of Order 135 prior to termination of that Order. If a hearing is given further consideration, a pre-hearing workshop should be scheduled following the procedure employed prior to the Notice of Hearing for the recent Class III and IV price formula hearing.

Respectfully submitted.

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