UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas

Docket Nos. AO-368-A32
AO-271-A37
DA-03-04

MOTION TO SUPPLEMENT RECORD DUE TO EX PARTE COMMUNICATIONS

I. Introduction

In prior correspondence with the Office of the Secretary, Sarah Farms called to the Department’s attention rumors involving the pending formal rulemaking concerning producer-handlers in the Pacific Northwest and Arizona-Las Vegas Marketing Areas. The Department declined to investigate these rumors for lack of specificity but promised, “to continue to ensure that ex parte communication prohibitions are not violated in any Federal milk order decisional process.” (Exhibit A.) Sarah Farms is a producer-handler that produces more than 3 million pounds of milk per month and, therefore, its status is the subject of the above referenced rulemaking proceeding.

Unfortunately, Sarah Farms now moves for the Department to place on the record all pertinent information related to an apparent ex parte communication by Gary Hanman (“Hanman”), the President and CEO of Dairy Farmers of America directed to Dana Coale, Deputy Administrator of USDA, AMS Dairy Division. This communication took place on October 12, 2004 and is in plain violation of both 5 U.S.C. § 557 and 7 C.F.R. § 900.16. These
comments came to the attention of counsel for Sarah Farms on or about March 29, 2005. Hanman’s comments are attached hereto as Exhibit C, as transcribed by Associated Court Reporters.

Dairy Farmers of America (“DFA”) is the proponent of proposals before the Department to limit the producer-handler exemption in the Pacific Northwest Marketing Area and the Arizona-Las Vegas Marketing Area. The Department had closed the hearing record on these proposals when Hanman re-argued DFA’s position to the Department at the Dairylea meeting. His comments have the potential to influence the hearing process.

In addition, DFA is the proponent of two other producer-handler limitations now before the Department related to the Appalachian Marketing Area and the Southeast Marketing Area. While not directly affected by the conditions in these marketing areas, Sarah Farms is also a participant in those hearings and has an interest in the protection of the producer-handler exemption in all Orders. Hanman’s comments violate the ban on ex parte communications in those hearings, as well.

Sarah Farms, in bringing this issue to the Department’s attention, does not intend to criticize the past or future beneficial involvement of Department officials in producer functions. Based on the information now known and presented herein, it seems that any improper communication was conveyed to the Department by DFA in a moment of opportunity. The criticism of Hanman’s poor judgment should not be construed as a criticism of the Deputy Administrator’s attendance at the Dairylea meeting, an event we presume she was attending as an invited guest in an interest to provide information to Dairylea’s membership.

II. The Ongoing Producer-Handler Hearings and Ex Parte Prohibitions
As this Motion is written, the Department is preparing a decision on a contentious hearing concerning producer-handlers in the Pacific Northwest and Arizona-Las Vegas Marketing Orders. Undeniably, the hearing process has been lengthy. The Department first issued a hearing notice on this matter on August 5, 2003. 68 Fed. Reg. 46505 (August 6, 2003).

That hearing notice established that formal rulemaking provisions of the APA applied. Id. at 46506. The hearing notice also contained the following prohibition on ex parte communication:

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

- Office of the Secretary of Agriculture,
- Office of the Administrator, Agricultural Marketing Service,
- Office of the General Counsel,
- Dairy Programs, Agricultural Marketing Service (Washington office)
- and the Offices of all Market Administrators.

Id. at 46509; See also 5 U.S.C. § 557(d)(1)(C), 7 C.F.R. § 900.16(c). The Deputy Administrator is included among those to whom the prohibition applies.

**III. Gary Hanman’s Comments of October 12, 2004**

On October 12, 2004, Dairylea Cooperative, Inc. held its 97th annual meeting in Liverpool, New York. Dairylea invited Hanman to speak at the meeting. (Exhibit B). Dana Coale, the newly appointed Director of USDA-AMS, Dairy Programs, also attended the meeting, but was not listed among the guest speakers in Dairylea’s press release.

Hanman’s comments directly addressed what DFA perceived as “problems” in the Federal Order System. Hanman singled out the Deputy Administrator and directed specific and
pointed comments to her regarding the producer-handler hearing, which are reproduced below:

Dana Coale is here as Dwight has indicated. She is the new boss of Federal milk marketing orders. We are glad to have her. And what I've shown on the screen as deficiencies in the program are not her fault, but they are something she and us have to solve.

It takes too long for us to have a hearing, to get a hearing in the first place, build a record, and then get the results of that record into place. We need some way to help her make that decision sooner.

We think in our case that we have too much participation in some of these fluid pools from milk sources that do not intend to satisfy that market demand. They are not in there to sell milk for the fluid market, which is what the Federal orders are designed to price, but they are in there really to just siphon some milk out of the pool. And so in our case and I think in DMS's case, our goal is to tighten those pools and ask that if you participate in the pool you've got to perform.

**We have a major problem with what we call producer handlers.** You may call it producer distributors. As these dairy farmers have gotten larger, they have looked at selling their milk off of the farm in gallon jugs or half gallon jugs instead of in 5600-gallon tankers, and they have gone to some major supermarkets and have cut some deals on gallons and half gallons of milk. And as a result of that, Federal milk orders do not price their sales. They are exempt.

When the Federal orders were passed in the early or the late '30s, when we got the authority for Federal orders, there were a lot of small farms that were selling milk out the back door of their milk house and they were excluded. Producer distributors, producer handlers were excluded from regulations under order, and since that time we have not been able to cause regulations to apply. And so now we have a lot -- they are [sic, bottler] like a Dean Foods who has to comply with an order in a classified system of pricing. It means that his milk that he puts in a bottle he gets class one cost for that, and if his competitor is a producer handler, a dairy farmer, who is looking at a less of a return his cost might be less for his milk in a jug, in a gallon jug, than Dean. So we have to be --as an industry, **we have to help Dana and the Federal milk order program make regulations totally applicable, whether producer distributors or whether they are regulated handlers like Dean. If we don't, and if we can't get that done, and that will take new legislation, the classified system of pricing that we've known will go away.**

***
We mentioned the producer handler issue, and there is a very large dairy in the west who now is packaging milk for Costco and Costco is taking reduced cost -- apparently reduced cost of milk to the marketplace and giving our customers all kinds of fits in the marketplace. And they've had to meet that lower price at retail and at wholesale and they've backed up to us, our customers have backed up to us, say you got to keep us competitive. We are not competitive with these producer handlers. They are selling class one milk on the blend. We've got to have a reduction in our cost of milk. So that's the pressure we are feeling by reason of this, and the solution to it is obviously regulation of producer handlers the same as we have regulated handlers.

Gary Hanman Tr. 11-13, 25-26 (full transcript attached as Exhibit C).

Hanman’s comments establish the following:

1. Dana Coale, a USDA representative subject to the prohibition on ex parte communications who Hanman described as “the new boss of Federal Milk marketing orders” was present for Hanman’s comments.

2. Hanman presented visual material, which may include electronic and documentary exhibits not a part of the hearing record, to the audience and the Deputy Administrator.

3. Hanman described producer-handlers as a “major problem” and implored the Department and the Deputy Administrator specifically to “help address these problems” and to make

4. Hanman attempts to present an explanation for the existence of the producer-handler exemption, an explanation that was vigorously contested at the on the record hearing encompassing eleven days of testimony subject to cross-examination by other interested parties and the Department.

5. Hanman’s comments were motivated, in part, by Dean Foods Company and other customers of DFA who allegedly have pressured DFA for price concessions. These facts
were either not presented or contested at the hearing.

6. Hanman implicitly threatens the demise of the Federal Orders and, indirectly, the jobs of the Deputy Administrator and other Department employees.

7. Hanman alludes to problems caused by the inability of DFA's customers to compete with producer-handler sales to Costco. Again, this topic was the subject to extensive testimony and cross-examination at the hearing. In fact, DFA's expert witness conceded that DFA was not only competing on such sales in to the Pacific Northwest, but was actually supplying the stores through its joint venture with Wilcox Dairy.

8. Hanman asserts, without any support whatsoever, that producer-handlers are "selling milk on the blend."

9. Hanman characterizes the solution as "the regulation of producer-handlers." Not coincidentally, this solution mirrors DFA's proposals on producer-handlers in Orders 124, 131, 5 and 7.

Hanman's comments are no mistake or simple indiscretion. As the leader of the nation's largest cooperative, he directly exploited the presence of a USDA representative to re-present and re-argue DFA's argument in favor of its proposals to cap producer-handlers. No party opposing DFA's proposals was notified of this ex parte contact either in advance or in hindsight.

With his opportunistic comments, Hanman has patently and undeniably violated the Department's clear and unequivocal prohibition on ex parte communications:

No person interested in the proceeding shall make or knowingly cause to be made to an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding an ex parte communication relevant to the merits of the proceeding except as provided in paragraph (a) of this
section.

7 C.F.R. § 900.16(b).

Rather than adhere to the rules that bind all hearing participants and interested parties, Hanman seized an opportunity to exert undue influence on the Department to the detriment of those who oppose his organization's proposals. Hanman spoke explicitly about alleged marketing conditions that, although never documented, he asserts necessitate regulatory change. Hanman made specific comments about Sarah Farms and implored the Deputy Administrator to take action. Other interested parties have no opportunity to address these comments.

The context of DFA's comments is also disconcerting. In a presentation dated February 15, 2005 to the Southern Dairy Conference, the Deputy Administrator gave a presentation on the Federal Orders and the hearing process. According to the time line presented there, the producer-handler hearing was at a critical stage (identified as "Phase Three"). At this phase, the record is analyzed and economic and policy decisions are made. (Exhibit D). While these important decisions were being made regarding producer-handlers, DFA was presenting its arguments for a second time to the Department in a private setting.

As troubling as DFA's actions is that in responding to earlier ex parte concerns, counsel for DFA argued that no investigation of possible ex parte concerns was necessary. (Exhibit E). ("The requested investigation of alleged improper conduct, and the necessary accompanying delay in the rulemaking process, is wholly unwarranted . . . [W]e urge you to reject the request and proceed to the long awaited decision in the matter.") When initial allegations of possible improper communications were raised, either DFA failed to determine whether its employees violated the rules or chose to ignore its own improper actions. While all participants are eager for a decision, at least some desire a decision that results from a fair and transparent process.
**IV. The Department Must Act to Preserve the Hearing Record**

There can be no argument that DFA intentionally violated the *ex parte* rules. DFA is an interested party; Hanman’s comments were heard by (in fact directed to) an agency representative subject to *ex parte* restrictions, concerned matters at issue in the pending proceeding, and were presented during the prohibited period.

Faced with this unarguable violation of both Federal statutes and Department regulations, the only remaining question is what steps need to be taken to guarantee the fairness of this hearing. The law and regulations provide one mandatory course of action and leaves the Secretary with discretion whether to take additional remedial steps. As a minimum, both the APA and the applicable regulations mandate full disclosure of improper contacts:

- a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
  1. all such written communications;
  2. memoranda stating the substance of all such oral communications; and
  3. all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

5 U.S.C. § 557(d)(1)(C). See also 7 C.F.R. § 900.16(c).

The Department must promptly place on the record any written copies of Hanman’s comments and copies of the presentation he references in his spoken remarks. In addition, the Deputy Administrator must provide a written account of this and any other *ex parte* communications she received while at the Dairylea meeting. To alleviate any concerns of hearing participants, the Deputy Administrator should provide a description of why she was in attendance at the Dairylea meeting, an account of any information she provided to the gathering.
and a full account of her interactions with DFA representatives or representatives of any other interested party at the meeting.

Once this material is placed on the public record and reviewed by other interested and opposing parties, an opportunity for comment is appropriate. Until the time of such disclosure, the extent of the harm to the integrity of the hearing, if any, will remain unknown. Additional action by the Department may be required. All that is certain is that Sarah Farms, whose status is placed at issue by this proceeding, is very concerned that the powerful and moneyed interests who initiated this hearing have taken advantage of an opportunity not available to all participants. Faith in the fairness of this process needs to be restored.

V. Future Actions and Conclusion

This is not an attempt to further delay any decision on this matter. Although some delay may result, the delay is occasioned by improper ex parte communications that are only the fault of Hanman. Sarah Farms shares the repeatedly expressed desire that a decision be issued as soon as possible. This decision must, however, be transparent, fair, and supported by a proper administrative record.

Sarah Farms calls upon all other hearing participants and the Department to take this opportunity to set out the details of this incident and any other incident where an interested party either provided to the Department or received from the Department information material to this hearing that remains outside the hearing record.

Other ex parte contacts that may come to light will need to be addressed. For example, the March 28, 2005 edition of Dairy Profit Weekly recounts Hanman’s comments at the DFA annual delegate meeting of March 22-23, 2005 concerning producer-handlers, “If we can’t regulate producer-handlers, the whole classified system of pricing will come tumbling down
around our shoulders. It has to be No. 1 on our hit parade.” (Exhibit F). The article notes that the DFA conference was attended by “1,100 dairy producers and industry leaders.” The article does not mention whether USDA representatives were among the industry leaders present. If the Dairylea meeting is any indication, the attendance of USDA representatives would not stop DFA from discussing matters in violation of the *ex parte* rules.

The Department must act accordingly.

Respectfully submitted,
HEBERT SCHENK P.C.

/s/ Alfred w. Ricciardi
Alfred W. Ricciardi, AZ #009547
4742 North 24th Street, Suite 100
Phoenix, AZ 85016
(602)248-8203
(602)248-8840 Fax
Counsel for Sarah Farms
CERTIFICATE OF SERVICE

The foregoing was Statement was served upon the following parties on April 7, 2005, by overnight mail and/or e-mail as indicated.

VIA E-MAIL AND OVERNIGHT MAIL

Joyce Dawson, Hearing Clerk
U.S. Department of Agriculture
Room 1081, South Building
1400 Independence Avenue, SW
Washington, DC 20250
joyce.a.dawson@usda.gov

Gino Tosi
USDA, AMS, Dairy Programs
gino.tosi@usda.gov

Richard Cherr
USDA, AMS, Dairy Programs
richard.cherr@usda.gov

Benjamin F. Yale
Counsel for Edaleen Dairy, Mallories Dairy, and Smith Brothers Farms
benayle@es.com

Marvin Beshore, Esq.
Counsel for DFA
mbeshore@mblawfirm.com

Charles M. English, Jr., Esq.
Thelen, Reid & Priest, LLP
Counsel for Dean Foods and Shamrock Foods
cenglish@thelenreid.com

Mike Brown
Northwest Dairy Association
Mike.brown@westfarm.com

United Dairymen of Arizona
uda@udaz.org

Roger Cryan
National Milk Producers Federation
rcryan@nmpf.org

VIA E-MAIL ONLY

Hon. Mike Johanns
Secretary, USDA
mike.johanns@usda.gov

Hon. Marc Hillson, ALJ
USDA, Office of Admin. Law Judges
marc.hillson@usda.gov

Kenneth Clayton, Assoc. Administrator
USDA, AMS
kenneth.clayton@usda.gov

Dana Coale, Deputy Administrator
USDA, AMS, Dairy Programs
dana.coale@usda.gov

Sharlene Deskins, Esq.
USDA, Office of General Counsel
sharlene.deskins@usda.gov

Jack Rower
USDA, AMS, Dairy Programs
jack.rower@usda.gov

Hon. Marc Hilson, ALJ
USDA, Office of Adm. Law Judges
marc.hilson@usda.gov

Charles M. English, Jr., Esq.
Thelen, Reid & Priest, LLP
Counsel for Dean Foods and Shamrock Foods
cenglish@thelenreid.com

Mike Brown
Northwest Dairy Association
Mike.brown@westfarm.com

United Dairymen of Arizona
uda@udaz.org

Roger Cryan
National Milk Producers Federation
rcryan@nmpf.org

/s/ Alfred W. Ricciardi
EXHIBIT A:

USDA Correspondence to Yale Law Office, LP  
Dated March 8, 2005
March 8, 2005

Benjamin Yale, Esq.
Yale Law Office, LP
Post Office Box 100
Waynesfield, Ohio 45896-0100

Dear Mr. Yale:

Thank you for your letter of February 16, 2005, to Secretary Johanns, on behalf of Mallorie’s Dairy, Smith Brothers Farms, Edaleen Dairy, and Sarah Farms, regarding the integrity of the Federal milk marketing order hearing process. You expressed concern over certain persons claiming to know the result of the series of hearings held regarding producer-handlers in the Arizona Las-Vegas and Pacific Northwest marketing areas. The Secretary has asked me to respond on his behalf.

Since your allegation of ex parte communications does not cite specific occurrences, we do not believe it provides a sufficient basis to warrant an investigation of ex parte violations. In addition, a review of records responsive to your Freedom of Information Act (FOIA) request, regarding Department of Agriculture (USDA) communications about the producer-handler hearing, revealed one letter which is being filed with the Office of the Hearing Clerk. This letter will be provided to you as part of the FOIA response.

As you know, USDA employees involved in the decision process are prohibited under the rules of ex parte communications from discussing the merits of any issues addressed at the hearing. Only after the issuance of a final decision may a USDA employee discuss any issues addressed at the hearing with the public.

Maintaining the integrity of the hearing process is of utmost importance to USDA and we will continue to ensure that ex parte communication prohibitions are not violated in any Federal milk order decisional process.

Thank you for your interest in the Federal milk marketing order program.

Sincerely,

Kenneth C. Clayton
Acting Administrator
EXHIBIT B:

Dairylea Press Release
dated October 6, 2004
FOR IMMEDIATE RELEASE
October 6, 2004

DAIRYLEA COOPERATIVE'S 97TH ANNUAL MEETING
TO FEATURE TOP INDUSTRY SPEAKERS
Nearly 1,000 Members and Industry Guests Expected to Attend

SYRACUSE, NY - The 97th Annual Meeting of Dairylea Cooperative will be held on Tuesday, October 12, and Wednesday, October 13, at the Holiday Inn in Liverpool, N.Y. The meeting will include reports from senior management, presentations from top executives in the dairy industry, and educational sessions.

At the annual meeting, Dairylea's members will hear from Dairylea President Clyde Rutherford and Chief Executive Officer Rick Smith, who will provide an overview of the Cooperative's accomplishments and financial performance over the past year, as well as reflect on events in the dairy industry. The meeting is also an occasion where members are recognized for progressive farming and the production of top quality milk, scholarships are awarded to Dairylea youth and 50-year members are recognized.

Dairylea has again secured top executives in the dairy industry to speak during the two-day event. Speakers include Gary Hanman, President and Chief Executive Officer of Dairy Farmers of America; Jay Waldvogel, Chief Operating Officer of Fonterra Cooperative Group Ltd.; and Jack Gherty, President and Chief Executive Officer of Land O'Lakes, Inc. All speakers will participate in a question and answer session at the end of the day, on Tuesday.

Day two of the event features Jerry Kozak, President and Chief Executive Officer of the National Milk Producers Federation. The day's program will also include a panel discussion on biosecurity and environmental issues. The panel will be moderated by Tom Shephard, President, Agri-Edge Development and Vice President, Agri-Financial Services, and will include Agnes Schafer, Vice President Corporate Communications, Dairy Farmers of America; Leon Graves, Director of Industry Affairs, Dairy Marketing Services; Karl Czymmek fromProdairy and dairy producers Shelley Stein of LeRoy, NY and Dale Hemminger of Seneca Castle, NY. Closing the program will be the Cooperative's annual business meeting and passage of resolutions.

Dairylea Cooperative Inc. is a farmer-owned agricultural marketing and service organization based in Syracuse, NY. It has more than 2,500 members located throughout the Northeast. Dairylea is a provider of resources such as insurance coverage, loan programs, milk price risk management services, business planning, livestock marketing and investment and retirement planning through its holding company, Agri-Services, LLC.

EXHIBIT C:

Transcript of Gary Hanman’s comments to Dairylea
(October 12, 2004)
MR. GARY HANMAN: Thank you, Clyde. I don't know what publication he's been reading but there's some I'll send you that you didn't read, if you are trying to look at, certainly, my pedigree. When Greg and Rick asked me to come in and give a presentation to you here today at your 97th annual meeting, what they thought might be of interest to you would be to give a little thought about DFA yesterday, what we looked at at that time when we put it together, where we are today, and then what we see down the road as we look into tomorrow. And so the topic they assigned me to cover this afternoon was DFA yesterday, today and tomorrow. Yesterday and today are a lot easier to cover obviously than tomorrow, but let me start with that and see if we can get through this. And hopefully as I go through this, if you have questions you will write them down on either the DFA or Dairylea scratch pads you picked up.

As you know we came together, DFA came together on January 1 of 1998, and at that time there...
were several things that were bugging the people that put DFA together. I might add that the leadership that put DFA together took almost a full year, the year of 1997, to design it because we had to totally redesign a new dairy marketing cooperative. It was the first one that anybody had ever put together on a national scale. Up to that time we've had local cooperatives that had been merged into regional cooperatives, but nobody had put one together coast to coast on a national scale. And there were several things that were bothering our leaders at that time, and we want to cover some of those. Concentration. The end of price supports and maybe even Federal milk orders which meant that those two basic government programs that had supported us through the years were possibly going to be eliminated. And then the whole issue of trade onshore and offshore and the issue of trade barriers. And so they were looking at how do we deal with these issues, issues such as purer and purer numbers of dairy farmers when you think in terms of concentration. The best data I think for the number of dairy farmers come from the Farm Bureau and they say now we have less than 70,000 commercial dairy farmers in the United States. Not dairy farmers with milk cows, but dairy farmers, farmers who have cows that they milk on a commercial
basis for an income stream. And so when you think in terms of what we and Clyde and Rick are dealing with and others, that all sugared-down group is very small compared to what we used to think about when we look at census data and we think there's a half a million or more dairymen in the country. We don't have that many commercial dairymen. So when we think about the politics and government relations, how much are 75,000 dairy farmers and their families, how much are they entitled to. Not only had concentration been occurring at the farm, but the markets that we were facing continued to shrink, and the biggest shrinkage was occurring in the liquid milk side of our business.

The green bars that you see there, each one of those are ten years apart. Those are the number of plants that we had in 1975, '85, '95 and 2002. And so we have seen a very rapid concentration of the market that we were serving, not so much on the manufacture side, cheese plants, the butter powder plants, those that are making products that have extended shelf life. But all of those are continuing to concentrate, and that concentration was occurring because people to whom they sold milk and dairy products were also getting together, getting bigger, covering more geography. You can see here the major retailers how they have changed
from '97, that's when DFA started doing the planning to put our cooperatives together, and where they were last year and you can see the percentage growth. I would estimate that these six, five retailers sell about close to 40 percent of the retail business. So our formulators, our designers, our organizers were looking at this concentration at the retail level in the market where they sell their milk and then the demise of the number of farmers geographically dispersed which led them to a conclusion that we need a cooperative that reaches shore to shore, border to border, so that we can deal with this concentration.

They looked at the possible end to the price support program and the end of the Federal milk marketing order program because in 1996 when that Freedom to Farm Act was passed Congress made a very significant decision relative to how they were going to maintain income to rural America. They were going to do it in the form of direct payments, not in the form of prices of things you as farmers sold. That was a very major change in the way government was to address rural America's economic well being. And that probably more than anything was what put our group at least on their toes to think that if we are going to direct payments, do we need federal milk orders, do we need
price support, how about import and export assistance. As Ed said this morning, we saw the price support over time move from a percent of parity to a specific hundredweight number and then down to 990 which really was a truly low economic safety net but not a market maker. And then with that, as Ed said this morning, we have seen tremendous increases in price volatility because when you have a perishable agricultural commodity like milk and you have all changes in demand or supply you get wild and wide price fluctuations. And so with economic price support low and with that variation above that level, we had wild price fluctuations to deal with.

So how did we go about looking at some of these trade barrier eliminations, what was at stake with that. Well, the budget that was put together said in six years we are going to do away with GAPP and we were going to have NAFTA, and the whole trade trend in international markets was one of opening up markets, eliminating trade barriers. And these domestic markets look like we are going to be a market of choice for those around the world. Clyde mentioned to you in his address this morning that we escaped the bullet in the Australian free trade, put that in quotes, "free trade" agreement, in that it is not a, quote, free trade

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agreement, and that we do have restrictions,

limitations, quotas on dairy products that come in, but

over time those volumes, those volume limitations,

increase on a percentage basis working towards open and

free competition, long term. Long term. Our

organizers felt like our markets were going to be open.

Maybe not totally open, but much more open than they

have seen in the past.

In the past our domestic dairy policy had

been one of building a wall around the United States,

tailoring domestic supply to our domestic demand and

not aiming to do any export business, but at the same

time not allowing any outside intervention, outside

product to come in. And what would this change in

government attitude, the '96 farm bill. What our

organizers saw was that this wall was going to come

down one brick at a time over time, and that we had to

get ourselves in a position where we could do more

things ourselves and rely less and less on government

assistance and less and less on government protection.

Imports from lower cost countries were a threat. You

will hear from Jay Vogel this afternoon, not that he's

a threat, but the dairymen in his country produce milk

all on grass. And the products that are made from

their milk have a very low input cost because of that
relatively inexpensive feed source, and I would guess their cost of milk to a manufacture plant would be half of what our cost would be. So if we are going to have free and open markets, and if we are the market of choice, are we looking at and do we have to deal with and be competitive with seven dollar milk. That's not what we are talking about. That's not what we need to plan for. We need to look at how do we stack up in the world as far as cost of production, and then can we compete in a different world environment. And I think as our planners put DFA together that was the future that they saw, and that we've got to learn how to not only compete at home, but we've also got to learn how to be an exporter and a participant in the world market ourselves.

Where is DFA today. What are we doing today in order to fulfill the mission, the vision the DFA leaders had at that time. You already heard Clyde and Rick talk about how we have all come together to be one when we go to the marketplace. We recognize, I think all of us recognize that it is going to be impossible to get all dairy farmers in the United States into one single marketing organization. If there is not an alternative, history tells me, and I've been at it for 42 years, farmers will create an alternative at the
farm. Farmers will have a choice at the farm barn yard
gate. And that's not where it is important that we be
together. Where it is important that we be together is
when that milk arrives or starts toward a market or
when products made from your milk starts to compete in
the marketplace. And in order to have the maximum
effect on price, to do the best job in the marketplace,
the more of that milk that we can collectively market
together the better off we will be. And so you can see
how we have changed DFA's approach to representation
and marketing.

Our first recognition I think was with
Dairylea and St. Albans when we invited them, we asked
them would they consider becoming a member of DFA for
marketing purposes to where we could go hand in hand to
market together. Not to merge. Be separate in the
country, but be together when we went to town. Then we
had an option, an opportunity to take more market
responsibility for the dairy farmers who were selling
their milk, proprietary handlers, not through
cooperatives but as what we would call nonmembers. And
we organized a system whereby we could represent those
farmers in the marketplace where it counted for a price
and terms of sale were decided we needed to be one.
And so we created DMS, and we are very proud of that.
and we need to give Rick and Greg and Clyde a lot of
credit and our Northeast council and Harold and Ralph
and Leon for putting this altogether and keeping it
altogether. That was no small matter. Within a period
of 90 days they reached out and assumed market supply
responsibility for in excess of 3,000 individual dairy
farms, picking up the milk, to dispatch the milk, to
move that milk to market, to bill it, to price it, and
to pay the member. And we did that. With a few
hitches, but we did that all within a very short period
of time, and you can thank Rick for doing that.

Then we also created what we call common
marketing agencies. Under the Capper-Volstead Act it
allows farmers not only to come together as
cooperatives into cooperatives, but also lets those
cooperatives create what the Act calls agencies in
common, which means that farmers get together and
market through cooperatives. They can ask those
cooperatives to do things together without being in
violation of any trust laws. The Capper-Volstead
exemptions lets us do that, create agencies in common.
We now call them common marketing agencies. What you
see on the map are common marketing agencies that we
are a part of that markets milk collectively with
multiple cooperatives being a part of that agency.
Some of these agencies are fairly primitive or basic in that all we do, and that's significant, is we meet, we have a board meeting, we all assess the supply and demand for milk in that large bracket area, and we decide collectively what we should charge for milk for the next period of time, whether it is a month or a quarter or whatever, and then we go home and charge it ourselves. We do what we say we will do in that agency.

There are other agencies that are much more formal and tough and complete and what you might call comprehensive, such as the one in the Southwest or the one in the Southeast. In that case, those cooperatives set down, they agree on a price, they agree on what costs to supply that market they are going to share, and in fact they've agreed they are to share them all. Whether it is going outside the market and bringing in supplemental milk and if that cost money, share that cost. If it means getting rid of surplus within that area, milk that is produced that we can't sell locally, those costs are also shared in that agency. They have also harmonized the producer program, what their members, our members, their members receive in the country relative to all types of producer programs so that we are giving the right signals to members in the
country to produce the kind of milk, the volume of
milk, the quality of milk, the hauling situation so
that we are all the same.

And then they've taken another step just
recently. And you probably have read in the Dairy
Press we are building a very large cheese plant
outside -- five miles outside of Clovis, New Mexico, in
partnership with an Irish cooperative, and as a result
of that decision Glanbia and the dairy farmer had to
each raise $30 million in equity capital to build this
plant, and that agency in the Southwest is raising
those dollars for that equity base from that super pool
program in the Southwest. So they really have taken a
larger step in pricing and pooling and sharing costs
and distributing dollars and now in equity generation.
But what we see on this map are all types of agencies.
They all work. Some are more comprehensive than others
and some of them might work better than others.

Federal order reform, we kept Federal orders
when the law was passed, if you remember, but we still
have some problems as we look today. Dana Coale is
here as Dwight has indicated. She is the new boss of
Federal milk marketing orders. We are glad to have
her. And what I've shown on the screen as deficiencies
in the program are not her fault, but they are
something she and us have to solve. It takes too long
for us to have a hearing, to get a hearing in the first
place, build a record, and then get the results of that
record into place. We need some way to help her make
that decision sooner. We think in our case that we
have too much participation in some of these fluid
pools from milk sources that do not intend to satisfy
that market demand. They are not in there to sell milk
for the fluid market, which is what the Federal orders
are designed to price, but they are in there really to
just siphon some milk out of the pool. And so in our
case and I think in DMS' case, our goal is to tighten
those pools and ask that if you participate in the pool
you've got to perform.

We have a major problem with what we call
producer handlers. You may call it producer
distributors. As these dairy farmers have gotten
larger, they have looked at selling their milk off of
the farm in gallon jugs or half gallon jugs instead of
in 5600-gallon tankers, and they have gone to some
major supermarkets and have cut some deals on gallons
and half gallons of milk. And as a result of that,
Federal milk orders do not price their sales. They are
exempt. When the Federal orders were passed in the
early or the late '30s, when we got the authority for

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Federal orders, there were a lot of small farms that were selling milk out the back door of their milk house and they were excluded. Producer distributors, producer handlers were excluded from regulations under order, and since that time we have not been able to cause regulations to apply. And so now we have a lot -- they are like a Dean Foods who has to comply with an order in a classified system of pricing. It means that his milk that he puts in a bottle he gets class one cost for that, and if his competitor is a producer handler, a dairy farmer, who is looking at a less of a return his cost might be less for his milk in a jug, in a gallon jug, than Dean. So we have to be -- as an industry, we have to help Dana and the Federal milk order program make regulations totally applicable, whether producer distributors or whether they are regulated handlers like Dean. If we don't, and if we can't get that done, and that will take new legislation, the classified system of pricing that we've known will go away.

And then we have to deal with negative EPDs. That is the most difficult Federal order feature that you have ever asked us to explain. And I'm not sure that I can do an adequate job in doing that. How in the world can you sell your milk in a month in a market
and then wind up getting a bill for it. We have to sit
down with Dana and work on how we eliminate under the
orders negative EPDs without, without giving up the
value that we got out of the marketplace for things
that we made from that milk. We think it can be done.

Some of our problems.

DFA, I think I have told you before,
believes in being a market maker. We believe it is not
only running businesses for profits and running
businesses for market access, but if possible using
those businesses for price enhancement to you and your
milk check. Each year prior to our -- the start of our
fiscal year, which is January to December, we sit down
with all of our manufacturing plants and we total up
what we think we will make for the next year, just like
the people in New Zealand do. And we, by design, plan
to make, to manufacture less American style cheese than
we sell, so we will be a buyer of cheese. To be a
buyer of cheese we think that puts us in a position to
put upward pressure on price, assuming that our company
can stay with it, such as our Gordon cheese company.

And so this last year our plan was to be 400 loads of
cheese deficit and to buy some of that cheese on the
CME. Chicago Mercantile Exchange is the tide that
moves all hopes up or down. As that market moves,
since that market is the basis on which all people sell cheese, if you can have a positive influence on that market, you can have a positive influence on that price.

And what I've got here on this map is a very busy chart, but across the bottom of it are times from January 5 to September 27. Up the left axis of this chart are numbers that represent the number of loads of cheese that were purchased on that day, 45,000 pounds, 40-pound blocks of cheddar cheese. On the right hand axis of this graph are dollars per pound for a block, 40-pound block of cheddar cheese. The red line through the middle is the price that occurred that day on the CME. And the spikes at the bottom are -- indicate whether DFA was a buyer or somebody else was a buyer. So you can see when we went into this February 2 to about the 26th of April we were not a buyer. We were not in the market. We were not in the CME. We were not involved. We did not put cheese to $2.20 a pound which is the peak that you see of that red line that occurred there in April, the middle of April. The market started to collapse. That company that moved that market to 2.20 we think were Schreiber Foods. Apparently they had missed their guesses on sales and inventory, so they were in the market looking for

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cheese to satisfy their customer needs with. And as that market started to fall we interceded some. You can see at the first level of $2.00 we made a stand and backed off. We did make a long significant stand at 1.80 a block. And you will note all along the bottom the big spikes each day, we were the main buyer of cheese on the CME trying to make a statement to the trade that we thought 1.80 was about the right price for 40-pound blocks of cheddar cheese. And notice on one day, about the 7th of June, we, DFA, bought 52 loads of cheese on that market that day, a record number of transaction. After we had bought the cheese that we needed for our market, for our customers, for our demand, we backed out, and when we did the market you can see it fell to about 1.36. What we are trying to show with this gray area in the middle is what effect we had on milk prices as a result of that. I would also call your attention to our activity since about the 16th of August when that market fell and then recovered some, and our sales improved. We needed about another 100 loads of cheese. We were back in the market holding that market roughly at 1.55. But our guys have made some estimates of what that has meant to you and to DFA members based on those months and based on the difference between $1.80 cheese and $1.36
cheese, CME. Our estimate is that that action, our
planning and our ability to be a market maker, our
ability to buy cheese on the exchange for our customers
put $1.3 billion in the dairy farmers' pockets, and to
the DFA members that was $278 million, our estimate of
that activity. Our ability to be in the cheese
business, to be a market maker, and then to fulfill our
needs in the marketplace is what caused, what led to
that price enhancement. This is the market since we
stepped out. We quit buying on October the 4th, and
you can see that as a result of DFA not being there,
that market adjusted very significantly. That was
lately. Incidentally, it did go up today, 40-pound
blocks are up two, I believe, two and three-quarters
today.

The question is where will this market be,
is 1.35, 1.36 the right level. I don't know. You can
see the CWT trigger points 1.40 for 40-pound blocks of
cheddar cheese and I would guess that we have seen the
peak for this year at least for 40-pound blocks, and I
think you will see CWT kick in and start doing some
export of cheese. I was visiting with Jerry Kozak at
lunch today. We have between 12 and $15 million left
in the CWT coffers to help with exports of cheese.

Part of the plan of DFA when our organizers
put it together was to put together facilities, plants, some of which buy milk, some of which just use dairy ingredients in the process. You saw Rick's map of Dairylea's spattering around where their customers are. These are our own either wholly owned or joint venture locations of facilities. The green ones are those that are balancing plants, plants that we have to run because we have milk. Balance plants are those that take surplus milk when the fluid market doesn't need it and give it up when the demand in the marketplace is there. Those are area council responsibilities. The yellow spots that you see are the ones that we run because we have a market for what they make, whether that's American cheese, whether that's mozzarella whether that's Frappachino, whether that's Enfamil. The joint ventures are in red, and our joint ventures are those that we have with Fonterra, those that we have with Dean -- excuse me, with Hood, with MBH, with Wilcox, with Stremik in California, with dairy farms in the middle of the country. Those bottling plants that we joint venture with others are now about 60 plants. We have a joint venture with LOL. Jack Garrity will be here with them on a cheese plant in Minnesota. We have a joint venture with some butter operations with some partners in Hotel R. Keller. We like joint ventures.

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It let's us specialize in specific management for that kind of an operation and it helps us leverage our balance sheet. That DFA plant system was what our organizers wanted, created so that they could be involved in the markets across the United States on a national basis.

Where are we going to be tomorrow. Well, we said we needed to be in the export business. These are the products that we have exported in the year '01, '02, '03. We don't have '02 on here yet. I would say that most of our nonfat domestically -- no, let me say it a different way. All of the nonfat dry milk that we produce, and we produce quite a bit in all of our balancing plants, is sold through DairyAmerica, a cooperative of cooperatives, a common marketing agency for nonfat dry milk. And DairyAmerica has taken one more step and they have said to Fonterra, this New Zealand cooperative, you know how to market nonfat in the world. If we get out there selling a dab of nonfat, we are liable to screw up your major market nonfat. Why don't you be our agent offshore and let's create another common agency for our sales offshore. And so not only are the cooperatives collectively using DairyAmerica that sells together domestically, but we are using Fonterra to sell internationally. And if you

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talk to Rich Louis at DairyAmerica who is the manager
of DairyAmerica, he will tell you that he believes that
relationship with Fonterra offshore has meant at least
a nickel a hundredweight higher nonfat prices than if
we were out there doing it ourselves.

We are big business in export. Last year we
exported about $64 million worth of products offshore.
Again remember when we said we were organizing a
company to get ourselves ready to be able to export or
be able to compete domestically. It doesn't mean we
are going to give up. We are still asking for some
regulations, tariff regulations, on a loophole in the
WTO agreement that we negotiated. A product called
milk protein concentrate wasn't even around when we
negotiated the deal and it is starting to roll in on an
increasing quantity. That's the one on the left you
see there. And casein, which is the one on the right
which is nothing more than the milk fraction of the
milk protein that you have in skim milk. We have not
been able to get the tariff commission or the commerce
commission to get that defined as a dairy product. It
is called a food ingredient, so there's no way under
present rules to put a quota on it. But we now have as
you can see 37 members of the Senate and 198 members of
the House who have agreed to co-sponsor this

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legislation. And we are not asking for full total
elimination of this import. We are just asking for a
cap. Put a cap on it so it doesn't continue to grow or
sky rocket. You will see us continuing to partner not
only with you and Dairylea, but you will see us
partnering internationally with Fonterra, and I
mentioned a minute ago our chief plant in Clovis, New
Mexico, with a co-op out of Ireland called Glanbia.
You will see us partnering with processors where they
bring something unique to a business, either money or
management skills or technology. And we're even
partnering as you know, as Rick just said, with dairy
farmers who choose not to be a member of Dairylea or
St. Albans or DFA, but will allow us to market their
milk as it leaves their barn yard gate, which is what
is important. DFA also had a plan and still has a plan
to retire and return to members earnings and retains
that we have retained in their business. This is an
expression of those different kinds of equity
retirements since we started. If you total all those
bars up we have early equity retirement for age, we
have estate settlement for sure, we have tenure
certain, we have had an early equity retirement on a
good basis. We have lots of different kinds of equity
retirement. And since we started in 1998 we have
retired $198 million of member equities that those
farmers brought in the DFA and what we have earned for
them since we started.

What are some of our challenges, what about
tomorrow. You all know the Department of Justice is in
a full investigation of us at DFA, and what we think
they are trying to decide is whether or not we have
lost our separate stead of unity by reason of things
that we have done through force or intimidation or
causi ng dairy farmers to become members of DFA that
don't want to be members of DFA. And so they are now
involved in a full scale investigation of DFA. And I
guess you could say -- first off, we will cooperate
with them 100 percent. And many of your cooperative
friends around the country has probably received
requests from the Justice Department for information in
trying to get a feel from other cooperatives how they
feel relative to DFA and whether we have strong-armed
them, intimidated them, used coercion to cause them to
do certain things. But you could say that we are being
looked at because we are active. We have no qualms but
when they get through they won't find any strong-arm
tactics or any coercion or anybody being asked,
required or demanded to do something they don't want to
do. They are also asking some of our board members how
involved they are in the operation of the DFA. And somehow I think they believe there's 196 DFA area council board members that serve on our seven area council are not involved in the operation of DFA. That's what we think is involved. But we are involved and will vigorously defend ourselves against this full scale D of J investigation. And maybe it is because we just won one with them. We own 50 percent of a single plant joint venture with a fellow by the name of Bob Allen in Somerset, Kentucky. Bob Allen was the president of the board at one time and he and us bought a single plant. He manages. He's the partner that runs it. And you can see where Somerset, Kentucky is. About 30 miles down the road from Somerset, Kentucky, is a plant owned by National Dairy Holdings, called Flav-O-Rich in London, Kentucky. And in extreme eastern Kentucky -- excuse me, western Kentucky there are 40-something counties where only Southern Belle, which is the one in Somerset, and Flav-O-Rich are the only two bidders on school milk. And since DFA owns half of one and half of the other, Justice has brought a suit against us because of our interest in Southern Belle indicating that we were in a position to get sensitive information from both companies and to instruct them on how to bid for school milk so we could
maximize profit, take advantage of the school
districts. We indicated we can't do it under our
contract while managers. We don't do it since we do
not have that access. We were deposed. Allen Meyer of
MDH was deposed. So was Bob Allen. We asked the
court, a Federal Court in Kentucky, for what lawyers
call a summary judgment which means judge, look at the
facts, look at the law, and let's not have a trial
because there's no basis to have a trial. Normally you
don't get judges to agree with you to not have a trial,
not be heard, but in this case this judge said to the
Department of Justice you don't have any basis to sue
based on what we see, and they granted our summary
judgment and threw Justice out of court. Now the
question is will they appeal. They have 60 days from
August 31st to make that decision and we don't know
what they will do. And it could be that our success in
this case has given them some added figures to look at
on the other deal.

You heard a lot of about CWT. And it is
great. And it will make a very significant
contribution to your economic well being this year.
But don't expect miracles. We are, as you heard,
planning to take 49,000 cows out of the nation's dairy
herd through the herd retirement feature of CWT and
we've set up the amount of money we allocated for that
part of the program. But from May to August, according
to USDA numbers, in all the states of the country, not
just the 20 that they get regular monthly data on, they
estimate we have increased the number of cows we are
milking by 53,000 head. So when we take 49,000 out of
the CWT we will merely be removing most of those that
we have kept since May until now. And CWT's herd
liquidation, herd retirement does not start, even
though the bidding process is in place, the cows, the
town will not start until December. So we have some
time between now and the time those cows go to market
while that milk is still flowing. So my question to
you, I guess, is if we want to have a significant
continuing market influx, to balance supply with
demand, five cents a hundredweight may not be enough in
the future to have the same impact that we had in the
past of this year. We mentioned the producer handler
issue, and there is a very large dairy in the west who
now is packaging milk for Costco and Costco is taking
reduced cost -- apparently reduced cost of milk to the
marketplace and giving our customers all kinds of fits
in the marketplace. And they've had to meet that lower
price at retail and at wholesale and they've backed up
to us, our customers have backed up to us, say you got

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to keep us competitive. We are not competitive with these producer handlers. They are selling class one milk on the blend. We've got to have a reduction in our cost of milk. So that's the pressure we are feeling by reason of this, and the solution to it is obviously regulation of producer handlers the same as we have regulated handlers.

The industry challenge, the industry challenges, I might add, as you know are dairy promotion. The producer side of our dairy promotion plan is under review by the Supreme Court. The last court to review, the Court of Appeals declared the 15 cents that you are contributing for promotion is illegal, an unfair restraint of free speech. There is some great hope I think in the promotion community that the Supreme Court will hear that and will rule that it is not a violation of free speech and continue the plan. If it is not, if it does not, it finds that the Court of Appeals will agree with that, we have some major restructuring to do in our promotion community if we want to continue the generic advertising and promotion plan. So that is one of the major challenges I see.

Fluid processors, they contribute 20 cents, you know, to the White Mountain Mustache Program.
Theirs is not being challenged, only yours. And our per capita consumption of class one continues to go down. And another challenge that we need to address is the round packages that we are putting out, the waivers we are putting in them, and the more avenues of distribution that we are gaining, such as McDonald's and Wendy's is the right place, the right time, putting those packages into schools is the right thing to do, but you can see we have a long history of reducing your class one market on a per capita basis. Today the largest single market for your milk in the United States is not class one. It is cheese. We produce -- we make more cheese out of more milk which you produce than we do sell as class one. A challenge. Additional ones we've got to deal with is the animal identification and that hinges back into whether or not the Canadian border will be open. Our guess is that it won't be open until we have a reliable, universally applicable, individual animal identification plan in place so that we can trace from birth to death every animal, every piece of livestock that we have. We've got this whole issue we mentioned this morning of safety, of homeland security, and quality assurance and traceability where we can trace a pound of cheese all the way back through the system to your individual farm.

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to know what was in that piece of cheese, and that's
going to be increasingly more difficult. And the
biggest challenge I see we have at DFA is keeping Rick
and Greg and Clyde challenged. Because they can eat up
more work than anybody I have ever seen and we are
extremely fortunate to have them working for us in
addition to working for you. Thank you very much.

(Applause.)
EXHIBIT D:

Slides from USDA Presentation on Federal Order hearing process
(February 15, 2005)
Where Are Federal Orders Headed: A Washington Update

By: Dana H. Coale
Deputy Administrator
Dairy Programs-AMS-USDA
Federal Order Issues

✓ Western Order Termination Impacts
✓ Pricing/Pooling Issues
✓ Decision Time Requirements
  ✓ Hearing to Effective Interim Amendments:
    ✓ 9 months
  ✓ Hearing to Effective Amendments
    ✓ 14 months
✓ Possible legislation to address
Federal Order Rulemaking

Phase I: AMS controls process (2.5 months)

Proposal Received
Decision to request additional proposals

Hearing Notice Published
(Minimum 15 day notice provided to public preferred)

Phase II: ALJ controls process (2 months)

Hearing begins
(3-10 days based on nature of issue under consideration)

Hearing concludes
-ALJ establishes transcript correction date and briefing date

Obtain transcript from reporting company
-Public and USDA review for corrections

Hearing record corrections completed
Federal Order Rulemaking

Phase III: AMS controls process (2.5 months)

Record analyzed and economic and policy decisions made (10 weeks)

Determine type of decision to issue which affects implementation schedule:

1) Tentative/Interim Final Decision
   - issue if hearing record data supports emergency marketing conditions exist to warrant immediate implementation

2) Recommended Decision
   - issue if hearing record data does not support immediate implementation of provisions

Decision sent to OGC for legal sufficiency (1 month)
Federal Order Rulemaking

Phase V:
USDA controls process (1 month)

Review and Department Clearance
(Decision cleared by AMS, MRP, OBPA, OCE, OSCE, others)

Phase VI:
FR controls process (3-5 days)

Decision Issued and Published in Federal Register
EXHIBIT E:

DFA/Dean Foods correspondence to USDA on *ex parte* communications dated February 25, 2005
February 25, 2005

VIA FEDEX

The Honorable Mike Johanns
Secretary of Agriculture
U.S. Department of Agriculture
Whitten Building/Room 200-A
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: Milk in the Arizona Las-Vegas and Pacific Northwest Marketing Areas,
Docket No. AO-368-A32; AO-271-A37; DA-03-04

Dear Mr. Secretary:

This letter is submitted on behalf of Dairy Farmers of America, Dean Foods Company, United Dairymen of Arizona and Shamrock Foods Company all of whom were proponents of certain hearing proposals in the above-referenced proceeding regarding the regulatory treatment of so-called producer-handlers. We write, reluctantly, in response to a February 16, 2005 letter submitted by counsel for Mallorie’s Dairy, Smith Brothers Farms, Edaleen Dairy, and Sarah Farms.

The requested investigation of alleged improper conduct, and the necessary accompanying delay in the rulemaking process, is wholly unwarranted and would do a great disservice to your staff, as well as work an injustice on all hearing participants. For the reasons which follow, we urge you to promptly reject the request and proceed to the long-awaited decision in the matter.

That February 16, 2005 letter is remarkable for what it says and for what it does not say. It fails to identify any named person who has allegedly made the statements that might suggest that such unnamed persons have received very specific, and to these authors heretofore unknown, information regarding the results of the hearing received from yet other unnamed person(s) allegedly from within the Department. In other words, other than the purported result,
which may or may not be a logical conclusion of the hearing, nothing is known about the sources or recipients of this magical information.

There is no indication, since the persons who allegedly received such information are unknown to all who received the letter, that such person or persons "is a person with an interest in the proceeding" (deemed to be a party). In an industry wherein rumors regularly circulate (there is even a so-called newspaper dedicated to the propagation and spread of dairy industry rumors), it can hardly be surprising that rumors may circulate about a proceeding as important as this one. What is shocking is the contention that the mere existence of such rumors could ever justify an investigatory demand of the type requested here. Moreover, there is no statutory or regulatory justification for such drastic action. The proper course, if any so-called ex-parte communication from the Department to a "person with an interest in the proceeding" has occurred, is simple and absolute - let it be spread upon the record of the proceeding. 7 C.F.R. 900.16(c).

The February 16 letter then leaps to the conclusion that even if a communication from the Department has been made to the industry after a decision has been tentatively made, that reverse communications or back-door deals (again by persons unknown) have occurred. With all due respect, no judge or magistrate would countenance such "evidence" for a request for a search warrant in a serious criminal matter. Nor should such be countenanced here.

Finally, we have additional concerns about the nature of the "information" being relied upon in the letter because after some checking, we believe that one person from California whom we believe to have close ties to one of the producer-handler opponents herein has indeed repeatedly told one or more other persons in California that "word on the street is that USDA will come down hard" on the producer-handlers or at least the one in Arona. This person has been questioned as to the source of his information, but has refused to divulge it other than to repeat mysteriously that his source is -- "word on the street." First, if this is the source for the February 16 letter, his ties to the other side do not support an investigation directed either at the Department or proponents. Second, his repeated statements, especially given his refusal to divulge his sources, have not been taken seriously by the industry and cannot be the basis for a Department investigation. But, finally, if allies of the maker of such statements can use those statements alone to achieve the delay in the process which they desire, it would mean that any participant (or their allies and agents) could manufacture rumors and use them to their advantage.

Opponents themselves label their evidence as "the recent rash of rumors or other innuendo." Their contention that information of this nature "call[s] into question the reliability of the entire structure of the Federal Milk Marketing Order system" borders on the preposterous, and should not be honored with weighty deliberation. Rumors and innuendo cannot and should not be the basis either for an investigation or for any further delay this process. The hearing
ended 13 months ago. A decision on the merits, whatever it is, is in order. We respectfully urge the Department to summarily reject the unwarranted actions requested by Messrs. Yale and Ricciardi and move forward with this important proceeding.

Sincerely yours,

Charles M. English, Jr.

CME/sf

cc: Undersecretary William T. Hawks
    Kenneth Clayton
    Joyce Dawson
    Dana Coale
    Sharlene Deskins, Esq.
    Benjamin Yale, Esq.
    Alfred Ricciardi, Esq.
    Northwest Dairy Association
    Roger Cryan, NMPF
    Constance Tipton, IDFA
### Class Prices

**Federal Orders**

**February**

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<th>Price</th>
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<tr>
<td>IV: 3.5%</td>
<td>$12.74/cwt.</td>
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**California February**

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<tr>
<td>4a: 3.5%</td>
<td>$12.46/cwt.</td>
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### DFA delegates meet in Kansas City

Under the theme of “Building Bridges,” about 1,100 dairy producers and industry leaders attended the 2005 Dairy Farmers of America (DFA) annual delegate meeting in Kansas City, Mo., March 22-23.

Created seven years ago with the merger of several regional dairy cooperatives, DFA – through partnerships, joint ventures and its own manufacturing facilities – now markets and processes about one-third of all the milk produced in the United States annually.

As you might expect on the heels of record 2004 milk prices, the meeting was upbeat. For the fiscal year ended Dec. 31, 2004, DFA payments to members increased 29% to a record $5.8 billion, up from $4.5 billion in 2003. DFA also reported record revenues of $8.49 billion on sales, up from $6.93 billion in 2003, for an increase of 23%. DFA marketed 57.2 billion lbs. of milk for member and nonmember dairy farmers in 2004.

Other financial highlights include:
- Cash flow generated from operations increased to $90.2 million.
- Selling and administrative expenses decreased 9% to $76 million, from $83.1 million in 2003.
- Net savings grew 17%, from $55.6 million in 2003 to $65.1 million in 2004.
- Total members’ equity increased 5% to $691.1 million, compared with $656.5 million at the end of 2003. In 2004, DFA retired $21.1 million of equity.
- For the fourth consecutive year, DFA issued a special allocation to dairy farmers of $10 million from the gain on the sale of Suiza Foods Group L.P, one of the co-op’s fluid milk joint ventures.
- Last September, members who marketed their milk through DFA in 2003 received $25.1 million in member patronage, of which more than $6.6 million in cash was paid to 16,501 farmers.

Addressing two issues that have resulted in negative publicity of late, president and CEO Gary Hanman said DFA is cooperating fully with ongoing investigations by some states and the U.S. Department of Justice regarding business practices and antitrust issues. “Every joint venture we have put together has required Justice scrutiny, so we’ve been down this road before. We aren’t sure what they’re trying to prove. We have not been charged. They have not told us what they’re looking at, or whether they will sue us, and if so, why. Eventually, we will find out if there is a specific problem.”

In his initial report to delegates, Tom Croner, DFA secretary-treasurer and a dairy producer from Berlin, Pa., told delegates that DFA had ended 2004 with investment-grade credit rating of BBB+ from Standard & Poor’s, unchanged from the previous year. Additionally, DFA had a Baa1 rating from Moody’s Investor Services, but that Moody’s would likely lower DFA’s rating by one grade. Later, however, Croner, Hanman and other DFA officials said that comment was in error, and that the co-op’s investment rating was under review by Moody’s, but that DFA had received no such indication of a lower rating. The ratings are used as a measure of a business’s ability to access capital at competitive interest rates. DFA officials said their organization was not alone in investment-grade scrutiny, and that market volatility in dairy and agriculture may be behind the concerns.

Federal milk marketing order pooling and producer-handler issues continue to be troublesome, according to Hanman.

“If we can’t regulate producer-handlers, the whole classified system of pricing will come tumbling down around our shoulders. It has to be No. 1 on our hit parade,” said Hanman. DFA is also aggressively pursuing tightening federal order pooling provisions.

Other issues in the national and international arena include an impending Supreme Court decision on the constitutionality of the national beef checkoff and its impact on the dairy checkoff; seeking restrictions on milk protein concentrate imports; and federal dairy and domestic ag policy impacts from the Doha round of World Trade Organization talks, as well as a proposed trade agreement with New Zealand.

Continuing on the “bridge building” theme, DFA chairman Tom Camerlo said the changing dairy industry will require construction of additional bridges, including spanning the gap between small and large producers. He said that while DFA represents a wide range in producer size and milk volume, less than 25% of its farmer-members now produce about 80% of its milk supply. “There’s a growing gap in what each of size needs,” Camerlo said. Also, he challenged dairy farmers to lead the industry in creating alternative ways to price milk, in light of pending international trade agreements; and asked members to lead the way on the 2006 farm bill, environmental regulations and food safety issues.
# REQUEST FOR SPECIAL SERVICE

**REQUEST FOR MESSENGER DELIVERY OF DOCUMENTS TO OGC**  
REQUEST BY THE HEARING CLERK'S OFFICE, Phone No. 720-4443, Room 1081-S  

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<thead>
<tr>
<th>DOCUMENTS FOR DELIVERY</th>
<th>TIME SENSITIVE</th>
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<tbody>
<tr>
<td>1. DA-03-04 - Letter dated Feb. 25, 2005 addressed to the Secretary from Charles English and Marvin Beshore.</td>
<td></td>
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<tr>
<td>2. DA-04-05 - Opposition to motion to reopen hearings submitted by Dean Foods Company, signed by Charles English.</td>
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| 3. Carol S. Warlick  
AMS - Room 2963 South Building |

**DELIVER TO**  
Carol S. Warlick  
AMS - Room 2963 South Building

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<tr>
<th>Received by (Please Print)</th>
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**Signature**  
Carol S. Warlick  
3-1-05

**Special Instructions**
February 25, 2005

VIA FEDEX

The Honorable Mike Johanns
Secretary of Agriculture
U.S. Department of Agriculture
Whitten Building/Room 200-A
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: Milk in the Arizona Las-Vegas and Pacific Northwest Marketing Areas,
Docket No. AO-368-A32; AO-271-A37; DA-03-04

Dear Mr. Secretary:

This letter is submitted on behalf of Dairy Farmers of America, Dean Foods Company, United Dairymen of Arizona and Shamrock Foods Company all of whom were proponents of certain hearing proposals in the above-referenced proceeding regarding the regulatory treatment of so-called producer-handlers. We write, reluctantly, in response to a February 16, 2005 letter submitted by counsel for Mallorie’s Dairy, Smith Brothers Farms, Edaleen Dairy, and Sarah Farms.

The requested investigation of alleged improper conduct, and the necessary accompanying delay in the rulemaking process, is wholly unwarranted and would do a great disservice to your staff, as well as work an injustice on all hearing participants. For the reasons which follow, we urge you to promptly reject the request and proceed to the long-awaited decision in the matter.

That February 16, 2005 letter is remarkable for what it says and for what it does not say. It fails to identify any named person who has allegedly made the statements that might suggest that such unnamed persons have received very specific, and to these authors heretofore unknown, information regarding the results of the hearing received from yet other unnamed person(s) allegedly from within the Department. In other words, other than the purported result,
which may or may not be a logical conclusion of the hearing, nothing is known about the sources or recipients of this magical information.

There is no indication, since the persons who allegedly received such information are unknown to all who received the letter, that such person or persons “is a person with an interest in the proceeding” (deemed to be a party). In an industry wherein rumors regularly circulate (there is even a so-called newspaper dedicated to the propagation and spread of dairy industry rumors), it can hardly be surprising that rumors may circulate about a proceeding as important as this one. What is shocking is the contention that the mere existence of such rumors could ever justify an investigatory demand of the type requested here. Moreover, there is no statutory or regulatory justification for such drastic action. The proper course, if any so-called ex-parte communication from the Department to a “person with an interest in the proceeding” has occurred, is simple and absolute – let it be spread upon the record of the proceeding. 7 C.F.R. 900.16(c).

The February 16 letter then leaps to the conclusion that even if a communication from the Department has been made to the industry after a decision has been tentatively made, that reverse communications or back-door deals (again by persons unknown) have occurred. With all due respect, no judge or magistrate would countenance such “evidence” for a request for a search warrant in a serious criminal matter. Nor should such be countenanced here.

Finally, we have additional concerns about the nature of the “information” being relied upon in the letter because after some checking, we believe that one person from California whom we believe to have close ties to one of the producer-handler opponents herein has indeed repeatedly told one or more other persons in California that “word on the street is that USDA will come down hard” on the producer-handlers or at least the one in Arizona. This person has been questioned as to the source of his information, but has refused to divulge it other than to repeat mysteriously that his source is -- “word on the street.” First, if this is the source for the February 16 letter, his ties to the other side do not support an investigation directed either at the Department or proponents. Second, his repeated statements, especially given his refusal to divulge his sources, have not been taken seriously by the industry and cannot be the basis for a Department investigation. But, finally, if allies of the maker of such statements can use those statements alone to achieve the delay in the process which they desire, it would mean that any participant (or their allies and agents) could manufacture rumors and use them to their advantage.

Opponents themselves label their evidence as “the recent rash of rumors or other innuendo.” Their contention that information of this nature “call[s] into question the reliability of the entire structure of the Federal Milk Marketing Order system” borders on the preposterous, and should not be honored with weighty deliberation. Rumors and innuendo cannot and should not be the basis either for an investigation or for any further delay this process. The hearing
ended 13 months ago. A decision on the merits, whatever it is, is in order. We respectfully urge the Department to summarily reject the unwarranted actions requested by Messrs. Yale and Ricciardi and move forward with this important proceeding.

Sincerely yours,

THELEN REID & PRIEST LLP

Charles M. English, Jr.

LAW OFFICES OF MARVIN BESHORE

Marvin Beshore

cc: Undersecretary William T. Hawks
Kenneth Clayton
Joyce Dawson
Dana Coale
Sharlene Deskins, Esq.
Benjamin Yale, Esq.
Alfred Ricciardi, Esq.
Northwest Dairy Association
Roger Cryan, NMPF
Constance Tipton, IDFA