

**UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
(Dairy Programs)**

In Re:

**Milk In the Western and
Pacific Northwest
Milk Marketing Areas**

Docket Nos. AO 380-A18, 368-A30
DA-01-08

Hearing: Salt Lake City, Utah
April 16 – 19, 2002

**POST-HEARING BRIEF
On Behalf of Glanbia Foods and Jerome Cheese Co.
In Opposition to Pooling Proposals 3 through 7**

As acknowledged by Dairy Farmers of America (DFA), and made crystal clear by the repeated echo of its allied witnesses, hearing Proposals 3 through 7 are based on a complaint that the Secretary made a grave mistake in the 1997-99 Milk Order reform process by merging the former Southwest Idaho-Eastern Oregon Market with the Great Basin Market. This mistake, it is claimed, included in the Western Market revenue pool too much milk in manufacturing uses, and lowered the marketwide blend price too much.

DFA seeks, by proposals 3 through 7, to create a *de facto* severance of the Southern Idaho milkshed from the Western Market by new regulatory barriers. The proposals, fitting neatly with DFA's virtual monopoly control of the raw milk supply to limited fluid milk outlets in the Western Market, would, as intended, deny pool access to hundreds of Idaho dairy farmers who stand ready, willing and

able to supply milk for fluid use whenever needed. The regulatory objective sought by DFA as desirable under the Federal Milk Order Program – local producers without access to or a share in the market’s Class I revenues – is reminiscent of the milk market disorders which Congress sought to remedy when it first authorized federal regulation of milk markets over 60 years ago. Accordingly, before we address the record facts and conclusions of law, we find it necessary to review the historical foundation upon which milk order regulation is built.

I. Regulatory Background: Market Disorder and USDA Response.

Federal regulation of milk prices evolved from the simple historical fact that raw milk used for beverage purposes was worth more than milk used to make manufactured products, such as cheese, milk powder and butter. As a result, dairy farmers cut off from access to the milk beverage (Class I) markets had an incentive to undercut prices of their competitors. See Alden C. Manchester and Don P. Blayney. Market and Trade Economics Division, Economic Research Service, U.S.D.A., *Milk Pricing in the United States* (Agriculture Information Bulletin No. 761, Feb. 2001) (<http://www.ers.usda.gov/publications/>) at 4 (hereinafter, “Manchester, Milk Pricing”); *Zuber v. Allen*, 396 U.S. 168 (1969); *Nebbia v. New York*, 291 U.S. 502, 517-18 (1934); Dairy Division, Agricultural Marketing Service, Questions and Answers on Federal Milk Marketing Orders, (AMS-559, Revised March 1996) (“Q & A”) at 1-2 (*reproduced at* <http://cpdmp.cornell.edu/publications>).

Congress' solution to the problem of farmers pitted against farmers was to authorize USDA to fix minimum "classified" prices that handlers must pay for milk, depending upon its value in the product made (7 U.S.C. §608c(5)(A)), and to "pool" all milk revenues at regulated prices so that dairy farmers (producers) receive an average "blend" or "pool" price regardless of how their milk is used. *Id.*, §608c(5)(B). By pooling milk revenues regardless of use, the burden of surplus milk production is shared by all producers. *Smyser v. Block*, 760 F.2d 514, 516 (3d Cir. 1985). The sharing of a uniform blend price among dairy farmers is the "foundation" of the federal statutory scheme. *Zuber v. Allen*, 396 U.S. at 179. *Farmers Union Milk Marketing Cooperative v. Yeutter*, 930 F.2d 466 (6th Cir.1991).

As the federal milk order program matured, conflicts between dairy farmers continued for the same economic reasons that triggered the milk wars of the early 1900s. Milk producers who enjoyed the economic benefit of high Class I sales predictably complained of diluted blend prices when USDA pursued objectives of market equity, and "have-not" producers of surplus milk were given access to a greater share of the Class I revenue by market expansion or consolidation (*E.g.*, *Benson v. Schofield*, 236 F.2d. 719 (D.C. Cir. 1956)(challenging expansion of the Boston Marketing Area); *Suntex Dairy v. Bergland*, 591 F.2d 719 (5th Cir. 1979) (Corpus Christi producers challenged merger with the Texas Marketing Area); *Peterson v. Butz*, No. 76-C-343 (W.D. Wisc. 1981)(Duluth-Superior producers

complained of blend price dilution by merger with large surplus markets creating the Upper Midwest Order)), or by milk pooling rules. *Peterson, supra*; 47 Fed. Reg. 11679, 11685 (col. 3)(March 18, 1982)(defending a Tennessee Valley pooling amendment against a producer association complaint, the Secretary said: “The Act provides no basis for concluding that a Federal order should restrict the absolute volume of Grade A milk that is pooled.”).

Perhaps believing that passage of time and fading institutional memories will produce a more receptive agency audience, DFA solicits the Department’s help to more effectively seal off the Western Market pool from unwanted surplus milk produced in Idaho. Based on market facts, statutory objectives, and historical agency policy, the Secretary should firmly reject these efforts.

II. Proposed Findings of Fact.

Although the four-day hearing transcript is long on rhetoric and argument, the salient facts are relatively simple.

1. The Federal Milk Order Reform decision to include the Great Basin Market with the Southwest Idaho Market in a merged Western Marketing Area added more Class I revenue to blend prices received by Southern Idaho producers and diluted blend prices of former Great Basin producers by the addition of more surplus milk.
2. The former Southwest Idaho Order was created in 1981 with the recognition that the “market is in a region of heavy milk production and limited fluid milk

sales.” 46 Fed. Reg. 21944, 21949 (Apr. 14, 1981)(Final Decision). Further the growing supply in competition for limited Class I sales “fosters disorderly marketing.” *Id.*

3. Proponent cooperatives at the time of the market’s promulgation advocated for restrictive pooling standards, which were rejected by the Secretary as serving “no valid purpose” due to the overabundance of supply relative to limited Class I demand. *Id.*, 21952 – 59. Based on proponent’s evidence, the Secretary estimated that the market would have 40% or more Class I utilization, and annual pooled volume of 325 million pounds. *Id.*, 21949

4. In the first full year of regulation, Class I utilization was 25%, and 562 million pounds of milk were pooled in the SW Idaho-E. Oregon Order – 94% of which originated on Idaho farms. Federal Milk order Market Statistics (“FMOS”) 1982 Annual; FMOS for June 1983 (FMOS – 282, Sept. 1983) at 44 (Special feature: “Producer Milk Marketed Under Federal Milk Orders by State of Origin” for 1982)(hereinafter “State Origin 1982”).¹ Some of the increase in SW Idaho pool milk over the Secretary’s estimates apparently resulted in a shift of Idaho milk from other markets where it had been pooled. Between 1980 and 1982, the volume of Idaho milk pooled in Eastern Colorado dropped from 40 million to 6 million, and in Oregon Washington from 99 million to 65 million pounds. State Origin 1980 and 1982. See also, Ex. 53.

¹ Federal Order producer milk by state of origin has been published by USDA periodically since 1957 as a special feature at the end of monthly FMOS’s or by separate, more detailed, publication.. As for the 1982 data, State Origin data are published 1-2 years after the relevant marketing year. These publications will be referred to herein by reference to the year for which data is published (i.e. “State Origin 19__”).

5. Regulation of the SE Idaho market resulted in the majority of Idaho Grade A milk pooled in the federal order system, until federal order reform became effective, as reported in USDA's State Origin publications:

<u>Marketing year</u>	1977	1982	1987	1997	2000
<u>% Pooled</u>	60%	96%	87%	81%	36%

State of Origin 1977-2000; Exhibit 46.

6. Idaho's loss of federally-pooled milk after federal order reform is a misfortune unique to Idaho's dairymen, and attributable to failure of the reformed pooling standards "to accommodate all the producer milk that would like to associated with the order..." State Origin 2000 (www.ams.usda.gov/dairy); Exhibit 35, p.2; Testimony of Jon Davis. As a result of the existing pooling barriers in the Western Order, Idaho producer milk has been pooled in the Upper Midwest and Central Markets. DFA has complained in hearings for those markets that Idaho milk should not be pooled there either. *Id.*

7. The objective of proponents of DFA proposals 3 – 7 is to cause additional Idaho milk to be disqualified from pool participation by making the pooling standards even less accommodating, and expressly conditioning producer qualification on need and use of the producer's milk for Class I purposes. *E.g.*, Peterson, Tr. 322-28; Radmall, Tr. 368-72, 377; Eakle, Tr. 404-405. The proposals would indeed force milk off the pool if adopted, especially with access to the Class I market limited by DFA supply arrangements. *E.g.* Stutzman, Tr. 958-59, 966.

(estimating 111 million pounds of producer milk will be disqualified by proposal 6 alone).

8. DFA represents almost 80% of milk production in Utah. Radmall, Tr. 368-69. DFA, by contractual commitment, is also the exclusive supplier of raw milk to all of the Western Market's major distributing plants, some of which are owned in part by DFA. Its sales to these plants represent approximately 80% of the market's Class I producer milk. Exhibits 6 (t.3) and 44 (table 2 and chart 1); Hollon, Tr. 584-92; 984; Gibbons, Tr. 336-37. For example, during October 2001, DFA delivered 79.7 million pounds of milk to the market's major distributing plants (Ex. 44), of which 90% (71.3 million pounds) is reasonably estimated as used for Class I purposes. Tr. 984. This represented 77.2% of the Market's Class I utilization of 92.4 million pounds. Ex. 6. DFA is additionally the exclusive supplier of Meadow Gold, the largest Class I handler in Idaho. Hallquist, Tr. 943.
9. The DFA proponent witness expressly and repeatedly refused to reveal additional, relevant evidence on cross-examination of its market share and terms of contract, claiming "proprietary" privilege. *E.g.* Hollon, Tr. 586-87, 590, 592, 636.
10. The smaller distributing plants in the Western Market are more than adequately supplied with milk, and would have difficulty maintaining pool status for producers if DFA's proposals are adopted. Larson, Tr. 872-886; Barrow, Tr. 1022-1027; Stutzman, Tr. 966; Stoker, Ex. 38.

11. Pooling access to DFA's Class I customer base in the Western Market can be realized by non-DFA producers only by paying a fee to DFA and giving marketing control to DFA. *E.g.* Carlson, Tr. 257-60.

12. Idaho producer milk pooled by non-DFA suppliers in the Western Marketing Area, as well as Grade A milk that has not had access to the pool since federal order reform became effective, stands ready, willing, and able to supply milk to distributing plants for fluid use. Reitsma, Tr. 664-65; Williams, Tr. 781, Ex. 37; Davis, Ex. 35.

13. There was no evidence that any non-DFA supplier of producer milk had ever been requested to supply, or refused to accommodate a request for milk by any fluid milk plant in the Western Market.

14. DFA acknowledged that there is no need for supplemental milk to serve Class I needs in the Western Market. Hollon, Ex. 43, pp 1-2.

15. A principal source of the regulatory problem perceived by DFA is the new, modest pricing zone-out feature of federal order reform, but DFA elected to propose a pooling rather than pricing solution to this problem. Hollon, Tr. 222.

III. **Conclusions.**

USDA's federal milk order reform decision, 63 Fed. Reg. at 16123, 16130, 16133 (April 2, 1999), reaffirmed that federal milk order pooling standards serve two principal functions: (1) "is to ensure both an adequate supply of milk for fluid

use,” and (2) “orderly marketing by allowing *all milk in a marketing area* the opportunity to serve the fluid market and thereby share in the pool.”

The first function was administratively created, and is not expressly provided by the AMAA. The Act provides for price to serve as the inducement for adequate market supply. 7 U.S.C § 608c(18). Evidence in this hearing reveals, in any event, that the market is more than adequately supplied by existing pooling standards.

The record also reveals that the orderly marketing objectives of the second function – pool participation regardless of milk use (*id.* § 608c(5)(B)(ii)) -- are currently being disserved by “reformed” standards that have reduced Idaho’s percentage of pooled Grade A milk to a 30-year low, and have necessitated the kind of destabilizing competition for very limited fluid outlets which federal regulation was intended to cure.² DFA’s proposals 3 through 7 for the Western Market will, contrary to the Congressional objectives, aggravate the fraternal destabilization of the market.³

The need to provide a means for surplus Grade A milk to share in fluid milk revenue has been recognized by regulators, economists and courts for over six

² USDA’s reform decision expectation that pooling standards would accommodate pre-reform producer milk was apparently made with abstract reference to market statistics rather than objective reference to the reality that DFA’s market share allows little access by non-members to fluid milk plants.

³ Implementation of any part of these proposals on an “emergency” basis, either without a recommended decision, or without notice of 30 days of more to allow adjustment to any new burden on producers and handlers, would also be entirely unjustified. Unlike DFA claims of emergency in other parts of the country because too much new milk was diluting the pool, the Western Market pool is characterized by a substantial reduction of old milk since reform took effect.

decades. *United States v. Rock Royal Coop.*, 307 U.S. 533, 550 (1939). It was to avoid the disruptive results of surplus milk competing for a fluid outlet that Congress made provision for all milk to participate in a marketwide pool. There is no express provision in the limited authority provided by 7 U.S.C. §608c(5) for the Secretary to draw a regulatory line to limit the volume of surplus milk that may share in marketwide proceeds, as DFA has asked the Secretary to do in this case.

A significant part of the statutory scheme for promoting orderly marketing is allowing producers of surplus milk and Class I milk alike to share in a uniform blend price, no matter how great the market's surplus. To achieve this result the act requires:

. . . payment to all producers and associations of producers delivering milk to all handlers of *uniform prices* for all milk so delivered *irrespective of the uses made of such milk* by the individual handler to whom it is delivered.

7 U.S.C. §608(c)(5)(B)(ii) (emphasis supplied). Such sharing of proceeds in the form of uniform producer prices, without regard to how milk is used is “the foundation of the statutory scheme.” *Zuber v. Allen*, 396 U.S. 168, 179 (1969).

That is, a price “that did not turn on or vary with the nature of the use for which a producer was able to dispose of his milk □ [and that] would not distinguish between producers on the basis of the use made of their milk.” *Blair v. Freeman, supra*.

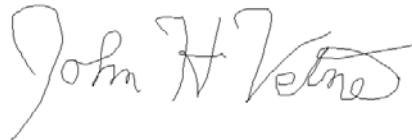
The rule at issue in *Blair* was similar to the *Zuber* rule, and provided a bit of extra income from the pool to producers who regularly supplied the fluid market.

On this statutory issue, the rules proposed by DFA are facially vulnerable. The Secretary is expressly authorized to consider classification of use only in fixing prices handlers must pay for milk., 7 U.S.C. §§608c(5)(A) and 608c(18). The proposed amendments, contrary to subsection (5)(B)(ii), are designed to condition producer eligibility for participation of the blend price to sufficient use of or need for their milk at an Western Market Class I distributing plant. See Fact Finding No. 7, above. Similar to the rules at issue in *Blair*, the justification advanced by DFA and its allies for the rule amendments at issue – that Idaho milk should not be eligible for a blend price because it is not sufficiently used to “service” the Class I needs of the market – renders the proposals unlawful because it unnecessarily conditions blend price eligibility on the use a handler may make of milk where there is no evidence that the market is short of Class I milk. On the contrary, proponents admit and USDA has previously concluded that there is excess milk on the market. Acting to eliminate this excess from the pool, DFA asks the Secretary to abandon the agency’s long-held view that: “The Act provides no basis for concluding that a Federal order should restrict the absolute volume of Grade A milk that is pooled.” 47 Fed. Reg. 11679, 11685 (col. 3)(March 18, 1982).

Notwithstanding DFA's quest for a better blend price at the expense of other producers in the milkshed, "[f]ederal orders do not guarantee a fixed price to producers, not even a fixed minimum blend price. The fact that utilization can change for regulated handlers precludes such a guarantee." Manchester, *Milk Pricing* at 8.

For the foregoing reasons, and those stated in the post-hearing brief of Northwest Dairy Association the Secretary should deny proposals 3 through 7. The Secretary should further make such amendments and interim rule suspensions as are necessary to re-accommodate the market's Grade A milk supply.

Respectfully submitted,

A handwritten signature in cursive script that reads "John H. Vetne".

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