

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:	)	
	)	Docket Numbers
	)	AO-368-A30 and
MILK ORDER AMENDMENT HEARING	)	AO-380-A18
FOR MILK IN THE PACIFIC	)	[DA-01-08]
NORTHWEST AND WESTERN	)	
MARKETING AREAS	)	
	)	

Hilton Airport Hotel  
5151 Wiley Post Way  
Salt Lake City, Utah

Friday,  
April 19, 2002

The above-entitled matter came on for  
hearing, pursuant to Adjournment, at 8:00 a.m.

BEFORE: HONORABLE JILL CLIFTON  
Administrative Law Judge

APPEARANCES:

On behalf of the U.S. Department of  
Agriculture:

GARRETT B. STEVENS, ESQ.  
Office of General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C. 20250

On behalf of the Proponents:

CHARLES M. ENGLISH, JR., ESQ.  
Thelen, Reid and Priest, LLP  
Suite 800  
701 Pennsylvania Avenue, NW  
Washington, D.C. 20004

APPEARANCES: (Continued)

On behalf of the Proponents:

MARVIN BESHORE, ESQ.  
Milspaw and Beshore Law Offices  
130 State Street  
Post Office Box 946  
Harrisburg, Pennsylvania 17108

JOHN VETNE, ESQ.  
15 Powow  
Amesbury, Massachusetts

Also Present:

GINO TOSI, Marketing Specialist  
U.S. Department of Agriculture  
Washington, D.C. 20250

## I N D E X

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Carl Conover	1191	1211 1225 1228 1229	1230 1238	1234 1234 1241	--
Daniel S. McBride	1255	1278 1303 1305	1309	--	--

## E X H I B I T S

<u>EXHIBIT:</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
Exhibit Number 54	1189	1190
Exhibit Number 55	1189	1190
Exhibit Number 56	1247	1249
Exhibit Number 57	1247	1249
Exhibit Number 58	1247	1249
Exhibit Number 59	1247	1249
Exhibit Number 60	1247	1249
Exhibit Number 61	1248	1249
Exhibit Number 62	1248	1249
Exhibit Number 63	1248	1249
Exhibit Number		
Exhibit Number		
Exhibit Number		
Exhibit Number		

## P R O C E E D I N G S

8:08 a.m.

1  
2  
3 JUDGE CLIFTON: We're on record on April  
4 19th, 2002. This is Friday, the fourth day of this  
5 rulemaking hearing, and we have two witnesses scheduled  
6 for today, and of course, if any other witnesses want  
7 to testify, I will hear their requests as well.

8 Yes, Mr. Marshall?

9 MR. MARSHALL: Good morning, Your Honor.

10 By agreement with Mr. English, I believe Mr.  
11 Carl Conover will go next, but I wanted to alert all  
12 parties and yourself to some thoughts that we have  
13 about ways -- things that need to be considered yet  
14 today, and first is that Mr. McBride has a substantial  
15 amount of -- substantial number of pages of prepared  
16 testimony, and I will be suggesting that that be read  
17 into the record as if read rather than read out loud.  
18 Whether that's done by exhibit or not is something we  
19 can discuss.

20 Copies of his testimony are now available in  
21 the back of the room, and I think that in the interests  
22 of time, that would be the most efficient way of  
23 dealing with that, although we'll be more than happy to  
24 stop and read out loud any parts that pertain to issues  
25 that people may have with his testimony or some of the

1 issues that he's raised, and of course, he would be  
2 available for cross examination. I think that might be  
3 the most expeditious way to deal with his testimony.

4 Second, to alert any interested parties, we  
5 have some concerns about the -- some -- there's some  
6 legal questions and some evidentiary problems  
7 associated with the fact that DFA's proposal for an  
8 assembly credit has turned out at this hearing to be  
9 also a proposal for a balancing credit, which we would  
10 -- we will be making a motion and people can be  
11 thinking about this, that's outside the scope of the  
12 Hearing Notice and will have to be discussing some ways  
13 that we can remedy that, if a ruling is made that it is  
14 within the scope of the Hearing Notice.

15 So, I just wanted to alert the parties that  
16 those are the two concerns that we have, that we can  
17 take up after Mr. Conover's testimony.

18 JUDGE CLIFTON: All right. Thank you, Mr.  
19 Marshall.

20 Mr. English?

21 MR. ENGLISH: Yes, Your Honor. Before Mr.  
22 Conover, and I don't know where Mr. Vetne is at the  
23 moment, but he and I've had some discussions off the  
24 record. So, this will not be a complete surprise to  
25 him.

1           First, let me say that my objection and  
2           exception from yesterday stand, but I think that how we  
3           deal with that and Mr. Vetne and I will discuss that  
4           later as to whether I choose to file something on brief  
5           or other pleading or not, and if so, I'll certainly  
6           alert him and then we can decide how to handle that.

7           But I do not want to belabor this record any  
8           more with that particular issue, except to say that --  
9           that I do think that the proper place for counsel in  
10          argument is here at the lectern and that was my point  
11          from yesterday, and Mr. Vetne and I have also discussed  
12          off the record and apologized to each other, but to the  
13          extent I offended anyone last evening with my temper, I  
14          apologize.

15          Finally, --

16          JUDGE CLIFTON: Mr. English, --

17          MR. ENGLISH: Yes?

18          JUDGE CLIFTON: -- you offend no one. You  
19          are extremely courteous. You're very knowledgeable.  
20          You fight hard on behalf of your clients in every  
21          proceeding, and I personally want to thank you and Mr.  
22          Beshore and Mr. Marshall and Mr. Vetne for the pool of  
23          expertise that contributes to the success of these  
24          hearings. So, in my opinion, you said nothing  
25          offensive, you did not display any temper, and

1 certainly apology is of record, but it was not needed.

2 MR. ENGLISH: Thank you, Your Honor.

3 And finally, last evening, I may have  
4 suggested, I did suggest the possibility that there  
5 would be additional attorneys on the stand. I for my  
6 part continue to believe that it's error and will not  
7 compound the error by participating in that. So, I  
8 will not be doing that.

9 Thank you, Your Honor.

10 JUDGE CLIFTON: Thank you, Mr. English.

11 MR. ENGLISH: At this time, I would have Mr.  
12 Conover come to the stand, and while he's getting up to  
13 the stand, I would say that I've had the court reporter  
14 mark and I've provided to Your Honor two documents  
15 which were also distributed yesterday to the Government  
16 and all participants.

17 JUDGE CLIFTON: Mr. Conover, if you'd be  
18 seated, please?

19 MR. CONOVER: Yes, ma'am. Thank you.

20 MR. ENGLISH: Two documents I've had marked,  
21 Your Honor, were Exhibit Number 54, curriculum vitae of  
22 Carl Conover, a two-page document, which essentially  
23 the identical text appeared in -- in prior hearings in  
24 the Upper Midwest and Central Order, and it is merely a  
25 statement of Mr. Conover's credentials rather than

1 having him go through them, especially because he has  
2 been acknowledged as an expert in so many -- on so many  
3 occasions, and I know that he always gets unhappy when  
4 I do this, but I would note that today is Mark's 51  
5 years, 11 months and 19 days in the dairy industry and  
6 that is to say the regular dairy industry.

7 (Applause)

8 MR. ENGLISH: And Exhibit 55 is his  
9 testimony. As I stated yesterday but I'm not sure  
10 everybody was in the room at the time, while we would  
11 want the entire testimony to go in as Exhibit 55, Pages  
12 6, 7, 8 and 9 are testimony that is almost identical  
13 with some modifications for this Order as the testimony  
14 that went in in the Central Order. It's a little  
15 different from the Upper Midwest, but it has to do with  
16 the double-pooling issue, which turns out not to be in  
17 dispute at this hearing, and to save time for the  
18 parties, I would suggest that we dispense with his  
19 reading Pages 6, 7, 8 and 9, but, of course, he's  
20 subject to cross examination on those.

21 JUDGE CLIFTON: Good. I appreciate that.

22 MR. ENGLISH: So, with that being said and  
23 obviously, you know, I don't want to waive the  
24 opportunity to -- to Voir Dire the witness, but I would  
25 ask that for obvious reasons and for the fact that

1 everyone in this room has either on their own behalf  
2 used Mr. Conover as an expert, either when he was at  
3 the government or when in private practice and/or has  
4 conceded the fact in the past, that if there's no  
5 objection, I would ask that he be accepted as an expert  
6 with respect to the regulation of milk, the  
7 implementation of -- of regulations, their formulation  
8 and their enforcement for milk marketing regulation  
9 purposes.

10 JUDGE CLIFTON: All right. Is there any  
11 objection?

12 (No response)

13 JUDGE CLIFTON: There being none, Mr.  
14 Conover, I accept you as an expert in the regulation of  
15 milk.

16 Help me with this, Mr. English. The  
17 regulation of milk, including the implementation of  
18 regulations, the formulation of regulations and the  
19 enforcement of those regulations.

20 MR. ENGLISH: And their impact, Your Honor.

21 JUDGE CLIFTON: And their impact. Thank you.

22 All right. Mr. Conover, please state your  
23 full name.

24 MR. CONOVER: My name is Carl Conover.

25 JUDGE CLIFTON: And would you spell both

1 names?

2 MR. CONOVER: C-A-R-L C-O-N-O-V-E-R.

3 JUDGE CLIFTON: All right. Would you raise  
4 your right hand, please?

5 Whereupon,

6 CARL CONOVER

7 having been first duly sworn, was called as a witness  
8 herein and was examined and testified as follows:

9 JUDGE CLIFTON: Thank you.

10 Mr. English?

11 MR. ENGLISH: Your Honor, --

12 JUDGE CLIFTON: Let's see. Let's -- let's --  
13 let's deal with the exhibits first.

14 MR. ENGLISH: Yes.

15 JUDGE CLIFTON: I've marked Mr. Conover's  
16 curriculum vitae as Exhibit Number 54. I've marked his  
17 testimony as Exhibit Number 55.

18 (The documents referred to  
19 were marked for identification  
20 as Exhibit Numbers 54 and 55.)

21 JUDGE CLIFTON: Is there any objection to the  
22 admission into evidence or any request to Voir Dire the  
23 witness with regard to Exhibit 54?

24 (No response)

25 JUDGE CLIFTON: There is none. Exhibit 54 is

1 hereby admitted into evidence.

2 (The document referred to,  
3 having been previously marked  
4 for identification as  
5 Exhibit Number 54, was  
6 received in evidence.)

7 JUDGE CLIFTON: Is there any request to Voir  
8 Dire the witness or any objection to Exhibit 55?

9 (No response)

10 JUDGE CLIFTON: There is none. Exhibit 55 is  
11 hereby admitted into evidence.

12 (The document referred to,  
13 having been previously marked  
14 for identification as  
15 Exhibit Number 55, was  
16 received in evidence.)

17 JUDGE CLIFTON: You may proceed, Mr. English.

18 DIRECT EXAMINATION

19 BY MR. ENGLISH:

20 Q Mr. Conover, before I do additional direct  
21 examination, if you please, read the first five pages  
22 of your statement.

23 A Yes. The proprietary bulk tank handler  
24 problem. The reason Proposals 11, 13 and 12 are  
25 needed.

1           My testimony is on behalf of Dean Foods  
2           Company doing business as Meadow Gold Dairies. The  
3           intent of Meadow Gold's Proposal 11 and 13 or 12 is to  
4           ensure that all pool handlers regulated by Federal Milk  
5           Order 135 pay at least the minimum class prices  
6           prescribed by the Order for milk received at their  
7           plant and disposed of as fluid milk or fluid milk  
8           products.

9           Thank you, Garrett.

10           Uniformity among handlers is required by  
11           Section 608(c)(5)(a) of the Agricultural Marketing  
12           Agreement Act (the AMA Act), which requires that prices  
13           established under a milk order must be uniform to all  
14           handlers, except for specific and limited exceptions  
15           that are not applicable here.

16           It has long been recognized by the Department  
17           that uniformity is meaningful only if it applies to all  
18           the milk received at the plant. As the 65-year history  
19           of milk regulation in this country shows, if there is a  
20           crack in the system and the economic incentive for it  
21           to do so, milk will soon find its way through that  
22           crack. This proposal is aimed at repairing one such  
23           crack.

24           A regulated handler operating a pool plant in  
25           this market may receive milk from a proprietary bulk

1 tank handler and not be required to pay the minimum  
2 Order prices for such milk. This creates an untenable  
3 situation among competing handlers.

4 Certainly a major cornerstone of the Milk  
5 Order Program, one that has allowed it to withstand  
6 attacks from many quarters is a principle that the  
7 minimum prices are uniform to all parties. Without  
8 that requirement, the program would not have endured.

9 The provisions of Order 135 allow a person  
10 who operates a plant that produces milk products, Class  
11 2, 3 and 4, and operates a truck that picks up the milk  
12 of producers to be a regulated handler and to  
13 participate in the pool under certain circumstances,  
14 such a person is a proprietary bulk tank handler and as  
15 such is accountable to the pool for producer milk  
16 delivered in his truck to a pool plant or to a non-pool  
17 plant, including his own.

18 In order to qualify the milk going to the  
19 non-pool plant for pool participation, a small portion  
20 of the milk must be delivered to a pool distributing  
21 plant. On this Order, the PBT handlers are Class 3  
22 plants.

23 When Class 3 is eligible for a pool draw, it  
24 is equivalent to the producer price differential.  
25 Thus, on the milk delivered to the non-pool plant and

1 processed into milk products, the PBT handler will  
2 generally receive a pool draw equal to the PBD. For  
3 2000 and 2001, that value averaged a \$1.45 and 90 cents  
4 per hundredweight, respectively. Exhibit -- I don't  
5 have that number on mine.

6 Q Exhibit 6.

7 A Exhibit 6, Table 5, of the Market  
8 Administrator's compilation of statistical material,  
9 Federal Milk Marketing Order Number 135, Western  
10 Marketing Area, April 2002.

11 This pool draw is the PBT handler's incentive  
12 to ship to a pool distributing plant to qualify milk  
13 for pooling. The pool draw is money available to the  
14 PBT handler to procure a supply of milk in competition  
15 with other handlers that must pay at least the blend  
16 price.

17 In order to obtain this benefit, the PBT  
18 handler needs a pool distributing plant to serve as an  
19 outlet for a small portion of its milk. Since the pool  
20 plant is providing a service of sorts to the PBT  
21 handler by electing to take that milk, the pool  
22 distributing plant has bargaining power in the  
23 determination of the price. It is not uncommon for  
24 pool distributing plants to charge for this service.  
25 Indeed, this happens in other markets and even in

1 transactions involving cooperatives on this Order.

2           However, in other markets or transactions  
3 involving cooperatives on this Order, there are  
4 regulatory and economic -- or economic constraints on  
5 the ability of the pool distributing plant to negotiate  
6 a price that is lower than the classified price. For  
7 example, when cooperatives sell raw milk to a handler  
8 for their account, that milk is treated as producer  
9 milk received at the plant and must be accounted for by  
10 the plant as such.

11           Also, when a supply plant sells raw milk,  
12 whether by diversion or transfer, even though the  
13 supply plant is the receiving handler, the higher  
14 shipping percentages associated with the supply plants  
15 make it uneconomical for supply plants to agree to  
16 lower their class prices.

17           Q     Stop for a second, Mr. Conover.

18           A     Yes.

19           MR. ENGLISH: Your Honor, it occurs to me  
20 that because he didn't have the Exhibit 6 number  
21 earlier, that he has a slightly earlier draft and a  
22 couple modest changes are going to follow. So, if I  
23 might approach the witness and give him my copy of the  
24 Exhibit 55, so that we won't have the situation where  
25 he will be having numbers missing and -- and one number

1 changed as a result of some testimony in the hearing.

2 So, if I could stop there and hand -- he does  
3 not have what is in essence Exhibit 55.

4 JUDGE CLIFTON: All right. Yes, you may  
5 approach the witness, and while we're stopped, I want  
6 to ask you a question.

7 With regard to the paragraphs in the middle  
8 of Page 2, Mr. Conover's reading of the paragraph was  
9 slightly different from what is written, and I don't  
10 know whether that's just because the wording was  
11 changed in the exhibit you have or whether -- and the  
12 -- and the question is whether -- no. I'm sorry. It  
13 -- it's the -- it's the paragraph that begins with  
14 "Indeed, this happens in other markets". I'm reading  
15 from the exhibit, "and could even happen in other  
16 transactions involving cooperatives on this Order.

17 That's what I have. Now, what Mr. Conover  
18 testified is that it -- that it does happen and could  
19 happen.

20 MR. ENGLISH: Why don't we start with the  
21 paragraph -- again, Your Honor, --

22 JUDGE CLIFTON: All right.

23 MR. ENGLISH: -- the correct version.

24 MR. CONOVER: Starting with the paragraph,  
25 "Indeed,"?

1 JUDGE CLIFTON: Yes, please.

2 MR. HOLLON: And I'm sorry for this, Your  
3 Honor.

4 JUDGE CLIFTON: No, no problem at all.

5 MR. WILLIAMS: Indeed, this happens in other  
6 markets and could even happen in other transactions  
7 involving cooperatives on this Order. However, in  
8 other markets or transactions involving cooperatives on  
9 this Order, there are regulatory and/or economic  
10 constraints on the ability of the pool distributing  
11 plants to negotiate a price that is lower than the  
12 classified price.

13 For example, when cooperatives sell raw milk  
14 to the handler for their account, that milk is treated  
15 as producer milk at the receiving plant and must be  
16 accounted for by the plant as such. Also, when a  
17 supply plant sells raw milk, whether by diversion or  
18 transfer, even though the supply plant is the receiving  
19 handler, the higher shipping percentages associated  
20 with supply plants make it uneconomical for the supply  
21 plant to agree to lower the class prices.

22 In this market, however, --

23 JUDGE CLIFTON: Let me make sure I have what  
24 you just said on that last phrase. Would you read that  
25 last line?

1           MR. CONOVER: Uneconomical for the supply  
2 plant to agree to lower than class prices.

3           JUDGE CLIFTON: Thank you.

4           MR. ENGLISH: Thank you, Your Honor.

5           MR. CONOVER: That was my ineptitude in  
6 reading. Nothing else.

7           In this market, however, where the truck  
8 operator is defined as a handler and the shipping  
9 percentage is very low, the situation is different.  
10 Here is an illustrative sample -- example of the  
11 economic incentive that entices PBT handlers to accept  
12 milk -- to accept less than the class price on sales to  
13 pool distributing plants.

14           BY MR. ENGLISH:

15           Q     Do you mean the Class 1 price?

16           A     To accept less than the Class 1 price on  
17 sales to pool distributing plants.

18           If the pool draw is, say, \$1, PBT handlers  
19 have a rational economic incentive to share up to 99  
20 cents and to get the benefit of one cent because they  
21 end up with one cent more per hundredweight than they  
22 would have without the cooperation of the pool  
23 distributing plant.

24           Thus, without the requirement of minimum  
25 prices and agreement to share in the benefits of the

1 pool draw can result in prices that will be less than  
2 Order minimums. Such transactions provide pool  
3 distributing plants involved in such transactions with  
4 a significant competitive advantage over other pool  
5 distributing plants.

6 The benefit to the pool distributing plant  
7 could be quite large. In fact, pool plants would have  
8 the incentive to share in the benefits of the pool  
9 draw. As discussed above, the average Order 135 pool  
10 draw for cheese plants was a \$1.45 and 90 cents during  
11 2000 and 2001, respectively.

12 Using the data for April 2001, from Exhibit  
13 10, Table 1, of statistical material prepared at the  
14 request of Charles M. English, Jr., April 2002, as an  
15 example, and assuming hypothetically that the three PBT  
16 handlers for that month each represented one-third of  
17 the volume pool and that each shipped an equal volume  
18 to Class 1 distributing plants, then each PBT pooled  
19 28,000 -- 28,841,576 pounds and each Class 1  
20 distributing plant received 1,523,200 pounds.

21 We conclude that only a minimum amount of  
22 Class 1 milk is processed at the Class 1 distributing  
23 plants that are known as juggers. The PPD for April  
24 2001 was a \$1.35 on the non-Class 1 volume -- Class 3.  
25 So that, the pool draw for each PBT in this

1 hypothetical would be \$368,798. That is, a \$1.35 times  
2 273,318 hundredweight.

3 If the PBT handlers shared only 24,371 or 6.6  
4 percent of the draw, of this PPT with the Class 1  
5 distributing plant, the benefit to the Class 1  
6 distributing plant would be equal to the \$1.60 Class 1  
7 differential on this milk.

8 Q Stop for a second, Mr. Conover.

9 A Yes.

10 Q A little earlier in that paragraph, in the  
11 parenthetical, I may have misheard, but did you mean to  
12 say, we conclude that only a minimum amount of non-  
13 Class 1 milk is processed at Class 1 distributing  
14 plants?

15 A I surely meant that.

16 Q Thank you.

17 JUDGE CLIFTON: Let me also just clarify one  
18 other point while we're stopped. All right. I think -  
19 - I think it's clear right in the paragraph. I just  
20 wanted to be sure I knew which statistical material you  
21 were referring to, but that is what Mr. English asked  
22 the Market Administrator to --

23 MR. ENGLISH: That was Exhibit 10. Yes, Your  
24 Honor.

25 JUDGE CLIFTON: Okay. Very good. All right.

1 Thank you, Mr. Conover.

2 MR. CONOVER: Thank you.

3 Specific proposals to address the PBT handler  
4 problem. Without specific language in the Order to  
5 require minimum Order payments by specific handlers  
6 receiving or handling producer milk from PBT handlers,  
7 the Administrator has taken the position that it will  
8 not enforce Order prices.

9 The purpose of Proposals Number 11 and 13 or  
10 12 is to provide the Market Administrator with language  
11 that will make clear his obligation to ensure that  
12 minimum prices are being paid by pool distributing  
13 plants participating in these transactions.

14 The language set forth in Proposal Number 11  
15 provides that the milk delivered by a PBT handler to a  
16 pool plant will be producer milk at the pool plant. As  
17 such, the pool plant operator will be fully accountable  
18 to the pool for the value of the milk and for paying  
19 the producers whose milk was delivered to the pool  
20 plant.

21 The pool plant operator would be responsible  
22 for paying the producers the Order price but could for  
23 the convenience of a single payment to each producer  
24 hand the value over to the PBT handler for distribution  
25 to the producers.

1           The order of the proposals in the Notice  
2 needs explanation. Proposals 11 and 13 should be  
3 viewed together. Together, they make clear that the  
4 pool distributing plant operator is responsible for  
5 paying the producers and accounting to the pool for the  
6 minimum prices.

7           Under this language, the Market Administrator  
8 has authority to verify the payments to the producer  
9 settlement fund and to producers as he has on all other  
10 transactions between handlers and producers.

11           Proposal 12 is offered as an alternative and  
12 would not change the current flow of funds but would  
13 specify that the pool plant is obligated to pay the PBT  
14 handler at least the Order prices. Statutory authority  
15 for such a provision in the Order to enforce minimum  
16 prices for raw milk can be found in Section  
17 608(c)(5)(c) and 608(c)(7)(d) of the Agricultural  
18 Marketing Agreement Act.

19           Indeed, Section 608(c)(7)(d) permits the  
20 Secretary to add terms in marketing orders that are  
21 incidental to and not inconsistent with the terms and  
22 conditions specified in Subsection 527 of this section.

23           JUDGE CLIFTON: Excuse me. Is that 5 to 7?

24           MR. CONOVER: 527 of this section and  
25 necessary to effectuate the other provisions of such

1 Order.

2 With a gap in the uniform application of the  
3 Order prices, as I have suggested, such a provision is  
4 "necessary to effectuate the other terms of the Order,  
5 incidental to" and certainly "not inconsistent with"  
6 existing Order provisions or the intent of the  
7 Agricultural Marketing Agreement Act.

8 Moreover, the AMA Act expressly authorizes  
9 the Secretary to provide a method for making  
10 adjustments in payments among handlers to ensure that  
11 handlers are paying the full minimum price for their  
12 milk purchases.

13 Section 608(c)(5) authorizes the Secretary to  
14 provide a method for making adjustments in payments as  
15 among handlers, including producers who are also  
16 handlers, to the end that the total sums paid by each  
17 handler shall equal the value of milk purchased by him  
18 at the prices fixed in accordance with Paragraph A of  
19 this subsection.

20 I think some comment on Proposal 5 would be  
21 appropriate since adoption of it would eliminate any  
22 purpose for our Proposals 11, 12 and 13. The provision  
23 for a PBT handler was introduced into the predecessor  
24 Southwestern Idaho/Eastern Oregon Order at its  
25 inception over 20 years ago. The justification given

1 in the decision was the absence of traditional supply  
2 plants in the marketing area and the desire to avoid  
3 imposing the cost of upgrading to Grade A facilities on  
4 existing manufacturing plants.

5 The rulemaking decision implementing the  
6 provisions suggested that the PBT handler concept was  
7 expected to facilitate the pooling of necessary market  
8 reserves in the absence of supply plants. Since the  
9 current Order has manufacturing plants that are now  
10 capable of serving as supply plants, and since USDA has  
11 implemented diversion provisions to accommodate the  
12 handling of market reserves from supply plants, it is  
13 not a big step to conclude that the PBT handler  
14 provision is no longer necessary.

15 As a result of the 1981 decision, the  
16 Department has effectively granted manufacturing plants  
17 in the Western Order privileges and benefits similar to  
18 and with respect to shipping percentages better than  
19 that of a 9(c) handler without the corresponding  
20 obligation to collect the minimum classified price.

21 It is not surprising, therefore, that  
22 notwithstanding the existence now of a supply plant  
23 provision that permits diversion as qualifying  
24 shipments, that no manufacturing plant has chosen to  
25 use that option.

1                   Therefore, while we have advocated the remedy  
2                   proposed in Proposals 11 and 13 or 12, Meadow Gold  
3                   would not object to Proposal 5 if the Department in its  
4                   wisdom determines that the problem with Meadow Gold is  
5                   -- with which Meadow Gold is concerned can best be  
6                   remedied by removing the outdated and unnecessary PBT  
7                   handler provision all together.

8                   BY MR. ENGLISH:

9                   Q     That would be where we stop, right?

10                  A     Yes.

11                  MR. ENGLISH:   And the rest of the testimony  
12                  will -- will come in as part of your exhibit, and again  
13                  we're just not trying to belabor the record on that  
14                  issue, especially since it appears that no one is  
15                  really contesting that issue.

16                  On the other hand, that's -- this is the  
17                  position of Dean Foods Company.

18                  JUDGE CLIFTON:   Thank you, Mr. English.

19                  BY MR. ENGLISH:

20                  Q     Mr. Conover, let me talk to that last point  
21                  for a moment with regard to Proposal Number 5.

22                  It is not the intent of Meadow Gold to impact  
23                  the ability of Glanbia and Jerome to pool on this  
24                  market, is that correct?

25                  A     I think the intent of Meadow Gold is

1 expressed in our Proposal 11 and 13 and that doesn't  
2 impinge in any way on the amount of milk they pool. It  
3 only requires the payment of the minimum prices on that  
4 -- that it received at the pool distributing plant.

5 Q And if the Secretary in her wisdom were to  
6 adopt Proposals 11 and 13 with respect to treating the  
7 milk as producer milk at the pool distributing plant,  
8 if the Secretary needs some technical changes in order  
9 to ensure that for responsible handler purposes for  
10 pooling, it nonetheless is pooled for Jerome and  
11 Glanbia, you would have no objections to those kinds of  
12 technical changes?

13 A No, I would not.

14 Q In your testimony, you noted that without the  
15 requirement of minimum prices, an agreement share of  
16 the benefits of the pool draw can result in prices that  
17 will be less than Order minimums and then you discussed  
18 how that happens.

19 When you came to this hearing, other than  
20 what your -- your client Meadow Gold had told you, this  
21 was largely theoretical and hypothetical, correct?

22 A Yes, it waas.

23 Q You've sat through this hearing?

24 A I have.

25 Q Have you now concluded that it's -- that --

1 that the testimony you've given and -- and this  
2 hypothetical theoretical agreement is something more  
3 than hypothetical and theoretical?

4 A Well, the testimony that I heard confirms  
5 what I -- I thought was the case before I came here.

6 Q And that is to say?

7 A That's to say that those distributing --  
8 distributing plants receiving milk from the PBT  
9 handlers are not paying the minimum class prices.

10 Q If Proposals 11 and 13 or 12 are adopted,  
11 what is your view as to the remedy that the Market  
12 Administrator and/or the Secretary would have if in the  
13 future the Market Administrator determined that  
14 nonetheless a pool distributing plant purchasing from a  
15 proprietary bulk tank handler receiving milk and  
16 responsible for the payment to the producers was not  
17 making minimum payments?

18 A Well, the remedy would be exactly the same as  
19 it is to the Department or the Market Administrator on  
20 all of the cases where handlers do not comply with the  
21 Order, by failing to pay the -- the producer settlement  
22 fund or pay -- failure to pay the producers the minimum  
23 prices.

24 The Act sets forth the authority for the  
25 Department to bring enforcement actions in the courts,

1 and they -- they have been down that road, as I have  
2 personally, many times. So, there's plenty authority  
3 to enforce payment of the minimum prices.

4 Q And if applicable charges for effectively  
5 interest in the form of an underpayment charge?

6 A That also is applicable. If they fail to pay  
7 it on time, there are additional charges imposed on the  
8 amounts due.

9 Q And you are not suggesting in any way that  
10 the Market Administrator should, if such discover that  
11 there are minimum payments not being made by pool  
12 distributing plants receiving milk from proprietary  
13 bulk tank handlers, that the pool status of proprietary  
14 bulk tank handlers would be adversely affected in any  
15 way?

16 A I'm not suggesting that, and I think -- I  
17 don't think ever in my experience that's ever happen  
18 where they said you're no longer a pool plant because  
19 you didn't meet the minimum payment requirements.

20 Q With respect to injury in the marketplace  
21 presently, is the injury to Class 1 handlers like  
22 Meadow Gold the loss of business or the requirement of  
23 meeting prices or both?

24 A It's both. There's no question about that.

25 Q Are proprietary bulk tank handlers similar to

1 supply plants in Order 30 as was testified to two days  
2 ago?

3 A Well, they serve a different function in  
4 Order 30 than the plants out here, and as I heard late  
5 last night in proposed testimony, I agreed with the  
6 testimony, that the reason for the supply plants in the  
7 Chicago area was and probably still is that they're  
8 moving milk 200 miles rather than the 30 or 40 from the  
9 production area to the plants, rather than the 30 to 40  
10 that it's moved in the Idaho area.

11 In addition to that, the farmers in Wisconsin  
12 are much smaller operations, and they use smaller  
13 trucks to pick up the milk at the farm. Those trucks  
14 are not efficient to make the long haul into Chicago.  
15 So, they have to assemble it so it can be put into  
16 larger trucks for that haul and that, as I understood  
17 it -- understand the situation in Southern Idaho and  
18 the testimony I heard here, the farmers are quite large  
19 and they do use the trucks quite capable of picking up  
20 the milk at the farm and moving it to the plants.

21 Q In your testimony, you referenced in the  
22 hypothetical the idea that a distributing plant would  
23 receive 1,523,200 pounds. When that term's -- when you  
24 say receive, do you mean received and processed in  
25 Class 1 pounds, correct?

1           A     Yes.

2           Q     Okay.  Would Proposals 11 and 13 regulate  
3     payments between handlers?

4           A     They will not.  There will be no payment  
5     between handlers, the same as between the plant that  
6     gets the milk directly from the farm and the producers.

7           Q     Now, your testimony, though, you said as a  
8     matter of convenience for single payment, it could be  
9     set up that the pool distributing plant hands the money  
10    over to the pool -- the proprietary bulk tank handler  
11    and the proprietary bulk tank handler makes the payment  
12    to the producer, correct?

13          A     Correct.  As far as I know, the Department  
14    has never said to a handler you can't have an agent  
15    distribute the money to producers.  That doesn't  
16    relieve the handler of any responsibility.  If the  
17    money doesn't get to the producers, I'm sure the  
18    Department would be moving against the receiving  
19    handler and not the PBT.

20          Q     And that would be your intent?

21          A     That's my intent.

22          Q     And -- and you're saying therefore that the  
23    proprietary bulk tank handler would no longer be  
24    responsible for the payment on that volume of milk  
25    received at the pool distributing plant, correct?

1           A     That is right.

2           Q     So, you're not speaking of a double  
3 obligation?

4           A     There's no -- no.

5           Q     Okay.

6           A     On the portion that's diverted to the non-  
7 pool plant, the PBT would be responsible on paying that  
8 -- paying for that.

9           Q     You heard the dairy farmer witness -- I'm  
10 trying to think now what day it was -- earlier in the  
11 hearing testify that he benefitted with respect to the  
12 pool from additional Falconhurst route disposition?

13          A     Yes, I heard that.

14          Q     Would that be because the more route  
15 disposition Falconhurst has, the more the producer's  
16 milk can then be pooled under the Order?

17          A     Yes, that's what I took it to mean.

18          Q     Does an increase in Falconhurst sales also  
19 benefit the proprietary bulk tank handler in attracting  
20 milk?

21          A     Well, I think my testimony goes to that, that  
22 the pool draw is -- is -- is the incentive and more  
23 milk that the Falconhurst could distribute, then the  
24 more milk he could qualify.

25          Q     So, does it follow then that the --

1           A     Before going to the non-pool plant.

2           Q     I'm sorry. Does it follow then that the  
3     proprietary bulk tank handler has an even greater  
4     incentive to share more of the pool draw or the  
5     economic benefit from the pool draw with Falconhurst?

6           A     That's certainly possible.

7           Q     On a slightly different issue, not addressed  
8     by your testimony, would it be fair to say that Meadow  
9     Gold Dairies supports the concept of transportation and  
10    assembly credits but is not prepared to take a position  
11    at this time on these particular proposals until we've  
12    had an opportunity to -- to review them further?

13          A     That's my understanding.

14                 MR. ENGLISH: Thank you, Mr. Conover. I am -  
15    - that concludes my direct examination. Obviously I  
16    reserve redirect, but the witness is now available for  
17    cross examination.

18                 Thank you very much, Your Honor.

19                 JUDGE CLIFTON: Thank you, Mr. English.

20                 MR. ENGLISH: Thank you, Mr. Conover.

21                 JUDGE CLIFTON: Who would like to begin cross  
22    examination of Mr. Conover? Mr. Vetne?

23                         CROSS EXAMINATION

24                 BY MR. VETNE:

25           Q     Mr. Conover, the policy issue concerning

1       which you expressed concern is that some handlers that  
2       bottle Class 1 milk are able to have a raw milk price  
3       that is different from other handlers that bottle Class  
4       1 milk. Am I right?

5             A       Raw milk price on producer milk that is  
6       pooled under the Order, yes.

7             Q       And that is because in the street, somebody  
8       with a lower raw milk price can upset competitive  
9       equity intended by uniform Class 1 price, is that  
10      correct?

11            A       I think so, yes.

12            Q       And to that extent, it's no different from,  
13      other than perhaps by degree, from producer handlers or  
14      exempt plants not having to account for the Class 1  
15      price, correct?

16            A       I want to elaborate a little bit on that  
17      other answer. Competitive equity meant by the uniform  
18      price doesn't deal with the price on the street. It  
19      deals with the price that the handler receiving the  
20      milk must pay.

21            Q       I understand. Your testimony was that the  
22      price the handler must pay is translated on the street  
23      in terms of loss of business and having to lower prices  
24      for which bottled milk is offered. That -- that was  
25      your testimony?

1           A     Yes, if the handler has a lower product -- is  
2     able to buy less than minimum price and that is  
3     translated into the street price.

4           Q     And -- and that's --

5           A     The testimony I heard here indicates that is  
6     happening.

7           Q     Okay. And -- and that's what I was  
8     addressing. For purposes of that impact, it's no --  
9     it's no different whether the milk comes from a  
10    producer handler, an exempt plant or somebody that buys  
11    from another handler and gives a discount?

12          A     There is a possibility that milk from those  
13    exempt plants would be out there on the street in  
14    competition, yes.

15          Q     Having the same impact?

16          A     I'm sorry. I didn't hear that.

17          Q     And having the same impact that you've  
18    described?

19          A     If it were priced at lower prices, which I  
20    heard no testimony in this hearing that that was  
21    happening, --

22          Q     Right.

23          A     -- then it could have the same impact. But  
24    there are constraints there. There are three or four  
25    different kinds of exempt plants. There's a plant

1 operated by a college, and I doubt if they'd be out  
2 there on the street selling at less than class prices.  
3 There's plants operated for charitable institutions,  
4 and I would say the same thing about those.

5 I believe the prisons are exempt, and I don't  
6 think they're selling milk out on the streets --

7 Q Okay.

8 A -- at lower prices. There are the 150,000-  
9 pound limits in this market. You're exempt if you're  
10 below that and that plant could, if they weren't very  
11 smart, be out there on the street under selling, but  
12 there is a cap on that because the minute they break --  
13 go over the 150, they've lost their exemption on  
14 everything. So, that's the other kind and then  
15 producer distributors and producer distributors have  
16 been a problem, and I've testified many times in  
17 hearings about producer distributors doing just what  
18 you're talking about.

19 I didn't hear that mentioned here in this  
20 market. I didn't hear anybody complaining that it was  
21 happening. In looking at the -- the exhibits, I don't  
22 -- I didn't see any listed -- producer handlers listed  
23 for the Idaho area. Now, I did hear there was one up  
24 there in certain periods, but that has not been a  
25 problem, at least Meadow Gold has not indicated to me

1 that there was a problem in competing with producer  
2 distributors.

3 Q Okay. Are you aware that there are some  
4 large producer distributors in markets to the immediate  
5 west and immediate south of the Western Order?

6 A Yes, I am.

7 Q Are you aware that there's a producer  
8 distributor in the Arizona/Las Vegas Market that  
9 markets in excess of 12 million pounds per month?

10 A I have no idea the volume. I know there's a  
11 large producer distributor down there.

12 Q Okay. Are you aware that there's a large  
13 distributor in the market to the immediate south of the  
14 Arizona/Las Vegas Market, producer handler, -- producer  
15 handler, producer distributor. Is that synonymous in  
16 your head?

17 A Yes.

18 Q Okay. Are you aware that there's a producer  
19 handler in the Arizona/Las Vegas Market, whatever its  
20 size, that has caused considerable problem in the  
21 street of the same kind that you've described?

22 A John, I -- I'm not surprised to hear that,  
23 and I just haven't been involved in that market in the  
24 last year or so to know that it's happened.

25 Q Okay.

1           A     But that wouldn't surprise me.  But it's not  
2     happening, at least I haven't heard of it being a  
3     problem in the Idaho area.

4           Q     Would it be correct to say that distributing  
5     plants by virtue of their ability to allow milk to  
6     associate with the market have substantial negotiating  
7     power when it comes to its suppliers?

8           A     I think that was the indication in my  
9     testimony.  If they're providing a service to someone,  
10    I'll put service in quotation marks, by pooling that  
11    milk, then that gives them some negotiating power, I  
12    think.

13          Q     Correct.  And you did refer to that as not  
14    uncommon for pool distributing plants to charge for  
15    that service?

16          A     It happens in -- in other markets, I know.

17          Q     It happens very frequently in the Order 30  
18    area, doesn't it?

19          A     I heard testimony at the hearing up there  
20    that it was happening.

21          Q     Okay.  And are you aware that Dean Foods does  
22    that fairly commonly in that market?

23          A     I am not aware of that.

24          Q     Okay.

25          A     I don't deny it, I just am not aware of it.

1 Q Okay. The calculation that you've given us  
2 on Page 3 near the bottom of the page, \$24,000, --

3 A Yes.

4 Q -- represents a little under a dime per  
5 hundredweight. How -- how is that different than the  
6 dime per hundredweight that the Valley Milk Producers  
7 pay for the privilege of pooling that was described?  
8 You heard that testimony --

9 A Yes.

10 Q -- by Rod Carlson, and the Valley Milk  
11 Producers accepted a dime or less than what they would  
12 otherwise get for the privilege of having the milk  
13 pooled.

14 How conceptually is what you've described  
15 here different from the dime that Valley Milk Producers  
16 pays?

17 A Who are they paying the dime to?

18 Q They're paying the dime to the people that  
19 pool their milk.

20 A Is that a cooperative?

21 Q And in that case, it's DFA, yes.

22 A If that cooperative is selling milk at less  
23 than the Order prices, then there are sanctions  
24 imposable at least under the Act.

25 Q Okay.

1           A     If that 10 cents brings the sale price of  
2     milk they sell below the class prices, then the remedy  
3     is there.

4           Q     You mean that because DFA as a cooperative is  
5     treated as a single large producer when it delivers its  
6     milk or any milk it handles to -- to Meadow Gold,  
7     Meadow Gold at least has to pay DFA the Class 1 price?

8           A     The minimum prices, yes.

9           Q     Okay. So, it doesn't matter what happens  
10    after that?

11          A     That's a -- it's not a statutory mandate, but  
12    there are sanctions imposed if they fail to meet that.

13          Q     Okay. And your objective here in effect is  
14    to treat it both -- the producer milk supply, the bulk  
15    tank handler, in much the same way as a 9(c)  
16    cooperative milk supply delivered to a distributing  
17    plant, correct?

18          A     That's what our proposal does, yes.

19          Q     To treat that whole supply as a producer when  
20    it hits the distributing plant?

21          A     The supply that goes to the distributing  
22    plant, yes.

23          Q     Okay. But unlike the 9(c) handler that  
24    accommodates such a supply, do you see any way in which  
25    the producers delivering to -- to that plant might

1 agree to compensate anybody for the privilege of being  
2 pooled in the same way that the River Valley Producers  
3 compensate somebody for the privilege of being pooled?

4 A Are you asking me to come up with a way that  
5 you could get around the Order? Is that what you're  
6 saying?

7 Q No. I'm asking you if there is a way in  
8 which the producers that are pooled through Glanbia or  
9 DAVISCO or Falconhurst, if there is a way under the  
10 system, and you're the expert, that those producers are  
11 permitted to pay someone for the privilege of being  
12 pooled in the same way that River Valley pays someone  
13 for the privilege of being pooled?

14 A If -- if it resulted in payments by the pool  
15 distributing plant at less than the Order minimums, I  
16 think there'd be a remedy.

17 Q Okay. But the remedy is that enforcement  
18 action would be taken so that it couldn't be done?

19 A I would think so.

20 Q Okay. So, River Valley or DFA after delivery  
21 can reblend to individual farmers in effect to  
22 compensate for the service but a bulk tank handler --  
23 handler's producer supply, that milk cannot be  
24 reblended in the same way?

25 A There's a distinction, and there are

1 privileges offered to cooperatives under the statute,  
2 yes.

3 Q Okay. You've referred to in the middle of  
4 Page 3 to \$1.45 and a \$1.90 as the --

5 A No, I don't think a \$1.90.

6 Q Pardon?

7 A Did I say a \$1.90?

8 Q No. A \$1.45 and -- and 90 cents.

9 A Okay.

10 Q As the pool draw for cheese plants. In fact,  
11 the \$1.45 and the 90 cents is the producer price  
12 differential that all producers get, subject to --

13 A Yes.

14 Q -- location adjustment?

15 A Yes.

16 Q It is not necessarily the draw because the  
17 draw depends on your Class 1, Class 2, Class 3 and  
18 Class 4 utilization, correct?

19 A Approximated. It isn't exactly.

20 Q It's a different -- the PPD is a different  
21 animal than the draw, correct?

22 A The dollar amounts are very close.

23 Q They're close because of arithmetic --

24 A Yeah.

25 Q -- and utilization of the plants, but it's

1 not the same thing?

2 A I can see a slight difference.

3 Q And that's because any Class 1, the draw is  
4 less?

5 A No, no, no. The draw is on. The net draw  
6 might be because you pay in on a Class 1.

7 Q The handler's milk supply, the draw on the  
8 milk supply is less than the PPD?

9 A But on the milk going to the non-pool plant,  
10 it's all draw, I believe.

11 Q Okay. If you isolate that portion --

12 A Yeah. That's what I was directing my  
13 testimony to.

14 Q You used the term "juggers". Isn't that a  
15 term that's also used sometimes to refer to producer  
16 handlers?

17 A In some markets, yes.

18 Q You're referring to juggers as a very small -  
19 -

20 A I adopted that term from the Meadow Gold  
21 testimony yesterday really.

22 Q Yesterday, Meadow Gold, I think, referred to  
23 jobbers.

24 JUDGE CLIFTON: And also juggers, Mr. Vetne,  
25 when he was talking about the plastic gallon milk being

1 sold largely in convenience stores.

2 MR. VETNE: Okay.

3 JUDGE CLIFTON: He talked about the people  
4 who provide that jug as juggers.

5 MR. VETNE: All right.

6 BY MR. VETNE:

7 Q So, your -- you're using it only in that  
8 sense, somebody that sells milk only in jugs?

9 A Yes.

10 Q Okay. You indicate that you don't intend to  
11 impact the ability to pool. Under the current bulk  
12 tank unit provision, a bulk tank handler may pool a  
13 milk supply that is less than its entire milk supply,  
14 correct?

15 A Yes.

16 Q Okay. And under the supply plant  
17 alternatives, a supply plant must qualify on the basis  
18 of all receipts, not just a designated unit of  
19 producers?

20 A Yes.

21 Q Can you envision that there would be  
22 difficulty pooling an entire milk supply to a company  
23 like Davisco or Glanbia, based on the testimony you  
24 heard yesterday that there just isn't pooling capacity  
25 for their entire milk supply?

1           A     If you used your entire non-pool plant --

2           Q     Yes.

3           A     -- as the supply plant, you would have that  
4 limitation.

5           Q     They couldn't qualify on the basis of their  
6 existing market for Class 1 milk, correct?

7           A     I'm not sure I heard that.

8           Q     The question is, they could not qualify their  
9 entire milk supply on the basis of their existing  
10 market for Class 1 milk if all -- if all receipts at  
11 those manufacturing plants --

12          A     I believe that to be the case. I -- I -- I  
13 don't know exactly how large their operation is there  
14 but that, I believe, would be the case.

15          Q     Okay. And finally, with respect to your  
16 analogies to the -- the Order 30 area and the assembly  
17 function of supply plants, you said farms there are  
18 smaller and sometimes milk is assembled, that's  
19 something that's happening less now than it did 10  
20 years ago and less 10 years ago than it did 30 years  
21 ago, correct?

22          A     I think that supply plants in many markets  
23 are dinosaurs.

24          Q     Well, is -- is it not the case that even in  
25 Order 30, most milk moves the same way as it does for

1 bulk tank handlers in this market that the pooling  
2 handler moves it directly from the farm to the  
3 distributing plants?

4 A There's a shift in that direction. Yes, it's  
5 happening.

6 Q And in fact, it's the far, far majority of  
7 the milk in Order 30 that moves that way?

8 A Yes.

9 MR. VETNE: Okay. That's all I have. Thank  
10 you.

11 JUDGE CLIFTON: Thank you, Mr. Vetne.

12 Yes? Mr. Marshall?

13 MR. MARSHALL: Your Honor, to -- in order to  
14 facilitate the hearing, I would simply ask that I be  
15 allowed to call Mr. Conover back to the stand, if I  
16 find out when we're off line that he can be helpful.

17 MR. STEVENS: Don't you want to take a chance  
18 now?

19 MR. MARSHALL: I'll be glad to. I'd be glad  
20 to. I'd be glad to.

21 MR. STEVENS: Just kidding.

22 JUDGE CLIFTON: So, you don't want to cross  
23 examine him, you want to --

24 MR. MARSHALL: I may -- I may wish to do so.

25 JUDGE CLIFTON: Oh, but --

1           MR. MARSHALL: I was thinking we could  
2 expedite the hearing if I could talk to him during a  
3 break, and I'm mindful of the fact that Mr. McBride has  
4 a substantial amount of testimony and that many people  
5 would like to leave here this afternoon.

6           JUDGE CLIFTON: All right.

7           MR. BESHORE: I agree.

8           JUDGE CLIFTON: Everybody says that's fine.  
9 Okay.

10          MR. MARSHALL: Thank you.

11          JUDGE CLIFTON: You're welcome.

12          Further cross examination? Mr. Beshore?

13          MR. BESHORE: Yes. Thank you.

14                           CROSS EXAMINATION

15          BY MR. BESHORE:

16           Q     I have just one question, Carl. Is there  
17 anything in the Agricultural Marketing Agreement Act  
18 which requires the Secretary in milk -- in promulgating  
19 milk marketing orders to devise them in a way which  
20 will accommodate and pool all Grade A milk produced  
21 anywhere?

22          MR. VETNE: Your Honor, I object for two  
23 reasons. One, it calls for a legal conclusion, and I  
24 guess I shouldn't make that objection, but I do. But  
25 secondly, -- but secondly, it goes well beyond -- well

1 beyond the scope of the direct testimony of this  
2 witness and in fact seeks to adopt this witness for a  
3 purpose -- for the purpose of being a witness on  
4 proposals that this witness has not addressed and on  
5 proposals which have, I think, closed. So, that's --

6 JUDGE CLIFTON: Nothing got closed here.

7 MR. VETNE: Okay. For -- on a subject -- on  
8 a subject that was addressed at length, and I see that  
9 the -- the -- there's about 80 percent of the people  
10 that were here addressing those subjects have left.  
11 So, that's -- that's my objection. It's -- it --

12 JUDGE CLIFTON: Thank you. Objection noted  
13 and overruled.

14 Mr. Conover, do you remember the question?

15 MR. CONOVER: I believe so.

16 JUDGE CLIFTON: All right. You may answer.

17 MR. CONOVER: There's nothing in the Act --  
18 no. Ask me the question again. I want -- I want to be  
19 sure.

20 MR. BESHORE: Okay.

21 BY MR. BESHORE:

22 Q Is there anything drawing from your knowledge  
23 and experience of more than a half century in Federal  
24 Milk Marketing Order regulations, is there anything  
25 that requires the Secretary to devise/promulgate orders

1 in a manner to necessarily accommodate all the Grade A  
2 milk in the pool that anyone would want to pool  
3 anywhere?

4 A There certainly is nothing in the statute  
5 that requires that, and as Orders have evolved over the  
6 65 years, an entirely different approach has been  
7 followed. Now, there are -- the California system  
8 requires that any milk pooled -- received at a plant in  
9 California is pooled and the AMA Act doesn't even  
10 authorize that as far as I know.

11 Q Okay. California system is a different  
12 system.

13 A Different system --

14 Q If you're in the state --

15 A -- in that respect, yes.

16 Q In that respect. If you're in the state,  
17 you're in the pool, correct?

18 A That's right.

19 Q But the Federal Order system's a different  
20 system.

21 A No, no. Not if you're in the state. If your  
22 milk is delivered to a plant in the state.

23 Q Okay.

24 A Then you're in the pool.

25 Q in the pool.

1           A     But that is not in the AMA Act, to my  
2     knowledge.

3           Q     And the Marketing Orders, Milk Marketing  
4     Orders that have been promulgated over the years,  
5     pursuant to the AMA Act, have operated on a different  
6     basis of performance pooling in essence?

7           A     Absolutely, yes.

8           MR. BESHORE: Thank you.

9           JUDGE CLIFTON: Thank you, Mr. Beshore.  
10          Cross examination? Mr. Vetne?

11          MR. VETNE: I've got to follow up.

12                                CROSS EXAMINATION

13          BY MR. VETNE:

14          Q     Nevertheless, Mr. Conover, as a matter of  
15     application of the authority contained in the  
16     Agricultural Marketing Agreement Act, has not the  
17     Secretary over the years adjusted definitions for  
18     plants, producers, performance diversions in a way to  
19     accommodate additional Grade A milk supplies, such as,  
20     for example, the conversion of Grade B milk to Grade A  
21     in the Upper Midwest?

22          A     No question but what he has accommodated the  
23     increasing supply of Grade A milk and the pooling of  
24     the increasing supply of Grade A milk in the markets.

25          MR. VETNE: Thank you. Thank you.

1                   JUDGE CLIFTON: Any other cross examination  
2 before I call for redirect? Mr. Tosi?

3                   CROSS EXAMINATION

4                   BY MR. TOSI:

5                   Q     Thank you, Mr. Conover. Thank you for  
6 appearing.

7                   A     My pleasure.

8                   Q     Regarding your experience and what you just  
9 called pooling philosophy, you know that in California,  
10 all milk that arrives at a pool plant that's produced  
11 in California is pooled?

12                  A     To the best of my knowledge, that is so.

13                  Q     And in the Federal Order system, it's  
14 different in that the Act does not require us to pool  
15 all milk on the Federal Order, if we have an Order?

16                  A     It does not require the pooling of all milk  
17 received at the plants. There are plants that are  
18 outside the pool.

19                  Q     And at the same time, the Act does not  
20 prevent the pooling of all milk --

21                  A     Of course.

22                  Q     -- within -- within the context of the  
23 Marketing Order?

24                  A     No. There's -- there's no limitation, no.

25                  Q     And is it within your experience that the

1 degree to which Grade A milk supplies are pooled in  
2 Orders have often been predicated on the desire of  
3 producers and their willingness to share Class 1  
4 proceeds to the broadest extent possible or to the  
5 limited degree necessary, depending on the prevailing  
6 marketing conditions of the Marketing Order?

7 A That's a pretty long question, but I'd be  
8 happy if you asked it again.

9 MR. TOSI: That's all I have. Thank you.

10 JUDGE CLIFTON: Thank you, Mr. Tosi.

11 Any other cross examination?

12 (No response)

13 JUDGE CLIFTON: Mr. English, redirect?

14 MR. ENGLISH: Yes, thank you. I had  
15 forgotten a few things. I apologize.

16 REDIRECT EXAMINATION

17 BY MR. ENGLISH:

18 Q Mr. Conover, these proposals were originally  
19 submitted or at least Proposal 12 was originally  
20 submitted in late September. Do you have any comment  
21 with respect to the emergency nature of this proceeding  
22 as to Proposals 11 and 13 or 12?

23 A The problem those proposals address is an on-  
24 going problem. It's here every day and Meadow Gold is  
25 coping with that situation, and we've been underway now

1 for -- since November, that's what, eight months or  
2 seven months or something like that, and the quicker  
3 the Department could handle it, the better.

4 I think it warrants immediate attention. If  
5 emergency's the word, then that's it.

6 Q Okay. And in fact, you know, a -- a  
7 situation where there's a lack of uniformity and an  
8 impact on regulated handlers in your years of  
9 experience in the Market Order system is a very  
10 critical situation for the Federal Order system to  
11 endure, correct?

12 A I can't think of a more critical problem than  
13 the lack of uniformity in the application of the prices  
14 out there in the marketing area.

15 Q Mr. Vetne asked you some questions about  
16 other operations, producer handlers, producer  
17 distributors, and you discussed a few things about  
18 exempt plants had a limit of a 150,000 pounds.

19 Do producer handlers/producer distributors  
20 have any limits of that nature?

21 A Currently, in all -- I really am not going to  
22 -- there have been times.

23 Q I don't mean --

24 A I know for a fact there have been times when  
25 they've had limits.

1           Q     I don't mean -- I don't mean size limits. I  
2 mean, do they have any kinds of constraints?

3           A     Oh, constraints. Well, they have the costs  
4 of production as -- as their minimum costs anyway.

5           Q     And they're also subject to regulatory  
6 provisions in order to maintain the producer handler  
7 status, correct?

8           A     Sure. Yes.

9           Q     There was some discussion through examination  
10 or through cross examination or from the handlers  
11 purchasing from proprietary bulk tank handlers  
12 concerning the relative size of players in this  
13 marketplace.

14                     Have you reached any conclusion about Idaho  
15 pool distributing plants and their sizes?

16           A     I -- I don't think there are any large, what  
17 I would call large distributing plants in Idaho. I  
18 think the Class 1 use in Idaho is 20 million pounds a  
19 month, and there are five or six plants up there. That  
20 comes out to four or five million, something in that  
21 range, and I'm familiar with a few plants in the  
22 country that have twice that much milk in one plant of  
23 the whole 20 million. That's a large plant. Those  
24 plants are small plants.

25           Q     Mr. -- I just want to clarify one thing

1 because Mr. Vetne referred to your analogy to Order 30.  
2 Is it fair to say that was Mr. Vetne's analogy to Order  
3 30 and you were contrasting a little bit? So, you're  
4 not adopting that analogy?

5 A I thought I elaborated on -- on his analogy a  
6 little bit.

7 Q Okay. And to the extent that Mr. Vetne asked  
8 you questions about the implications for a supply plant  
9 down the road, if I were to tell you that Order 135 has  
10 a provision known as a split plant provision, would  
11 that perhaps modify the answer to the hypothetical  
12 question about how one might be able to pool milk or  
13 not and leave milk off?

14 A Well, as -- as I was formulating my answer to  
15 John's question, that was going through my mind. Was  
16 he expecting me to tell him to -- to build a separate  
17 facility for that, and I -- I avoided saying that, but  
18 sure, that -- that eases the problem. That's one way  
19 of coping with that situation is a split plant.

20 MR. ENGLISH: I have no further questions. I  
21 thank you again.

22 JUDGE CLIFTON: Thank you, Mr. English.

23 Any recross? Mr. Vetne?

24

25

1 CROSS EXAMINATION

2 BY MR. VETNE:

3 Q Just on that last question, Carl. Are you  
4 aware of an interpretative opinion by the Market  
5 Administrator for the Northeast Area that does not  
6 permit split plants to plants that do not receive Grade  
7 B milk?

8 A No, I am not aware of it.

9 MR. VETNE: Thank you.

10 JUDGE CLIFTON: Any other recross? Mr. Tosi?

11 RECROSS EXAMINATION

12 BY MR. TOSI:

13 Q Thank you again, Mr. Conover. I need to ask  
14 a few more questions about the regulatory impact on  
15 small businesses.

16 A Sure.

17 Q To the extent that you've offered testimony  
18 that would either -- that presented in Proposals 12 and  
19 11 and 13 and that you would have no objection to the  
20 elimination of bulk tank handler -- the bulk tank  
21 handler provision, to the extent that those are --  
22 these provisions have provided certain pooling  
23 opportunities or pooling flexibilities to small  
24 businesses and to the extent that these provisions have  
25 allowed business to continue for a very long time now,

1 with other handlers, for example, the buyers of bulk  
2 tank handler milk, and I know we had Mr. Stoker  
3 yesterday testify why he thought it needed to continue.

4 The trade-off between the impact of perhaps  
5 those entities going out of business or the lack of  
6 ability for people to pool milk in a way that was to  
7 their economic advantage that's now damaged in some way  
8 or left -- certainly left an impact, what -- what  
9 advice would you offer the Secretary in terms of  
10 rationalizing the adoption of any of these proposals?

11 A Well, with regard to requiring minimum Order  
12 prices, I don't believe you can say you're immune from  
13 minimum Order prices because you fall under that small  
14 business category. That's the one I -- I don't think  
15 the Secretary could go draw that conclusion.

16 Now, on the other one, --

17 Q Size in this -- equity is more important than  
18 --

19 A That and the statutory requirement.

20 Q Okay.

21 A Now, on the other one, elimination, if this  
22 closed the door entirely to them pooling the milk, the  
23 elimination of that provision, then you might have a  
24 problem, but it doesn't close the door. It -- it -- it  
25 may make it a little more inconvenient for them, but

1 surely it doesn't close the door.

2 Q And to the extent that it may result in the  
3 buyers -- the Class 1 distributors who -- who end up  
4 buying bulk tank milk, to the extent that it may -- the  
5 change in that regulation alone could cause them to no  
6 longer be able to function as a business, --

7 A I believe -- I believe --

8 Q -- there's an impact there?

9 A I believe Mr. Stoker -- I think that's who  
10 testified. I've forgotten. Someone testified -- one  
11 of them testified that they didn't mind paying the  
12 class prices. They can live with that. That's what  
13 they said.

14 Q And would you have any knowledge that if one  
15 of these proposals that would in effect transfer the  
16 payment responsibility from the bulk tank handler to  
17 the Class 1 distributor, like Mr. Stoker and his  
18 operation, whether or not they'd have the wherewithal  
19 to submit the reports to the Market Administrator to  
20 have all the infrastructure necessary to keep the  
21 records and run producer payroll and all those other  
22 functions that, for example, larger Class 1 handlers  
23 that don't buy milk from the bulk tank handlers?

24 A I've been in a lot of plants, and I've never  
25 been in one that didn't have the facility to receive

1 milk from a few producers and keep the records on them.  
2 If he's in the milk business, that -- that -- I don't  
3 see that's a problem.

4 MR. TOSI: Thank you. I appreciate it.

5 JUDGE CLIFTON: Mr. Tosi, were you wanting  
6 Mr. Conover's advice also with regard to the other  
7 proposals that would eliminate the status of bulk tank  
8 handlers?

9 MR. TOSI: Well, Your Honor, I -- at least  
10 from myself being the representative for the Secretary,  
11 I -- I think -- I think the record is pretty long on  
12 explaining that conceptually, these -- these proposals  
13 all aim to address issues that may be causing disorder  
14 in the market and inequity among standards in terms of  
15 prices, and they're all offered as alternatives and  
16 conceptually all deal with the same theme.

17 JUDGE CLIFTON: Yes, and I -- and I think  
18 what I heard Mr. Conover's response to cover was only  
19 the three proposals on behalf of the client that he's  
20 here representing.

21 MR. TOSI: Correct. They also -- he also  
22 testified that they have no objection to the support --  
23 that if Proposal 5 were adopted, which calls for  
24 elimination of the bulk tank handler provision, they  
25 would not be opposed to it, and -- but they're -- but

1 they're offering, as far as I understand, alternatives.  
2 You know, if you don't go that far, here's some other  
3 things that maybe you could modify those provisions  
4 with that would restore equity amongst handlers and --  
5 and therefore enhance what we're marketing in the  
6 marketing area.

7 JUDGE CLIFTON: And you obtained all the  
8 information you want from this witness with regard to  
9 that proposal?

10 MR. TOSI: With regard to that. The thing  
11 is, is that these would be -- these are significant  
12 changes to those provisions. They will have an impact.  
13 That's something that we need -- that we have to  
14 address, and I wanted to get as much information on the  
15 record from expert people on what the probable  
16 regulatory impact would be if such things were adopted.

17 JUDGE CLIFTON: And you don't need any more  
18 information from Mr. Conover with regard to the  
19 Proposal Number 5?

20 MR. TOSI: No, I do not.

21 JUDGE CLIFTON: All right. All right. Any  
22 other cross examination? Recross? Redirect?

23 FURTHER REDIRECT EXAMINATION

24 BY MR. ENGLISH:

25 Q With respect to the -- any implications for

1 paperwork for the pool distributing plant receiving  
2 milk from a proprietary bulk tank handler, is it  
3 precisely for that reason that Proposals 11 and 13, as  
4 you stated, could for the convenience of the parties  
5 allow the party that's presently doing the paperwork to  
6 still do it?

7 A Most of it, yes.

8 Q Okay. In which event, there wouldn't be any  
9 increased -- any significant increase regulatory impact  
10 on the pool distributing plants receiving milk from the  
11 proprietary bulk tank handlers, correct?

12 A The increase would be minimal.

13 MR. ENGLISH: That's all I have. Thank you.

14 JUDGE CLIFTON: All right. Thank you.

15 Any other questions for Mr. Conover?

16 (No response)

17 JUDGE CLIFTON: All right. Thank you. You  
18 may step down.

19 (Whereupon, the witness was excused.)

20 JUDGE CLIFTON: Let's -- let's take a 10-  
21 minute break. Please be ready to -- Mr. English?

22 MR. ENGLISH: How about five? Can we do  
23 five?

24 JUDGE CLIFTON: No. I think I need 10.

25 MR. ENGLISH: All right.

1 JUDGE CLIFTON: 9:35.

2 MR. ENGLISH: You win.

3 MR. STEVENS: Your Honor? Your Honor, could  
4 I -- I'm sorry. I was asleep at the switch here. I  
5 need to ask Mr. Conover some questions about the  
6 testimony. I neglected to do so because I thought he  
7 was going to testify on milk pooling, but if you're  
8 finished, if you're finished -- if you're finished,  
9 after you finish with that, I would like to ask him a  
10 question or two.

11 JUDGE CLIFTON: All right. At 9:35, you may,  
12 and Mr. Marshall may, if he has any at that point.

13 MR. STEVENS: That's fine. Thank you, Your  
14 Honor.

15 JUDGE CLIFTON: Off record.

16 (Whereupon, a recess was taken.)

17 JUDGE CLIFTON: Let's go back on record. All  
18 right. We're back on record at 9:36.

19 I just want to mention one thing before we  
20 resume with Mr. Conover's testimony. I have given the  
21 court reporter the lay-out for the transcript, and I  
22 have utilized as a guide Exhibit 1, and Exhibit 1 has  
23 the Pacific Northwest first and that's what I'm doing  
24 with regard to the heading for this case.

25 Even though this case was more about the

1 Western area, I'm saying that the heading is In the  
2 Matter of Milk in the Pacific Northwest and Western  
3 Marketing Areas. So, just so you all know that.

4 All right. Mr. -- who wants to go first?  
5 Did you, Mr. Stevens?

6 MR. STEVENS: Yes.

7 JUDGE CLIFTON: Mr. Stevens, you may cross  
8 examine Mr. Conover.

9 Whereupon,

10 CARL CONOVER

11 having been previously duly sworn, was recalled as a  
12 witness herein and was examined and testified as  
13 follows:

14 MR. STEVENS: Thank you.

15 FURTHER RECROSS EXAMINATION

16 BY MR. STEVENS:

17 Q Mr. Conover, you're appearing here today on  
18 behalf of Dean Foods Company?

19 A Yes.

20 Q And you gave testimony -- you just gave  
21 testimony, you have given previous testimony, have you  
22 not?

23 A I testified.

24 Q Have -- have you given testimony previous to  
25 this time in the hearing?

1           A     No.

2                    JUDGE CLIFTON:  No.

3                    MR. STEVENS:  All right.  Fine.

4                    BY MR. STEVENS:

5           Q     So, this is -- this is the extent of your  
6 testimony?

7           A     Yes.

8           Q     The statement you just put in the record.  As  
9 far as the testimony that you've given, this -- did you  
10 create this testimony?

11          A     Yes, I did.

12          Q     Did you have any assistance in creating the  
13 testimony?

14          A     A degree of editing it, yes.

15          Q     Yes, and who assisted you?

16          A     Mr. English and Wendy.

17          Q     And -- and -- and Wendy, employees of Dean  
18 Foods or Meadow Gold Dairy?  Let me -- let me -- let me  
19 ask it a little different way.

20                    Did -- did any of the employees of Dean Foods  
21 or Meadow Gold assist you in any way in the preparation  
22 of this testimony?

23          A     They had a chance to review the testimony.

24          Q     All right.  Did they talk to you about the  
25 testimony?

1           A     Yes.

2           Q     All right.  And just briefly, your -- the  
3     substance of those conversations, if you care to put on  
4     the record the substance of the testimony, not  
5     specifically what you talked about but you talked about  
6     these proposals, I guess.

7           A     Surely, yes.

8           Q     And -- and -- and what was happening with  
9     respect to Meadow Gold and other -- other parts of  
10    these two Orders, I guess, I'm asking, with respect to  
11    the proposals?

12          A     I -- I talked to them, surely, to get a feel  
13    for what their competitive situation was and what  
14    problems they were having there.

15          Q     And --

16          A     That was -- all right.  On that basis, I  
17    drafted the testimony.

18          Q     And it's a matter of record that you have  
19    extensive experience in milk marketing orders and  
20    implementation and enforcement?

21          A     I have to modestly say yes, I have.

22          Q     We all know you do, sir.  And would -- and  
23    applying that expertise to the information you received  
24    and the assistance of counsel, you prepared this  
25    testimony?

1           A     Yes.

2           Q     Now, just let me ask you this.  You gave a  
3     certain amount of testimony.  All of the testimony was  
4     written by you?

5           A     It was all drafted by me.

6           Q     Personally, by you?

7           A     Yes.  I'm a terrible typist.  I sat there in  
8     front of the computer and beat it out.

9           MR. STEVENS:  That's all I have.

10          JUDGE CLIFTON:  Did you want to talk about  
11     milk pooling?

12          MR. STEVENS:  Well, I know that was what I  
13     was asking earlier and, of course, Mr. Conover told me  
14     that he didn't give testimony about double dipping.

15          BY MR. STEVENS:

16          Q     Did you?

17          A     Yes.  Yes, I believe I did.

18          JUDGE CLIFTON:  Yes.  He had an exhibit that  
19     he put into evidence, and therefore it is fair cross  
20     examination material.

21          MR. STEVENS:  And that's -- my questions were  
22     directed to the entire statement in that regard.  So,  
23     it is a matter of record, and with regard to the entire  
24     testimony.

25          MR. CONOVER:  Well, I -- I thought when I

1 answered your question that when I said I have  
2 testified, I included my entire statement.

3 MR. STEVENS: And I agree, and I agree that  
4 my questions were asked in that regard, and you  
5 answered them in that regard.

6 MR. CONOVER: Okay.

7 JUDGE CLIFTON: All right. So, you -- you're  
8 satisfied?

9 MR. STEVENS: I'm satisfied, and I'm finished  
10 questioning. Yes, Your Honor.

11 JUDGE CLIFTON: Thank you.

12 Mr. Marshall, do you have any need to examine  
13 this witness?

14 MR. MARSHALL: No, Your Honor.

15 JUDGE CLIFTON: All right. Thank you, Mr.  
16 Marshall.

17 Any further questions of your witness, Mr.  
18 English?

19 MR. ENGLISH: No, Your Honor.

20 JUDGE CLIFTON: All right.

21 MR. ENGLISH: Again, I thank you and the  
22 witness and everyone else.

23 JUDGE CLIFTON: You're welcome.

24 You may step down again, Mr. Conover.

25 MR. CONOVER: Thank you.

1 (Whereupon, the witness was excused.)

2 JUDGE CLIFTON: All right. Mr. Marshall, you  
3 would be calling the next witness?

4 MR. MARSHALL: Mr. McBride.

5 JUDGE CLIFTON: Mr. McBride, you may be  
6 seated at the witness stand.

7 MR. McBRIDE: Thank you.

8 MR. MARSHALL: Thank you, Your Honor.

9 We have asked Mr. McBride to testify at this  
10 point, and we would note that he's our only witness as  
11 we presently see a need.

12 JUDGE CLIFTON: All right. Now, I have a  
13 packet of his exhibits. Does the court reporter have  
14 copies?

15 COURT REPORTER: Yes.

16 JUDGE CLIFTON: All right. Let's mark those  
17 first, with your permission, Mr. Marshall.

18 MR. MARSHALL: Yes.

19 JUDGE CLIFTON: Mr. Marshall, I'm going to  
20 indicate what numbers to put on them. Please interrupt  
21 if you want it to be other than what I'm about to say.

22 I'm going to ask that the next number be  
23 assigned, and the next number is 5-6, 56, to the  
24 testimony regarding Proposals Number 3, 4, 6 and 7,  
25 Preamble.

1 (The document referred to was  
2 marked for identification as  
3 Exhibit Number 56.)

4 JUDGE CLIFTON: Exhibit 57 will be Proposal  
5 Number 3, Netting for Supply Plants.

6 (The document referred to was  
7 marked for identification as  
8 Exhibit Number 57.)

9 JUDGE CLIFTON: Proposal 58 will be -- excuse  
10 me. Exhibit 58 will be Proposal Number 4, Cooperative  
11 Pool Plant Changes.

12 (The document referred to was  
13 marked for identification as  
14 Exhibit Number 58.)

15 JUDGE CLIFTON: Exhibit 59 will be Proposal  
16 Number 6, Diversion Limitations.

17 (The document referred to was  
18 marked for identification as  
19 Exhibit Number 59.)

20 JUDGE CLIFTON: Exhibit 60 will be Proposal  
21 Number 7, Netting for Diversions.

22 (The document referred to was  
23 marked for identification as  
24 Exhibit Number 60.)

25 JUDGE CLIFTON: Exhibit 61 will be Proposal

1 Number 8, Transportation and Assembly Credits.

2 (The document referred to was  
3 marked for identification as  
4 Exhibit Number 61.)

5 JUDGE CLIFTON: Exhibit 62 will be Proposal  
6 Numbers 5, 11, 12 and 13, Bulk Tank Handler Issues.

7 (The document referred to was  
8 marked for identification as  
9 Exhibit Number 62.)

10 JUDGE CLIFTON: Exhibit Number 63 will be  
11 Proposals Number 14, 15 and 16, Market Administrator  
12 Proposals.

13 (The document referred to was  
14 marked for identification as  
15 Exhibit Number 63.)

16 JUDGE CLIFTON: I'm going to ask the court  
17 reporter if I've covered everything that you were  
18 handed?

19 COURT REPORTER: Yes, you did.

20 JUDGE CLIFTON: All right. Thank you.

21 Now, because there are so many and because  
22 people have not had an opportunity to read them yet, I  
23 will be very liberal and generous in entertaining any  
24 objections as we go along. In the interest of time, it  
25 is my intention to take them all into evidence now.



1 witness herein and was examined and testified as  
2 follows:

3 JUDGE CLIFTON: Mr. Marshall?

4 MR. MARSHALL: Your Honor, as a preliminary  
5 matter, may I request that Mr. McBride's testimony,  
6 prepared testimony, which has now been entered as an  
7 exhibit, also be read into the record as if read?

8 My reason for that request is simply this.  
9 In the current era, the Department, and I think it  
10 should be commended for this, puts on to the Internet  
11 copies of the transcript. There are search vehicles,  
12 search engines, if you will, within Acrobat Reader  
13 which allow people like myself and others who  
14 participate in these hearings to do quick searches for  
15 subject matters. That will be very useful in doing  
16 briefing.

17 I would offer that opportunity to have Mr.  
18 McBride's testimony as part of the transcript for  
19 search purposes which would not be as easily done if  
20 they were merely exhibits.

21 JUDGE CLIFTON: Now, when you say "read into  
22 the record", are you asking that I instruct the court  
23 reporter to type into the transcript verbatim these  
24 exhibits?

25 MR. MARSHALL: Yes, that is my request, to

1 have them appear as if read.

2 JUDGE CLIFTON: Why didn't we think of that  
3 sooner? That's an excellent technique. I've never  
4 done that before.

5 All right. Is there any objection to that  
6 procedure? Mr. Beshore?

7 MR. BESHORE: Not -- not an objection per se.  
8 The exhibits have tables and tabular materials in them  
9 in part and I -- I don't know how --

10 JUDGE CLIFTON: You --

11 MR. BESHORE: -- that can be handled in the  
12 same manner. I mean, --

13 JUDGE CLIFTON: I think that's up to the  
14 court reporter, you know. He can scan it or he can  
15 type it.

16 MR. BESHORE: Well, the tables haven't been  
17 read by other witnesses and in that manner. I don't  
18 know whether it makes any difference whether they're on  
19 the transcript page or not, but it's a little different  
20 situation than what the situations were when the  
21 testimony's been read.

22 MR. MARSHALL: Your Honor, I would certainly  
23 agree that it would not be appropriate to put in tables  
24 attached to the prepared testimony. I -- such as, for  
25 example, with Exhibit 56. I do note that there are

1 some data within -- in table form in connection with  
2 Exhibit Number 61, I believe, and I believe those can  
3 be put into the transcript as if read.

4 JUDGE CLIFTON: Okay. Let's go through them  
5 one-by-one. With regard to Exhibit 56, is it the  
6 agreement of counsel that I instruct the court reporter  
7 to include in the transcript Pages 1 through 5 but to  
8 exclude the following two pages, which is each  
9 enumerated with a Page 5?

10 MR. VETNE: Yes.

11 MR. MARSHALL: That would be our suggestion  
12 as well, Your Honor.

13 JUDGE CLIFTON: All right. Is there any  
14 objection to that?

15 (No response)

16 JUDGE CLIFTON: All right. Then I'm asking  
17 that the transcript include all of Exhibit 56, with the  
18 exception of the last two pages, as I've indicated.

19 (Insert Exhibit Number 56)

20 JUDGE CLIFTON: Now, with regard to Exhibits  
21 57, 58, 59, 60, if there's no objection, I will  
22 instruct the court reporter to include those words  
23 contained in this exhibits in the transcript as if they  
24 had been read by this witness into the record.

25 Is there any objection to that?

1 (No response)

2 JUDGE CLIFTON: All right. No objection. I  
3 so instruct the court reporter with regard to  
4 preparation of the transcript.

5 (Insert Exhibit Numbers 57 through 60)

6 JUDGE CLIFTON: Now, with regard to Exhibit  
7 61, the only language that is not a complete sentence  
8 is found on Page 5, and it appears to me that would be  
9 easily included in the transcript.

10 Is there any objection to the entirety of  
11 Exhibit 61 appearing in the transcript?

12 (No response)

13 JUDGE CLIFTON: All right. There appears to  
14 be none.

15 (Insert Exhibit Number 61)

16 JUDGE CLIFTON: All right. With regard to 62  
17 and 63, is there any objection to the court reporter  
18 including those exhibits entirely in the transcript?

19 (No response)

20 JUDGE CLIFTON: There is none, and I so  
21 instruct.

22 (Insert Exhibit Numbers 62 and 63)

23 JUDGE CLIFTON: Mr. Marshall, do you happen  
24 to have these documents on a disk that you can give the  
25 court reporter?

1           MR. MARSHALL: Your Honor, we can certainly  
2 make that available. At the present moment, they are  
3 not -- not available entirely on a floppy diskette, I  
4 don't believe, but we can surely do that before we  
5 leave here today.

6           JUDGE CLIFTON: Excellent. Thank you. If  
7 you'll make those arrangements directly with the court  
8 reporter? All right. That's an excellent procedure.  
9 You may proceed.

10                           DIRECT EXAMINATION

11           BY MR. MARSHALL:

12           Q     Mr. McBride, for the benefit of the audience  
13 and other participants, let's review very briefly what  
14 is contained in each of these exhibits.

15                     Earlier in this hearing, there was a lot of  
16 testimony about the alleged impact, economic impact on  
17 Utah dairy producers from -- traced to the Reform  
18 process. You've got a section on Exhibit 56 that runs  
19 from Page 1 over on to Page 3. Is that attempted to --  
20 an attempt to provide our economic analysis of that  
21 issue?

22           A     Yes.

23           Q     And we've heard a number of questions asked  
24 by Mr. Tosi during the hearing about what performance  
25 and pooling standards should be applicable or should be

1 applied in a Federal Order. The materials on Pages 3  
2 through 5, would that be our attempt to lay out in a  
3 consistent way our theory regarding those matters?

4 A Yes.

5 Q Exhibit 57, which relates to Proposal 3,  
6 begins with a section entitled "NDA Opposes Proposal 3"  
7 and proceeds through the first three pages to discuss  
8 and then on Page 4 to summarize NDA's position on  
9 Proposal 3.

10 Beginning at the middle of Page 4 and through  
11 the remainder of that exhibit, you testified about "our  
12 general concern about the sale of pooling rights". At  
13 this point, I'd like to ask some additional questions  
14 regarding the subject of pooling rights.

15 We've heard testimony earlier in this hearing  
16 from the representative of the River Valley Cooperative  
17 that their members pay a 10-cent pooling fee to Dairy  
18 Farmers of America, directly or indirectly. Do we have  
19 information from the field, obtained from members of  
20 the River Valley Cooperative, about the other related  
21 arrangements?

22 A We have heard that -- that --

23 MR. BESHORE: Your Honor?

24 JUDGE CLIFTON: Mr. Beshore?

25 MR. BESHORE: The question has asked for

1 second- or third-level hearsay. We have very little  
2 time to discuss, you know, 25 pages of prepared  
3 testimony, analysis of data, arguments, etc., of Mr.  
4 McBride.

5 To take additional time with hearsay, rumor,  
6 reports from the field about a contract that has been  
7 testified to by principals, one of the principals at  
8 least, and other -- and other folks previously is not  
9 going to help, and in fact, it's going to clutter and  
10 impede our ability to get to the heart of the testimony  
11 in the very limited time we've got.

12 MR. MARSHALL: Can I speak?

13 JUDGE CLIFTON: You may, Mr. Marshall.

14 MR. MARSHALL: Your Honor, first of all, this  
15 is a hearing involving a matter of extremely important  
16 economic and competitive importance to our cooperative.  
17 We have been most considerate, I think, during this  
18 hearing of the priority of witnesses with respect to  
19 producers and expert witnesses, such as Mr. Hollon, who  
20 had to leave.

21 This is our time to put into the hearing  
22 record as much as we can and need to argue from in our  
23 post-hearing briefs.

24 The second point made by Mr. Beshore was -- I  
25 guess his primary point is that this was a hearsay

1 objection. His own witnesses testified as to reports  
2 from their field staff. Now, his own witness had the  
3 opportunity to clarify the contractual relationship  
4 being discussed by Mr. McBride and chose not to do so.  
5 That is their choice.

6 But the reality is that the word is on the  
7 street of exactly what those arrangements are. We have  
8 been told in fact by a principal of the River Valley  
9 Cooperative that Mr. McBride would be presenting  
10 technically hearsay evidence but of the kind that has  
11 been introduced throughout this hearing.

12 JUDGE CLIFTON: All right. Thank you.

13 I have been very tolerant of rumor and word  
14 on the street throughout this hearing. Normally that  
15 would not be considered evidence in a hearing, but I  
16 have allowed it in, and part of the reason I've allowed  
17 it in is protections that are given to proprietary  
18 information make it very difficult for the Secretary to  
19 know what happened in the marketplace.

20 So, I don't know how reliable this  
21 information is. I know we have limited time. I hope  
22 you'll move right along, Mr. Marshall, but I will allow  
23 your witness to answer the questions.

24 MR. MARSHALL: Thank you.

25

1 BY MR. MARSHALL:

2 Q Do you remember the question, Mr. McBride?

3 A Yes. We have heard from, you know, our field  
4 staff that talk to other producers, you know, that, you  
5 know, the producers -- basically River View is paying a  
6 25-cent fee, which 10 cents is being paid by the -- by  
7 the producers.

8 Q And the other 15 cents is paid from whom to  
9 whom?

10 A Be paid by -- you know, from -- as we  
11 understand it, from -- by the cooperative, River View  
12 or River Valley, to -- to DFA.

13 Q It would be paid by the cooperative and/or  
14 the Sorrento plant? Could it be either of those two  
15 that are paying that?

16 A Yes.

17 Q And then, with respect to producers who ship  
18 directly to Sorrento rather than through the River  
19 Valley Cooperative, what have you heard as word on the  
20 street about that arrangement from our field staff who  
21 in turn have talked to Sorrento producers?

22 A They said that Sorrento producers are -- you  
23 know, are also paying an additional 10 cents and that  
24 the Sorrento is also paying an additional -- Sorrento  
25 is paying an additional fee to DFA to have their milk

1 pooled on the Western Order.

2 Q Those are the only questions I have regarding  
3 that. So, let's move on.

4 Proposal Number 4 relates in Exhibit --  
5 discussed in Exhibit 58 relates to the Cooperative Pool  
6 Plant provisions of the existing Order. I notice on  
7 Page 3 of your prepared testimony, there is a suggested  
8 modification to the proposal as outlined in the Hearing  
9 Notice.

10 Would you please read the paragraph towards  
11 the bottom lower half of Page 3 in which that is  
12 discussed?

13 A Beginning with the paragraph that starts,  
14 "Specifically, we suggest the proposal be modified to  
15 reduce the current 35-percent delivery requirement to  
16 10 percent rather than increase to 50 percent. Then a  
17 cooperative such as ours with roughly a quarter of the  
18 milk being pooled in the market could utilize this  
19 provision. As it stands, NDA would have to deliver 35  
20 percent of our milk to distributing plants to utilize  
21 this provision. If we are 25 percent in the market in  
22 a given month, then we'd have to deliver 35 percent of  
23 our 25 percent which would be 8.75 percent of the  
24 entire market to milk, but if a combined Class 1 to 2  
25 utilization of the Western Order is only 25 percent in

1 the market, then in order to utilize this provision  
2 today, NDA would therefore need to deliver roughly a  
3 third of our needs to a pool distributing plant."

4 Q Because this may be a subject that would  
5 involve cross examination, I'm going to ask you to read  
6 the remainder of this section, the next several  
7 paragraphs.

8 A All right. "NDA supplies one-third of the  
9 Class 1 and 2 market in the Pacific Northwest Marketing  
10 Area, and we would be very comfortable with the one-  
11 third share of the Western Order's Class 1 and 2  
12 market. But the fact is, is that to achieve that level  
13 and to be able to use the cooperative pool plant  
14 provision with even the 35-percent requirement would  
15 necessarily require us to displace others who presently  
16 supply those Class 1 and 2 plants.

17 There are two very real problems with that.  
18 First, the major pool distributing plants in the  
19 Western Order Market are today all tied up with long-  
20 term single-source supply contracts with DFA. Second,  
21 even if that were not the case, the only way we could  
22 achieve the 25-percent market share would be to cut  
23 price. Doing so would almost certainly create  
24 disorderly marketing conditions.

25 Given that even the present 35-percent

1 provision is unrealistic for us to meet in the Western  
2 Order, we are/would support reducing the percentage.  
3 We suggest 10 percent to be the new percentage for two  
4 reasons. The first, it is the number used in the  
5 supply plant provision in the Upper Midwest Order which  
6 has similar class utilization to the Western Order, and  
7 more importantly, it matches the 90-percent diversion  
8 limitations in the Western Order which should be  
9 retained as we will demonstrate further in our  
10 discussions of Proposal Number 6."

11 Q Thank you, Mr. McBride.

12 Your exhibit of prepared testimony then  
13 proceeds to document our understandings of the nature  
14 of existing contracts in the Salt Lake City and Boise  
15 markets and how those contracts worked, to the best of  
16 our knowledge. Is that your testimony --

17 A Yes.

18 Q -- regarding that?

19 Exhibit Number 59 relates, of course, to the  
20 diversion limitations that are being proposed in this  
21 Order.

22 A I would like to make one correction on Page 1  
23 of this exhibit.

24 Q Please.

25 A Down on the last paragraph, I have the 150

1 million millions. So, it should just read a 150  
2 million and cross out the six zeros.

3 Q Thank you, Mr. McBride.

4 I believe on Page 1, you have in italics a  
5 request that official notice be taken of the  
6 publication entitled "Milk Production" which is  
7 published monthly by the National Agricultural  
8 Statistics Service.

9 MR. MARSHALL: Your Honor, I believe that  
10 official notice of that has already been taken.

11 JUDGE CLIFTON: Thank you.

12 BY MR. MARSHALL:

13 Q With respect to the general subject of  
14 diversions, your testimony includes information about  
15 disorderly marketing conditions. I'd like to ask you  
16 one additional question to put into the record some  
17 evidence.

18 You heard testimony earlier in this hearing  
19 that some Sorrento direct shipping producers, some  
20 producers who have been shipping directly to the  
21 Sorrento cheese factory in Nampa, Idaho, had considered  
22 building a bottling plant.

23 Have we heard those rumors as well?

24 A We heard the rumors that there is a group  
25 trying to build a bottling plant so they'd have a way

1 for them to become pooled on to the Western Order.

2 Q If that were to occur, what would be the  
3 impact on the West Farms Food Plant, bottling plant, at  
4 Boise, Idaho?

5 A Well, you'd be very disruptive in whatever  
6 area they built that bottling plant because that would  
7 be additional sales that would have to be taken away  
8 from existing customers.

9 Q Would that constitute, in your opinion,  
10 disorderly marketing conditions?

11 A Yes.

12 Q With respect to diversion limitations, what  
13 has been the philosophy of Northwest Dairy Association  
14 in the Pacific Northwest Order as proposed to the  
15 Department? In fact, let me break that down.

16 In the Pacific Northwest Order today, is it  
17 true that effectively there are -- the diversion limits  
18 permit all the milk within the Order area to be pooled?

19 A I believe so.

20 Q And do the cooperatives within the Order area  
21 all work together to ensure that all of that milk has  
22 been pooled?

23 A Yes. But we have to combine a letter to the  
24 other cooperatives to make sure that all the milk in  
25 the markets or at least members of the cooperative's

1 milk can be pooled.

2 Q There's a special provision of the Pacific  
3 Northwest Order called a "cooperative reserve supply  
4 unit". Could you describe that and why it was put into  
5 the Order?

6 A That -- that's a provision that was put in to  
7 where a manufacturing plant -- a co-op could deliver to  
8 a manufacturing plant its -- its entire supply of milk  
9 and still have the milk pooled on the -- on the Order.  
10 There was a co-op that was supplying an Olympia cheese  
11 plant in Washington that had no Class 1 sales, and, you  
12 know, the provision was put in that they could have  
13 their milk pooled without having any -- any performance  
14 standards to the -- to the Class 1 market, except there  
15 was also provision in there, a call provision which  
16 required if milk was needed in Class 1 market, that  
17 they would -- you know, they would have to deliver.

18 Q And that call provision would require the  
19 Market Administrator to make a request to the  
20 cooperative reserve supply unit if there was a  
21 demonstrated need by any distributing plant for the  
22 milk, is that correct?

23 A Correct.

24 Q You made a reference -- so the record is  
25 clear, you made a reference to an Olympia cheese plant.

1 Is the name of that company that you're referring to --  
2 was -- do I understand correctly you're referring to a  
3 plant that once was known as the Olympia Cheese  
4 Company?

5 A Yes.

6 MR. MARSHALL: Turning to Exhibit 61,  
7 Proposal Number 8, Your Honor, we indicated earlier in  
8 this hearing when we first reconvened this morning that  
9 we had some -- we were going to be making an objection  
10 as to some of the testimony yesterday regarding  
11 Proposal Number 8.

12 MR. McBRIDE: Excuse me. Doug, did we cover  
13 Number 60?

14 MR. MARSHALL: Thank you for that correction.

15 BY MR. MARSHALL:

16 Q Mr. McBride, Exhibit Number 60 relates to  
17 Netting for Diversions and Proposal Number 7. Is there  
18 anything you'd like to add to your prepared testimony  
19 there?

20 A No.

21 Q Now, with respect to the proposals so far and  
22 these subjects of pooling standards, are there any  
23 corrections that you had wanted to note in the record  
24 of your exhibit, any corrections of your exhibit that  
25 we didn't discuss?

1           A     I think back on Proposal -- Exhibit Number  
2     56, the second line from the bottom, it says,  
3     "Distributing plants in those two Orders". That should  
4     read "in those two areas".

5           Q     Again, what -- would you point that out again  
6     for the record?

7           A     That was Exhibit 56, Page 1, second line from  
8     the bottom. It should read "Distributing plants in  
9     those two areas".

10          Q     Thank you.

11                     Any other corrections on these exhibits --

12          A     No.

13          Q     -- regarding pooling standards?

14          A     No.

15          Q     All right. Turning to Exhibit 61.

16                    MR. MARSHALL: Your Honor, so that we can  
17     provide some background information with respect to the  
18     objection that will be forthcoming, I would like to ask  
19     Mr. McBride to actually read --

20                    JUDGE CLIFTON: Mr. McBride, let me hear Mr.  
21     Beshore's suggestion here.

22                    MR. BESHORE: My suggestion is that the  
23     testimony's in the record. The objection can be made  
24     on brief, and the clock is winding down very fast, and  
25     I -- I've got -- if we're going to all make the 1:00

1 plane we're on, I've now got, you know, less than an  
2 hour to cross examine, assuming I can read all Mr.  
3 McBride's testimony, you know. All this testimony and  
4 objection to -- to proposals, and I want to move it  
5 along. I don't think he has to read it. We can brief  
6 these objections and go.

7 JUDGE CLIFTON: Is there anyone in the room  
8 who does not have a copy of Exhibit 61?

9 (No response)

10 JUDGE CLIFTON: Mr. Marshall, everyone has  
11 it. If you would merely call the witness's attention  
12 to the portion that's important, it won't be necessary  
13 for him to read it to us. But I do appreciate your  
14 highlighting the crucial parts.

15 MR. MARSHALL: Thank you, Your Honor.

16 What I would like to do is make the motion  
17 for the record then with respect to our objection to  
18 testimony regarding the subjects, all subjects relating  
19 to balancing costs as a factor in an assembly credit.  
20 I would like to speak to that objection and discuss the  
21 evidentiary problems that it presents.

22 JUDGE CLIFTON: So, -- so, you -- you want to  
23 interrupt your client's testimony in order to make the  
24 objection?

25 MR. MARSHALL: Right.

1 JUDGE CLIFTON: You may proceed.

2 MR. MARSHALL: I will simply cite to you our  
3 prepared testimony on Page 2 of Mr. McBride's Exhibit  
4 61 as to what the traditional concept of assembly is in  
5 our opinion, and then I would like to speak further to  
6 that.

7 JUDGE CLIFTON: Is it only Paragraph 3 that I  
8 need to read?

9 MR. MARSHALL: All of it would be helpful,  
10 Your Honor, but that's the key point.

11 JUDGE CLIFTON: All right. Let's go off  
12 record just a moment.

13 (Pause to review document)

14 JUDGE CLIFTON: Back on record. All right.  
15 We're back on record at 10:12.

16 You may proceed with your objection, Mr.  
17 Marshall.

18 MR. MARSHALL: Your Honor, the objection is  
19 to all testimony and evidence regarding balancing costs  
20 as a factor in assembling credits. The reason for that  
21 objection is that it's outside the scope of the Hearing  
22 Notice, and I move to strike all such testimony and  
23 evidence.

24 In speaking to that objection and motion, I  
25 point out several things. First, that, as Mr. Beshore

1 indicated, the hour is late, and we spent a lot of time  
2 during this hearing simply because -- in cross  
3 examination of his witnesses simply because there was  
4 no advance copy of DFA's testimony provided to NDA.

5 As a result, we were unaware until yesterday  
6 afternoon that what is typically called in Federal  
7 Orders a balancing fee was going to be introduced into  
8 this hearing record as evidence in support of an  
9 increased assembly credit.

10 The two are different concepts, in my  
11 opinion, as an advocate, and to ensure that I was  
12 correct last evening, I can represent to you that last  
13 evening, I went to the final rule, which is the most  
14 current statement that I can think of of Federal Order  
15 philosophy, and learned the following.

16 First, that there was approved in the final  
17 rule an assembly and procurement credit in the Upper  
18 Midwest, which has been cited by DFA as some precedent  
19 or parallel for their proposal. There was no mention,  
20 I represent to you that there was no mention in the  
21 final rule of any balancing costs as a justification  
22 for that assembly credit.

23 In contrast, in the Northeast Market,  
24 balancing credits were proposed but denied as it turned  
25 out, but there was a lot of discussion in the final

1 rule regarding that proposal for a balancing credit.  
2 Part of that discussion was an analogy -- was a -- was  
3 with respect to the proponents in that proceeding  
4 arguing by analogy to assembly credits, which were  
5 described as, and I quote, "the cost of milk assembly  
6 and the movement of milk". That comes from Page 22 of  
7 the Internet version of the final rule under the  
8 heading "Regional Issues".

9 Your Honor, as further background, let me  
10 point out that the assembly credits in that Order and  
11 indeed the proposed balance -- in the Upper Midwest  
12 Order and indeed the proposed balancing credits in the  
13 New England -- correction -- the Northeast Market were  
14 then paid to plants for balancing services. That is  
15 the way a balancing credit should work.

16 What I'm about to make would be argument, but  
17 it also is supportive of the reason why this is outside  
18 the Hearing Notice. The cost of balancing the market  
19 incurred by balancing plants should be returned to the  
20 plants which provide that service, not to the producers  
21 who cause the balancing problem, as would be the case  
22 if -- if the proposal is adopted and if the costs of  
23 running a balancing plant are included within the  
24 assembly credit.

25 Now, I have said what I wished to say. I'd

1 be happy to answer any questions, but I must say also  
2 that the decision that you make will have a tremendous  
3 impact on how we do the evidence for this proceeding.

4 I might note that there's been discussion of  
5 a full hearing on balancing credits for the Northeast  
6 Market. There's a study, I guess, I'm told, by Mr.  
7 Ling of the Department of Agriculture, I believe it's  
8 the Rural Cooperative Business Service, about supply --  
9 the costs to a balancing plant, a study, which I've not  
10 read but which would be evidence in this hearing if we  
11 were to consider all of that.

12 There has been no opportunity for us even to  
13 put into the record the kind of study --

14 MR. BESHORE: Your Honor?

15 MR. MARSHALL: -- that we do routinely within  
16 Northwest Dairy Association with respect to our costs  
17 of balancing simply because this was not noticed in the  
18 hearing.

19 MR. BESHORE: Your Honor, the evidence is in  
20 the record without objection from yesterday. Every  
21 minute that I spend or anybody else spends on this  
22 right now, I'm cutting my own throat from being able to  
23 examine Mr. McBride on the -- on the testimony -- on  
24 the proposals that are part of this hearing record  
25 because we've got a finite amount of time.

1           Mr. Marshall's talking about the ability to  
2 bring in and strike down evidence of studies that  
3 aren't even in the record.

4           MR. STEVENS: Your Honor?

5           JUDGE CLIFTON: Mr. Vetne? I'm sorry. Mr.  
6 Stevens?

7           MR. STEVENS: Your Honor, I -- I -- I don't  
8 want to lengthen the time we discuss this. I think  
9 that the matter that we're discussing now is a matter  
10 that is, in my opinion, and I'll only offer it as that,  
11 certainly not the Secretary's opinion, but in my  
12 opinion, we're talking about a semantic difference.

13           If -- if it's a matter of semantics, if it's  
14 a matter of argument, it's a matter of briefing, and in  
15 terms of what evidence someone would have presented or  
16 wouldn't have presented, I understand the point that's  
17 made, but we are, it seems to me, not moving the record  
18 forward by discussing this at this point, and I  
19 appreciate Mr. Beshore's concern that we have adequate  
20 time for cross examination.

21           It is a matter, I think, clearly for  
22 briefing, not something that we should be involved with  
23 in the hearing. So, I would also add, I hope, in  
24 assistance to the parties.

25           JUDGE CLIFTON: Mr. Vetne?

1           MR. VETNE: Yes, Your Honor. At least in one  
2 prior occasion in this hearing, the hearing officer has  
3 ruled that evidence concerning a proposal was beyond  
4 the scope of the Notice.

5           I just wanted to join Mr. Marshall in -- in  
6 responding to the -- the concept of assembly and  
7 balancing credits being different. As a matter of  
8 fact, the history of those goes back to 1985. There  
9 was a hearing in the Southeast for balancing credits in  
10 1987, and there were subsequent hearings in the Upper  
11 Midwest for assembly credits. Those are terms of art  
12 which to me, and I believe to others, certainly Mr.  
13 Marshall, mean very different things and generate the  
14 need to bring very different evidence.

15           I do think that balancing is different than  
16 assembly, and for that reason, you know, and there's  
17 plenty -- there was good reason, as we found out, not  
18 to object previously, to simply allow the evidence to  
19 proceed. I don't think because we have to catch a 1:00  
20 plane, that we ought to give Mr. Marshall less time to  
21 present his case than DFA.

22           Thank you.

23           MR. BESHORE: We're not presenting his case.  
24 That's the problem. Balancing is not a term of art in  
25 the system, I will represent to you, in spite of any

1 statements by other learned counsel. It has never been  
2 adopted as a provision, as a term of art in any Federal  
3 Order by the Secretary, period. There is no definition  
4 by the Secretary of balancing anywhere.

5 JUDGE CLIFTON: Well, I am going to rule.  
6 First of all, I don't strike any of the evidence that's  
7 been presented. The motion to strike the evidence of  
8 Mr. Hollon is untimely.

9 Furthermore, even when I find that things are  
10 beyond the scope of the hearing, that is not  
11 necessarily good grounds to strike the information from  
12 this record.

13 I do, however, find that the concept of  
14 balancing is different from assembly and balancing has  
15 more to do with the idea of the fluctuations in flow,  
16 and there is not adequate notice in Proposal Number 8  
17 that a balancing credit would be considered here.

18 I rule that the request for an assembly  
19 credit does not include a credit based on balancing and  
20 that therefore the concept of including in the assembly  
21 credit a credit related to balancing is beyond the  
22 scope of this hearing.

23 Mr. Beshore?

24 MR. BESHORE: Yes. Thank you.

25 Your Honor, we take extreme exception to that

1 ruling and note that, of course, according to the Rules  
2 of Practice, the ruling is subject to review by the  
3 Secretary in the -- in the decision-making process, and  
4 that's all I'm going to say at this point. I'm not  
5 going to argue it because, as I said, I'm -- I've been  
6 -- I've been painted into the corner of shooting myself  
7 in the foot or cutting off my own time by having to  
8 deal with this dilatory and late objection.

9 JUDGE CLIFTON: Well, I know everyone would  
10 like to get out of here, but, you know, this hearing  
11 doesn't have to end at 11. I'd like for it to end as  
12 quickly as we can, but, you know, we're here for as  
13 long as this takes.

14 Mr. Marshall?

15 MR. MARSHALL: Thank you, Your Honor.

16 Just as a further matter, I hope that there  
17 was not a ruling -- if there was a ruling there that  
18 yesterday's testimony should have been objected to  
19 then, I would simply ask that consideration be given by  
20 the Secretary and by you to the expedited pace of these  
21 proceedings and the attempts to let evidence in so that  
22 objections could be raised at a later time rather than  
23 taking time during yesterday's testimony, when, as it  
24 will be recalled, Mr. Hollon was anxious to leave to  
25 meet a prior commitment, and you've indicated earlier

1 in this portion of our testimony that you will allow  
2 late objections, and I would hope you would do the same  
3 in this case as well.

4 JUDGE CLIFTON: That's true, and I would deny  
5 your motion to strike, even if it had been made  
6 contemporaneously with the problem.

7 MR. MARSHALL: I can understand that, and I  
8 do appreciate the ruling, and we shall now proceed.

9 BY MR. MARSHALL:

10 Q Mr. McBride, it's not necessary to cover the  
11 material we had discussed we would cover regarding  
12 balancing as a theory, in view of that most recent  
13 ruling.

14 Your next two exhibits, Exhibits 62 and 63,  
15 are fairly short. Is there anything about those that  
16 you would like to point out or correct?

17 A No corrections. It just says that we're  
18 going to oppose the elimination of Proposal Number 5,  
19 proprietary bulk tank handlers, and that on 11 and 13,  
20 we will take a look and decide if we will support those  
21 on brief.

22 MR. MARSHALL: Your Honor, I have no further  
23 questions at this time, and Mr. McBride is available  
24 for cross examination.

25 JUDGE CLIFTON: I'd like Mr. McBride to

1 clarify what he meant when he said that "we oppose the  
2 elimination of Number 5". I can read his statement and  
3 it's clear, but what he just said was not clear to me.

4 What is your client's or your -- your  
5 company's, your co-op's position with regard to  
6 Proposal Number 5?

7 MR. McBRIDE: We will oppose the elimination  
8 of -- of the provision.

9 JUDGE CLIFTON: All right. Thank you.

10 MR. MARSHALL: Your Honor, one more matter.

11 BY MR. MARSHALL:

12 Q Mr. McBride, you've heard a request earlier  
13 in this hearing for adoption on an emergency basis of,  
14 I think, all proposals. What is NDA's position with  
15 regard to the need for emergency adoption of Proposals  
16 3 through the end, other than -- other than 10?

17 A 1 and 10, we believe it needs to be done on  
18 an emergency basis. The -- the other proposals, we  
19 think, should be done on, you know, a regular basis  
20 because of everything that's, you know, gone on at the  
21 hearing. We're going to need to have time to see a  
22 recommended decision and make our comments on that.

23 MR. MARSHALL: Thank you. No further  
24 questions at this time, Your Honor.

25 JUDGE CLIFTON: All right. Thank you, Mr.

1 Marshall.

2 Who would like to begin cross examination?

3 Mr. Beshore?

4 MR. BESHORE: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. BESHORE:

7 Q Mr. McBride, in the -- in the earlier session  
8 of this hearing with respect to Order 124, you were a  
9 witness, and you were at that hearing, correct?

10 A Yes.

11 Q Pacific Northwest hearing of which this is --  
12 this is a continuing part.

13 Dairy Gold has -- Northwest Dairy Association  
14 has what, 60 percent or so of the milk pooled in that  
15 Order or is it more than that?

16 A Approximately, yes.

17 Q Is it -- is that -- is that actually on the  
18 low side?

19 A No.

20 Q Okay. And Pacific Northwest Order, Dairy  
21 Gold's position is that there's too much milk being  
22 pooled. DFA was pooling, paper pooling milk from Idaho  
23 and you wanted to tighten it up, isn't that correct?

24 A We wanted to --

25 Q Tighten the Order up, lower the diversion

1 limitations, add the touch-base provision, keep more  
2 milk off of that pool, isn't that correct?

3 A That was the proposal.

4 Q Yeah. That was -- that was Northwest Dairy's  
5 position in that hearing, correct?

6 A Correct.

7 Q Right. There was -- you wanted to reduce the  
8 diversion limitations from 90 -- 90+ percent to 80  
9 percent, correct?

10 A Correct.

11 Q Keep Idaho milk off of that pool, so that  
12 your utilization would be kept up, correct?

13 A Correct.

14 Q All right. Your utilization there is already  
15 in the 30-percent area, it's been running, correct?

16 A Yes.

17 Q And you want it to be higher, so your 60-  
18 percent share has a higher blend price up there,  
19 correct?

20 A We want to maintain the 30 percent.

21 Q Yeah. Or increase it with additional touch  
22 base. You want every producer up there to touch base  
23 two times a month during designated months, isn't that  
24 correct?

25 A Yes.

1           Q     And that'll make it more difficult for people  
2     to pool milk up there or at least more expensive for  
3     anybody that wants to, isn't that correct?

4           A     They just have to perform the standards to  
5     pool the milk.  If they perform, you know, --

6           Q     Right.  Performance standards.  It would be  
7     more difficult or at least more expensive if they've  
8     got to go two times a month to the pool plants instead  
9     of one, isn't that correct?

10          A     That -- that'd be correct.

11          Q     Right.  So, by the way, DFA was a team player  
12     in that -- in that Order and supported the -- the  
13     proposals of the Federation, even though it was going  
14     to in effect bump its own milk off of that pool, isn't  
15     that correct?

16          A     DFA was supportive of the issues.

17          Q     Right.  And it knew and you knew and  
18     everybody knew that that meant that that was going to  
19     adversely impact DFA's ability to pool milk up in that  
20     Order, isn't that correct?

21          A     Adversely pool milk from outside the Order on  
22     the Order?

23          Q     Yes.

24          A     Yes.

25          Q     Milk from Idaho, you felt -- that's outside

1 the Order as far -- the marketing area of the Order,  
2 correct?

3 A Correct.

4 Q Okay. Now, of course, Northwest Dairymen, to  
5 the extent that you don't pool Idaho milk on Order 135,  
6 you pool it on 124, do you not?

7 A Say that again.

8 Q You have milk in Idaho, --

9 A Yes.

10 Q -- and if you don't pool it on 135, you pool  
11 it on 124, isn't that correct? If your Idaho milk is  
12 not pooled on 135, it would be pooled on 124, isn't  
13 that correct?

14 A Not necessarily. Why --

15 Q Where? Would you just not pool it at all?

16 A If we had milk in --

17 Q Idaho, and you don't pool it on 135 for any  
18 reason, you'd pool it on 124, would you not?

19 A I don't know. We've never -- you know, we  
20 keep the milk in the Southwestern Idaho/Eastern  
21 Oregon -- the Eastern Oregon pooled on the Western  
22 Order.

23 Q Okay.

24 A We have not pooled milk from Idaho on to  
25 the --

1 Q On to --

2 A From -- from Southwest Idaho. We have  
3 producers in Idaho, --

4 Q Right.

5 A -- up in the Panhandle, that are pooled on  
6 the --

7 Q That are pooled --

8 A -- Pacific Northwest Order.

9 Q Okay.

10 A Now, if -- if --

11 Q Now, your position is, with respect to 135,  
12 that the present pooling provisions, which have  
13 generated 17-percent utilization, should be maintained  
14 or reduced, correct, so that more milk could be pooled,  
15 at least as much as being pooled now or in fact more  
16 milk be pooled on Order 135, isn't that correct?

17 A We believe the performance standards that are  
18 there now --

19 Q Right.

20 A -- should be -- you know, should be adequate  
21 to keep the milk that's currently pooled, you know, on  
22 -- on the -- on the market.

23 Q Well, you've gone beyond that, have you not,  
24 Mr. McBride? You've proposed reducing them, so that  
25 more milk can be pooled on Order 135 and the

1 utilization reduced from 17 percent, isn't that  
2 correct?

3 A I'm not sure.

4 Q Doesn't your testimony, for instance, and  
5 I've only had, you know, a few minutes to peruse  
6 Exhibits 56 through, you know, 62, but you -- you  
7 propose, for instance, reducing the supply plant  
8 percentage from 35 percent to 10 percent, don't you?

9 A Not the supply plant.

10 Q The cooperative supply plant, cooperative  
11 manufacturing plant provision?

12 A We are doing that, yes.

13 Q You're -- you're proposing --

14 A We are proposing that.

15 Q Yeah. You're proposing to -- to make it --  
16 to reduce the performance standards of 135 in order to  
17 make it easier for dairy -- Northwest Dairy Association  
18 or anyone else to pool milk through a cooperative  
19 supply plant, isn't that correct?

20 A We are making it more -- that is correct,  
21 yes.

22 Q Yes. Okay. Even though there's no  
23 cooperative supply plant presently on the Order 135,  
24 isn't that correct?

25 A Correct.

1           Q     But if you could make -- if you had a 10-  
2     percent pooling provision for a cooperative supply  
3     plant in -- in Order 135, as you've testified, you  
4     might well consider making one of your plants in Idaho  
5     a cooperative plant?

6           A     It would be an option.

7           Q     Right. And that would give you an option to  
8     pool additional volumes of milk if they were under your  
9     control or available to you through other organizations  
10    on Order 135, isn't that correct?

11          A     If we met the standards.

12          Q     If you met the -- the -- the reduced standard  
13    as you propose it to be reduced, correct?

14          A     Yes.

15          Q     Okay. Why is it, Mr. McBride, that what's  
16    good for the goose on Order 124 is not good for the  
17    gander in Order 135?

18          A     In 124, we want to make sure that all the  
19    milk that's in the marketing area is remaining pooled  
20    and to keep the outside milk, distant milk, you know,  
21    from being pooled, paper pooled into the market -- into  
22    the -- into the Pacific Northwest Order, you know,  
23    without having, you know, -- without actually coming  
24    into the -- into the -- serving in the bottled plants.

25          Q     Okay. So, it's your philosophy that the

1 definition -- that the geographic confines of the  
2 marketing areas are what should define what milk is  
3 going to be pooled in each Federal Order?

4 A No.

5 Q Isn't that what you just said with respect to  
6 124, that you want the milk within the marketing area  
7 of 124 pooled but milk that's located geographically  
8 outside not to be pooled?

9 A We want the milk that's, you know, located  
10 outside, if it's going to perform, you know, we are not  
11 going to keep it out.

12 Q But the proposals you made to tighten the  
13 pool in Order 124 are to make it harder for milk  
14 outside the marketing area to be pooled on an Order,  
15 milk that's being pooled there now, isn't that correct?

16 A It's just got to perform. We don't -- you  
17 know, we don't -- we haven't -- we've gone to here, and  
18 we haven't seen any decision.

19 Q But that's your proposal in that Order?  
20 That's your philosophy?

21 A We have supported the proposals that, you  
22 know, was presented by Northwest Milk Marketing  
23 Federation.

24 Q Okay. Now, what -- what's Northwest Dairy  
25 Association's -- approximately how much of the current

1 Order 135 pool do you -- do you represent?

2 A I believe I stated 25 percent.

3 Q Okay. Let me -- let me look at Exhibit 56  
4 for a minute. You're not suggesting in your analysis,  
5 in your critique, in your critique of the testimony of  
6 the Utah Dairy Farmers, -- I'm sorry. 56.

7 In your critique of the testimony of the Utah  
8 Dairy Farmers, you're not suggesting that their -- that  
9 they would not be better off as they testified if the  
10 utilization of the Utah -- of the Order 135 was closer  
11 now to what it was pre-reform than it is, are you?

12 A Say that again.

13 Q Well, their testimony was that their -- that  
14 they have a utilization -- Class 1 utilization of 30-  
15 40, nearly 50 percent prior to the year 2000, correct?

16 A Correct.

17 Q And now, they have a utilization of 17  
18 percent in most recent months, correct?

19 A Correct.

20 Q And that that reduction in Class 1  
21 utilization has reduced the price that they would  
22 otherwise receive, correct?

23 A If you look just at Class 1 utilization,  
24 correct.

25 Q Okay. So that, as far as that's concerned,

1 they were correct in their analysis of -- of the effect  
2 of -- of the changes in the Orders since January 1,  
3 2000, correct?

4 A Looking at Class 1 utilization, yes.

5 Q Okay. Now, in -- in what -- are you  
6 contending in your testimony that the Class 3 price is  
7 the same -- the same level with the changes in formula  
8 that were made in the reform decision as it was pre-  
9 reform?

10 A I believe the statement says in 1999, the --  
11 which is, you know, pre-reform, the DFP price and the  
12 -- using the NASS commodity prices into the formula,  
13 the prices were similar.

14 Q Okay. There's a whole -- without going into  
15 it, there's a whole record of the Class 3 and 4  
16 proceeding which analyzed -- I mean, Congress said in  
17 essence in some legislation, we think these prices need  
18 to be relooked at by the Secretary because it looks  
19 like they're lower to us than they were before. You're  
20 aware of that legislation that required a hearing  
21 that's still on -- in process?

22 A Yes.

23 Q Okay. Exhibit 57 addresses Proposal 3,  
24 Netting for Supply Plants, and again having not had a  
25 chance to -- to read Exhibit 57, I gather your position

1 is that there should be no net shipments language  
2 adopted in Order 135, correct?

3 A Correct.

4 Q Okay. And you believe that it's appropriate  
5 to pool milk on the basis of performance that's  
6 represented by taking milk from a supply plant or a --  
7 would this apply to cooperative manufacturing plants as  
8 well? Your -- your concept here of opposing net  
9 shipments. Would you oppose net shipments being  
10 applicable to cooperative plants as well?

11 A Net shipments is Proposal 3. So, it applies  
12 to supply plants.

13 Q But let's talk about it in concept. Would  
14 you oppose net shipments applying to cooperative supply  
15 plants?

16 A We haven't -- you know, we haven't addressed  
17 the issue.

18 Q Okay. Well, as far as supply plants are  
19 concerned, you oppose it. So, that means that in your  
20 philosophy of pooling, it would be adequate performance  
21 for a supply plant to haul milk to a distributing  
22 plant, pump it in, pump it back out on to the same  
23 truck and take it back to the cheese plant, correct?

24 A If you're reading the other performance  
25 standards, yeah. Yes, you're correct.

1           Q     But -- but we're -- the -- the purpose of  
2     this hearing and the proposal is to define what those  
3     performance standards are, and your definition that  
4     you're advocating is one which would define as  
5     performance the -- the delivery of milk to a plant --  
6     delivery of milk from a supply plant to a distributing  
7     plant, pumping it in, pumping it back out on to the  
8     same truck and taking it back to the supply plant. You  
9     would define that as performance for the market, would  
10    you not?

11           A     Yes.

12           Q     Has -- with respect to Proposal 4 and Exhibit  
13    58, has Northwest -- Northwest Dairy Association ever  
14    pooled -- used its plants as cooperative plants under  
15    Order 135? Have you ever used -- used the provision?

16           A     The provision is not there currently. That  
17    was part of the hearing in December to include that  
18    provision --

19           Q     I'm sorry.

20           A     Excuse me.

21           Q     135.

22           A     We have not. Excuse me.

23           Q     Okay. And may I ask why you have not? Maybe  
24    you say -- maybe you say so in the testimony, which I  
25    haven't had the chance to digest, but --

1           A     We have not used -- you know, we -- just  
2     putting -- not used that provision to this point.

3           Q     So, assuming that -- let me just ask this.  
4     Assuming -- in your proposal to reduce the language --  
5     to reduce the -- the plant requirement to -- to 10  
6     percent rather than 50 percent, there is no net  
7     shipment language in the Order at the present time  
8     relating to cooperatives -- cooperative pool plants,  
9     correct?

10          A     Correct.

11          Q     Therefore, your proposal to reduce it to 10  
12     percent, if it were adopted, would mean that a  
13     cooperative pool plant with a 10-percent performance  
14     requirement could meet the pooling standards of the  
15     Order by delivering its 10 percent to a distributing  
16     plant, pumping it in, pumping it out, and bringing it  
17     back to the cooperative manufacturing plant, correct?

18          A     Correct.

19          Q     Does the Order language allow cooperative  
20     manufacturing plants to pool their milk through direct  
21     9(c) deliveries to distributing plants? Do you know?

22          A     I'm not sure.

23          Q     Okay. I've noted somewhere in one of your  
24     exhibits, I don't know where, you'll remember it, that  
25     you've made the -- made the point that there's no

1 evidence in the proceeding that distributing plants in  
2 Order 135 are lacking supply Class 1 -- supply of milk  
3 for Class 1 needs, correct?

4 A Yes.

5 Q Okay. Now, I think your -- I know. I know  
6 that Northwest Dairy -- Mr. Marshall, the -- the  
7 skilled advocate that he is and representative of your  
8 association, I think, has engaged in the time-honored  
9 tactic of advocacy that I call erecting a strawman and  
10 striking it down as a way of bolstering a case here  
11 with that point, and I wonder if you can tell me, isn't  
12 it true that Mr. Hollon in the proposals for DFA never  
13 made it a point as a part of advocating those proposals  
14 in his testimony that there was a problem getting milk  
15 to the Class 1 market in this Order, isn't that  
16 correct?

17 A That he never asked -- that there was not a  
18 problem?

19 Q No. That he did not -- he did not cite  
20 difficulties in getting milk to the Class 1 market as  
21 the reason why any of these changes need to be made.

22 A Okay.

23 Q Okay. The -- in fact, the premise of DFA's  
24 position has been that the producers who are supplying  
25 the Class 1 market are not being appropriately rewarded

1 with a -- with a share of those returns because the  
2 utilization of the pool has been diluted by, you know,  
3 loose pooling provisions. Isn't that what he testified  
4 to?

5 A Yes.

6 Q Okay. So, all the testimony about -- and  
7 Doug very skillfully at cross examination raised the  
8 issue and then struck it down about whether or not  
9 there was a problem in getting milk to Class 1 in this  
10 Order really is not an issue as far as DFA's proposals  
11 are concerned, if you look at -- at the testimony  
12 presented in -- in principle in support.

13 A Okay.

14 MR. MARSHALL: Would you like a stipulation  
15 to that effect, Mr. Beshore?

16 MR. BESHORE: I'd love one.

17 MR. MARSHALL: Stipulation that there is no  
18 evidence --

19 JUDGE CLIFTON: Closer to the microphone,  
20 please, Mr. Marshall.

21 MR. MARSHALL: Stipulation that there's no  
22 evidence in the record --

23 JUDGE CLIFTON: You're not close enough to  
24 it.

25 MR. MARSHALL: Be happy to offer a

1 stipulation that there's no evidence in the record  
2 indicating that any supply plant in the Western Order  
3 has had difficulty obtaining a supply. Distributing  
4 plant.

5 MR. BESHORE: The -- yeah. The stipulation  
6 that I would propose, that I assume Mr. Marshall would  
7 join in, is that, you know, DFA is not citing the lack  
8 of supply to distributing plants as a basis for its  
9 proposals in these hearings.

10 MR. MARSHALL: We can so stipulate, Your  
11 Honor.

12 MR. BESHORE: Thank you.

13 JUDGE CLIFTON: Thank you. Thank you,  
14 gentlemen.

15 BY MR. BESHORE:

16 Q Let's turn to the Proposal 6, Exhibit 59, the  
17 Diversion -- Diversion Limitation proposal.

18 A Which proposal?

19 Q Proposal 6. Your testimony's marked as  
20 Exhibit 59.

21 A Okay.

22 Q Your -- you've supported, you've indicated, a  
23 diversion percentage of 80 percent in the Pacific  
24 Northwest Order, correct?

25 A Correct.

1           Q     In -- but in this Order, you support  
2     maintaining it at 90 or -- or increasing it to a -- to  
3     a higher level, correct?

4           A     We support maintaining the 90 percent.

5           Q     And in -- in addition, retaining language in  
6     the Order that allows that 90 percent to be pyramided  
7     by qualification being obtained by pumping in and  
8     pumping out. That has the effect of pyramiding the 90  
9     percent or any applicable diversion percentage, does it  
10    not?

11          A     Right. Change in any of the current pooling  
12    requirements.

13          Q     So, -- but -- and the current -- just so we  
14    understand, the current pool -- pooling requirements  
15    which both allow transfers, I'll call them for  
16    shorthand, allow -- as some people have -- allow  
17    transfer shipments, shipments in and shipments out,  
18    plus 90 percent, have the effect of establishing a  
19    diversion percentage that is considerably in excess of  
20    90 percent. Would you not agree?

21          A     What are you getting as a receipt?

22          Q     Well, let me -- let's look at it this way.  
23    The -- the -- the Market Administrator's exhibits that  
24    indicated the -- the utilization of proprietary bulk  
25    tank handler unit milk showed that that milk could be

1 pooled with Class 1 utilization of less than five  
2 percent, correct?

3 A Okay.

4 Q By -- by supplies to -- by supplies to the  
5 distributors that we've heard from in this hearing that  
6 don't process anything other than Class 1 products,  
7 correct?

8 A Correct.

9 Q Okay. So, therefore, assuming that -- that  
10 that demonstrates that when you don't have a net  
11 shipments provision, and you've got a 90-percent  
12 diversion provision, in essence, you can pool milk at a  
13 ratio of 20:1 or perhaps more with respect to the Class  
14 1 volume at distributing plants, correct?

15 A Okay.

16 Q Okay. And that's the status quo with respect  
17 to pooling and performance that -- that you're  
18 supporting for Order 135, correct?

19 A Correct.

20 Q In Exhibit 60, with respect to Proposal  
21 Number 7, you are also opposing DFA's proposal to  
22 attempt to establish a net provision in the Order with  
23 respect to diversions, is that correct?

24 A Yes.

25 Q And again, if the failure of having any net

1 provision in the Order with respect to diversions  
2 allows milk to be pooled at a ratio of 20:1 or greater  
3 with respect to Class 1 versus manufacturing uses,  
4 that's the system that you are supporting and  
5 advocating for Order 135, correct?

6 A As part of the current system, yes.

7 Q Is it your view, Mr. McBride, that any person  
8 who decides to produce Grade A milk in the -- in the  
9 state of Idaho has an entitlement as soon as he gets  
10 that Grade A permit to be pooled in Order 135?

11 A No.

12 Q Just have to have the ability to pump his  
13 milk in and out of a distributing plant or be a part of  
14 the 20 loads or diverted for the one load that's  
15 delivered into the distributing plant. Is that your  
16 position?

17 A There's performance standards in the Order,  
18 and if you meet those, you're qualified.

19 Q Do you know what the -- have you done any  
20 calculations with respect to what the utilization in  
21 Order 135 would be if all the Grade A milk in Idaho was  
22 pooled in the Order?

23 A If all the Grade A milk was pooled in this  
24 Order?

25 Q Yes.

1           A     No.

2           Q     Okay.  Is it your view that the utilization  
3 of the Order ought to be in the four- to eight-percent  
4 range that it was in prior to 2000, when it was just  
5 the Southwestern Idaho/Eastern Oregon Order?

6           A     Was in what range?

7           Q     Four to eight percent.  Four to eight  
8 percent.

9           A     Oh, four.  Okay.

10          Q     I'm sorry.

11          A     At that -- prior to reform, those diversion  
12 limitations were suspended and there was probably more  
13 milk that was pooled that was, you know, -- it didn't  
14 have the performance standards.

15                 MR. BESHORE:  Your Honor, if we have not  
16 taken notice, and honestly I don't know whether we  
17 have, of the -- taken official notice of the monthly  
18 statistics for Orders 139 and 135 for the years 1997,  
19 '98 and '99, I think the same time period as most of  
20 the other datasets -- okay -- most of the other  
21 datasets that have been -- that have been offered, I'd  
22 like to request that official notice be taken of -- of  
23 those -- this might be -- let me make it easier.

24                 I'd like to request that official notice be  
25 taken of the Annual Federal Milk Order Statistics

1 publications for -- for the system, for all Orders.  
2 It's one -- one document published for those three  
3 years by the USDA Dairy Programs.

4 JUDGE CLIFTON: All right. Is there any  
5 objection?

6 (No response)

7 JUDGE CLIFTON: No? Official notice will be  
8 so taken.

9 MR. TOSI: '97 through '99?

10 MR. BESHORE: Yes.

11 BY MR. BESHORE:

12 Q Okay. Let's talk about Proposal Number 8,  
13 Transportation and Assembly Credits, for a minute or  
14 two, Mr. McBride.

15 JUDGE CLIFTON: This is Exhibit 61?

16 MR. BESHORE: Exhibit 61, yes.

17 BY MR. BESHORE:

18 Q Now, you -- you agree, do you not, Mr.  
19 McBride, that persons -- supply organizations which  
20 supply the Class 1 market incur costs in supplying that  
21 market by virtue of its -- its unique needs?

22 A Unique needs would be?

23 Q The unique needs of the fluid market.

24 A You mean delivery?

25 Q Delivery schedules, delivery times, seasonal

1       fluctuations in demand, daily fluctuations in demand  
2       and things of that sort, correct?

3             A     Okay.

4             Q     There are costs involved in meeting those --  
5       meeting those demands of the Class 1 market, are there  
6       not?

7             A     Okay.  Yes.

8             Q     Is that a yes?  Okay.  Thank you.

9                     And those costs are not incurred by producers  
10       who supply their milk or cooperatives who supply their  
11       milk to cheese plants, isn't that correct, or other  
12       manufacturing plants?

13             A     Those costs -- if you're taking milk, putting  
14       it into a bottling plant and not putting it into a  
15       cheese plant, there's, you know, idle time at the  
16       manufacturing plant.

17             Q     Well, I wasn't talking about that.  We can --  
18       we can talk about that, but I wasn't specifically  
19       talking about that.  I'm talking about the costs of  
20       having the milk delivered to the fluid plant, when it  
21       wants it, when it needs it, seven days, four days, five  
22       days, or whatever a week throughout the year.

23             A     Okay.

24             Q     Okay.  The costs that are involved in that  
25       are not necessarily involved in supplying milk to a

1 manufacturing plant, isn't that correct?

2 A If the manufacturing plant, you know, was --  
3 was -- if -- if the manufacturing -- it's a balancing  
4 plant, -- I'm not sure.

5 Q Do your fluid customers and Dairy Gold's own  
6 fluid milk plants -- by the way, you operate your own  
7 -- Northwest Dairymens Association owns and operates  
8 fluid milk distributing plants, does it not?

9 A Yes, we do.

10 Q Okay. In both Order 134 and Order -- 135,  
11 I'm sorry, and Order 124, correct?

12 A Yes.

13 Q Okay. And you supply those plants with milk  
14 of your members, correct?

15 A Yes.

16 Q Okay. Now, do they take the same amount of  
17 milk each day of the week year-round?

18 A No.

19 Q And your customers who also operate -- your  
20 distributing plant customers, not your own plants but  
21 third-party customers, have varying demands days of the  
22 week and months of the year for fluid milk needs, do  
23 they not?

24 A Yes.

25 Q Okay. Are your -- you saw the data which Mr.

1 Hollon presented with respect to the differences in  
2 demand on days of the week in the Salt Lake City  
3 market. Did that tend to be something similar to -- to  
4 your experience in supplying Class 1 plants?

5 A You know, early to mid-week and then, you  
6 know, lower demand on the weekends.

7 Q Okay. That's been your experience, also?

8 A Yes.

9 Q Okay. And seasonally, of course, the demand  
10 for fluid milk -- I mean, the market aggregate  
11 statistics show this, but the demand for fluid milk is,  
12 you know, somewhat higher in the Fall than it is in  
13 some of the Spring and Summer months?

14 A Yes.

15 Q Okay. And the Class 1 supplier has to have  
16 the capability of balancing those -- meeting those --  
17 those requirements of its Class 1 customer?

18 A Yes.

19 Q When you -- one of the concerns, and I think  
20 it's expressed somewhere in your testimony with respect  
21 to Proposal 8 and Exhibit 61, is that if you are  
22 providing -- you, that is Northwest Dairymens  
23 Association or whoever it might be, is providing the  
24 marginal balancing for a fluid plant, by that, I mean,  
25 the plant has other suppliers for regular Class 1

1 deliveries and you're the secondary supplier who  
2 supplies some milk all the time but absorbs  
3 fluctuations in demand, okay, but you wouldn't receive  
4 all of the credits, all of the payments for deliveries  
5 of assembling milk for Class 1. Is that a concern?

6 A That we would not --

7 Q Receive sufficient credits under DFA's  
8 proposal for the -- in recognition of the balancing  
9 element you play in that account.

10 MR. MARSHALL: Your Honor, I object to the  
11 question as compound and confusing. Could it be  
12 restated, please?

13 MR. BESHORE: No. I think I'll just drop it.  
14 I won't -- I won't attempt to restate it.

15 I don't have any other questions at this  
16 time, Your Honor. I will just -- just note, I have not  
17 personally had the opportunity to read every part of  
18 these exhibits. I have been able to glean the position  
19 which has been advocated by the -- by the witness, and  
20 I've had the opportunity to inquire into those  
21 positions a bit, which I appreciate, and I don't have  
22 any other -- any other questions at this time, although  
23 in other -- in other circumstances with other --  
24 different time -- time factors, I -- I might.

25 Thank you.

1 JUDGE CLIFTON: I understand. Thank you, Mr.  
2 Beshore.

3 Mr. Vetne?

4 CROSS EXAMINATION

5 BY MR. VETNE:

6 Q Mr. McBride, early in your direct testimony,  
7 you referred to fees associated with the River Valley  
8 Cooperative and Sorrento-Lactalis.

9 Did your cooperative get that information  
10 from an individual who was a member of River Valley  
11 and, to your knowledge, either an officer, director or  
12 official of that co-op?

13 A I understand it was from an individual from  
14 River Valley.

15 Q Okay. Do you know whether that -- who that  
16 person was?

17 A I don't recall, you know.

18 Q If I told you the name Greg Trost, would that  
19 refresh your memory?

20 A I don't know --

21 Q Pardon me?

22 A -- who Greg Trost is. I -- you know, I'm not  
23 sure who they got it from.

24 Q And the purpose of your testimony was to  
25 provide a little bit additional background concerning

1 the details of -- of that fee transaction to which Mr.  
2 Carlson, representing in this hearing as a party River  
3 Valley Co-op, revealed in part but in your opinion not  
4 in full?

5 A Correct.

6 Q With respect to -- if you go back for a  
7 moment, do you recall the goose and the gander  
8 questions by Mr. Beshore?

9 A Yes.

10 Q Yes. With respect to those questions as to  
11 the Pacific Northwest, it's your objective, is it not,  
12 that the milk produced in the Pacific Northwest Market  
13 should be accommodated in the pool efficiently if that  
14 milk is ready, willing and able to serve the Class 1  
15 market, is that correct?

16 A Yes.

17 Q And consistently, it's your position and  
18 opinion that the milk produced in the Western Market  
19 Area should be accommodated in the pool if it's ready,  
20 willing and able to serve the Class 1 market?

21 A Yes.

22 Q And concerning that net shipments, if that's  
23 what it takes to accommodate that milk, that's what  
24 should be left in place, correct?

25 A Correct.

1           Q     Okay.  Would you agree with me that for  
2 purposes of -- of efficiency, if that is a regulatory  
3 consideration, that it would be better if that milk  
4 didn't have to be pumped in and out?

5           A     It would be better.

6           Q     Okay.  But as it stands, at least if it's not  
7 needed, at least a delivery to a distributing plant  
8 demonstrates both readiness, willingness and ability to  
9 serve Class 1 needs, even though on that day, it's not  
10 needed?

11          A     Yes.

12               MR. VETNE:  Thank you.  That's all I have.

13               JUDGE CLIFTON:  Any other cross examination?

14               (No response)

15               JUDGE CLIFTON:  Mr. Tosi?

16               MR. TOSI:  I have none.

17               MR. RADMALL:  I have a couple at this time.

18               JUDGE CLIFTON:  All right.  Mr. Radmall, of  
19 course.

20                               CROSS EXAMINATION

21               BY MR. RADMALL:

22           Q     I appreciate your comments about the increase  
23 in prices after Order Reform.

24                       Has this Order -- increase applied to other  
25 Orders, other than 135?  Have other dairymen in other

1 Orders benefitted from the Order Reform?

2 A Well, I -- you know, Order Reform, you know,  
3 basically is a moving target. There's good things.  
4 There's some -- you know, and there's some things that,  
5 you know, aren't so good.

6 Q Well, let me rephrase that. Specifically  
7 from the higher of Class 3 or Class 4, have other  
8 Orders benefitted from that?

9 A Yes.

10 Q Dairymen in Order 124, have they benefitted  
11 from that?

12 A Yes.

13 Q Okay. So, it's not a unique thing, just that  
14 the dairymen in 135 have seen an increase in their  
15 prices, is that correct?

16 A Correct.

17 Q Okay. How many plants in Order 135 -- do you  
18 know how many plants produce Class 4 milk products?

19 A Well, we have -- we have a powder plant in  
20 Caldwell, --

21 Q Okay.

22 A -- and we have a condensing plant down in  
23 Jerome and that condensing -- you know, its final  
24 utilization determines what its -- what the plant's  
25 utilization is.

1 Q Okay. That answered my question about who  
2 owns those plants.

3 Has the total production from each plant been  
4 pooled each month since Order Reform in Order 135?

5 A Yes.

6 Q Total -- total amount of production?

7 A Total NDA production has been pooled.

8 Q Okay. So, the producers in 135 have  
9 benefitted a hundred percent from the higher of in  
10 Class 3 or Class 4 --

11 A Producers --

12 Q -- since Order -- Order Reform? Yeah. In  
13 Order Reform, we take the Class -- the higher of the  
14 Class 3 or 4 and so every producer in 135's benefitted  
15 if the Class 4 prices were higher than all the  
16 producers in 135 have benefitted from that higher  
17 price?

18 A Yes.

19 Q Okay. It's been my observation that -- and  
20 maybe you can explain this or not, but in certain  
21 months when Class 4 prices exceeded Class 3, there was  
22 a diminished number of Class 4 pounds pooled, and when  
23 the Class 3 prices were higher, it seems -- and I don't  
24 have the -- the months to -- to substantiate that, but  
25 in -- in Class 3 months -- okay. I have a Table 3 from

1 Exhibit 7.

2 Exhibit 6, Table 3. I haven't had a chance  
3 to really to review this, but it just appears from a  
4 bystander, from somebody that's not as knowledgeable as  
5 others, that there seems to be some changes there that  
6 might not benefit every producer in 135 when -- when  
7 Class 4 is higher.

8 Do you have a comment on that?

9 A There are months -- I mean, yeah. If -- due  
10 to price, we will determine whether we do pool the  
11 milk.

12 Q I thought you just told me that you pooled  
13 all the milk --

14 A Okay. Yeah.

15 Q -- from -- a hundred percent of the time.  
16 So, is that different now?

17 A We have not always pooled all of the milk on  
18 the -- on the Western Order, and when we don't pool,  
19 it's due to price relationships.

20 Q Okay. So, then, the Utah producers have not  
21 benefitted a hundred percent from the higher of 3 or 4,  
22 have they?

23 A They still have a higher -- you know, the  
24 higher of 3 or 4 are still there.

25 Q Well, if the milk's not on the pool, then how

1 can they benefit from that higher of?

2 A The milk that's on the pool is -- you know,  
3 they get the higher of.

4 Q Sure. But how much -- what happens to the  
5 milk that's not pooled? Does that contribute to  
6 orderly marketing in the Order or does it contribute to  
7 disorderly marketing in the Order?

8 A It's -- I don't know. It depends on when you  
9 -- how you -- how you describe disorderly.

10 MR. RADMALL: Okay. Thank you very much.

11 JUDGE CLIFTON: Thank you, Mr. Radmall.

12 Any other cross examination?

13 (No response)

14 JUDGE CLIFTON: Any redirect, Mr. Marshall?

15 MR. MARSHALL: Your Honor, I would like to  
16 ask the government witness -- the people if they would  
17 like a break, so that they can finish their business  
18 and return to the hearing.

19 JUDGE CLIFTON: No, we're not going to do  
20 that. If you've got any redirect, you may ask it.

21 MR. MARSHALL: Thank you, Your Honor.

22 JUDGE CLIFTON: You're welcome.

23 REDIRECT EXAMINATION

24 BY MR. MARSHALL:

25 Q Just to clarify the last series of questions,

1 the higher of phraseology applies to the Class -- to  
2 the price mover that sets the Class 1 formula. Is that  
3 your meaning of the term as you used it?

4 A Yes.

5 Q There was a number of questions by Mr.  
6 Beshore with respect to the Pacific Northwest Order  
7 hearing, and just to clarify how that might apply here,  
8 is it true that as proposed in that hearing, all plants  
9 within the Pacific Northwest Order could be used to  
10 meet pool qualification requirements by delivery to  
11 those plants, whether they are distributing plants or  
12 not?

13 A All pool plants.

14 Q As a practical matter, would all plants in  
15 that Order be pool plants?

16 A No.

17 Q Could a delivery to Linden Fall qualify as  
18 touching base for purposes of the new provisions?

19 A If the plant was designated as a -- as a  
20 supply plant or a co-op supply plant, reserve plant.

21 Q Isn't -- isn't the practical effect to allow  
22 performance mandated by delivery to any manufacturing  
23 plant that wishes to be so designated?

24 A Yes.

25 Q And if that same theory were to be applied to

1 Order 135, is it not true that the same opportunities  
2 would exist, for example, for Sorrento to pool all of  
3 its milk without perhaps having to pay pooling fees?

4 A Yes.

5 Q And is it also not true that if those  
6 provisions were adopted, all of the milk of Jerome  
7 Cheese could be pooled and all of the milk of Glanbia  
8 Cheese could be pooled more easily without having to go  
9 through some of the mechanisms required by the current  
10 Order, Western Order provisions?

11 A State that again.

12 Q The practical effect if the Order 124  
13 provisions were adopted and 135 would be to more easily  
14 pool all of the milk from Jerome Cheese and Glanbia  
15 Cheese without having to go through some of the  
16 gyrations described earlier in this hearing?

17 A Yes.

18 Q Would we support such a liberalization of the  
19 pooling requirements in this Order?

20 A Open pooling or of the --

21 Q Of the -- would we support the same kinds of  
22 pooling requirements in Order 135 as have been proposed  
23 for 124?

24 A No.

25 Q So, we're not proposing any looser

1 requirements for this Order unlike perhaps might have  
2 been assumed from Mr. Beshore's questions, is that your  
3 testimony?

4 A Yes.

5 Q Mr. Beshore asked a number of questions about  
6 balancing which I think has been ruled outside the  
7 scope of the hearing, but in the event he intends to  
8 argue it on brief, I think it's important to get into  
9 the hearing record some understanding about who bears  
10 the balancing costs.

11 In the situation involving a proprietarily-  
12 owned pool distributing plant which has its own  
13 producers, as an example the KDK plant that's been  
14 testified at this hearing, their producers would have a  
15 seasonal fluctuation in their production, would it not?

16 A Yes.

17 Q And somehow, the market would have to  
18 accommodate that balancing need, true?

19 A Yes.

20 Q I believe it was testified that that plant is  
21 supplied by, among others, Magic Valley Quality Milk  
22 Producers Cooperative. Is that your recollection and  
23 understanding?

24 A Yes.

25 Q So, they would be the balancing entity for

1 that plant, would they not?

2 A Hm-hmm. Yes.

3 Q Magic Valley also supplies the West Farms  
4 Food Supply Plant at Jerome, does it not?

5 A Yes.

6 Q And if it were necessary for the Magic Valley  
7 plant to remove milk from the West Farm Foods Plant at  
8 Jerome in order to supply the needs of the distributing  
9 plant that we've been talking about, KDK's, the actual  
10 balancer would be -- the actual balancing plant would  
11 be the West Farms Food Plant at Jerome, would it not?

12 A Correct.

13 Q I'm reminded that -- scratch that.

14 Mr. Beshore asked the effect of the proposal  
15 on the Pacific Northwest were to -- if our intent in  
16 proposing the proposals in the Pacific Northwest was to  
17 establish the geographic confines of the Marketing  
18 Order as the test of pooling.

19 Does the provision of that Order also permit  
20 any milk from outside the Order area that regularly  
21 delivers to the market to be pooled?

22 A Yes.

23 Q Mr. Beshore asked -- asked about a  
24 congressional intent behind the legislation that  
25 mandated the current Class 3 or 4 hearings, and you

1 testified that you were aware of such hearings. His  
2 question implied that there was a congressional intent  
3 as to whether the Class 3 price or the Class 4 price  
4 might be too high or too low.

5 Are you aware of any expression of Congress  
6 that could be so interpreted?

7 A No.

8 Q Your answer could not be construed as  
9 agreeing to that part of his compound question?

10 A Yes.

11 Q It could be construed as agreeing?

12 A No.

13 Q Could be or could not be?

14 A It should not be construed.

15 Q As agreeing?

16 A As agreeing.

17 MR. MARSHALL: Your Honor, I have no further  
18 questions at this time.

19 JUDGE CLIFTON: Thank you, Mr. Marshall.

20 You may step down, Mr. McBride.

21 (Whereupon, the witness was excused.)

22 JUDGE CLIFTON: All right. I'd like to set  
23 the briefing deadline. The court reporter is -- well,  
24 I guess I better ask.

25 Is there any other evidence to come to the

1 hearing? Mr. Stevens?

2 MR. STEVENS: One thing, Your Honor. Your  
3 Honor, Garrett Stevens.

4 This relates to Proposal 17, I believe.  
5 Seventeen is proposed by the -- proposed by Dairy  
6 Programs, Agricultural Marketing Service.

7 JUDGE CLIFTON: Yes.

8 MR. STEVENS: This -- this proposal is  
9 contained in every Milk Order hearing that I've had  
10 anything to do with. It's a proposal that allows the  
11 Secretary to, under statutory authority, to make any  
12 conforming changes -- well, it speaks for itself what  
13 it provides, and it -- and it allows the Secretary to  
14 evaluate the record and make such changes as may be  
15 necessary to make the entire Order agreements and the  
16 Orders conform with any amendments thereto that may  
17 result from this hearing.

18 I'd just note that for the record. It's  
19 authorized by the statute. It's part of every  
20 rulemaking and that's included in the record.

21 Thank you.

22 JUDGE CLIFTON: Yes, you're welcome, and  
23 there's been no objection to it.

24 All right. The hearing clerk contract for  
25 the transcript here did not have any delivery time

1 deadline, but regardless of what delivery time deadline  
2 is set, it appears to take about a month to get the  
3 transcript. Do counsel agree? Has that been your  
4 experience?

5 MR. TOSI: Well, at least three weeks.

6 JUDGE CLIFTON: About three weeks has been  
7 the experience?

8 MR. TOSI: At least three weeks.

9 JUDGE CLIFTON: At least three.

10 MR. TOSI: At least three weeks and could be  
11 longer.

12 JUDGE CLIFTON: All right. Assume for a  
13 moment, I'm looking at 2002 calendar, assume for a  
14 moment, today is April 19th, assume that you do not  
15 have the transcript available on the Internet until May  
16 17th. If that occurs, when do you want your transcript  
17 corrections to be due, how many weeks thereafter, and  
18 when do you want your briefs to be due? Proposals?

19 Mr. English?

20 MR. ENGLISH: I think two weeks for  
21 corrections and either additional two or additional  
22 three for the -- for the brief.

23 JUDGE CLIFTON: All right.

24 MR. ENGLISH: I can live with either, which  
25 would -- so, I guess you'd be looking at May 31st for

1 the corrections. Is that Memorial Day?

2 JUDGE CLIFTON: No. Memorial Day is May  
3 27th.

4 MR. ENGLISH: Okay. So, May 31st for the  
5 corrections and June 21 for the brief.

6 JUDGE CLIFTON: Sounds great.

7 MR. ENGLISH: And then I assume we're doing  
8 what we've been doing, which is if the transcript  
9 misses, we'll automatically move. We've been doing  
10 that the last several hearings which is that we've been  
11 putting in the record that if the transcript is late,  
12 that for every day the transcript is late, those two  
13 dates, the corrections date and the brief date, move  
14 the exact number of days that the transcript is late.  
15 So, people will know in advance and not have to come to  
16 Your Honor getting an extension because of the  
17 transcript not being available.

18 JUDGE CLIFTON: Sounds excellent. Is there  
19 any objection to that proposal?

20 MR. MARSHALL: Your Honor, --

21 JUDGE CLIFTON: Mr. Marshall?

22 MR. MARSHALL: -- I'd like to explain first  
23 that as the senior vice president of our organization,  
24 one of my duties is to spend about two weeks in June  
25 each year on the road talking to the members of our

1 cooperative.

2 I would much prefer a later briefing date  
3 simply to allow me to do that as well as to concentrate  
4 fully on the voluminous record that was compiled for  
5 this hearing.

6 JUDGE CLIFTON: What date do you propose?

7 MR. MARSHALL: I would propose the first  
8 Monday in July.

9 JUDGE CLIFTON: For which?

10 MR. MARSHALL: I'm sorry. For the final  
11 briefing date, not the -- I do not propose a change in  
12 the corrections date. I do propose an extension of the  
13 date for filing briefs.

14 JUDGE CLIFTON: From June 21 to July 1?

15 MR. MARSHALL: That would be fine.

16 JUDGE CLIFTON: All right. Is there any  
17 objection to that? Mr. Vetne?

18 MR. VETNE: None.

19 JUDGE CLIFTON: Mr. Beshore?

20 MR. BESHORE: Fine.

21 JUDGE CLIFTON: Mr. English?

22 MR. ENGLISH: I can live with that.

23 JUDGE CLIFTON: Okay. Great.

24 MR. MARSHALL: Thank you.

25 JUDGE CLIFTON: You're welcome.

1           So, brief will be due July 1, which is a  
2 Monday, July 1, 2002, unless the transcript goes on the  
3 Internet later than May 17th, 2002. If it does, the  
4 extension for briefs is the same number of days as the  
5 transcript is delayed.

6           The proposed corrections to the transcript  
7 will be due May 31, with the same possibility for  
8 extension if the transcript is delayed beyond May 17th.  
9 Please do not use the U.S. Post Office for delivery of  
10 the briefs. I hate to do that, but the delay is very  
11 lengthy because everything that comes through the post  
12 office is diverted and irradiated and thereby damaged  
13 as well as delayed. You may use a commercial carrier,  
14 such as FedEx. It comes through just fine. If all  
15 else fails, you can use the fax, although for  
16 voluminous briefs, that's really not appropriate.

17           All right. Anything further? Mr. Vetne?

18           MR. VETNE: I would note that in the past,  
19 the Dairy Division has accepted e-mail attachments of  
20 the brief, and I think they'll do so here. They'll  
21 provide, once they get the e-mail copy, they'll provide  
22 a copy to the hearing clerk.

23           JUDGE CLIFTON: Mr. Tosi, is -- is -- are you  
24 willing to accept that responsibility?

25           MR. TOSI: Yes, Your Honor. In the most

1 recent series of hearings that we've had, in light of  
2 September 11th, the e-mail has worked out very, very  
3 well.

4 Also, just for purposes of having it on the  
5 record, if, in the unfortunate event that the hearing  
6 transcript is delayed in such that by moving the date  
7 by which briefs would be due would occur on a holiday  
8 or a weekend, may we just then assume that it would be  
9 the next business day --

10 JUDGE CLIFTON: Yes.

11 MR. TOSI: -- following that delay?

12 JUDGE CLIFTON: Yes, indeed.

13 MR. TOSI: Okay. Thank you very much, Your  
14 Honor.

15 JUDGE CLIFTON: Thank you.

16 And please be aware, all of this has to be  
17 filed with the hearing clerk, but if Mr. Tosi's office  
18 is willing to accept the responsibility of making that  
19 transfer, then e-mail is a wonderful way to provide  
20 your briefs as well as your transcript corrections.

21 MR. TOSI: Yes, Your Honor, and also, to the  
22 extent that people have sent me briefs, I usually then  
23 send back a quick e-mail reply to them so they know in  
24 fact that we received it, and it works well that way.

25 JUDGE CLIFTON: Excellent. All right. Mr.

1 Beshore?

2 MR. BESHORE: Do I understand that the -- the  
3 means of serving briefs which have been stated by Your  
4 Honor supersede any possible interpretations that may  
5 be given to the -- the Rules of Practice in the -- in  
6 the Code of Federal Regulations?

7 I only say that because they specifically  
8 provide, and I've been in the circumstances of  
9 litigating it, the only way you can file it is to have  
10 it there or send it by the United States Postal  
11 Service. That is all the Rules of Practice authorize.  
12 FedEx does not qualify.

13 JUDGE CLIFTON: FedEx qualifies if it's  
14 received by the hearing clerk by the deadline.

15 MR. BESHORE: Yes.

16 JUDGE CLIFTON: But not if that's the day you  
17 deliver it to FedEx.

18 MR. BESHORE: Right. So, -- but when you say  
19 don't mail it, although the Rules say that's how you do  
20 it, you're saying FedEx it there the day before, and,  
21 of course, e-mail is no where on the radar screen in  
22 the Rules.

23 JUDGE CLIFTON: You're -- you're correct, Mr.  
24 Beshore. I want it quite clear that I do not have the  
25 authority to waive the Rules of Practice, and this does

1 create a problem. It needs an amendment in that  
2 regard.

3 If you want to protect yourself and if by  
4 putting it in the post office, you meet the filing  
5 deadline, go ahead and do that but don't rely on it  
6 getting to us.

7 All right. Anything further?

8 (No response)

9 JUDGE CLIFTON: I thank you all, and I know  
10 you have to run for planes.

11 We'll -- we'll be in recess at 11:30.

12 (Whereupon, at 11:30 a.m., the hearing was  
13 adjourned.)

14

15

16

17

18

19

20

21

22

23

24

25