UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re:	)	[AO]
	)	Docket No. 15-0071
	)	
Milk in California	)	
_____	)	

VOLUME XIV

TRANSCRIPT OF PROCEEDINGS

October 9, 2015

Myra A. Pish CSR, Certificate No. 11613
397077

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5   )
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6   _____)

7

8   BEFORE U.S. ADMINISTRATIVE LAW JUDGE
                    JILL S. CLIFTON
9
            Friday, October 9, 2015
10
                  9:00 a.m.
11

12   Clovis Veterans Memorial District
                  808 4th Street
13   Clovis, California 93613

14

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16   TRANSCRIPT OF PROCEEDINGS

17   VOLUME 14

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23   Reported by:

24   Myra A. Pish CSR
     Certificate No. 11613
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TRANSCRIPT OF PROCEEDINGS - VOLUME XIV

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1   FRIDAY, OCTOBER 9, 2015 - - MORNING SESSION

2   JUDGE CLIFTON: We're back on record. It is October 9,

3 2015. It's a Friday, it's 9:00 in the morning, and we're in

4 Clovis, California. My name is Jill Clifton. I'm the

5 United States Administrative Law Judge who is assigned to take

6 in evidence at this milk hearing.

7   I'm a USDA employee and I would like now to take

8 appearances of my fellow USDA employees who are here at this

9 time.

10   MR. FRANCIS: Good morning, William Francis, F-R-A-N-C-I-S.

11 United States Department of Agriculture, Agricultural Marketing

12 Service, I'm a Dairy Marketing Specialist.

13   MS. FRISIUS: Good morning, happy Friday. My name is

14 Meredith Frisius, M-E-R-I-D-I-T-H, F-R-I-S-I-U-S, with the USDA

15 AMS Dairy Programs.

16   MS. MAY: Good morning, Laurel May, L-A-U-R-E-L, M-A-Y,

17 USDA AMS Dairy Programs, Order Formulation Division.

18   MR. MYKRANTZ: John Mykrantz J-O-H-N, M-Y-K-R-A-N-T-Z,

19 Agricultural Economist Pacific Northwest/Arizona Order, on

20 detail with Dairy Programs.

21   MR. SCHAEFER: Henry Schaefer, H-E-N-R-Y, S-C-H-A-E-F-E-R,

22 with the Upper Midwest Milk Marketing Order, Federal Order 30,

23 on detail with AMS Dairy Programs.

24   MR. HILL: I'm Brian Hill, B-R-I-A-N, H-I-L-L, I'm an

25 Attorney with the Office of General Counsel.

1   MS. BECKER: Lauren Becker, L-A-U-R-E-N, B-E-C-K-E-R, USDA

2 Office of the General Counsel.

3   JUDGE CLIFTON: And now I would like to take those teams of

4 proponents and opponents.

5   MR. BESHORE: Good morning, Marvin Beshore. M-A-R-V-I-N.

6 B-E-S-H-O-R-E, Attorney for the proponents of Proposal 1,

7 California Dairy Institute, Dairy Farmers of America, and

8 Land O'Lakes.

9   MR. HOLLON: Good morning, Elvin Hollon, E-L-V-I-N,

10 H-O-L-L-O-N. Dairy Farmers of America, one of the proponents

11 of Proposal 1.

12   MR. VLAHOS: John Vlahos, Hanson Bridgett law firm, with

13 the co-counsel for the proponents of Proposal Number 1,

14 J-O-H-N, V-L-A-H-O-S. Hanson Bridgett is H-A-N-S-O-N,

15 B-R-I-D-G-E-T-T.

16   MS. OLIVER THOMPSON: Good morning, Megan Oliver Thompson,

17 Megan is M-E-G-A-N, I'm also with the law firm of Hanson

18 Bridgett, and co-counsel for the proponents of

19 Proposal Number 1.

20   MR. SCHAD: Good morning, Dennis Schad, S-C-H-A-D, I work

21 for Land O'Lakes.

22   MR. ENGLISH: Good morning, your Honor. Chip English,

23 C-H-I-P, E-N-G-L-I-S-H, with the law firm of Davis, Wright,

24 Tremaine in Washington DC, on behalf of the Dairy Institute of

25 California. I'm not a member of the California Bar, but I have

1 an office in San Francisco and I'll be there on the Bay

 2 watching Fleet Week this weekend.

 3   MS. VULIN: Ashley Vulin, A-S-H-L-E-Y, V-U-L-I-N, also with

 4 Davis, Wright, Tremaine, representing the Dairy Institute of

 5 California.

 6   DR. SCHIEK: Good morning, William Schiek, S-C-H-I-E-K.

 7 Economist with the Dairy Institute of California.

 8   MS. KALDOR: Good morning, Rachel Kaldor, R-A-C-H-E-L,

 9 K-A-L-D-O-R, Executive Director of Dairy Institute of

10 California.

11   MR. BLAUFUSS: Good morning, Rob Blaufuss, B-L-A-F-U-S-S,

12 Dean Foods Company.

13   MR. DeJONG: Good morning, James DeJong, J-A-M-E-S,

14 D-e-J-O-N-G, with Hilmar Cheese, a dairy farmer-owned cheese,

15 whey, and milk powders.

16   MR. RAMIREZ: Miguel Ramirez, M-I-G-U-E-L, R-A-M-I-R-E-Z,

17 Associate Director of Economics for the Leprino Foods, Denver,

18 Colorado.

19   MR. VETNE: John Vetne, appearing for Hilmar Cheese,

20 J-O-H-N, V-E-T-N-E.

21   MS. HANCOCK: Nicole Hancock with Stoel Rives, S-T-O-E-L,

22 R-I-V-E-S, representing California Producer Handlers

23 Association and Ponderosa Dairy.

24   MR. LAI: Good morning, Victor Lai, V-I-C-T-O-R, L-A-I,

25 with Producers Dairy Foods, a Member of California Producer

1 Handler Association.

2   JUDGE CLIFTON: Now I would like other participants to

3 identify themselves. Even though they may not be associated

4 with a particular proposal.

5   MS. REED: Kristine Reed, K-R-I-S-T-I-N-E, R-E-E-D, Counsel

6 for Select Milk Producers.

7   JUDGE CLIFTON: Is there anyone here this morning who

8 anticipates testifying today, in addition to Mr. Hollon? No

9 one identifies himself at this time.

10   I would like now to go to preliminary matters,

11 beginning with announcements and other preliminary matters by

12 USDA employees.

13   MS. FRISIUS: Good morning, welcome to day 14, everyone.

14 I'm Meredith Frisius and I work for the USDA. You can notify

15 me if you want to testify and then I will be able to let the

16 Judge know. If you can provide me with a business card and one

17 to the court reporter, that would be great.

18   USDA is here to collect a record to look into the

19 promulgation of a California Milk Marketing Order. If anyone

20 in the audience would like to question a witness, please come

21 and approach the microphone to do so.

22   We are broadcasting this audio feed and this can be

23 found at tinyurl.com/camilkhearing. We have a court reporter

24 here to do, to record official transcripts, and they will be

25 available approximately two weeks after the end of each hearing

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1 week.

 2   Exhibits are numbered in order that, in the order that

 3 they are presented. When you come, please provide me with

 4 three copies, and one for the court reporter, one for the

 5 Judge. Additional copies will be distributed and found at the

 6 back of the room.

 7   As always, refreshments and food are also in the back.

 8 And yesterday we ended, or the day concluded with Elvin Hollon

 9 working through his testimony. Today he will continue that

10 and potentially begin cross-examination.

11   JUDGE CLIFTON: Excellent. Thank you. Our time table

12 today is to stop no later than twelve noon. We will next go on

13 record next Wednesday at 9:00 in the morning.

14   Would there be any other preliminary matters that

15 anyone else has? I don't see anyone indicating. I do want to

16 read into the record the docket number in brackets, [AO], that

17 is a designation the Hearing Clerk for the United States

18 Department of Agriculture uses for agreements and orders cases,

19 of which this is one. The docket number is 15-0071.

20   All right. Then, Mr. Hollon may come back to the

21 witness stand and Mr. Beshore you may proceed.

22   Mr. Hollon, you remain sworn, but I would like you

23 again to state and spell your name.

24   MR. HOLLON: Elvin, E-L-V-I-N. Hollon, H-O-L-L-O-N.

25   MR. BESHORE: Good morning, Mr. Hollon, your Honor.

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1   MR. HOLLON: Good morning.

2   DIRECT EXAMINATION

3 BY MR. BESHORE:

4   Q. Before we ask you to resume your prepared statement,

5 which you will pick up at page 28, there are two loose ends

6 from the earlier part of the statement that I would like to

7 pick up and take care of.

8   So would you go to page 6, first. Are there some

9 column references that need to be corrected on page 6?

10   A. There are.

11   On page 6, under the subheading;

12   D. Pooling Incentives and disincentives, fifth line

13 down.

14   Q. First paragraph?

15   A. First paragraph, fifth line down, that sentence begins,

16 or that line begins: July 2015, Columns -- and currently reads

17 L, M, N, and it should read K, L, and M.

18   Q. Okay. Thank you. And then would you turn to page 13?

19   JUDGE CLIFTON: Before you go there, I am going to ask that

20 Ms. Frisius mark the record copies of Exhibit 63 accordingly.

21 So on page 6, instead of L, M, and N, those will be stricken,

22 and K, L, and M inserted.

23   MR. BESHORE: Thank you, your Honor.

24 BY MR. BESHORE:

25   Q. Would you turn then to page 13 of Exhibit 63,

1 Mr. Hollon?

2   A.   Page 13?

3   Q.   Okay.

4   A.   The --

5   Q.   Is there, did we find that some unidentified gremlin

6 deleted part of the text of the language recitations on that

7 page?

8   A.   That may well be true.

9   Q.   Okay.

10   A.   At least the deletion part. The language referenced

11 as, the first language reference at the top third of the page

12 reads:

13   c. A plant that is located in the marketing area,
                 which during the month receives milk from a
14   producer located in the marketing area.

15   And in addition, the words should be added:

16   or from a Cooperative marketing the milk of a
                 producer located in the marketing area, pursuant
17   to Section 1051.9(c).

18   Q.   And that would, with the addition of that language, it

19 will read as it appears in the Notice of Hearing at page 47211

20 and over into 47212 of the Federal Register, correct?

21   A.   Correct.

22   Q.   And is essentially the identical language not included

23 in c.(1) of the second specific textual proposal on page 13?

24   A.   That is true. On page 13, the lower language cite

25 currently reads:

2801

1   (c)(1) A plant located in Churchill County,
           Nevada -- strike the word that, insert the words
2   which during the month -- now back to the regular
           language -- receives milk from -- insert the word
3   producers -- back to the regular language -- in
           Churchill County or in the marketing area -- and
4   now add the words -- or from a Cooperative
           marketing the milk of a producer located in the
5   marketing area or in Churchill County, pursuant to
           Section 1051.9(c).

6

7   Q. Okay.

8   JUDGE CLIFTON: Now, before you go on, Ms. Frisius, with

9   the help of the proposed language in the Federal Register at

10 pages 47211 and 47212, do you believe you can complete that

11 without Mr. Beshore reading it again?

12   MS. FRISIUS: Yes.

13   JUDGE CLIFTON: Yes is the answer.

14   Now, I do note one little difference between the

15 proposed language and the Federal Register, and that we have

16 here on page 47212 of the Federal Register, which is Exhibit 1,

17 with regard to the part that became (c)(1), the Federal

18 Register refers to "from producers located in Churchill

19 County."

20   Page 13 of the testimony just says "from producers in

21 Churchill County." I think they mean exactly the same, but I

22 would like Mr. Beshore, for you to opt which you prefer.

23   MR. BESHORE: We'll go with the Federal Register language.

24 It's perhaps redundant, but it is absolutely clear.

25   JUDGE CLIFTON: I agree, so Ms. Frisius, that would be one

additional change to the text on page 13 of the testimony. You

really are just adding a word, "located".

    MR. BESHORE: Yes, thank you, your Honor.

    JUDGE CLIFTON: You're welcome. Now, there's not much room

for her to write on this, how should we handle that?

    MS. FRISIUS: Can I type a version and print it and then

have that, and have a little note saying "see corrections?" I

don't know how --

    JUDGE CLIFTON: Or turn to the backside of this page,

indicate with an arrow that you are adding it to the backside

of the page. Then we have to remember to scan both sides, and

that's the only part of this exhibit that would require that.

    MS. FRISIUS: I can put a sticky note to identify the page.

    JUDGE CLIFTON: All right. I like that better than you

adding a page, just working with what they have got and somehow

finding a way to write it out. And I believe you were chosen

because you have the very best handwriting.

    MS. FRISIUS: Hopefully that's true.

    JUDGE CLIFTON: She says hopefully that's true.

        All right. Mr. Beshore?

BY MR. BESHORE:

  Q. Thank you. Now, Mr. Hollon, would you proceed with

your testimony in Exhibit 63, beginning at the top of page 28?

  A. C. Adoption of Multiple Component Pricing Plans.

        Since the early days of Federal Orders in the 1930's,

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1 producers were paid, and handlers were billed, on the basis of

2 skim milk and fat produced/purchased. But since the late

3 1980's, multiple component pricing (MCP) of milk have been used

4 in the FMMO system, and it has become the predominant system of

5 pricing.

6   Generally, the adoption of MCP in an Order, serves to

7 improve the price signals to producers and processors. Both

8 parties pay or receive a price more targeted to their

9 production and processing requirements. While four of the

10 existing ten orders still use some type of skim/fat-oriented

11 pricing, the majority of all FMMO regulated milk is priced on

12 an MCP basis (as is milk regulated under the current California

13 Milk Marketing system).

14   In 2013, 86 percent of the 132 billion pounds of

15 producer milk under FMMO regulation was subject to an MCP plan

16 by which dairy farmers are paid for the valuable solids content

17 of farm milk -- butterfat, protein, and other nonfat solids.

18 The move from a fat/skim to an MCP in Federal Order pricing was

19 a sea change in producer and handler relations, changing a

20 system would have been in place for literally decades, if not

21 more than a century in most markets.

22 JUDGE CLIFTON: I would just like to interject an

23 instruction for the court reporter, it's fine the way

24 Mr. Hollon read it, but watch for the punctuation on page 28

25 when you type it. You will see that in the second paragraph of

1 that page there's a forward slash in between the word skim and

2 the phrase fat-oriented pricing, and in the third paragraph you

3 will see that there's a forward slash in between the word fat

4 and the word skim. Mr. Hollon, you may resume.

5   MR. HOLLON: MCP was first included in a FMMO program

6 following a 1986 hearing for the Great Basin Order.

7   JUDGE CLIFTON: Now, that sentence as you read it means

8 exactly what is written, but what is written is slightly

9 different. You used the word "included" and the typing says

10 "introduced." I'd just like a preference which would you like

11 the testimony to read?

12   MR. HOLLON: I'll re-read the sentence.

13   MCP was first introduced in the FMMO program following

14 a 1986 hearing for the Great Basin Order. (53 Fed. Reg. 686

15 (1988).) In the following years, MCP was adopted for the

16 Mid-Atlantic Market (56 Fed. Reg. 57850 (1991)), the Ohio and

17 Indiana Markets (58 Fed. Reg. 33347 (1993)), the Pacific

18 Northwest and Idaho Markets, (59 Fed. Reg. 8546 (1994)), five

19 of the upper Midwest Markets, (60 Fed. Reg. 41833 (1995)) and

20 the Southern Michigan Market, (60 Fed. Reg. 43066 (1995)).

21 The Federal Milk Marketing Order Reform Decision provided a

22 uniform, protein-based MCP plan for all seven markets outside

23 of the Southeast and Arizona (64 Fed. Reg. 16026, 16015

24 (1999).)

25   MCP plans are markedly different from the specifics of

2805

1   a traditional skim/fat payment plans. The following three

2   examples involving two different orders and the Reform Decision

3   highlight both the differences as well as the benefits

4   resulting from the changes. First, in a 1994 decision made for

5   the Pacific Northwest and Southwestern Idaho, Eastern Oregon

6   Orders, the pricing basis was shifted from skim/fat to a

7   component basis, but the actual components choice in the two

8   side-by-side orders were not identical. "Under the Pacific

9   Northwest Order, the components to be priced will be nonfat

10 milk solids and butterfat. Under the Southwestern

11 Idaho-Eastern Oregon Order the components to be priced will be

12 protein and butterfat." (59 Fed. Reg. 8546, 8547 (1994).)

13   Second, just one year later, in 1995, five of the

14 existing Orders in the Upper Midwest region (Orders 30, 65, 68,

15 76 and 79) adopted an MCP system that replaced the

16 long-standing skim/fat method for paying producers. Notably,

17 the choice of component alternatives was not identical to the

18 1994 decision for the Idaho/Oregon/Washington markets. Rather,

19 these upper Midwestern orders determined that "[p]roducers

20 would be paid on the basis of the pounds of butterfat, protein,

21 and other solids, (solids -- should read, solids-not-fat other

22 than protein) in their milk..."

23   JUDGE CLIFTON: I'm going to interrupt right there,

24 Mr. Hollon, when you read the phrase just before you explained

25 solids-not-fat, you left out a word. So could you please, I

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1 hate to have you do it, but start again the sentence beginning

2 with rather. And also, you referred to Upper Midwestern

3 Orders, so I think it would be good to start with "rather."

4   MR. HOLLON: Rather, these Upper Midwest Orders determined

5 that "[p]roducers would be paid on the basis of the pounds of

6 butterfat, protein, and other nonfat solids (solids-no-fat

7 other than protein) in their milk..." (60 Fed. Reg. 41833,

8 41834 (1995).) Further, the variations in MCP plans were noted

9 in the decision to which these changes were made, as follows:

10   JUDGE CLIFTON: And before you do that quote, I'm going to

11 instruct Ms. Frisius on the record copies, on the page 29 of

12 Exhibit 63, to insert a "T" in the middle of the page so that

13 the phrase that Mr. Hollon has pointed out to us will read on

14 the record copy solids-not-fat. Thank you.

15   Mr. Hollon, you may proceed.

16   MR. HOLLON: The following is a quote from the decision:

17   The multiple component pricing plans considered
                 thus far for inclusion in Federal Milk Orders have
18   been developed and proposed by the industry
                 participants in the affected marketing areas. The
19   plans have tended to be modified from one
                 proceeding to the next, with ideas about the most
20   appropriate provisions evolving as time goes on,
                 and to reflect individual marketing conditions.
21   ...

22   Unlike the multiple component pricing plans
                 adopted previously in other Federal Milk Marketing
23   Orders, this decision recommends the adoption of a
                 pricing plan for milk based on three components,
24   rather than two.
                 (ID at 41838.)

25

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1   Lastly, in the Federal Order Reform decision of 1999,

2   several key changes were made that unified rather than

3   diversified the component pricing provisions. MCP provisions

4   were adopted for six of the ten currently remaining reformed

5   orders, with the difference being inclusion of a somatic cell

6   premium/deduction component in four of those six orders.

7   Reading a cite from a hearing record:

8
               Under this final rule, producers in most Federal
9   Orders will be paid on a multiple component basis
               --
10

11   BY MR. BESHORE:

12   Q. Mr. Hollon, just begin the quote again. You missed a

13   word.

14   A. Okay.

15   Q. Take your time.

16   A.
               Under this final rule, producers in most Federal
17   Order markets will be paid on a multiple component
               basis since the basic formula price replacement is
18   based on individual milk component prices.
               Producers will be paid for the pounds of
19   butterfat, pounds of protein, pounds of other
               solids, a per hundredweight price known as the
20   producer price differential, and a per
               hundredweight somatic cell adjustment. The
21   producer price differential returns to producers
               their pro rata share of the proceeds of the
22   classified pricing system. The butterfat,
               protein, and other solids prices paid to producers
23   will be the same as the prices for those
               components announced for Class III use regardless
24   of the utilization of the milk. Handler
               obligations and producer payments under the
25   Federal Orders that do not provide for component

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1   computed from these component prices.

2   (64 Fed. Reg. 16026, 16105 (1999).)

3   This decision collected various MCP plans formulated by

4   the Secretary considered to be a superior alternative for all

5   markets that utilized an MCP plan at that time. In formulating

6   that alternative, the Secretary provided the following

7   reasoning: "The formulas are relatively simple to use and can

8   be applied uniformly. The formulas are transparent and the

9   Class III and Class IV formulas meet the sound economics

10 criterion." (64 Fed. Reg. 16026, 16096-16097 (1999).) The

11 basic product price formulas were, and remain the same, for all

12 markets. Further, the price values of the formulas are all

13 derived from national, rather than regional, prices. In the

14 MCP markets, the price formulas play out in the form of an

15 individual component values -- start that sentence over again.

16 In the MCP markets, the price formulas play out in the form of

17 individual component values, while in skim/fat markets, they

18 play out in the form of butterfat and skim values. All of the

19 orders (both MCP and skim/fat) calculate all prices in the same

20 basic formula constructs.

21   D. Development of Transportation Programs to Meet

22 Market Needs

23   The development of transportation programs in the FMMO

24 system also provides an example of the type of variation that

25 can exist from order to order in terms of implementation,

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1 change, and significance.

2   The transportation credit programs were a result of the

3 1985 Farm Bill, which allowed market-wide service programs to

4 be implemented in the Orders, if justified by a hearing.

5 Transportation credit programs are currently present in Orders

6 5, 7, and 30 to address the specific needs of procuring both

7 local and supplemental milk for the market by allowing partial

8 recovery of transportation costs. The Order 30 model has been

9 unchanged since implementation, while the Order 5 and 7 model

10 have been modified several times in response to changing market

11 conditions.

12   The transportation credit provisions in Orders 5, 7,

13 and 30 are similar in that they are all transaction-based,

14 mileage-based, and subject to audits. They differ markedly,

15 however, in how they are funded and what milk qualified for

16 payment. In particular, the Order 30 provisions are funded

17 from the blend pool, while the Order 5 and 7 provisions are

18 funded via an assessment on Class I pounds.

19   Interestingly, the first transportation program after

20 the 1985 Farm Bill was authorized by the 1988 decision in the

21 (pre-FMMO Reform decision) Texas Milk Marketing Area. That

22 program was not included in the (post-FMMO Reform Decision)

23 Southwest Order. Unlike the existing transportation credit

24 programs that are currently in place in Orders 5, 7, and 30,

25 which assist in getting milk supplies to the market, this

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1 decision assisted in moving surplus milk out of the market.

2   The 1988 Texas Order Decision reversed the USDA mindset

3 with regard to market-wide service payments for transportation

4 assistance and granted them for dealing with surplus milk

5 supplies.

6   Reading a citation from that -- not a citation, a

7 sentence from that decision.

8   Q. Quotation.

9   A. Quotation, there we go.

10   This final decision would provide transportation
             credits to handlers for hauling excess producer
11   milk to nonpool plants located outside the state
             of Texas. The credits would represent a partial
12   reimbursement of hauling costs from the Order's
             market-wide pool. Such credits would apply during
13   the months of March through June and the last half
             of December, and would be limited to milk going
14   into Class II and Class III uses. The credits
             would be computed at a rate of 2.4 cents per ten
15   miles. Credits would be limited to handlers who
             transfer milk from plants located in Zone 1 of the
16   marketing area, while credit on milk is moved
             directly from farms to nonpool plants would be
17   limited to milk produced in Northern Texas and
             Southern Oklahoma. Handlers would also receive a
18   credit to recognize costs associated with hauling
             milk from higher to lower prices areas. The
19   amount of milk to which transportation credits
             apply, would be reduced to the extent that a
20   handler or affiliate of a handler caused milk from
             outside the state of Texas to be received from
21   plants in the marketing area.

22 (53 Fed. Reg. 36321, (1988).)

23   JUDGE CLIFTON: Before you go to the next quotation,

24 Mr. Hollon, in the, we're on page 32 of Exhibit 63, and in the

25 next to the last line of that first paragraph you have quoted,

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1   if what is shown there says the handler rather than a handler,

2   would you prefer that your testimony say the handler?

3   Oh, it's both ways in that sentence. I'd just ask you,

4   since this is a direct quote, I'd just ask you to read again

5   the last sentence of that first quotation on page 32.

6   MR. HOLLON:

7   The amount of milk to which transportation credits
                apply would be reduced to the extent that a
8   handler were affiliate of the handler caused milk
                from outside the state of Texas to be received in
9   plants in the marketing area.

10 BY MR. BESHORE:

11   Q. Continue with the second quoted material then, please.

12   A.   ...

13   There are a number of significant differences that
                distinguish the Texas situation from that
14   described in the decision denying the issuance of
                such credits for the several Southeastern markets.
15   Primary differences, or the geographical
                limitation of the proposal, and the fact that the
16   reserve milk supplies for other markets are
                generally processed at El Paso, Texas and do not
17   displace Texas Order producer milk at plants in
                the major production areas of Northern Texas and
18   Southern Oklahoma.

19 (53 Fed. Reg. 36321 (1988).)

20   This decision is notable because it implemented a new

21 practice. A transportation credit concept that had been

22 recently denied in the Southeastern borders, but there was

23 determined to expressly meet market needs, market data and

24 testimony in the Texas order.

25   One year prior, in 1987, several proposals regarding a

2812

1 transportation -- no, start over.

 2   One year prior, in 1987, several proposals regarding

 3 transportation programs were made with regard to the

 4 Southeastern orders. (52 Fed. Reg. 15951 (1987).) Two of the

 5 proposals were to provide transportation assistance for

 6 transporting milk supplies into the market, and for

 7 transporting surplus milk out of the market. The hearing on

 8 these proposals was terminated with no decision. Later in the

 9 1990's, USDA allowed transportation credits for procuring

10 supplemental milk supplies to the Southeastern market as the

11 proposals were refined to match unique and specific market

12 needs.

13   E. Modernizing the FMMO System in Federal Order Reform

14   The Federal Order Reform decision was clearly a status

15 quo altering decision. In one decision, the number of orders

16 was reduced from 31 to 11 and multiple modifications were made

17 to the remaining orders. The differential pricing surface was

18 altered across the country, the price discovery system was

19 changed from one drawn from a competitive survey to a

20 product-formula basis, product classification definitions were

21 changed, transportation credit systems were modified, pooling

22 provisions were altered, and producer payment methodologies

23 were restructured into basically two methods driven by the same

24 set of formulas and based on nationally-derived prices. Many

25 provisions were made uniform through, "Part 1000," --

                                2813

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1   JUDGE CLIFTON: Start that sentence again, please.

2   MR. HOLLON: However, many provisions were made more

3 uniform through "Part 1000," in which many components of Order

4 provisions were declared the same for all orders. Definitions,

5 price formulas, and price discovery methodologies were a few of

6 the features that were made uniform.

7   If we were to review every FMMO hearing over time, we

8 would find that most hearings are about a short list of similar

9 topics. Common are the decisions that modify performance

10 standards, adjust an existing payment amount, or make a change

11 to a boundary, but there are also clear-cut examples of

12 significant policy shifts, such as eliminating the type of

13 order, (e.g., the individual handler pool), making significant

14 changes to a handler definition (e.g., the definition of

15 producer-handler), implementing an entirely new producer

16 payment scheme with many subtle differences but very common

17 underlying principles (e.g., MCP plans), and transportation

18 assistance programs that modify the pricing surface but not the

19 differential surface itself. The FMMO Reform Decision made

20 substantial changes to the existing system and standardized

21 many key foundational provisions and principles that are common

22 to all orders. The FMMO Reform Decision, thus located a

23 foundation that was national in scope while, at the same time,

24 allowing for more unique provisions tailored to individual

25 markets.

1   F.   Conclusion

2   These examples show that the Secretary has a history of

3   making decisions that alter the status quo, some of which have

4   been adopted as written, and some have been tested in courts.

5   Therefore, the fact that some of the concepts offered in the

6   Cooperatives' proposal may become the next status quo altering

7   decision should not weigh against their adoption, especially in

8   the face of the supporting data submitted by the Cooperatives

9   in this hearing. The AAMA provides many tools --

10   JUDGE CLIFTON: Start again on that sentence.

11   MR. HOLLON: The AMAA provides many tools and great

12   flexibility for fashioning the pooling terms of the Milk Market

13   Order. It does not prescribe the rules for defining who is in

14   and who is out of the market-wide pool, that is left up to the

15   hearing process. The proposed California order provisions for

16   pooling, although different from pooling provisions in other

17   FMMO's, are designed to meet the marketplace, just as

18   provisions for handler pooling, component pricing,

19   transportation, and many other previously unutilized provisions

20   have evolved over the years to address changes in the

21   marketplace and thus, become part of the Federal Order system

22   today.

23   BY MR. BESHORE:

24   Q. Thank you, Mr. Hollon that completes your prepared

25   testimony, I have just one question to ask you in addition.

1 This second statement you have made for this hearing is

2 addressed to the pooling issues with the proposal of the new

3 Federal Milk Marketing Order, and as happened, your testimony

4 has been divided over two days. And in conclusion, I just want

5 to ask if you would like to sort of sum up the position of the

6 proponents of Proposal Number 1 with respect to so-called

7 inclusive pooling. Why is it important and a part of this

8 proposal?

9   A. That would be helpful.

10   The producer interest that the Cooperatives represent

11 went to experience those national class values. We have heard

12 from producers earlier in the week -- was it this week? Or

13 perhaps earlier last week, and they uniformly expressed their

14 opinion on that. They recognize that those values are there

15 and that they aren't sharing in them. And they have concluded

16 that the next possible alternative step to do that is to

17 request a Federal Order.

18   And embodied in that, in order to achieve those values,

19 the pooling proposed that we have proposed are essential. And

20 in our study of the existing proposals, perhaps the only

21 alternative that would insure that.

22   Depooling defeats the purpose of capturing those

23 values. In addition to that, the California market

24 configuration with the presence of quota, and with the presence

25 of extremely high Class III utilization and extremely Class IV

1 utilization, creates a unique situation that offers actually

2 greater incentives to depool than in any other order.

3   And so, and when that happens, the amount of milk that

4 flips out of the pool would have a bigger impact on pricing

5 than it does in the other orders that offer that. So with

6 those two thoughts, I think that frames our broad perspective.

7   Q. Thank you very much. I have no further questions for

8 Mr. Hollon. I would move admission of Exhibit 63 and 64.

9   JUDGE CLIFTON: Let's start with the admission of the

10 exhibits. Ms. Becker?

11   MS. BECKER: Lauren Becker, USDA.

12   We noted two very minor corrections that we might want

13 to make before we admit this.

14   JUDGE CLIFTON: All right.

15   MS. BECKER: The first is on page 5, the fourth line down

16 reads: 78 times Class IV is higher." I believe that should be

17 Class 4b.

18   MR. HOLLON: Are you on --

19   MS. BECKER: I'm on your testimony, Exhibit 63, page 5,

20 fifth line down from the top.

21   MR. HOLLON: I think that that is correct that 92 times 4b

22 is higher, but I would need to --

23   JUDGE CLIFTON: Wait, take a look at it again.

24   MS. BECKER: I'm sorry, earlier in the sentence it says, 78

25 times, Class 4.

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1   MR. HOLLON: Oh, oh, okay, I'm sorry, yes that should be

        2   Class 4b.

        3   MS. BECKER: And the only other thing is on page 28 of your

        4   testimony, at the very bottom of the page, I believe there is a

        5   typographical error. The very last citation to the Federal

        6   Register reads 16026, and I believe it should read 16105. And

        7   that citation appears again on page 30 as correctly as 16105.

        8   MR. BESHORE: Thank you.

        9   JUDGE CLIFTON: Those are not small, those are big. Thank

       10   you so much, Mrs. Becker. Mr. Beshore, do you agree with those

       11   changes now that you have had a chance to look at what

       12   Ms. Becker proposes?

       13   MR. BESHORE: I do.

       14   JUDGE CLIFTON: Then I'm going to ask, Ms. Frisius, on the

       15   record copies of Exhibit 63, on page 5, fourth line down, to

       16   insert as best you can the small letter (b) after the Arabic

       17   numeral 4, so that that phrase will read 78 times, Class 4b is

       18   higher.

       19   Then I'm going to ask Ms. Frisius, on page 28, I would

       20   like you to strike 16015 and insert 16105. Now, with regard to

       21   Exhibit 63, the testimony. Does anyone wish to question the

       22   witness before you determine whether you have any objection to

       23   it being admitted into evidence? There's no one. Is there any

       24   objection to the admission into evidence of Exhibit 63? There

       25   is none. Exhibit 63 is admitted into evidence.

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1   (Thereafter, Exhibit 63 was

          2   received into evidence.)

          3   JUDGE CLIFTON: 64.   Does anyone wish to question

          4 Mr. Hollon about Exhibit 64 before you determine whether you

          5 have any objection to its being admitted?   There is no one.   Is

          6 there any objection to the admission into evidence of

          7 Exhibit 64?   There is none.   Exhibit 64 is admitted into

          8 evidence.

          9   (Thereafter, Exhibit 64 was

         10   received into evidence.)

         11   JUDGE CLIFTON: I have a question for Mr. Hollon and I

         12 don't know whether counsel wants him to field this question or

         13 not, but I want to know why the word "inclusive" is regarded as

         14 adequately descriptive of what you want?   Why does that word --

         15 why is the meaning of that word helpful in people understanding

         16 what milk goes into the pool?

         17   MR. HOLLON: I think it simply implies that it includes

         18 all.

         19   JUDGE CLIFTON: All right.   What other questions are there

         20 for Mr. Hollon, and do you want a short break before you do the

         21 cross-examination?   We could have a short break if anyone needs

         22 it.   There's kind of an indication it might be a good idea.

         23 Let's take ten minutes.   Please be back and ready to go at

         24 10:05.

         25   (Whereupon, a break was taken.)

1   JUDGE CLIFTON: We're back on record at 10:07. Who will be

2 the next to question Mr. Hollon? Mr. English?

3   CROSS-EXAMINATION

4 BY MR. ENGLISH:

5   Q. Chip English.

6   Good morning, Mr. Hollon.

7   A. Good morning, Mr. English. I trust we will enjoy the

8 next five to ten minutes of our interchange.

9   Q. You might enjoy the first five.

10   A. That was what I anticipated.

11   Q. So in that spirit, let's maybe start with what I think,

12 if I understand correctly, might be some easy things.

13   Looking at Exhibit 63, and then comparing it to

14 Mr. Beshore's statement in response to the Department's

15 questions about sort of a roadmap, you have testimony in this

16 statement about pooling that, as I read it, discusses

17 producer-handlers but sort in the context of policy changes.

18   A. Would it be easier if I said that we'll have testimony

19 on producer-handlers in another witness?

20   Q. Yes.

21   A. And it would be easier if I said we will the testimony

22 about, help me out, you know what I'm going to say.

23   Q. Transportation?

24   A. Transportation, no, that wasn't the one.

25   Q. Okay.

                            2820

1 A. Partially-regulated handlers.

2 Q. So partially-regulated handlers will be something I

3 should talk to somebody else about?

4 A. No, but not now.

5 Q. All right. Well, that is very helpful and that is sort

6 of the direction I was going in. And as I said, that was sort

7 of the enjoyable part of this. And, actually, again, a

8 separate issue, I'm certainly not looking to interrupt the flow

9 of this, but when we first conversed during this proceeding, we

10 had a conversation about Exhibit 20 and some corrections at

11 some point that you would likely make to Exhibit 20. And, in

12 fact, I think your Honor even indicated that when that happened

13 we would create a sort of a 20(a). Is that also going to

14 happen at a later date?

15 A. It is. That research has been done, those corrections

16 have been made, but there were other pressing matters between

17 then and now.

18 Q. All right. Did you happen to bring up, there was some

19 discussion with your counsel, the CDFA, Exhibit 61?

20 A. I did not. I have a copy in my bag if you want to keep

21 that one.

22   JUDGE CLIFTON: Well, I think you should have yours,

23 Mr. Beshore, and Mr. Hollon should get his.

24 BY MR. ENGLISH:

25 Q. If you could also have in front of you your Exhibit 64,

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1   and it's Table 5(c)(1) for instance.

2   A. Okay.

3   Q. So Table 5(c)(1) is the Table, Cooperatives' Table

4   5(c)(1) blend price estimate calculation using CSO, California

5   State Order, utilization, correct?

6   A. Correct.

7   Q. So for Column H, for CSO blend --

8   A. Correct.

9   Q. -- and if you said this during your testimony in

10   response to Mr. Beshore, maybe I missed it. Is that at test or

11   is that at 3.5/8.7?

12   A. It is at 3.5/8.7.

13   Q. And so only for FMMO blend that's what it is?

14   A. No, FMMO blend would be at 3.5 and 8.5, whatever the

15   Federal Order standard is.

16   Q. Okay. So the two are not exactly comparable?

17   A. They are not exactly comparable. And there's a

18   difference of about 2 cents per hundredweight that actually

19   would be in my favor if I put it in there.

20   Q. Okay. In your favor, meaning the Federal Order blend

21   would be higher and therefore, the difference would be altered,

22   correct?

23   A. Correct.

24   Q. Now, even as Mr. Beshore asked you about the fact that

25   you have been up twice, I'm certainly hoping not to repeat, and

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1 not looking to repeat, segments from the first time. So with

2 that in mind, we had a discussion, lengthy -- whatever you want

3 to call it -- a discussion last week with respect to your views

4 about the pricing surface, correct?

5   A. Yes.

6   Q. And that, in essence, and I can summarize, and if I get

7 it wrong please correct me, that, in essence, relied either on

8 Federal Order Reform or the changes that have been made since

9 Federal Order Reform that the Class 1 price surface is the

10 appropriate method for pricing in California today, correct?

11   A. Correct.

12   Q. And similarly, that the existing Federal Orders of

13 Federal Order price formula for Class III Class IV, and by

14 extension Class II, are correct, and are the ones you used for

15 this purpose, correct?

16   A. Correct.

17   Q. So to the extent we have a disagreement about that

18 price surface, that might impact the absolute level, but I

19 think you are probably going to say, it doesn't impact the

20 ultimate conclusions you are going to make?

21   JUDGE CLIFTON: Can you be more specific about where you

22 might have a disagreement?

23   MR. ENGLISH: Well, I was hoping -- I think we, I think,

24 have said, your Honor, that Class I differentials have to be

25 proved and have to be current. I think we have said the Class

2823

III and Class IV formulas have to be proved and have to be current, and would not rely on the existing system, and I think it's our conclusion, I think as indicated from some of the data, that those prices would likely be lower than the Federal Order prices that exist today in the system.

JUDGE CLIFTON: I see. So you are asking him that even if you were right about that, that would not change his overall vision for this California Order?

MR. ENGLISH: Yes.

JUDGE CLIFTON: You may answer, Mr. Hollon.

MR. HOLLON: First let me say we also will have another witness that will deal with pricing, but this is, I'm interpreting this as not a numbers question, but I would say a policy question between our two views?

BY. MR. ENGLISH:

Q. Yes.

A. Is that fair?

Q. Yes.

A. Then yes, we do support the national pricing grid as you have just described it, and those prices were used in all of these calculations. And to the extent that, you know, you would use the different pricing grid as you suggested, you would get different numbers, quite likely lower numbers, and that would, I don't know what those numbers would be or what they would look like, but I think the conclusions we would draw

2824

1 would still be to support our pooling provisions, but I can't

2 say for certain without obviously seeing what your numbers are.

3   Q. Okay. Now, in Exhibit 64 and in your calculations in

4 Exhibit 64, to the extent that your proposal at least as

5 drafted does not presently deal with exempt quota, and to the

6 extent that your proposal would, by the nature of Federal

7 Order, pool milk from out-of-state that presently, as we heard

8 from Mr. Shippelhoute yesterday, it is on the reports it goes

9 in and then it comes out, right?

10   A. That's the way I understand it, also.

11   Q. That did you, in preparing Exhibit 64, take into

12 consideration the impacts on the pool and the overbase price of

13 that Class I volume being in the pool when it is presently not

14 in the pool?

15   A. We did not. We used the utilizations as published

16 based on the total solids tables.

17   Q. So recognizing that you are talking about a change in

18 policy, let's at least explore what the policy to date has been

19 in the Federal Orders, in particular with respect to pooling,

20 and then the flip side of that, how it affects depooling?

21 Would you agree that as Federal Orders are presently

22 constructed, they are designed to permit farmers, whether or

23 not they actually serve the Class I market, but if they stand

24 ready, willingly and able to serve the Class I market, to share

25 in the Class I proceeds, the higher dollars in the Class I, for

2825

1 the pool?

2   A. That would be through the function of market-wide

3 pooling, and I would agree with that.

4   Q. And for that purpose, Federal Orders look to what the

5 reasonable reserve supply would be for the market, correct?

6   A. For the purpose of market-wide pooling?

7   Q. Yes, in order to determine, for instance, performance

8 standards?

9   A. I think that market-wide pooling was designed as a

10 price level impact.

11   Q. But in determining pooling in order to determine what

12 volume of milk is necessary or just looked at in terms of for

13 sharing in those proceeds, has the term reserve supply been

14 used by the market?

15   A. I'm not sure that I recall that. I understand the

16 concept of reserve supply.

17   Q. What is the concept of reserve supply?

18   A. Having milk that may be available to meet a demand when

19 it's demanded, and the available for the market if it's not

20 demanded, and sharing in the pool values.

21   Q. And didn't you use the term "reasonable reserve supply"

22 yesterday with respect to the diversion discussion?

23   A. I did.

24   Q. Okay. So what is your definition of a reasonable

25 reserve supply, since you used the term?

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A. I think in that, first of all, let's see where it's at.

         Q. Sure. Please. If it helps, I see it on page 21, but
it may be discussed elsewhere.

         A. On page 21.

         Q. I see the phrase "reserve milk supply" on page 21, that
may or may not be the right place. I'm not trying to misdirect
you?

         A. So we choose this measure as the best choice to
demonstrate a need for reserve milk supply in the California
market?

         Q. Yes. I'm sorry.

         A. Go ahead finish what you need.

          JUDGE CLIFTON: Actually, we need to keep some sound coming
so that they can check.

          MR. ENGLISH: And I appreciate what she's doing is very
important, and the only thing is I'm missing the answers --

          JUDGE CLIFTON: Could you, Mr. English, for now, move the
podium, until you are just in front of Ms. Becker. Thank you.

          MR. ENGLISH: I have lost my place.

          MR. HOLLON: I understand your concerns. We were on page
21.

BY MR. ENGLISH:

         Q. Right.

         A. And you pointed out the sentence "we choose this
measure as the best choice to demonstrate a reserve milk

                              2827

1 supplies in the California market."

2   Q. Yes.

3   A. That would be milk supplies that could be used to

4 supplement the Class I market when needed.

5   Q. Okay. Now, so what is your definition of what would be

6 an adequate reserve supply for the California market?

7   A. Well, I don't have the number, if that's the question.

8   Q. Okay.

9   A. And again, it would be, you know, milk to serve that

10 market when needed, and available when needed.

11   Q. Okay. Would you agree that a 50 percent diversion in

12 the, for a market that has a Class I utilization of ten percent

13 would be high relative to any other Federal Order with the

14 utilization similar to that?

15   A. With regard to that question, the answer would be yes.

16 But with regard to this instance, there's a difference, this

17 instance were Class -- first of all, our proposal would only

18 allow a supply plant to be outside the market, and this refers

19 to the qualifications for that supply plant outside its located

20 outside the market. And I think based on our proposals, your

21 clients and ours, is perhaps not a need for outside the market

22 reserve supplies. However, orders don't allow you to do that

23 by feat. You can't just say no milk from outside the market

24 can come in, but you can establish standards for outside of the

25 market that don't necessarily match inside. For example, in

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1   Order 30, 32, 33, there's a certain class of supply plants that

2   can only perform based on transferring milk as opposed to

3   diversions. So we are choosing to apply this standard to the

4   supply plants, and again the supply plants would only be

5   outside the market.

6   Q. I'll come back to that issue.

7   So given sort of existing pooling issues, and let's use

8   the post-Federal Order Reform discussion in a number of

9   hearings with respect to performance standards and pooling.

10   Let's go over what happened and why.

11   Post-Federal Order Reform, for various reasons, having

12   to do with price surface and advanced pricing, and you can name

13   other things if you wish, but the bottom line that what started

14   happening after Federal Order Reform is, you would have

15   situations where entities with Class III and IV milk, would

16   pool their milk on the existing Federal Orders during months

17   when they could draw from the pool, correct?

18   A. Yes.

19   Q. And when, because of pricing issues, such as the

20   Class III price being above the blend price, they would then

21   withdraw their milk from the pool so that they wouldn't have to

22   make that contribution to the pool, correct?

23   A. That happened. I would say my recollection of those

24   was that that milk was attached to the pool, and that was not,

25   as that was the primary reason for most of those hearings, was

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1 that there was milk attached that was not performing the

2 market, not performing for the market.

3   Q. The evidence that it wasn't performing for the market

4 was that it withdrew from the market when the price was such

5 that they had to make a contribution to the pool, correct?

6   A. Again, those hearings were awhile back, but my

7 recollection was that the records demonstrated the milk was

8 distant and rarely if ever served the market, California milk

9 in Order 30.

10   Q. We'll talk about that separately, that's a slightly

11 different issue.

12   A. But I don't know that I completely consider that

13 separate or Idaho milk in Order 30, or Kansas milk in Order 33

14 those issues were where performance standards were crafted to

15 meet individual market needs.

16   Q. Did you participate in a number of those proceedings?

17   A. I did.

18   Q. Do you remember that there were two proceedings in the

19 Upper Midwest, one in around 2001 and the other in 2004?

20   A. Generally, yes.

21   JUDGE CLIFTON: Let's go off record for a moment. Let's

22 resume it's 10:29. Thank you.

23 BY MR. ENGLISH:

24   Q. Did you read the decisions of the Secretary when they

25 came out with respect to those proceedings? Do you recall?

1   A. I'm sure I read them at the time. I don't recall them,

2 you know, word for word.

3   Q. Okay. I'm going to read for a moment, your Honor, from

4 Volume 71 of the Federal Register, dated September 13th, 2006,

5 the final decision which then became a final rule in the Upper

6 Midwest, which was the 2004 hearing, from page 54146.

7   "While the Orders' performance standards tend to assure

8 the distributing plants are adequately supplied with fresh

9 fluid milk, the goals of market-wide pooling are undermined by

10 the practice of depooling."

11   Do you remember that conclusion?

12   A. I don't remember that, but I trust you are reading it

13 from the Decision.

14   Q. Does that conclusion sound correct as to what the

15 Secretary would likely have concluded as a result of the

16 depooling hearing?

17   A. Yes.

18   Q. So let's parse that for a moment. First, the Secretary

19 uses the phrase "performance standards." Would you agree that

20 performance standards, as used in the existing Federal Orders,

21 encompass shipping requirements, touch base requirements,

22 diversion limits? Yes or no?

23   A. I can't tell if you are finished.

24   Q. I'm finished, but you can add if you need to add.

25 Would you agree it includes those three?

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1   A. I would agree that those three are things that are

2 parts of performance standards.

3   Q. And would you agree in the Federal Orders as they exist

4 today, that the purpose is to assure distributing plants are

5 adequately supplied with fresh fluid milk?

6   A. I would agree with that as part and also to help define

7 who shares in the pool values.

8   Q. Good. Fine. I certainly accept that, and I think

9 that's going to come in the next sentence.

10   Do you agree that with respect to the service of the

11 market for adequately supplying fresh fluid milk to

12 distributing plants, that the goals of market-wide pooling are

13 undermined by the practice of depooling?

14   A. I'm sorry, would you repeat? I was making a note.

15   Q. Do you agree that with respect to the performance

16 standards assuring that distributing plants are adequately

17 supplied with fresh fluid milk, that the goals of market-wide

18 pooling are undermined by the practice of depooling?

19   A. I think it's clear for a number of reasons that there

20 are performance standards, you have identified some, and that

21 there are standards for depooling in other Orders that reflect

22 the local practices as they impact that market and the

23 market-wide pooling of those markets.

24   Q. So the next sentence, page 54146 and I'm on column one

25 by the way, of three columns.

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1   "Producers and handlers who regularly and consistently

2 bare the costs of serving the Class I needs of the market, will

3 not equitably share in the additional value arising momentarily

4 from non-fluid uses of milk."

5   A. Sorry, read that again.

6   Q. "Producers and handlers who regularly and consistently

7 bare the cost of serving the Class I needs of the market, will

8 not equitably share in the additional value arising momentarily

9 from non-fluid uses of milk."

10   JUDGE CLIFTON: Yeah, I don't think we have enough of the

11 quote, but Mr. Beshore, let me hear your thoughts.

12   MR. BESHORE: My thoughts were just that, and that quote is

13 in context of something, well, not in some context, but I don't

14 think there's there.

15   MR. ENGLISH: I was trying to parse it, but I'll try to

16 read the whole thing.

17   JUDGE CLIFTON: Okay.

18   MR. ENGLISH: Going back to --

19   JUDGE CLIFTON: Now, is it possible that we can stop and

20 you ca make a copy -- oh, you have it in your laptop.

21   MR. ENGLISH: I have it in my laptop.

22   JUDGE CLIFTON: You know, it would be so much easier if

23 Mr. Hollon could see the Federal Register that you are using,

24 rather than just trying to capture the little bits you are

25 giving him.

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1   MR. ENGLISH: If we need to take a break and see how I can

2 do that, it's not easy. I have been trying to do that. I'm

3 using online services and things. I will do whatever, you

4 know, makes the most sense. I didn't have a whole lot.

5   JUDGE CLIFTON: Yeah, but out of context, whatever you are

6 getting is not valuable. Because if you we can't wrap our

7 heads around it. So let's go off record just a minute.

8   (Whereupon, a break was taken.)

9   JUDGE CLIFTON: Back on record. We are back on record at

10 10:45. Mr. English?

11   MR. ENGLISH: Yes, at your request, your Honor, and the

12 best we could, we have made copies. It would have been easier

13 to make one page, but it didn't work that way. We have

14 distributed to several people, your Honor, the witness,

15 witness's counsel and USDA, copies of the proposed rule

16 published on September 13th, 2006, and I'm referring to page

17 54146, Column 1.

18   JUDGE CLIFTON: Yeah, you know, it is a little hard to put

19 one paragraph in context no matter what reading this with such

20 an involved decision, but do your best.

21   MR. ENGLISH: Well, it is, but, your Honor, the way these

22 decisions work is they summarize sort of the testimony of

23 everybody and then near the end, the Department gives its

24 conclusions. And the conclusions tend to be relatively short.

25 And obviously, the whole thing is there, and we're, we intend

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1 to take official notice of this document so that all parts get

2 used since we have handed it out, although counsel on redirect

3 will be able to do it what he needs to do.

4   JUDGE CLIFTON: Ms. Hancock?

5   MS. HANCOCK: If we're going to go that far, I would like a

6 copy of it.

7   MR. ENGLISH: I'm sorry, Ms. Hancock, at first there was

8 one witness.

9   JUDGE CLIFTON: Thank you, Mr. English.

10   MR. ENGLISH: So the section I'm interested in is on page

11 5146, the first column, and I will read.

12   JUDGE CLIFTON: 541 --

13   MR. ENGLISH: 54146. It starts on the first column, the

14 second line, "While the Orders' performance standards." Is

15 everybody there? All right.

16   "While the Orders' performance standards tend to assure

17 the distributing plants are adequately supplied with fresh,

18 fluid milk, the goals of market-wide pooling are undermined by

19 the practice of depooling. Producers and handlers who

20 regularly and consistently bare the costs of serving the Class

21 I needs of the market, will not equitably share in the

22 additional value arising momentarily from non-fluid uses of

23 milk. These same producers and handlers will, in turn, be

24 required to share the additional revenue arising from higher

25 valued Class I sales in a subsequent month, when class price

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 1   relationships change."

 2   BY MR. ENGLISH:

 3      Q.  So Mr. Hollon, if you want to look through for other

 4   things that's fine.

 5        JUDGE CLIFTON:  I'm sorry, Mr. English, I really don't

 6   think it's proper to focus on that paragraph without starting

 7   on the page before.

 8        MR. ENGLISH:  If that's your Honor's wish, of course we

 9   can.

10        JUDGE CLIFTON:  Even though it focuses on exceptions filed

11   by Foremost, I really do think you need to start with that

12   paragraph to put this in context.

13        MR. ENGLISH:  So I'll read the entire section at your

14   request.

15        "Exceptions filed by Foremost, et al, regarding the

16   interpretation of continuously pooled, and arguing that a

17   producer should be allowed to depool some milk in each month

18   without pennies, is contrary to the goal of the Federal Order

19   program and would undermine the intent of the repooling

20   standard.

21        Handlers and Cooperatives that depool, purposely do so

22   to gain a momentarily financial benefit (by avoiding making

23   payments to the PSF) which would otherwise be equitably shared

24   among all market participants."

25        That leads into the section I have read, but I'll read
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1 it again.

2   "While the Orders' performance standards tend to assure

3 that distributing plants are adequately supplied with fresh

4 fluid milk, the goals of market-wide pooling are undermined by

5 the practice of depooling. Producers and handlers who

6 regularly and consistently bare the costs of servicing the

7 Class I needs of the market, will not equitably share in the

8 additional value arising momentarily from non-fluid uses of

9 milk. These same producers and handlers will, in turn, be

10 required to share the additional revenue arising from higher

11 valued Class I sales in a subsequent month when class price

12 relationships change.

13   In regards to the repooling standard, continuously

14 pooled will be interpreted to mean that a producer's milk is

15 pooled everyday on a Federal Order."

16   That is the entire paragraph.

17   JUDGE CLIFTON: Thank you, very much. You did say one word

18 slightly different from what it is here, but the meaning is

19 exactly the same, so I'm not going to go back there with you.

20   MR. HOLLON: It's tough to read those long paragraphs.

21   JUDGE CLIFTON: Yes, it is.

22 BY MR. ENGLISH:

23   Q. So let me start then, Mr. Hollon having done it this

24 way.

25   A. Before you start, can I ask you a question? I have

2837

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 1  looked and I can't find it.  Can you tell me who Foremost, et

 2  al represented?  I've looked through the statement and I can't

 3  notice that.

 4      Q.  I do have an answer and I was more interested in the

 5  Secretary's response.  If you think it is important, I guess we

 6  can try to figure it out.

 7      A.  Let's try to proceed.

 8      Q.  Do you recall whether you attended this particular

 9  proceeding?

10      A.  I recall that I attended this particular proceeding.

11  At least, I think I recall that I did.  I haven't noticed

12  myself in the decision yet though.

13      Q.  Well, I don't think names --

14      A.  -- or my employer.

15      Q.  I thought I saw your employer but -- let's start back

16  half hour ago or so, your recollection was that these

17  proceedings were largely about the pooling of distant supplies

18  of milk.  Does this either refresh your recollection or give

19  you a view that there was more at issue with respect to it and

20  depooling, while may be linked in some instances, to Idaho,

21  California, nonetheless there was a specific discussion about

22  depooling generally?

23      A.  Yes, there was a specific discussion.

24      Q.  And I'm really trying not to go through all the

25  decisions made post-2000 two Upper Midwest decisions, and two
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1 Mideast, and two Central and one Northeast?

2   A. Do you have the number associated with your "all"?

3   Q. I would have to go and look at the regional hearings

4 there were a number of hearings, correct?

5   A. You said, "I'm not going to try all," I'm just

6 wondering does the number you are going to try would be 1, 2,

7 3, 4, 5, 6, 7, 8?

8   Q. I'm trying to limit.

9   A. Very good.

10   Q. Given these decisions, isn't it the case that what the

11 Secretary was concerned about is entities taking or sharing in

12 the Class I proceeds when it was to their economic benefit and

13 then removing milk from the pool when they otherwise would make

14 payments to the pool?

15   A. I'm going to preface my answer with the comment of, you

16 know, there were, as you mentioned, several of these, and they

17 all represented different market situations. That, and the

18 decisions were unique for those markets. With that preface,

19 the situation of depooling, did and does address the sharing of

20 marketing proceeds. I'm not sure if I would say it was only,

21 it would only be Class I proceeds, although I agree with you

22 that read Class I in this comment however, when you are the

23 depooling math covers broader than Class I values.

24   Q. Well, the depooling math may cover more than the

25 values, but hasn't the Secretary in these decisions focused on

1   the purpose of the pool and Class I impacts?

2   A. In this decision there, I, again, haven't read it all,

3   and it was 15 years ago but, the paragraph that you read, I

4   would agree that the Secretary has a focus on Class I and

5   depooling this one.

6   Q. And just to be clear, it was nine years ago?

7   A. Thank you. But again, this was a decision for that

8   market.

9   Q. Would it surprise you if responding to different

10 exceptions, if the identical language that I read initially

11 before adding in the rest of the paragraph, with that initial

12 language that I read appears in multiple decisions from the

13 Secretary with respect to these hearings that were held

14 post-Federal Order Reform?

15   A. No, it would not.

16   Q. Now, there was another hearing, and I'm not sure you

17 participated, it was in the Northeast. Do you recall there was

18 only one Northeast post-2000 hearing. Did you participate in

19 that hearing?

20   A. You will have to give me some more detail.

21   Q. It was another pooling and performance standards, and

22 there was a request for Cooperatives --

23   A. Can you tell me the general topics?

24   Q. Yes, as soon as I can open it?

25   A. Okay.

1   Q. Year-round supply plant performance standards,

2   excluding milk received by supply plants from producers not

3   eligible to be pooled on the Northeast Order, remove a

4   split-plant provision, established one-day touch base standard,

5   establish explicit diversion limits for pool plants, prohibit

6   the ability to pool the same milk on Federal Milk Order and

7   market-wide pool administered by another entity, and grant

8   authority to the Market Administrator to adjust the touch base

9   and diversion limit standards it market conditions warrant."

10   Does that help at all?

11   A. I don't recall attending that. Can you tell me the

12   date or at least the year?

13   Q. And this was, unfortunately, I couldn't open for some

14   reason. I apologize. The Notice of Hearing was in 2002, a

15   supplemental Notice of Hearing in August of 2002, a recommended

16   decision on March 25th, 2004, and the proposed rule issued on

17   January 31, 2005.

18   A. I don't recall being a part of that proceeding.

19   Q. Do you recall whether, before that proceeding -- first

20   of all, DFA does have member producers in the Northeast,

21   correct?

22   A. It does.

23   Q. And it has since it was formed, correct?

24   A. Yes.

25   Q. And you're familiar with the provisions generally of

2841

1 Federal Orders because that's part of your job, correct?

2   A. Correct.

3   Q. Do you recall whether prior to this decision that there

4 was a provision for supply plants that didn't meet the

5 standards after already being a pool plant? They were a pool

6 plant and then they didn't meet the standard, they could

7 nonetheless automatically be pool plant for a period of months

8 after they lost their status?

9   A. In what order?

10   Q. Order 1 or --

11   A. Part of that hearing?

12   Q. Well, before that -- okay. In Order 1, prior to that

13 hearing, are you aware that there was a provision permitting

14 the automatic pool status of a supply plant in subsequent

15 months if it had had pool status?

16   A. I'm not aware.

17   JUDGE CLIFTON: Mr. English, with regard to this Final Rule

18 in 2005, would you read into the record where it can be found

19 in the Federal Register?

20   MR. ENGLISH: Yes, your Honor, and then I'm going to move

21 on since the witness doesn't recall anything.

22   Monday, January 31, 2005, which is 70 Fed. Reg. Page 4932,

23 January 31, 2005.

24   JUDGE CLIFTON: Thank you.

25 BY MR. ENGLISH:

2842

1   Q. Are you aware whether other orders had had provisions

2 for so-called automatic pooling of supply plants in months

3 immediately succeeding their either voluntarily or otherwise

4 losing their pool plant status?

5   A. Not offhand.

6   Q. So you have referred separately, and I promised to come

7 back to it, to the issue with respect to California milk that

8 was pooled, for instance, on the Upper Midwest Order, correct?

9   A. Correct.

10   Q. And the nature of that issue was that milk, until its

11 change was made by the Secretary, could simultaneously receive

12 the benefits of the California pool and also be pooled on a

13 Federal Order at the same time, correct?

14   A. So long as it met the existing performance standards

15 the Federal Order, correct.

16   Q. Effectively, the same milk would receive two blend

17 prices?

18   A. Correct.

19   Q. And the Secretary concluded that that was not to be

20 permitted, correct?

21   A. That the same milk could receive a blend price under

22 the California provisions and the same milk could receive a

23 blend price under the Federal Order provisions, that was

24 incorrect.

25   Q. And did you participate with respect to that issue, at

2843

1 least in the Upper Midwest hearing?

2   A. I did.

3   Q. And you testified that that was a form of a regulatory

4 of abuse -- maybe that's too strong a word.

5   A. I testified and our position in that was to correct

6 that situation.

7   Q. Was your testimony because permitting that to happen

8 was a form of double-dipping?

9   A. Perhaps that was the term that was used at that time.

10   Q. Do you agree with that term?

11   A. I think it was a slang term to describe the practice of

12 being in the two pools on the same milk at the same time.

13   Q. Do you have another term that you would use?

14   A. Being in two pools in the same, on the same milk at the

15 same time.

16   Q. Do you disagree with the slang of double-dipping?

17   A. I don't know if it's appropriateness or not.

18   Q. So let's talk about performance standards. And I read

19 your testimony, and your view is that the diversion limit for

20 supply plants is a performance standard for your proposed

21 order. Is that a correct reading of your testimony?

22   A. There's -- it is a performance standard, yes, for the

23 proposed order. And the specific sections deal with supply

24 plants that can only be located outside the marketing area.

25   Q. Are there any performance standards for supply plants

1   located inside the market area?

2   A.   I don't think our proposal calls for supply plants and

3   so it allows supply plants inside the marketing area.

4   Q.   They are just simply pool plants, correct?

5   A.   That's correct. Section 7(c) describes the pool plant

6   and would fit the definition of any plant that is located in

7   the marketing area that receives a milk from a supplier in the

8   marketing area would be a pool plant.

9   Q.   Are there any performance standards for 7(c) plants?

10   A.   There are not.

11   Q.   Is there a performance standard for a 7(c)(1) plant

12 which is a plant located in Churchill County, Nevada if certain

13 conditions are met?

14   A.   If the decision finds for 7(c) and 7(c)(1) as written,

15 no, there would not be.

16   Q.   And you agree that that is different from any existing

17 Federal Order?

18   A.   Yes.

19   Q.   And it is your, and I realize that because we're

20 chopping this up or whatever we're doing, I know I'm jumping

21 ahead a little bit, but there's been testimony about it?

22   A.   I'll grant you grace.

23   Q.   Thank you. I'm sure I need it. It is your testimony

24 that the incentive to move milk to Class I plants is going to

25 come out of your transportation credit provisions, correct?

1   A.   That and other marketplace dynamics.

2   Q.   What other marketplace dynamics will move milk to

3 Class I plants?

4   A.   The relationships between buyers and sellers, the

5 desire to have a diversified portfolio, if you will, of buyers

6 contractual relationships that are both in the market and reach

7 to entities located both in and outside the market.

8   Q.   What Federal Order provisions other than transportation

9 credits, will provide Class I handlers with the ability to get

10 milk?

11   A.   None.

12   Q.   Why should Class I handlers who pay a Class I

13 differential and in normal price relationship months, therefore

14 pay the highest price formula, not as with existing Federal

15 Orders, receive a performance standard as existing in other

16 Federal Orders such as shipping percentages?

17   A.   Those prices that you refer to are set in the uniform

18 pricing grid, if you will, and the Class I differential that

19 you referred to will go into the pool and fund those

20 transportation allowances as a part of the regular prices and

21 be used to make shipments to any handler that a Class I handler

22 and in this case, a Class I and Class II handler versus a Class

23 III and Class IV handler in different so those would be the

24 reasons.

25   Q.   Well, if it just makes them indifferent, why would they

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1 bother to engage in the transaction costs of having to actually

2 make the shipment and get a credit, when they can be

3 indifferent and instead just ship to Class III and Class IV?

4   A. Again, the reasons I mentioned before, the desire to

5 have a diversified sales base, contractual relationship

6 relationships between companies.

7   Q. None of which are Federal Order provisions, right?

8   A. None of which is are Federal Order provisions.

9   Q. In your exhibit, Exhibit 64, you purported to show the

10 price relationships for different classes, and I can pull the

11 schedule, I'm sorry. So it is 5(e) and Column K, which is

12 Federal Order Class II, you have an analysis there. How many

13 stand-alone Class 2 and 3 plants are there in California?

14   A. I don't have a firm count.

15   Q. Do you have any information for this record?

16   A. I do not.

17   Q. To the extent that facilities with what is Class 2 and

18 Class 3 that would become Class II in Federal Order, if that is

19 operated as part of a Class I operation, then that milk cannot

20 depool regardless under existing Federal Milk Order Rules,

21 correct?

22   A. I think that's correct.

23   Q. Okay. But your calculation K on 5(e) essentially

24 assumes that all that milk is stand-alone facilities and could

25 depool, correct?

2847

1   A.   That would be true.

2   Q.   In your testimony you discuss the, and the exhibit, you

3   discuss the decision to depool, as I read the schedule on the

4   Exhibit 64 and your related testimony, and this is now schedule

5   5(d)(1), you did not input into choice G any costs associated

6   with depooling in a subsequent month, correct?

7   A.   Say it again, please? I'm sorry.

8   Q.   So in looking at, for instance, the column, the row

9   January 2000, and the comparison of the California State Order

10   4a price, the California State Order 4b price, the California

11   State Order for determining which is higher and the column F

12   and getting to the choice G to depool milk?

13   A.   I'm with you.

14   Q.   You did not, those -- those are just, every one of

15   those is just made an insulation for each month when you looked

16   at that, correct?

17   A.   Correct.

18   Q.   You did not consider if the Secretary adopted

19   restrictions on repooling, how restrictions on repooling in

20   February would impact the decisions in January?

21   A.   Did not.

22   Q.   On page 7 of your testimony, you referenced the

23   possibility of entities that have both 4b and 4a capabilities,

24   to keep a permanent block of milk off the pool, correct?

25   A.   Correct.

2848

1   Q.   Which entities presently, today, have that capability?

2   A.   Two come to mind, and one assumes that a plant that's

3 under construction will be constructed. But I would say two

4 quickly come to mind would be DFA or Hilmar Cheese.

5   Q.   Without going into specifics, and in this gets into

6 what?

7   A.   It is a little late when you asked for names.

8   Q.   No, I'm going more specific than that. So, but I'm

9 conscious of what Mr. Estes called a trade secret yesterday.

10 Can you provide for this record whether DFA's plant capacities

11 have the ability to sort of make that switch?

12   A.   Under this scenario, I don't think that would matter.

13   Q.   Okay.

14   A.   You would simply swap capacities.

15   Q.   Nonetheless --

16   A.   -- and there may be others, and there could be two that

17 are not the same entity, two separately owned entities could

18 make an arrangement if their costs were similar. You could

19 have an entity with a drier in one location as an example, or

20 Class IV in one location, and nearby another entity with Class

21 III, and they could strike the same type of arrangement.

22   Q.   Those kinds of arrangements we allow the Market

23 Administrator to look through at various transactions and

24 couldn't the Secretary divide a mechanism to make, to look at

25 those transactions and conclude that they were designed to

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1 avoid regulation, and thus, as with other changes, put other

2 kinds of restrictions, other than non-restrictions in place?

3   A. I guess this is not my position to limit the Secretary.

4   Q. So I think you have suggested that I should discuss

5 with a later witness, whoever that may be, Section 76, correct?

6 Partially regulated plants?

7   A. Yes. At a separate time I think it will be the same

8 person.

9   Q. Okay. I understand. But, you know --

10   A. We'll get to it.

11   Q. There's no reason to cross-examine you if you have not

12 had an opportunity to speak about it. I'm perfectly -- I just

13 need to know, I didn't he need to know it was going to be the

14 same witness, I appreciate knowing that, but I did need to know

15 that I have my chance.

16   So let's, instead, turn to some discussions about

17 plants located outside the marketing area and let's start with

18 looking at, and some of this may also go to things inside the

19 market, so let's start by looking at 7(a). And even though

20 7(a) doesn't say it, as a practical matter, because of 7(c), a

21 pool distributing plant located in California that only has 20

22 percent of its route disposition in California, so it would not

23 meet the standard of 7(a), and let's say it is not an ESL

24 facility so it doesn't meet the standard 7(b), it nonetheless

25 would be a pool plant under Cooperative Proposal 1, paragraph

1 7(c), correct?

2   A. Yes.

3   Q. So would it be fair to say that 7(a), whether designed

4 that way or not, really only makes a difference for regulation

5 for plants that are located outside the state and then meet the

6 pool plant definition by having 25 percent or more disposition

7 in California?

8   A. I think I was with you until the end. Would you try

9 that again?

10   Q. Okay. The practical impact of 7(a) is to affect the

11 regulatory status of plants outside the marketing area only.

12   A. I guess I think of 7(a) as the status of plants inside

13 the marketing area.

14   Q. In Proposal 1, whether in Section 7, or Section 12, or

15 Section 13, are there any regulatory implications of a plant

16 being regulated under 7(a) inside the marketing area versus my

17 example of a 20 percent plant and therefore falling under 7(c)?

18   A. None that I recall at this time.

19   Q. Okay. So assuming that is correct, and the therefore,

20 7(c) basically captures all plants in California receiving

21 California milk, correct?

22   A. Correct.

23   Q. So given that, doesn't that mean the practical impact

24 of 7(a) is to have a regulatory affect on those plants

25 out-of-state that have 25, that meet the 25 percent route

2851

1 disposition and transfers in the marketing area?

2 A. Well, I haven't studied all the implications, at least

3 initially I would agree with you.

4 Q. So if such a plant hypothetically existed in a state

5 surrounding California, and I think actually your first

6 testimony actually went a step further, we can make a little

7 less hypothetical, because you basically said I think, that the

8 existence, the application of the Milk Regulatory Equity Act to

9 a plant in Arizona that sells milk into California, I believe

10 you testified was one of our elements of disorderly marketing,

11 correct?

12 A. Yes.

13 Q. In Exhibit 19. And you said that adoption of Proposal

14 1 will remedy that, correct?

15 A. Yes.

16 Q. So it is your professional opinion that a plant, one or

17 more plants in Arizona that presently ship milk into California

18 that are regulated under the Arizona Federal Order, will become

19 instead, regulated on this California Milk Order if they don't

20 change any of their route disposition?

21 A. That's what I think will happen.

22 Q. Now, that plant, then, becomes a pool plant under the

23 Federal under Proposal 1 for your order, correct?

24 A. Yes, under that scenario, if it doesn't, if it has the

25 right route disposition and percentage of fluid or percentage

2852

of Class 1 is as a percent of total, if it meets those two

requirements, the 25 and 25, it would become pooled in the

California Order.

Q.   Now, when I attempted to ask Dr. Erba questions about

this subject, he more than strongly suggested that I needed to

ask that of subsequent witnesses, so I want to ask questions

about the combination of the testimony about quota and pool

plant. And would you be the right witness to ask those

questions of?

A.   I wasn't here when Dr. Erba testified, so I don't know,

but I will try.

Q.   Okay. So to the extent that one or more Arizona plants

that are presently regulated under the Arizona Order would

become regulated under the California Federal Order under the

coop of Proposal 1, and to the extent that those plants, that

one or more plants receive milk from Arizona dairy farmers who

cannot own quota, their price or the credit the handler would

receive for their milk would be now under the Federal Order you

propose, equal to the non-quota blend price, correct?

A.   Correct, that is our proposal.

Q.   Okay. And have you done a comparison based upon your

analysis of what that non-quota California blend price would be

compared to the price or the credit the handler receives today

on that milk under the Arizona order?

A.   Have not.

2853

1   Q. Okay. Would you agree with me that it is very likely

2 going to be lower?

3   A. Try that again. I think, yes, but I want to hear you

4 say that again so I make sure.

5   Q. That the Arizona Federal Order blend price for that

6 plant shipping into California that today's regulated in

7 Arizona, but under Proposal 1 you believe would be regulated

8 under California Federal Order, that the Federal Order blend

9 price it receives today at that plant would be higher than the

10 overbase price?

11   A. There was a lot of moving parts there. Is the thought

12 that a blend price with quota taken out would be different than

13 a blend price without quota taken out?

14   Q. Yes.

15   A. And so the one without quota taken out would be higher

16 than the one with quota taken out?

17   Q. But I'm also factoring into the consideration, the

18 Arizona Order is not identical to the California Order and

19 would have a different blend price regardless.

20   A. The Arizona --

21   Q. The Arizona Federal Order has a blend price today,

22 correct?

23   A. Yes.

24   Q. And ignoring quota for a moment, California would have

25 a statewide blend price it would not be identical to the

2854

1 Arizona blend price, correct?

     2   A. Not likely.

     3   Q. But even considering that difference, you would agree

     4 with me that it is very likely that the overbase price in a

     5 California Federal Order is going to be here going forward than

     6 the Arizona blend price?

     7   A. That I don't know.

     8   Q. Okay. And you didn't do the analysis?

     9   A. I didn't. Was that your question from the start?

    10   Q. No, no, no, that's where I think I ended up.

    11   A. What was the milk cream quote?

    12   Q. Skim milk masquerades as cream.

    13   A. Things are --

    14   Q. So --

    15   A. Thank you. Can I interrupt you just one second? Can I

    16 ask a question? Because this is kind of a separated time, can,

    17 if we want to do any redirect, can we allow ten minutes at the

    18 end in case this goes -- it may be difficult to come back

    19 Wednesday and say, well, what did we say on Friday? Would that

    20 be acceptable if we wanted to do it?

    21   JUDGE CLIFTON: You noticed your counsel was shaking his

    22 head no.

    23   MR. HOLLON: That's fine. I will agree with my counsel.

    24   MR. ENGLISH: By the way, I was going to nod my head yes,

    25 but your counsel disagrees.

BY MR. ENGLISH:

Q. So now to the extent that that plant receives milk from California farmers as opposed to Arizona farmers, if that milk is received on an everyday basis, and I think we may be going back a week now, we may have already said this, but you would agree that it is very likely that that milk is going to be overbase milk, if that milk is received everyday at an Arizona plant?

JUDGE CLIFTON: Well, wait a minute now, you just added that it's going to the Arizona plant?

MR. ENGLISH: Yes, it's California produced milk, it's California farm milk, ranch milk as now know, California ranch milk physically received at the Arizona plant because of quota rules and requirements, you would agree that that milk is almost certainly going to be overbase milk, correct?

MR. HOLLON: Are you asking me about the, who the shipper is or are you asking me about what the California regulation is about what can be quota and what can't?

BY MR. ENGLISH:

Q. I'm sort of asking a combination. You know what the California quota rules are about what can and cannot be, correct?

A. That the milk has to be produced in California.

Q. And it also has to be received at a pool plant in California, a certain number of days, correct? Or at least

2856

1 every 60 days?

2   A. Yes, I agree with that.

3   Q. So if instead that milk is received everyday, which is

4 to say, year-round --

5   A. Yes.

6   Q. -- in the plant in Arizona, it's not going to qualify

7 as quota milk, correct?

8   A. That's correct. Under current rules that would be the

9 case.

10   Q. Under current rules.

11   A. Which are established by the California Legislature, if

12 you will, not by the Order, but yes, under current rules it

13 would not be quota milk.

14   Q. Okay. And, therefore, you would conclude as a rational

15 businessperson that that milk is overbase milk?

16   A. Yes.

17   Q. Going into the Arizona plant, correct?

18   A. Correct.

19   Q. And so the same questions I asked about the impacts as

20 to Arizona milk would have identical answers or in the case you

21 haven't analyzed an identical answer as to that, correct?

22   A. Correct.

23   Q. So I don't have to go back and ask those questions,

24 correct?

25   A. Correct. It would be true that -- it would be true

1 that the entity making those shipments would also evaluate that

2 and decide perhaps they didn't want to do that. They might

3 make a different business decision, which we can't, which we

4 can't figure out. But to your math comparisons, I would agree

5 with you.

6   Q. Well, the only different business decision they could

7 make was to abandon the California market, right?

8   A. Or ship into a different California location instead.

9   Q. You mean the farm?

10   A. The farm, correct.

11   Q. But the farm could make a different decision, but in

12 making that different decision, it's going to have the same

13 impact, it is only going to make the overbase price, right?

14   A. Not if it ships to a California plant and it has quota,

15 it would get quota payment and their blend price.

16   Q. I understand. But by supposition, with which I thought

17 you agreed, was that given that milk today being received all

18 year round at the Arizona plant, that it is not eligible for

19 quota, it is not quota milk, correct?

20   A. That's right. With those suppositions, I agree.

21   Q. Okay. So if it made a decision to sell to a different

22 plant in California as opposed to Arizona, it's not going to be

23 enhanced, it's regulatory price, correct?

24   A. But to the extent that in the scenario you have

25 described and assuming it had quota to start with, that was

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1 part of the assumption, correct?

2   Q. Yes.

3   A. Then if it chose to ship to a California plant, then it

4 would meet the requirement.

5   Q. And I'm sorry, my assumption was that --

6   A. Your assumption.

7   Q. -- milk was overbase, because -- my assumption was the

8 milk received in Arizona plant everyday wouldn't rationally be

9 quota because it would lose its quota status anyway, and

10 therefore, it must be overbase. I thought you agreed with that

11 proposition.

12   A. I did, and when we got to the end, I said that that

13 producer could decide to change their mind and ship to a

14 California plant and cure that problem if it was a producer who

15 had quota and shipped.

16   Q. If it had quota?

17   A. If it had quota, yes.

18   Q. But if my supposition is correct and it doesn't have

19 quota, it doesn't have that particular option?

20   A. Correct.

21   Q. Now, I want to turn a little bit to this idea of

22 recognizing the quota value and the impacts of the pool. Isn't

23 it true that the quota value is really the $1.70 per

24 hundredweight difference because that's what you are going to

25 take out of the pool, correct? That's the quota value?

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1 A. Is it the 19.5 cents per pounds of nonfat solids

2 generally converted to a per hundredweight?

3 Q. Yes, that's the quota value, correct?

4 A. Correct.

5 Q. So whether the pool for the month, let's say the blend

6 price, statewide blend price of the pool is $25. The quota

7 value for that month for that milk is still $1.70, correct?

8 A. Yes.

9 Q. And so now, let's say the blend price for the month is

10 statewide blend price is $15. The quota value is still $1.70,

11 correct?

12 A. Correct.

13 Q. So isn't the implication of your proposal not that you

14 are trying to preserve the quota value, but that you are really

15 trying to raise the overbase price?

16 A. I don't know.

17 Q. So let's talk about provision (c)(1), I'm sorry, be

18 more specific, 1051.7(c)(1), which is a reference to a plant

19 located in Churchill County, Nevada.

20 So first s couple predicate questions. How many plants

21 are located in Churchill County, Nevada today?

22 A. Today, one as far as I know.

23 Q. Are there any others being built right now?

24 A. Not that I'm aware of.

25 Q. That plant, I think, as we discussed either two Fridays

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1 ago, or Monday, or whatever, is a Dairy Farmers of America

2 plant, correct?

3   A. It is.

4   Q. And when did it open?

5   A. I don't have the exact date in mind. It's been recent.

6 I don't know.

7   Q. Was it a year ago?

8   A. Again, I don't exactly recall.

9   Q. Your Honor, I'm going to hand yourself, the witness,

10 and the court reporter a color map of Nevada with counties.

11 And I would ask that this be marked as the next exhibit number.

12   JUDGE CLIFTON: All right. This would be Exhibit 65. 65.

13   (Thereafter, Exhibit 65 was marked

14   for identification.)

15   MR. ENGLISH: And I pulled this off the Internet and had it

16 printed this morning, your Honor. Again, I'm not attempting to

17 represent specific geographic lines or even mileage, although I

18 think it was done on the map, but this is, I represent, a

19 county map of Nevada.

20 BY MR. ENGLISH:

21   Q. So, Mr. Hollon, the Dairy Farmers of America plant

22 we're referring to is located in Fallon?

23   A. It is.

24   Q. Which actually happens to be marked on the map of the

25 county of Churchill?

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1   A.   It is.

2   Q.   Okay.   Now, when I read provision 7(c)(1), first of all

3   I note that there was one change that I'm not sure was

4   emphasized when you made the testimony, which is that in your

5   testimony, the provision reads, "A plant located in Churchill

6   County, Nevada, that receives milk from producers located in

7   Churchill County or the marketing area or from Cooperative

8   marketing the milk of a producer located in the marketing area,

9   or in Churchill County pursuant to Section 1051.9(c)."

10   The written testimony included a parentheses around

11 "producers" as a it appears in the third line of the Federal

12 Register 47212.   And I can refer you to your testimony.

13   A.   I agree with you.

14   Q.   Okay.   Was that a change you intended to make?

15   A.   No, it wasn't.   Well, yes, it is, it was a change I

16 intended to make.

17   Q.   Okay.   So what is the significance of that making that

18 change, making it "producer" or is it -- by definition it means

19 it can be a singular one dairy farmer --

20   A.   Or more than one.

21   Q.   Or more than one.

22   A.   Correct.

23   Q.   Now, when I read that section and I, it may be it's not

24 intended to be this way, but when I read that section and it

25 says that, that means that a plant, if one dairy farmer located

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1 in Churchill County delivers milk to that plant, it becomes a

2 pool plant.

3   A. That would be true.

4   Q. Is that the -- is that like every month at least one

5 farmer in Churchill County has to ship every month to that

6 plant?

7   A. I don't know that we put a calendar qualification in

8 there, but the intent would be yes, that if it, if there were

9 none, it would miss the mark.

10   Q. Okay. And a plant, it's either a pool plant or it's a

11 nonpool plant, it's not some hybrid operation, is it?

12   A. Under (c)(1)?

13   Q. Under paragraph 7 generally. There's -- a plant can't

14 be both a pool plant and a nonpool plant, correct?

15   A. Correct.

16   Q. So once milk is received at that plant from a producer

17 located in Churchill County, if a farmer in Lyon County were to

18 have milk received at that plant, it's a pool plant, and

19 therefore, if the producer otherwise met the producer

20 definitions under .12 it could be a producer, a pool producer,

21 correct?

22   A. Correct.

23   Q. And, in fact, there is at least one dairy farmer in

24 Lyon County, correct?

25   A. To my knowledge that's true, I don't have the exact,

1 but I will accept that there is one.

2   Q. And Nevada is actively looking to grow milk supply in

3 the Northern part of the state to your knowledge?

4   A. Yes.

5   Q. So if dairy farmers, whether from California or

6 elsewhere, relocated to Nevada, whether they are located in

7 Churchill County or not, so long as at least one dairy farmer

8 in Churchill County delivers to that plant in Fallon, they

9 could become pool producers if they otherwise meet the

10 standard, correct?

11   A. Correct.

12   Q. Now, I noticed from the exhibits provided by

13 California, which is, again, Exhibit 61, and I'm looking near

14 the back to the two tables that they provided, but for

15 instance, CDFA-Y?

16   JUDGE CLIFTON: CDFA which?

17 BY MR. ENGLISH:

18   Q. Y. It is Exhibit 61 table Y as in yellow. And there's

19 pretty consistently milk, bulk milk from Idaho that is showing

20 up on that, but regardless of the fact that it is showing up on

21 that, once milk from one dairy farmer in Churchill County has

22 received in Fallon, if milk from Idaho is received at that

23 plant, that plant could under, if it otherwise meets the

24 provisions under .12, could become pool milk, correct?

25   A. Correct.

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1   Q. Now, are there any diversion limitations on milk that

2   becomes pooled under (c)(1)?

3   A. (c)(1) has all the same. I think we used the word

4   burdens and benefits of (c), it would be the intent that it

5   would be pooled all the time, it could not depool. It would be

6   inclusively pooled.

7   Q. I'll get to inclusively pooled later. Once milk is

8   received at the Fallon plant, say, from Idaho, it would still

9   have to meet the producer milk definition under .13, correct?

10 A. The producer milk -- yes, it would.

11 Q. Okay. So the diversion limitation -- so first of all,

12 these in order to qualify, that milk would have to at least at

13 one time have five days production received?

14 A. No, no, no, no.

15 Q. It is not --

16 A. Again, the (c)(1) provision treats everything like (c),

17 it's always pooled no matter what.

18 Q. So would that apply only with the milk received at that

19 plant or, let's say milk is received at that plant part of the

20 month but is otherwise diverted to a plant in Idaho for the

21 remainder of that month. Does that milk get pooled all the

22 time or does it have to meet some standard?

23 A. Have to admit, I have not thought about that

24 arrangement.

25 Q. Given our discussion earlier about the pooling

1 decisions and the need to deal with distant milk, you would

2 agree with me that that could matter a whole lot?

3   A. I would.

4   Q. So now looking back at the map which has been marked as

5 Exhibit 65. Your testimony with respect to why that plant is

6 associated with California had, I think, two parts; one part

7 was that the dairy farmers in Churchill County have a historic

8 relationship is sending milk over the hill into California,

9 correct?

10   A. Correct.

11   Q. Okay. And secondarily, that those dairy farmers and

12 Dairy Farmers of America, supply a plant with distribution into

13 California, correct?

14   A. Correct.

15   Q. And is that the plant we know of?

16   A. It is.

17   Q. So, now, looking at that plant in Reno, do the same

18 dairy farmers located in Churchill County as was a matter of

19 public record in a lawsuit back from '99 to 2005, those dairy

20 farmers from Churchill County all provide milk to the Reno

21 plant at least part of the month?

22   A. Are you asking me if every single of those --

23   Q. Yes.

24   A. -- farms in some group --

25   Q. Yes.

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1   A.   I don't know the answer to that.

2   Q.   But at least a number do, correct?

3   A.   Yes.

4   Q.   Okay. Now, to the extent those farms ship milk to the

5   plant in Reno, they are -- first of all, we'll go back to some

6   testimony we heard earlier. Northern Nevada maintains its own

7   regulation of minimum prices, correct?

8   A.   Correct.

9   Q.   And those prices are set to be identical to Northern

10 California, correct?

11   A.   At present, correct.

12   Q.   At present. So those dairy farmers shipping from

13 Churchill to Reno, every month receive a plant blend price

14 because there's no market-wide pooling in Nevada, correct?

15   A.   Correct.

16   Q.   And?

17   A.   Do you imply that individually they receive a plant

18 blend price or because they are part of the a cooperative the

19 sale receives the plant blend price?

20   Q.   The sale receives it, the Cooperative receives it?

21   A.   Okay. Then, yes.

22   Q.   Okay. And things may have changed, but the matter of a

23 public record of a lawsuit that is now resolved, at least up

24 until 2005, those dairy farmers had a right to receive that

25 payment directly?

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1   A.   I thought you established I couldn't talk about

2 lawsuits.

3   Q.   I was referring to the public record, but whatever --

4 the bottom line is your cooperative receives for that milk, the

5 plant blend price for that, correct?

6   A.   Correct.

7   Q.   So if Proposal 1 is adopted as written, to the extent

8 those farms have milk that is received at the plant in Reno,

9 and otherwise, their milk is received in Fallon, they will

10 receive the plant blend price on their milk received in Reno,

11 assuming it doesn't, for some reason, meet the pooling

12 regulations of California?

13   A.   That would be a big assumption, but, yes, I'm with you.

14   Q.   But may not be the assumption?

15   A.   It may or may not be.

16   Q.   But assuming that's the case. It is partially

17 regulated which we haven't talked about yet, but assuming it

18 retains a nonpool plant status, the milk received from those

19 dairy farmers going into Reno would continue to, for DFA's

20 benefit, receive a plant blend price, correct?

21   A.   Correct.

22   Q.   And the milk going to Fallon would get the overbase

23 price from California, correct?

24   A.   Correct.

25   Q.   Would you agree with me that the combined prices on a

2868

1 Class 1 plant in Reno getting a plant blend plus the overbase

2 price on that milk going to Reno -- going to Fallon -- will be

3 higher than the overbase price that other farmers can receive?

4   A. Were you at the end?

5   Q. Yes.

6   A. Likely.

7   JUDGE CLIFTON: The way you asked the question, it sounded

8 to me like the Churchill producers get both. They don't get

9 both?

10   MR. ENGLISH: They get, on the volume of milk going to

11 Reno, they get the plant blend. And on the volume going to

12 Fallon, they get the overbase price. But I am suggesting that

13 if you did the math, and I can do it if we need to, but I think

14 the witness followed along with me, if you do the math, those

15 dairy farmers would receive a higher price, or I'm sorry, DFA

16 would receive a higher price for that milk than it could

17 otherwise receive if all that milk was overbase.

18   MR. BESHORE: Well, that's almost a totality.

19   JUDGE CLIFTON: Right, because when you take quota out, the

20 price goes down. Right. Okay. I'm with you.

21   MR. ENGLISH: Okay. I mean, we can do the math.

22   JUDGE CLIFTON: No, no I understand.

23   MR. ENGLISH: All right. And I think you are very clever,

24 and I think this is an important thing to deal with, and I'm

25 glad you raised it. And I need to stop you.

1   MR. ENGLISH: All right, your Honor. I understand. I know

2 it is close to noon.

3   JUDGE CLIFTON: It is, six minutes until, and we have a

4 couple of issues.

5   Ms. May, would you come talk to us about whether

6 everything leaves this room when we stop at noon.

7   MS. MAY: Laurel May.

8   Yes, everything leaves this room when we stop at noon,

9 and everything leaves the premises when we stop at noon.

10   MR. BESHORE: May the witness be excused?

11   JUDGE CLIFTON: Yes, thank you. Mr. Hollon, you may step

12 down but you are not required to. So, Ms. May, there is no

13 room that we can put our things in?

14   MS. MAY: They were not able to find us anything so, no.

15   JUDGE CLIFTON: All right. And are there any other

16 announcements with regard to -- I know one witness was

17 mentioned who expects to be here Wednesday. Is that still

18 true?

19   MR. HILL: Brian Hill.

20   This is Brian Hill. We have since found out that that

21 witness will not be testifying next Wednesday, so I guess we

22 can strike him off the list for now.

23   JUDGE CLIFTON: We'll resume then, with Mr. Hollon on

24 Wednesday morning at 9:00. Are there any other issues anyone

25 wants to address at this time?

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1   I want the court reporter to have a copy of the record

2   copy where we wrote so much on them so that when she uses that

3   as her guide in doing the transcripts, she will have it.

4   Mr. Beshore, yes.

5   MR. BESHORE: Do we know if the initial transcripts will be

6   posted today, so that we have some weekend reading?

7   MR. FRANCIS: Will Francis, USDA.

8   The company has delivered those to our Washington DC

9   office. We are in the process of trying to post those to the

10   Internet website for this California hearing. We're not

11   certain it will be done today, we will do it as soon as

12   practically possible.

13   JUDGE CLIFTON: Mr. Beshore?

14   MR. BESHORE: Thank you. I had one other administrative

15   request. In anticipation of the proponents of Proposal 1

16   closing their case in the not-too-distant future, we appreciate

17   some preview appropriately of the witnesses to come from the

18   other parties.

19   JUDGE CLIFTON: Well, while you are on that topic, what

20   witnesses will you still have?

21   MR. BESHORE: The witness after Mr. Hollon will be

22   Mr. Schad, and then Mr. Hollon again.

23   JUDGE CLIFTON: Okay. Very good.

24   MR. BESHORE: That's what we anticipate. We will also

25   anticipate additional dairy farmers.

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 1        JUDGE CLIFTON:  All right.  Good.

 2        MR. BESHORE:  And there may be some third parties that have

 3   additional testimony, too, I'm not certain.  But in terms of

 4   our principal proponent witnesses, Mr. Hollon and Mr. Schad.

 5        JUDGE CLIFTON:  All right.  Good.  That's helpful.  What

 6   does Mr. Schad speak to?

 7        MR. BESHORE:  The piece after Mr. Hollon, which is pricing.

 8        JUDGE CLIFTON:  Pricing.  Okay.  Good.

 9        Mr. English, are you prepared now to give all of us a

10   preview of how you will begin when Mr. Beshore concludes?

11        MR. ENGLISH:  I can do the preview of where we will begin

12   subject to a caveat, and I do intend by the time we begin, to

13   provide an overall roadmap, which may or may not contain all

14   the witnesses, because we have moving pieces.  But assuming

15   that Dr. Schiek can get on the stand on or before the Monday,

16   October 19th, then he would be the first witness.  And it is

17   our intention to have the first witness, and notwithstanding

18   our discussion about the schedule, we do intend to arrange

19   things as best as possible to talk about, for instance, like

20   not, I suppose in my opening statement, an opening statement by

21   Dr. Schiek with respect to orderly marketing and disorderly

22   marketing and those kinds of things.

23        There will be multiple witnesses essentially to talk

24   about that issue from various perspectives, but Dr. Schiek is

25   expected to be on the stand, and I hope to do that Monday.
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1   The caveat is if he's not on by then, we have some

2   witnesses that are technical experts who are coming in on a

3   very particular issue who will need to start on Tuesday, and

4   I'm going to have to move my things around a little bit. And

5   that is going to be, in fairness to everybody, with respect to

6   the shrinkage issue that is in the extended shelf life

7   operation. So that unfortunately, has some time constraints.

8   And I know, Mr. Beshore, we have been working on when

9   people go on, and it may be I have to work around witnesses.

10 Now, the worst case scenario that somehow we haven't started by

11 the 20th, I'm going to have to have a conversation with Beshore

12 about taking witnesses on. But I'm certainly hoping that we're

13 going by then.

14   JUDGE CLIFTON: In other words, you might ask to interrupt

15 his case in chief in order for your people to get their

16 testimony in.

17   MR. ENGLISH: That's correct. Even I, with my view of when

18 this case is going to end, have my hope and expectation that

19 we're not there. That we don't have that issue. We don't

20 cross that bridge.

21   MR. BESHORE: I'm assuming that with the accommodations

22 from the cross-examination, that's not going to be any problem

23 at all.

24   JUDGE CLIFTON: Mr. Vetne?

25   MR. VETNE: John Vetne. There are a couple of people at

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least, who have been looking to me to keep them apprised at how

things are going, who have independent views they want to put

on the record, and they are not clients, but they are friends.

Erick Metzger for National All Jersey, and M-E-T-Z-G-E-R.

JUDGE CLIFTON: M-E-T-Z-G-E-R. And Erick is

MR. VETNE: E-R-I-C-K.

JUDGE CLIFTON: E-R-I-C-K. Our third variation of Erick.

MR. VETNE: And Calvin Covington. Both hope to be around

the week of the 19th. Calvin Covington is going to, after he

appears, to Lebanon to do some humanitarian work. So I'm just

saying I don't think either one of those will be very long. I

don't know if they are proponents or opponents of particular

things. I know National All Jersey represents Jersey producers

and wants to maximize the protein price wherever possible.

So that's a preview. So they have been in contact with

me, they have also been in contact with Ms. Frisius. So it may

be something that only Ms. Frisius and I have knowledge of, so

I want everybody to know.

JUDGE CLIFTON: Yes. Where a person has a limited window

in which they can appear, and otherwise they would not be able

to give their testimony, we will certainly try to accommodate

them, even if it requires interrupting people. But shuffling

priorities is sometimes difficult.

MR. ENGLISH: And I understand that. And so the witnesses

with limited time that we know of today, are the extended shelf

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 1   life witnesses who are three witnesses.  And then we have a

 2   dairy farmer we expect for Thursday, the 22nd, which I think is

 3   also important to remind everybody that on the 22nd we won't be

 4   physically here, we will be at the wonderful Piccadilly Inn.

 5        JUDGE CLIFTON:  All right.  Good.  This discussion we have

 6   just had, we will renew and have almost daily when we're back

 7   onboard, because nobody knows how long anything takes and

 8   people's schedules change.  All right.  Good.  Thank you so

 9   much.  This has been an amazing three weeks.  It does amaze me.

10   We go off record at 12:03

11        (Whereupon, the proceedings were concluded.)

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 8   the State of California, holder of Certificate Number CSR

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11          I am not financially interested in this action and am

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14          I am the reporter that stenographically recorded the

15   testimony in the foregoing proceeding and the foregoing

16   transcript is a true record of the testimony given.

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19          DATED:    October 29, 2015

20                    FRESNO, CALIFORNIA

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