

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

TRANSCRIPT OF PROCEEDINGS

September 25, 2015

Shelly A. Davis, CSR No. 8947  
397067



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Milk in California )  
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BEFORE U.S. ADMINISTRATIVE LAW JUDGE  
JILL S. CLIFTON

Friday, September 25, 2015  
9:00 a.m.

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

TRANSCRIPT OF PROCEEDINGS  
VOLUME 4

Reported by:  
Shelly A. Davis, CSR, RPR  
Certificate No. 8947

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		LAUREN BECKER, ESQ.
4	U.S. DEPARTMENT OF	LAUREL MAY, Marketing Specialist
5	AGRICULTURE:	ERIN TAYLOR, Marketing
		Specialist
6		MEREDITH FRISIUS, Marketing
		Specialist
7		DANA COALE, Deputy Administrator
		USDA AMS Dairy Program
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	LAND O'LAKES, INC.:	BY: JOHN VLAHOS, ESQ.
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16	DEAN FOODS COMPANY:	GREG DRYER, Senior
17		Vice-President Industry and
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21	MAINE DAIRY INDUSTRY	DANIEL SMITH, ESQ.
22	ASSOCIATION, KENTUCKY	
23	DAIRY DEVELOPMENT	
24	COUNCIL, GEORGIA MILK	
	PRODUCERS, INC.,	
25	TENNESSEE DIARY FARMERS	
	ASSOCIATION:	

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APPEARANCES (CONT.):

WESTERN UNITED  
DAIRYMEN:

ANDY ACMOODY, Economist

SELECT MILK PRODUCERS,  
INC.:

MILTNER LAW FIRM  
BY: RYAN MILTNER, ESQ.  
KRISTINE REED, ESQ.

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EXHIBITS

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Exhibit 14	Letter dated May 27, 2015, to Ms. Dana Coale from Charles M. English, Jr., and Ashley L. Vulin, Re: Potential California FMMO Hearing - Dairy Institute of California Submission	698	741
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FRIDAY, SEPTEMBER 25, 2015, 9:00 A.M.

CLOVIS, CALIFORNIA

P R O C E E D I N G S

JUDGE CLIFTON: We're back on record. It is September 25, 2015. It's Friday. We're in Clovis, California, in day four of the hearing regarding Milk in California.

The docket number is in brackets capital A capital O, end of brackets, 15 hyphen 0071.

My name is Jill Clifton. I'm the United States Administrative Law Judge who is assigned to take evidence at this hearing, that is to gather in the testimony and the exhibits.

I'd like to ask at this point if there's anyone here who expects to participate in the hearing who is here for the first time? Appears to be no one new.

I am eager to invite dairy farmers to the witness stand at any point that they might appear and find it convenient, even though it may interrupt the agenda we would otherwise be following for that day.

All right. I still would like to have, as I have done each -- each day participants come forward,

1 state their names for the record, and I think we're  
2 getting to know each other's names pretty well, but I  
3 don't quite have them all, and so I'd like us to  
4 continue that routine.

5 I'd like to begin with those participating on  
6 behalf of the United States Department of Agriculture,  
7 and I am such an employee. I'd like the others, please,  
8 to come forward to the podium and identify themselves.

9 MS. WARREN: Good morning. Happy Friday.  
10 Lorie Warren. L-O-R-I-E. W-A-R-R-E-N. Chief of the  
11 Market Information Branch for AMS Dairy.

12 MR. POLLOCK: William Pollock. W-I-L-L-I-A-M.  
13 P-O-L-L-O-C-K. Agricultural Economist for the Order 33,  
14 Brunswick, Ohio, on detail for AMS.

15 MS. RAGHUNATHAN: Uthra Raghunathan.  
16 U-T-H-R-A. R-A-G-H-U-N-A-T-H-A-N. Agricultural  
17 Economist for USDA Dairy Program.

18 MS. STEENECK: Amanda Steeneck.  
19 S-T-E-E-N-E-C-K. Agricultural Economist for AMS Dairy  
20 Programs.

21 MS. ELLIOTT: Pamela Elliott. P-A-M-E-L-A.  
22 E-L-L-I-O-T-T. Marketing Specialist, USDA AMS Dairy  
23 Program.

24 MS. MAY: Laurel May. L-A-U-R-E-L. M-A-Y.  
25 Dairy Program Marketing Specialist and roadie.



1 JUDGE CLIFTON: Ms. Taylor, could you help us  
2 out with what she said at the end?

3 MS. TAYLOR: As long as you don't ask me to  
4 spell it. She said "roadie," like a groupie.

5 MS. MAY: It's the person who helps the band  
6 set up.

7 MS. TAYLOR: Yeah, she helps -- our set-up --  
8 guy.

9 JUDGE CLIFTON: Oh, that kind of roadie, like  
10 the one that carries in all the heavy microphones.

11 MS. TAYLOR: Exactly.

12 JUDGE CLIFTON: Yeah. Speakers. So I think  
13 you spell that R-O-A-D-I-E, roadie.

14 MS. TAYLOR: I'll go with that.

15 JUDGE CLIFTON: All right.

16 MS. TAYLOR: Erin Taylor. E-R-I-N.  
17 T-A-Y-L-O-R. Marketing Specialist with Dairy Programs.

18 MR. MYKRANTZ: John Mykrantz, J-O-H-N,  
19 M-Y-K-R-A-N-T-Z. Agricultural Economist, Pacific  
20 Northwest and Arizona Orders on detail with Dairy  
21 Programs.

22 MS. SCHAEFER: Henry Schaefer. H-E-N-R-Y.  
23 S-C-H-A-E-F-E-R. Agricultural Marketing -- or  
24 Agricultural Economist with the Upper Mid West Milk  
25 Marketing Area, Federal Order 30, on detail to AMS Dairy

1 Programs.

2 MR. CRYAN: Good morning. My name is Roger  
3 Cryan. R-O-G-E-R. C-R-Y-A-N. I am a Supervisor  
4 Agricultural Economist with Dairy Program in Washington,  
5 and I'm here to support the presentation of data and the  
6 Economic Impact Analysis. Thanks.

7 MR. CARMAN: Good morning. Clifford Carman.  
8 I'm honoring your request, Your Honor, I took my coat  
9 off, and I don't have a tie. C-A-R-M-A-N. I'm an Ag --  
10 Agricultural Marketing Specialist and currently employed  
11 as Assistant to the Deputy Administrator for Dairy  
12 Programs, Agricultural Marketing Service, USDA.

13 JUDGE CLIFTON: The record should show that  
14 Mr. Carman carried his sport coat over his arm, he's  
15 ready to be more formal at any moment.

16 MS. COALE: Good morning. Dana, D-A-N-A.  
17 Coale, C-O-A-L-E. Deputy Administrator AMS Dairy  
18 Program.

19 MS. BECKER: Good morning. Lauren Becker.  
20 L-A-U-R-E-N. B-E-C-K-E-R. Office of the General  
21 Counsel.

22 MR. HILL: Good morning. Brian Hill.  
23 B-R-I-A-N. H-I-L-L. Attorney with the Office of the  
24 General Counsel.

25 JUDGE CLIFTON: And now we'll have groups of

1   proponents come forward.

2                   MR. BESHORE:   Marvin Beshore.   M-A-R-V-I-N.  
3   B-E-S-H-O-R-E.   Representing the proponents of Proposal  
4   1.

5                   MR. VLAHOS:   John Vlahos.   J-O-H-N.  
6   V-L-A-H-O-S.   Hanson Bridgett.   H-A-N-S-O-N.  
7   B-R-I-D-G-E-T-T.   Co-counsel representing the Co-ops,  
8   proponents of Proposal Number 1.

9                   MS. THOMPSON:   Good morning.   Megan Oliver  
10   Thompson.   Megan is M-E-G-A-N.   Also an attorney with  
11   Hanson Bridgett and representing the proponents of  
12   Proposal Number 1.

13                   MR. HOLLON:   Elvin Hollon.   E-L-V-I-N.  
14   H-O-L-L-O-N.   Dairy Farmers of American.   One of the  
15   proponents of Proposal 1.

16                   MR. WEGNER:   Thomas Wegner.   T-H-O-M-A-S.  
17   Wegner, W-E-G-N-E-R.   With Land O'Lakes.

18                   MR. ENGLISH:   Good morning.   Chip English.  
19   C-H-I-P.   E-N-G-L-I-S-H.   Attorney with Davis Wright  
20   Tremaine for the Dairy Institute of California.

21                   MS. VULIN:   Ashley Vulin.   A-S-H-L-E-Y.   Last  
22   name is V, as in Victor, U-L-I-N.   Attorney for Davis  
23   Wright Tremaine for Dairy Institute of California.

24                   MR. SCHIEK:   Good morning.   William Schiek.  
25   That's W-I-L-L-I-A-M.   Schiek is S-C-H-I-E-K.   Economist

1 with the Dairy Institute of California.

2 MS. KALDOR: Good morning. Rachel Kaldor.  
3 R-A-C-H-E-L. K-A-L-D-O-R. Executive Director Dairy  
4 Institute of California.

5 MS. TAYLOR: Good morning. Sue Taylor.  
6 Standard spelling. Leprino Foods, L-E-P-R-I-N-O.

7 MR. DEJONG: James Dejong. J-A-M-E-S.  
8 Dejong, D-E-J-O-N-G, Hilmar Cheese Company, and I'm the  
9 Economist and Policy Analyst.

10 MR. VETNE: My name is John Vetne, V-E-T-N-E.  
11 I'm appearing as a representative for Hilmar Cheese  
12 Company. Hilmar Cheese is the member of the Dairy  
13 Institute and supports that proposal. Previously  
14 appearing but not here today is Alan Zolin. Z-O-L-I-N.  
15 Consultant to Hilmar Cheese. Thank you.

16 MR. BLAUFUSS: Good morning. Rob Blaufuss.  
17 B-L-A-U-F-U-S-S. With Dean Foods Company.

18 MR. VU: Good morning. Bao Vu of the law firm  
19 Stole Rives. Appearing on behalf of the California  
20 Producer Handler Association and Ponderosa Deli --  
21 Dairy, excuse me.

22 JUDGE CLIFTON: Deli; are you hungry? Would  
23 you spell both your names?

24 MR. VU: Yes. First is Bao, B, as in boy,  
25 A-O. Last Vu, V, as in Victor, U. Thank you.

1 JUDGE CLIFTON: Thank you. All right. Other  
2 participants who -- who may not have submitted a written  
3 proposal but nevertheless participate here actively.

4 MR. SMITH: Daniel Smith. D-A-N-I-E-L.  
5 Smith, S-M-I-T-H. Attorney from Vermont representing  
6 the Maine Dairy Industry Association, the Kentucky Dairy  
7 Development Council, the Georgia Milk Producers, Inc.,  
8 and the Tennessee Dairy Farmers, Inc.

9 MR. MILTNER: Good morning. Ryan Miltner.  
10 M-I-L-T-E-R. Attorney for Select Milk Producers, Inc.

11 MS. REED: Good morning. Kristine Reed.  
12 K-R-I-S-T-I-N-E. R-E-E-D. Co-counsel for Select.

13 MS. ACMOODY: Good morning. Andy AcMoody.  
14 A-C capital M-O-O-D-Y. Economist with Western United  
15 Dairymen.

16 JUDGE CLIFTON: I'd like now to address  
17 preliminary matters, including whatever general  
18 announcements that would be made on behalf of the  
19 Agricultural Marketing Service and any issues about in  
20 what order we might proceed today.

21 MS. MAY: Good morning. As you know, we're  
22 here to hear testimony and receive evidence on a  
23 proposed Federal Milk Marketing Order for California.  
24 We welcome anyone who would like to provide testimony at  
25 this hearing to do so, and if you would like to do so,

1 to contact one of us. Meredith is normally that person,  
2 but I don't see her right this second.

3 MS. STEENECK: Her red jacket is right here.

4 MS. MAY: Okay, yeah, her jacket is right  
5 there. Okay. She's around the corner, but Meredith is  
6 who you should see or let your people know if they come  
7 in and would like to speak to -- to talk to Meredith.  
8 And of course the audience, anybody in the audience is  
9 welcome to ask questions of any of the witnesses also.  
10 And to do so, you will approach the microphone and let  
11 the judge know that you would like to do so.

12 We have a live audio feed, and it's not being  
13 recorded, but anybody that would like to can tune into  
14 it at [tinyurl.com/camilkhearing](http://tinyurl.com/camilkhearing), it's all one word.

15 Transcripts and exhibits from this hearing  
16 will be available on an ongoing basis starting about two  
17 weeks after the end of today. And you can see those  
18 online at [www.AMS.USDA.GOV/caorder](http://www.AMS.USDA.GOV/caorder).

19 Finally we have some exhibits that you're --  
20 copies of the exhibits that have been introduced so far,  
21 and you're welcome to pick up those copies over on the  
22 side of the room.

23 And we have, as we have every day this week,  
24 have some nice refreshments in the back that you're  
25 welcome to share.

1                   And that's all I have.

2                   JUDGE CLIFTON:   And then one other thing, the  
3 copy machine, that's available for all.

4                   MS. MAY:   The copier, yes, we have a copy  
5 machine back there.  If you have a limited number of  
6 copies that you need to make of exhibits, please help  
7 yourselves.

8                   JUDGE CLIFTON:   Thank you.

9                   Does anyone have a suggestion as to which USDA  
10 witness would come next?

11                  MR. HILL:   Brian Hill.  I believe that John  
12 Mykrantz -- oh, excuse me, Henry Schaefer is taking  
13 questions at this time.

14                  JUDGE CLIFTON:   Are there any other  
15 preliminary matters before Mr. Schaefer comes back to  
16 the witness stand?

17                  MR. SMITH:   Good morning, Your Honor.  The --  
18 we --

19                  JUDGE CLIFTON:   Name?

20                  MR. SMITH:   Dan Smith representing the four  
21 producers groups from Maine and the South.  Yesterday we  
22 entered, I believe it was Exhibit 13 that had the  
23 utilization information that I requested from USDA.  I  
24 apologize to everybody concerned for -- for being in a  
25 bit of -- of a fly when I came in.  There were -- there

1 were two items of information provided when there should  
2 have been four, so all I received was the utilizations  
3 under the Institute Proposal. I believe I had asked,  
4 and I apologize for the confusion if it's on me when I  
5 asked. I was looking for the utilization from -- for  
6 both proposals, not just the Institute Proposal as well  
7 as the Co-op Proposal. I spoke with the USDA folks and  
8 they told me I had to go back on the record to correct  
9 this, so that's what I'm doing.

10 I'd like to clarify that -- that what I was  
11 looking for is the utilization information for the  
12 Northeast and the Southeast, those two regions, and  
13 under both the Institute Proposal and the Cooperative  
14 Proposal. And, again, my apologies.

15 I had one other preliminary question for USDA.  
16 Is it your intent to make Ms. Steeneck available for  
17 testimony later in the hearing with regard to questions  
18 that might -- might come up?

19 MR. HILL: We can't really answer that  
20 question. She's been ill, and she --

21 MR. SMITH: No, not -- I don't mean today, I  
22 mean later at some point later in the hearing.

23 MR. HILL: We did not plan to have her back.  
24 We'll have to see, but she was not planning to be back  
25 after this week, no.



1 MR. SMITH: Okay.

2 JUDGE CLIFTON: Mr. Smith, what area did you  
3 want her to address, if you know?

4 MR. SMITH: Well, I think it's -- it's more of  
5 a question of whether issues about the model emerge over  
6 the -- the testimony over the next six weeks, if there  
7 are questions that nobody else can answer but  
8 Ms. Steeneck as to how the model is -- is configured.  
9 And -- and for somebody such as myself that's trying to  
10 schedule what seems to be the phraseology of parachuting  
11 into this hearing, so whether she would be available at  
12 some time, if there was some sense as to whether she  
13 might be available after, you know, in -- in a corrected  
14 way, that would be good to know.

15 JUDGE CLIFTON: What I recommend you do is,  
16 pardon me, I recommend that make known your request, not  
17 necessarily by which witness the USDA would provide to  
18 respond to it, but what is the area of your inquiry when  
19 you -- when you become aware that there's an issue.

20 Now, if you are not here in this room because  
21 you cannot be here for every day of the hearing, I  
22 understand, is there someone, an attorney with whom you  
23 have some acquaintance who might be able to relay that  
24 so that it's on the record with everyone able to hear  
25 it?

1           MR. SMITH: Certainly the milk bar is the milk  
2 bar so, yes, we're all acquainted. But I guess I would  
3 just make the request. I -- you know, I'm trying to  
4 have a light presence in this hearing given my  
5 involvement, so I'm -- I'm hesitant to make a formal  
6 request, but I'll go ahead and do it. I think that --  
7 that from -- from what's gone on this week, I would  
8 request that the Department consider, I'll leave it at  
9 that, bringing Ms. Steeneck back at some point after  
10 the -- the preponderance of the testimony has been  
11 entered as to the different proposals to address  
12 methodology questions involving the model.

13           JUDGE CLIFTON: Thank you.

14           MR. SMITH: Thank you. Thank you, Your Honor.

15           MR. ENGLISH: Chip English. Your Honor, I --  
16 I understand the burden on the Department for some of  
17 these things, but I am going to agree with Mr. Smith  
18 that the Department should consider and, you know, maybe  
19 even with a time certain announce later on the web and  
20 communicate it to people like Mr. Smith so that she  
21 doesn't have to be here endlessly, but I think that --  
22 that perhaps the Department could consider at some later  
23 date after we've heard some of the testimony from the  
24 Cooperatives and Dairy Institute, because I do think  
25 that it's likely to be the case that things percolate in

1 a way.

2 And I would be remiss if I didn't mention that  
3 we asked a question yesterday, and I don't know if we  
4 have an answer yet today, and I don't need the answer  
5 yet today, so that may in and of itself raise an issue.

6 And I would then finally say, of course, that  
7 it may be that some other witness who is here -- again,  
8 not telling the Department what to do -- would be able  
9 to address some issues. So I don't think it necessarily  
10 has to be Ms. Steeneck, not that she's not valuable.

11 JUDGE CLIFTON: Is there anyone else who you'd  
12 like to be heard on the issues of additional evidence  
13 that you'd like to see you don't yet have in the form of  
14 an exhibit or testimony from the USDA economist group or  
15 Market Administrator group? All right. That's, of  
16 course, something you could bring up every day, whatever  
17 is on your mind, you may bring it up and raise it at  
18 that time. This doesn't close the door at all, but the  
19 earlier the Department is aware of what you need, the  
20 earlier they can respond with whether they can comply  
21 with the request.

22 MR. BESHORE: I'm sorry, I was a little slow  
23 on the thought. There's a -- there's a product  
24 classification exhibit which we had requested, it was on  
25 the website as one of the requests, and it hasn't been

1 exclusively produced yet, and I don't want it to be  
2 forgotten, but yet if one of the USDA witnesses --

3 MS. TAYLOR: Mr. Beshore, we're aware of that  
4 request, and we're working on it. It has not been  
5 forgotten.

6 MR. BESHORE: Thank you very much.

7 MS. TAYLOR: Nor has anyone else's request,  
8 for that matter.

9 JUDGE CLIFTON: We've been so spoiled here,  
10 you know, we've grown to expect miraculous performance  
11 instantly. And I love the announcement to bring the  
12 hearing to order, I'm not wanting to do hearings without  
13 it.

14 All right. Let's have Mr. Schaefer come back  
15 to the stand.

16 Mr. Schaefer, you remain sworn. Would you  
17 again state and spell your name?

18 THE WITNESS: Henry Schaefer. H-E-N-R-Y.  
19 S-C-H-A-E-F-E-R.

20 JUDGE CLIFTON: Now, when we interrupted your  
21 testimony because we had reached the end of the day,  
22 where were we?

23 MR. ENGLISH: Mr. Beshore had just concluded.

24 MR. BESHORE: I concluded.

25 JUDGE CLIFTON: Who next would like to

1 question Mr. Schaefer?

2 CROSS-EXAMINATION

3 BY MR. ENGLISH:

4 Q. Chip English. And I realize that -- that some  
5 others have not had an opportunity yet, but Mr. Beshore  
6 and Mr. Schaefer were having a specific conversation at  
7 the very time we broke with respect to the question of  
8 fortification 1000.15, 1000.43 impacts, and it made  
9 sense to me for the transcript going back to some of the  
10 issues addressed in the scheduling issues to try to  
11 follow up on that right now, and I only have that one  
12 area to discuss.

13 So at the end of the day yesterday,  
14 Mr. Schaefer, you were discussing sort of the  
15 consequences of the pool obligation of a pool -- a  
16 distribution plant receiving either nonfat dry milk or  
17 condensed milk used for fortification, correct?

18 A. Correct.

19 Q. And in that discussion, you mentioned and  
20 there was some hand gestures, which of course will not  
21 show up in the transcript, that -- that essentially what  
22 happens is there's a charge between the Class -- the  
23 difference between the Class I and the Class IV in the  
24 pool obligation, correct?

25 A. Correct.

1 Q. And then I think you used the term -- and if  
2 I'm wrong, I apologize -- but I heard you use the term  
3 as to the Class IV portion, it's a wash?

4 A. Correct.

5 Q. Now, what you meant by that is that for the  
6 pool obligation of the pool distributing plant, the  
7 Class IV piece of that has already been paid by somebody  
8 else, correct?

9 A. That's correct.

10 Q. And so for the pool distribution plant, the  
11 additional cost that ends up showing up on the pool  
12 obligation is this difference between the Class I and  
13 Class IV, correct?

14 A. Basically that's correct.

15 Q. You -- you were not saying that in essence  
16 that pool distribution plant doesn't have a cost for  
17 cost accounting purposes for when it purchased that  
18 nonfat dry milk or that condensed product?

19 A. That is correct.

20 Q. Thank you. I'm done.

21 JUDGE CLIFTON: Who next has questions for  
22 Mr. Schaefer?

23 CROSS-EXAMINATION

24 BY MR. MILTNER:

25 Q. Ryan Miltner on behalf of the Select Milk

1 Producers.

2 Mr. Schaefer, I have what I hope to be just a  
3 few questions here. You spoke yesterday about order  
4 reform, and specifically the consolidation of several  
5 orders into what is now the Upper Midwest Order. My --  
6 my first question is when that process was undertaken  
7 and the -- the orders that became the Upper Midwest were  
8 consolidated, were there any plants that were  
9 unregulated that became regulated as a result of that  
10 consolidation in the Upper Midwest?

11 A. I do not believe so.

12 Q. Would it be accurate to say that it was a  
13 conscious effort on the part of the Department to not  
14 cause plants to be regulated during order reform if  
15 those plants were not regulated beforehand?

16 A. That was my understanding.

17 Q. Similarly, when the orders were consolidated,  
18 and I'm talking again specifically about the Upper  
19 Midwest, were there any conflicting provisions between  
20 or among the previous orders that had to be reconciled?

21 A. I don't believe there were necessarily  
22 conflicting, there were differences in certain  
23 provisions that had to be addressed.

24 Q. Where there were differences and -- where  
25 there were differences between previous orders, and I'm

1 trying to think of the best way to describe the  
2 situation. Let's say you had one provision in the  
3 Chicago Order and one in the former Upper Midwest Order,  
4 between the two provisions, if one could be considered  
5 more restrictive than the other, was -- was there a  
6 policy or a -- an intention to select either more  
7 restrictive or less restrictive provisions?

8 MR. HILL: Your Honor, this is Brian Hill. I  
9 think this witness again is here to testify as to how  
10 his order works, not as to the policy of -- of -- there  
11 is a decision that they can look at, and he's not to  
12 here to testify as to the policy of the Department but  
13 to the actual provisions that are in the -- in the order  
14 that he's currently working with out in the Midwest.

15 JUDGE CLIFTON: I agree with you, Mr. Smith.  
16 I sustain the objection. I mean Mr. Hill, sorry.  
17 Smith's over here. Hill's over here.

18 MR. HILL: Close enough.

19 MR. MILTNER: That was my last question.  
20 Thank you.

21 JUDGE CLIFTON: Thank you, Mr. Miltner.

22 CROSS-EXAMINATION

23 BY MR. VETNE:

24 Q. Good morning. John Vetne for Hilmar Cheese  
25 Company. Member and supporter of the -- of the Dairy



1 Institute Proposal.

2           Mr. Schaefer, I think it was in dialogue  
3 yesterday with -- with Mr. Beshore, there was some  
4 discussion on performance standards and your reference  
5 to the pool supply plant and the 10 percent. I think  
6 the question was asked to this effect -- tell me if you  
7 agree so we can go on. The performance standards for  
8 the Upper Midwest were based on marketing conditions,  
9 supply, demand, Class I in that market based on a  
10 hearing record that showed those things. Do you recall  
11 that series of questions?

12           A. Yes, I do.

13           Q. With respect to the Upper Midwest or any  
14 market created by consolidation of Federal Milk  
15 Marketing Order Reform, there was in fact no hearing  
16 record such as we're making here?

17           A. That is correct. It was an informal -- it was  
18 informal rulemaking, and so there was not a hearing  
19 record.

20           Q. So it was a consolidation superimposed upon  
21 decades of prior hearing records, but for which an  
22 independent hearing record showing current marketing  
23 conditions at that time was not created, correct?

24           A. Correct.

25           Q. To the extent there was a record as opposed to

1 hearing record, it would have been record of notice and  
2 comment not subject to cross-examination or witness  
3 presentation?

4 A. That is correct. There was a recommended  
5 decision that was put out that comments were asked for  
6 on that recommended decision, and then there was a final  
7 decision.

8 Q. Okay. And in structuring the -- the  
9 provisions of the Federal orders that now exist, the --  
10 the Agency had several study committees, one of which  
11 was a Uniform Provisions Committee; do you recall that?

12 A. Correct.

13 Q. Did you participate in any of those  
14 committees?

15 MR. HILL: Your Honor, again I'm -- I'm --  
16 this is Brian Hill. I'm going to object to this line of  
17 questioning. He can't testify as to the public policy,  
18 or -- or -- there might not be a hearing record, but  
19 there is a decision, there have been public comments.  
20 He's here to testify as to one thing, which is how his  
21 order works. These questions don't appear to be asking  
22 how his order works.

23 JUDGE CLIFTON: Mr. Vetne, what -- what is  
24 your ultimate objective here?

25 MR. VETNE: My -- my question did not -- did

1 not address or seek to address policy, which was the  
2 knee-jerk reaction. Actually it addresses the question  
3 of how uniform provisions are administered in this  
4 order, and it was a Uniform Provisions Committee, to  
5 which -- to which the witness answered in the  
6 affirmative. The objective of uniform provisions is to  
7 have provisions that are applied the same everywhere.  
8 Those are incorporated by reference in Proposals One and  
9 Two. So how they would be administered in Chicago  
10 presumably would be the same as how they're administered  
11 elsewhere, and I wanted to get into that.

12 JUDGE CLIFTON: Yeah, I'm not going to  
13 entertain those questions with this witness. That may  
14 be important evidence that you -- you will want to  
15 present or argue it in a brief, but whether Mr. Schaefer  
16 participated on a committee I think is irrelevant.

17 MR. VETNE: May I ask whether how those  
18 uniform provisions operate in his market is relevant?

19 JUDGE CLIFTON: He's -- he's -- he's testified  
20 about many provisions. Which ones are you wanting to go  
21 into that have not already been addressed?

22 MR. VETNE: Yes. He's testified about the  
23 operation of provisions and which is what I understand  
24 his objective here, which is the subject of my  
25 examination.

1           What I'm concerned about, Your Honor -- just  
2 bear with me for a moment.

3           JUDGE CLIFTON: I will.

4           MR. VETNE: What I'm concerned about is when I  
5 was in the General Counsel's Office at the Department of  
6 Agriculture, Congress passed a Government in the  
7 Sunshine Act. What I am perceiving is the Government in  
8 increasing darkness, not transparency, how these things  
9 work and what the policies are, the guidelines that  
10 apply is what the Government in the Sunshine Act  
11 intended to provide public light to. I cannot put up a  
12 witness that describes the USDA's policy and application  
13 of rules.

14           MR. HILL: Brian Hill. Once again, Your  
15 Honor, this witness cannot testify to the policy, which  
16 is what Mr. Vetne just mentioned. He's not the witness  
17 to do that.

18           MR. VETNE: Maybe there is a witness, but this  
19 witness can testify how to the policy that his office is  
20 directed to follow, and that's what the producers and  
21 the handlers that are subject to marketing orders are  
22 interested in because that's what they must comply with.

23           JUDGE CLIFTON: So you want to know beyond  
24 written regulation what policies are followed in  
25 addition?

1 MR. VETNE: Absolutely not.

2 JUDGE CLIFTON: What is it you want to know?

3 MR. VETNE: What I want to know is with  
4 respect to written regulations, and my question related  
5 to uniform provisions, how they work. What is the  
6 directive of his office. How they're applied. Was the  
7 intent that certain provisions be applied uniformly  
8 regardless. And that was the importance of the  
9 question, the uniform provisions that apply to all  
10 marketing orders.

11 JUDGE CLIFTON: If you have a specific  
12 question of this witness about, you know, a specific  
13 provision in the order which he administers, I'll hear  
14 it. I -- I agree with you that it is helpful if  
15 government business is conducted where those affected  
16 can participate. I think that's exactly what we've got  
17 here. So I'm not sympathetic to your overall concern,  
18 but I do think if there's a particular thing that this  
19 witness has experience with that you'd like to ask him,  
20 not whether he served on a committee, but I mean in his  
21 administration of the order, I'd hear it.

22 MR. VETNE: Okay. Let me get to a specific  
23 provision then.

24 BY MR. VETNE:

25 Q. You indicated in your introduction, you talked

1 about certain uniform provisions, including the  
2 classification of milk and milk products. I'm looking  
3 at Section 40 of the general regulations. Those are in  
4 fact, Mr. Schaefer, are they not, uniform and are  
5 applied in every marketing order including yours and the  
6 one proposed?

7 A. That's correct.

8 Q. Are you aware of any differences in policy,  
9 application, or guidelines with -- within the various  
10 Market Administrator offices that may apply to Section  
11 30?

12 A. I am not.

13 Q. Does your office periodically receive  
14 directives or guidelines from AMS so that they are  
15 applied uniformly in all markets?

16 MR. HILL: Again, Your Honor, this is Brian  
17 Hill, he's going into this policy. He's not talking  
18 about Order 30 specifically.

19 MR. VETNE: I'm not asking about policy, I'm  
20 asking if he receives directives, I'm not asking what  
21 those policies are.

22 MR. HILL: He's here to describe how Order 30  
23 works, not how he arrives at the conclusion of whether  
24 he should -- how he should be doing his job, how the  
25 order works.

1           JUDGE CLIFTON:  The objection is noted but  
2  overruled.

3           You may answer, Mr. Schaefer, as to whether  
4  you periodically receive direction as to how you're to  
5  apply the provisions of Section 40.

6           THE WITNESS:  As you move through time, there  
7  are questions that come up about particular provisions,  
8  and we can pick on Section 40, and I can't pick on any  
9  particular provision in Section 40, on whether -- maybe  
10  it's a question -- let me back up.  It may be a question  
11  on some part of that that we rarely see, and at those  
12  times, a discussion is held to discuss the application  
13  of that provision.  Not all -- in some orders, of  
14  course, you don't always have the same marketing things,  
15  same products and some of those kind of things, and a  
16  discussion would be held to see if everybody's on the  
17  same page, and if we are, then we just go on from there.

18  BY MR. VETNE:

19           Q.  An illustration might be if a new product is  
20  developed, it's not clear what class it falls into?

21           A.  That would be a good example.

22           Q.  And -- and, in fact, there has been a  
23  post-order reform hearing on that subject, has there  
24  not?

25           A.  There has.

1 Q. 40(a), this is class classification, talks  
2 about Class I being milk disposed of in fluid milk  
3 products. You're familiar with that of course, correct?

4 A. Correct.

5 Q. Okay. And that captures essentially from the  
6 volume of milk received from producers and cooperatives  
7 milk that is in a package and distributed to  
8 consumers/suppliers?

9 A. For the most part that's correct.

10 Q. And in 40(a), (b) and (d), a little bit  
11 different qualifying or descriptive language is used.  
12 Rather than "disposed of in the form of or disposed  
13 within," the language is "used to produce." So with  
14 respect to those used to produce products, it doesn't  
15 matter whether the producer -- whether the milk received  
16 is actually in the product, remains on pipes, falls on  
17 the floor, it's all the milk that comes in for the  
18 purpose of making those products, correct?

19 JUDGE CLIFTON: I'd like you to reword that  
20 question.

21 MR. VETNE: I'm just trying to find out the  
22 difference between "used to produced" or "disposed of  
23 in."

24 JUDGE CLIFTON: Well, start again, if you  
25 will.



1 BY MR. VETNE:

2 Q. Rather than have me -- geez, you know, I tried  
3 to put words in your mouth, and I'm sorry. Okay. Could  
4 you just describe the difference between "used to  
5 produce" as you apply in your classification,  
6 accounting, and -- and obligation --

7 A. Okay.

8 Q. -- procedures and "disposes of in"? What is  
9 the difference?

10 A. Well, I'll start with "used to produce." When  
11 we talked about used to produce, that is milk dairy  
12 products, milk products that are physically used to  
13 produce a product. And the accountability on those is  
14 based on the amount of milk or product that went into  
15 it. So, for instance, if we're looking at ice cream in  
16 Class II, the handler reports how much milk, cream, et  
17 cetera, was used to make that ice cream.

18 Q. Yes.

19 A. When -- and so the accounting is really on how  
20 much of that -- how much of those products went into the  
21 finished product.

22 Q. I'm sorry, you used "product," same word  
23 "product," how many pounds of product went into the  
24 product.

25 A. Okay. I'm sorry. The amount of dairy

1 ingredients that went in to make a specific product.

2 Q. By dairy ingredients you may of raw producer  
3 milk from the farm, condensed milk, powder, any -- any  
4 raw material input that went into that, correct?

5 A. That is correct. We do not include such  
6 things as flavorings. So in ice cream if you were  
7 adding strawberries, we're not going to add straw --  
8 we're not going to include strawberries in what we look  
9 at. We're only looking at the dairy ingredients. And  
10 it's accounted for on a pound or per pound per  
11 hundredweight basis.

12 The Class I products are handled somewhat  
13 differently in that we take the volume of finished  
14 product, so if you've got a gallon, we look at the  
15 gallon of milk and convert it to a hundredweight. And  
16 so a slightly different -- we don't look at how much --  
17 specifically we're not looking at the pounds of milk  
18 that went into the gallon, we look at the gallon and say  
19 so many pounds went into it.

20 On a gallon, that's not very much of a  
21 differentiation. Where you get into a differentiation  
22 is in products that have added things to them, so if we  
23 go to chocolate milk, for instance, we look at the  
24 gallon of chocolate milk, and we have a conversion  
25 factor that converts that volume of chocolate milk into

1 pounds, and that -- that conversion factor takes into  
2 account that there's sugar, there's cocoa, there's other  
3 flavorings and so forth and so on in that package with  
4 that gallon or with that container of milk. And so it  
5 does give you a pound of -- of milk that was used in  
6 there, but it's a conversion type of thing rather than  
7 actual pounds. So that's really -- that's the  
8 difference really in the accounting and how that --  
9 those products are handled.

10 Q. I'd like to get into one -- there might be  
11 another difference that you haven't mentioned with  
12 respect to, say, cheese. A hundred pounds of producer  
13 milk comes in. Handler makes cheese with that hundred  
14 pounds of producer milk, and it is required to account  
15 for a hundred pounds of milk at the Class III price,  
16 whether the handler got ten pounds of cheese, nine  
17 pounds, or whatever, correct?

18 A. Correct.

19 Q. And if a handler whose only function is to  
20 bottle milk receives a hundred pounds of milk and puts  
21 them in consumer packages, and the total volume in those  
22 consumer packages is 98 pounds because some of it was  
23 lost in shrinkage and processing, that would be a  
24 difference because only 98 pounds is charged to the  
25 handler as Class I, and the two percent would be

1 allocated to shrinkage, correct?

2 A. It -- it would be correct that if he purchased  
3 a hundred pounds of milk from a dairy farmer but only  
4 bottled 98 of it and the rest disappeared --

5 Q. Yes.

6 A. -- that it would be that other two pounds  
7 would be considered shrinkage, correct.

8 Q. So the charge, the accounting to the pool and  
9 to producers in Class I would be for 98 pounds and the  
10 accounting to producers for the other two pounds would  
11 be whatever the shrinkage accounting is, usually Class  
12 IV? Or is it the lower of?

13 A. Well, and you asked me that and my mind just  
14 went blank. Let me think here. Yeah, let me -- let me  
15 just --

16 Q. Let's look it up.

17 A. Let's look it up, that's right.

18 Q. You know --

19 A. Okay. Actually here it's Class IV.

20 Q. Even if Class IV is higher than Class III?

21 A. Just a minute. Yes, if we look at 10 -- or we  
22 look 1000.41, and we look at, let's see, (b), Class IV  
23 milk should be all skim milk and butterfat, and it's got  
24 used to produce, and then -- in number 1, and then in  
25 number 2, it -- let's see. I just saw it. Oh, number

1 4, under 1000.41(b)(2) -- or -- yeah, (b)(2) is in  
2 shrinkage assigned pursuant to Section 1000.43(b).

3 Q. Okay. So what you were reading means that  
4 some shrinkage may go back to Class I because 40 -- it's  
5 in excess of 43(b)?

6 A. There -- there is a possibility that some  
7 shrinkage could get into Class I. Excess shrinkage  
8 could get into Class I.

9 Q. There is a -- put it this way: There is a  
10 bias in -- in all of these rules toward putting milk --  
11 producer milk in Class I if at all possible, correct?

12 A. I think in many cases that would be true.

13 Q. For example, when a handler receives other  
14 source milk, it is generally allocated to the lowest  
15 classes first, so that in that handler's milk supply,  
16 more producer milk gets assigned to Class I if there is  
17 Class I to be assigned?

18 A. That is correct.

19 Q. And in -- in shrinkage, there's an allowance  
20 of two percent, if a handler happens to have more than  
21 two percent, the bias is to put, okay, you know, you're  
22 not being efficient enough, we're going to put your  
23 excess shrinkage into Class I for the producer's  
24 benefit, correct?

25 A. Correct.

1 Q. Thank you.

2 JUDGE CLIFTON: Does anyone else have  
3 questions for Mr. Schaefer?

4 CROSS-EXAMINATION

5 BY MR. SCHIEK:

6 Q. William Schiek for the Dairy Institute.

7 Mr. Schaefer, just one question. I was  
8 looking through Section 40, maybe I missed it, so it's  
9 my understanding that when a plant, butter plant is  
10 churning butter, that there's some product left over  
11 after the churning process. Is it -- I think it's -- it  
12 is called buttermilk; is that correct?

13 A. Correct.

14 Q. If that were to be used in a baking mix from  
15 its liquid form, would that be classified as II?

16 A. I believe that would stay as Class IV because  
17 we've already priced --

18 Q. Priced it so --

19 A. -- the product in Class IV.

20 Q. Okay. So buttermilk powder then made from  
21 that would also be Class IV?

22 A. That is correct.

23 Q. Okay. Thank you.

24 MR. VETNE: One of the problems with these --

25 JUDGE CLIFTON: Name?

1 MR. VETNE: John Vetne.

2 One of the problems of these hearings,  
3 Your Honor, in this industry is that we make assumptions  
4 that other people know what we're talking about when we  
5 use a word. So I wanted to ask Mr. Schaefer about  
6 buttermilk.

7 CROSS-EXAMINATION

8 BY MR. VETNE:

9 Q. The buttermilk that you refer to in response  
10 to the previous question, that is a byproduct of making  
11 butter, is not buttermilk as consumers in -- in any  
12 state, including California, know it, buttermilk on the  
13 shelf in the grocery store; is that correct?

14 A. That is correct.

15 Q. In fact, the buttermilk on the shelf in a  
16 grocery store is a product generally made from skim milk  
17 that is cultured?

18 A. I believe that is correct.

19 Q. Thank you.

20 JUDGE CLIFTON: Thank you, Mr. Vetne.

21 Are there any other questions for  
22 Mr. Schaefer?

23 DIRECT EXAMINATION

24 BY MS. TAYLOR:

25 Q. Mr. Schaefer -- this is Erin Taylor -- can you

1 turn to Section 1000.43(b)(1). I think that's where the  
2 shrinkage is -- is assigned, and if you want to look  
3 through that and make clear for the record. In  
4 paragraph (b)(1), if I didn't say that earlier.

5 JUDGE CLIFTON: And, Ms. Taylor, that's  
6 1000.43.

7 MS. TAYLOR: Yes.

8 THE WITNESS: Correct. Okay. I -- I'm going  
9 to make a correction here. When I was reading through  
10 40 very quickly, and then I step back and look, it has  
11 that same line in shrinkage assigned pursuant to  
12 1000.43(b) in every class, and so we have to make a  
13 little adjustment there. 43(b) says that shrinkage  
14 incurred by pool plants qualified pursuant to Section .7  
15 of any Federal Milk Order to be assigned to the lowest  
16 class price to the extent that such shrinkage does not  
17 exceed, and then it goes into the discussion of the  
18 two percent and so forth, so I'll correct my statement  
19 there.

20 JUDGE CLIFTON: So you started out by saying  
21 it's either Class IV or lowest, and now which is it?

22 THE WITNESS: It -- it could be -- it -- it's  
23 lowest price class, so if the Class III price is lower  
24 than the Class IV price, then it would be in Class III.  
25 And I did not thoroughly look at 40 to clarify myself



1 when I answered the question.

2 JUDGE CLIFTON: And does the Administrator  
3 have to make that determination afresh each month?

4 THE WITNESS: Basically, yes, because each  
5 month the prices change, and so the shrinkage -- what  
6 class the shrinkage would go into or which class --  
7 actually there's some other things that go into lowest  
8 price class as well. So what the -- the product that  
9 goes into the lowest class price would be determined  
10 each month, which class it's going to go into. And as  
11 somebody mentioned, and I don't remember whether it was  
12 Mr. Vetne, conceivably it could go into Class I, and I  
13 think actually at some time in the last 15 years that  
14 we've had order reform, we have actually had product in  
15 Class I as the lowest price class. Not -- it's pretty  
16 unusual, but it can happen.

17 BY MS. TAYLOR:

18 Q. I also want to make the record clear that,  
19 Mr. Schaefer, that there was a lot of discussion on why  
20 certain provisions are set at what they are, and that  
21 despite what was said, there is a hearing record that  
22 participants can refer to and that is the reasons in  
23 that record as to why certain provisions are set at the  
24 way they are?

25 A. Correct.

1 Q. And any words used today about any kind of  
2 bias towards one side or the other, not your words, but  
3 in fact you're just here to talk about what the rules  
4 are and where it would be assigned?

5 A. Correct.

6 MS. TAYLOR: That's it.

7 JUDGE CLIFTON: Thank you, Ms. Taylor.

8 CROSS-EXAMINATION

9 BY MR. SCHIEK:

10 Q. Just one -- excuse me. Bill Schiek from the  
11 Dairy Institute. Well, William Schiek from the Dairy  
12 Institute. I also go by Bill, I hope both of those are  
13 acceptable.

14 Just one follow on question to what Ms. Taylor  
15 was saying. So I'm -- I was looking at the shrinkage  
16 provisions in the section that you were just  
17 referencing, 1000.43(b)(2), and I guess the question is  
18 when I'm looking at those percentages and the why  
19 aspect, in other words, why that percentage, Ms. Taylor  
20 talked about hearing records. I'm assuming some of this  
21 uniform provision -- sections that are under uniform  
22 provisions, Part 1000, is not in a -- as John Vetne  
23 noted -- not in a hearing record but in another  
24 document. Is that accurate?

25 A. I believe the shrinkage provisions that we're

1 talking about where it talks about the two percent and  
2 so forth, those I believe are in a hearing record. I do  
3 not know specifically what hearing record. I believe  
4 they have been pretty consistently that way or that  
5 portion has been that way since at least when I was --  
6 started with the Federal order, so I'm going to guess  
7 that they would have been some time before 1985.

8 Q. Okay. And if -- if we can't -- if there isn't  
9 a hearing record on some of those uniform provisions, is  
10 an explanation likely to be in the Final Rule on Federal  
11 Order Reform?

12 A. It very well could be because the Final Rule  
13 on Order Reform did kind of a nice job of -- of not  
14 necessarily real specific, but summarizing some of that  
15 provisions that were put in there.

16 Q. Okay. Thank you very much.

17 JUDGE CLIFTON: Are there any other questions  
18 of Mr. Schaefer? There are none.

19 Thank you so much, Mr. Schaefer.

20 THE WITNESS: Thank you.

21 JUDGE CLIFTON: You may step down.

22 THE WITNESS: Thank you.

23 MR. HILL: Brian Hill. We're ready to recall  
24 John Mykrantz for questioning, I believe.

25 JUDGE CLIFTON: You remain sworn. Would you

1 please state and spell your name?

2 THE WITNESS: My name is John Mykrantz.

3 J-O-H-N. M-Y-K-R-A-N-T-Z.

4 JUDGE CLIFTON: Now, I remember when we  
5 interrupted him, but I don't remember what was next.  
6 Can someone help me?

7 MR. HILL: Yes. He is here for  
8 cross-examination. We had no questions for him, Your  
9 Honor.

10 JUDGE CLIFTON: Who would have questions of  
11 Mr. Mykrantz?

12 CROSS-EXAMINATION

13 BY MR. BESHORE:

14 Q. Marvin Beshore. Good morning, John.

15 A. Good morning.

16 Q. I had just one area of questioning for you.  
17 I'm -- and you testified, according to my notes, to  
18 Sections 43 and 44, I think, amongst some others.

19 A. Correct.

20 Q. And when my question is the 44 classification  
21 of producer milk, for instance, refers to, you know, in  
22 part (a), skim milk shall be allocated in the following  
23 manner, and part (b) says butterfat shall be allocated  
24 in accordance with procedure for skim milk, and (c) the  
25 quantity of producer milk of each class shall be

1 combined pounds of skim and butterfat. So it doesn't  
2 specifically talk about protein pounds, other solids  
3 pounds, and -- and the -- those components that are  
4 priced and accounted for in multiple commodity pricing  
5 orders, so my question is how does that work under  
6 the -- how do multiple component values get applied  
7 under some of the uniform provisions, the verbiage of  
8 which only identifies skim and butterfat?

9 A. I believe in my testimony yesterday, I stated  
10 that the result of allocation is producer skim milk and  
11 butterfat by class and Federal orders assume that the  
12 components in the skim, that is protein and other  
13 solids, follow the skim that's assigned to a particular  
14 class.

15 Q. Okay. So can you just elaborate on that for  
16 me just a bit, perhaps put some, hypothetically, numbers  
17 in there. If you've got a hundredweight of skim, what  
18 does that mean for --

19 A. I guess you would look at the percentage of  
20 skim that may be assigned -- percentage of producer milk  
21 skim that may be assigned to a class, that same  
22 percentage of protein in producer milk receives will be  
23 assigned to that class.

24 Q. Okay. And likewise for other solids if  
25 there's some other solids --

1 A. Correct.

2 Q. -- in the butter?

3 Okay. And does that principle or concept  
4 apply, you know, throughout the -- the language of the  
5 uniform provisions as they are incorporated in each  
6 order, whether it's a multiple component pricing order  
7 or not? And you -- you deal with one of each, right?  
8 You deal with -- in your -- you have a multiple  
9 component pricing order in the Pacific Northwest and a  
10 skim fat order in Arizona?

11 A. Correct.

12 Q. Okay. So if you remember my question, you can  
13 go back.

14 A. Could you repeat it?

15 Q. Well, maybe. My question was in -- in  
16 applying the uniform language, the uniform provisions,  
17 which are incorporated uniformly in orders that are skim  
18 fat orders or multiple commodity pricing orders, do you  
19 apply the -- the -- every time it just says skim and  
20 butterfat, do you apply the skim proportionately to the  
21 components as you indicated you would under Section 44?

22 A. Again, I am not the Market Administrator for  
23 either of those two orders. I would look to the Market  
24 Administrator to be more specific.

25 Q. Okay. Did your testimony represent how you

1 understand it to work with respect to uniform provisions  
2 43 and 44 to which you've testified?

3 A. Could you repeat that?

4 Q. Okay. Did your testimony about applying the  
5 percentages of skim to the pounds of butterfat and other  
6 solids -- do you recall that testimony earlier -- did  
7 that apply to how you understand uniform provisions 43  
8 and 44 to be administered in a multiple-component  
9 pricing order since you've testified about those  
10 particular once?

11 A. Generally, yes.

12 Q. Okay. That's all. Thank you.

13 A. Judge, can I make a request?

14 JUDGE CLIFTON: Yes.

15 THE WITNESS: Can we shut these blinds to my  
16 right?

17 JUDGE CLIFTON: Ah. Oh, you're being cooked.

18 MR. ENGLISH: Or blinded.

19 MS. COALE: Can we take a break? We've asked  
20 for it.

21 JUDGE CLIFTON: All right.

22 MS. COALE: So we're waiting for them to come.

23 JUDGE CLIFTON: All right. Very good.

24 Please be back and ready to go at 10:20. That  
25 gives you 15 minutes.

1 (Whereupon a break was taken.)

2 JUDGE CLIFTON: We're back on record at 10:22.

3 Who will next question Mr. Mykrantz?

4 BY MR. BESHORE:

5 Q. Marvin Beshore.

6 John, I just need to clarify a misstatement  
7 that I made in the last question to you, which is kindly  
8 called to my attention by Ms. Taylor, Sue Taylor. So I  
9 was asking you whether in Section -- when you're  
10 applying, you know, your Order Sections 43 and 44, which  
11 talk about skim and butterfat, whether when skim fat --  
12 whether when you applied skim to the components, protein  
13 and other solids, and I said "fat and other solids," did  
14 you understand we were talking about the components of  
15 skim being protein and other solids, and that the  
16 percentage of skim would be applied to the pounds of  
17 protein and other solids as you had testified?

18 A. Correct.

19 Q. Okay. So that what that -- fat and then other  
20 solids, when I misspoke that way, that was -- that was  
21 incorrect, and you didn't mean your testimony to take it  
22 that way?

23 A. No.

24 Q. Thank you.

25 ///



1 CROSS-EXAMINATION

2 BY MR. ENGLISH:

3 Q. Chip English.

4 Good morning, Mr. Mykrantz.

5 A. Good morning.

6 Q. So I'm hoping that we can keep this really  
7 short, and I want to focus solely on the questions that  
8 I had and that Mr. Beshore also had before me of  
9 Mr. Schaefer but as it applies to orders you  
10 administered as fortification involving the use of  
11 nonfat dry milk or condensed skim. Okay?

12 A. Okay. I guess one clarification is that I do  
13 not administer the order.

14 Q. Sorry.

15 A. The Market Administrator does.

16 Q. I apologize. To the extent that you're  
17 involved and can speak to the technical aspects of how  
18 it ends up being administered. Okay?

19 A. Correct.

20 Q. All right. So were you here both yesterday  
21 evening, before 5:00 o'clock, and this morning when  
22 Mr. Schaefer and Mr. Beshore discussed the interplay of  
23 1000.15(b)(2), 1000.40(d)(3) with respect to  
24 fortification?

25 A. I was here.

1 Q. And also this morning when I followed up some  
2 questions about that as well?

3 A. I was here.

4 Q. Okay. In -- when your order is administered  
5 by your Market Administrator with your assistance, are  
6 those provisions treated identically as Mr. Schaefer  
7 testified.

8 A. I believe they are.

9 Q. Thank you. And I appreciate your being here,  
10 I appreciate Mr. Wise being here, and I appreciate  
11 Mr. Schaefer being here. I think all three have been  
12 extraordinarily useful witnesses, and I appreciate it.  
13 And I know that it's somewhat frustrating at times for  
14 participants, but I think these witnesses have been  
15 extremely valuable, and we are grateful.

16 JUDGE CLIFTON: Does anyone else wish to  
17 question Mr. Mykrantz? No one.

18 Mr. Mykrantz, you may step down. Thank you so  
19 much.

20 MR. HILL: This is Brian Hill.

21 Your Honor, we have no more witnesses for  
22 today. There are some requests that we're going to be  
23 working on, but that is it for witnesses.

24 JUDGE CLIFTON: Have we come to the part in  
25 between the Government's evidence and the opening

1 statements where Mr. English talks about the issue that  
2 is not in the Federal Register but that he believes  
3 should be part of this evaluation by the Secretary?

4 MR. ENGLISH: I believe so. I have one  
5 question for the record -- sorry.

6 Chip English. I believe the answer is yes,  
7 but I just want to clarify we are still at some point  
8 expecting, but I think it isn't yet organized in the way  
9 that it's going to be presented, the California  
10 information. Is that correct? But it's just not quite  
11 ready yet.

12 MR. HILL: That is correct.

13 MR. ENGLISH: Then the answer is yes,  
14 Your Honor, as far as I'm concerned.

15 JUDGE CLIFTON: Are you going to have three  
16 documents marked as exhibits to begin this, Mr. English?

17 MR. ENGLISH: You're mostly there, Your Honor.  
18 It's five.

19 JUDGE CLIFTON: Ah, five. All right. So I'm  
20 thinking that the first one of those will be Number 14.  
21 Am I correct?

22 MR. HILL: That is -- Brian Hill. Brian Hill.  
23 That is correct, Your Honor.

24 JUDGE CLIFTON: All right. So why don't  
25 you -- before you begin to distribute them, Mr. English,

1 stand at the microphone and tell us what 14 is entitled,  
2 15, and so on. Do you need a pen?

3 MR. ENGLISH: I had one.

4 JUDGE CLIFTON: And as you do that, if for  
5 example you have read into the record what you want to  
6 say about proposed Exhibit 14, if you then want to hand  
7 it to someone to begin to distribute, you can do that.

8 MR. ENGLISH: I will do that. And would that  
9 also include the two for Meredith or --

10 MS. RAGHUNATHAN: I will do that.

11 MR. ENGLISH: You're -- okay, you're Meredith.

12 JUDGE CLIFTON: And the court reporter will  
13 need one, and I will need one.

14 MR. ENGLISH: So I will keep one for each of  
15 us.

16 So then, Your Honor, proposed Exhibit 14 would  
17 be a letter dated May 27th, 2015, from Ms. Vulin and me  
18 on behalf of the Dairy Institute of California, which is  
19 the final submission to USDA, and it's just a cover  
20 letter. That would be proposed Exhibit 14. And I  
21 will --

22 JUDGE CLIFTON: So we start with the two  
23 record copies, and then the court reporter and the  
24 judge, and then you may distribute them however you  
25 wish.

1           And, again, the one handed to the court  
2 reporter at this stage is just a courtesy copy. The  
3 official ones will come from the Agricultural Marketing  
4 Service to the court reporter at the end of the day.

5           (Whereupon Exhibit 14 was marked for  
6 identification.)

7           MR. ENGLISH: Continuing, Your Honor, proposed  
8 Exhibit 15 was Attachment 3 to that May 27th letter. We  
9 are omitting Attachment 1 because it is merely our final  
10 petition language which showed up in the hearing notice,  
11 and we don't think we need to have the bulk, and  
12 Attachment 2, which was the responses to questions from  
13 the Department. So this is the -- these today have to  
14 do with the cover letter and its direct impacts with  
15 respect to what is proposed Exhibit 15.

16           (Whereupon Exhibit 15 was marked for  
17 identification.)

18           JUDGE CLIFTON: So to give it a name,  
19 Mr. English, I --you may not want to read all of that  
20 in, but --

21           MR. ENGLISH: I will read what I think the  
22 critical part is. Alternative Proposal for Class III  
23 Other Solids Price, paren 7, C.F.R., all caps with  
24 periods, Section 1150.50(q), end parentheses.

25           The next document for proposed Exhibit 16,

1 Your Honor, is a one-page letter dated August 5th, 2015,  
2 from the United States Department of Agriculture,  
3 Agricultural Marketing Service, addressed to me and  
4 signed by William Francis, Director Dairy Order  
5 Formulation and Enforcement Division.

6 (Whereupon Exhibit 16 was marked for  
7 identification.)

8 MR. ENGLISH: Exhibit 16 does not have a re:  
9 line so I think it's properly identified as the  
10 letter -- responsive letter from the Department to my  
11 May 27th submission in Attachment 3. It's a letter  
12 dated August 5, 2015, to Charles N. English, Junior, and  
13 signed by Mr. Francis.

14 Proposed Exhibit 17, Your Honor, is a letter  
15 dated August 17th, 2015, from Ms. -- from me to  
16 Ms. Dana Coale as Deputy Administrator for AMS Dairy  
17 Programs. It is -- the re line is Re: August 5 Letter  
18 Rejecting Dairy Institute of California Alternative Whey  
19 Formula, spelled W-H-E-Y.

20 (Whereupon Exhibit 17 was marked for  
21 identification.)

22 MR. ENGLISH: During this presentation, I'm  
23 going to do everything I can to use the word -- the only  
24 word whey I will try to use is W-H-E-Y. Unfortunately,  
25 there are times when in the vernacular, the other two

1 versions may be used, and if so, I will try to spell  
2 them out. I'm going to try very hard to use "manner"  
3 than "way" for W-A-Y, and I'm going to try very hard not  
4 to use at all W-E-I-G-H. If there's a fourth one, I'm  
5 not going to deal with it.

6 So that's Proposed Exhibit 17, and we're going  
7 to hand it out as we have been handing out the others.

8 And -- and for the record, the May 25th -- I  
9 think a number of these have been posted on the website,  
10 but we're putting it as part of the record, but I think  
11 the only one that was not on the website is this  
12 proposed Exhibit 16. I'm not sure that was on the  
13 website, but the others I've seen on the website.

14 (Whereupon Exhibit 18 was marked for  
15 identification.)

16 MR. ENGLISH: So proposed Exhibit 18, which is  
17 the last proposed exhibit for this portion of the  
18 discussion, proposed Exhibit 18 is a letter from US  
19 Department of Agriculture, Agricultural Marketing  
20 Service, dated September 9, 2015, addressed to me,  
21 Charles M. English, Junior, and signed by Dana Coale,  
22 Deputy Administrator, and again it doesn't have a re  
23 line, but it is clearly responsive, the very first  
24 sentence makes it clear that it is responsive to Exhibit  
25 17.

1           JUDGE CLIFTON: Mr. English, would you begin,  
2 please, by telling me why despite these two firm denials  
3 this is important enough that you have persisted?

4           MR. ENGLISH: Well, that's probably my entire  
5 discussion, but I would note that in Exhibit 18 on page  
6 2, the last sentence of the letter from Ms. Coale to  
7 me -- last two sentences are: "The hearing will be  
8 administered by Administrative Law Judge. At the  
9 hearing, the Dairy Institute of California will have the  
10 opportunity to explain to the Judge why the WPC other  
11 solids pricing concept should be included in the hearing  
12 record." I have accepted that invitation.

13          JUDGE CLIFTON: No, I don't mean procedurally,  
14 I mean meritoriously why -- why is this so important?

15          MR. ENGLISH: Well, that really is literally  
16 most of my discussion, Your Honor.

17          JUDGE CLIFTON: Can you give me a little  
18 preview?

19          MR. ENGLISH: Well, the preview, Your Honor,  
20 is that we are here in wonderful downtown Clovis,  
21 California, in a nutshell because California dairy  
22 farmers have for several years been concerned that the  
23 portion of the 4(b) formula, Arabic 4(b) in California  
24 that is used to value the milk used to make cheese, that  
25 portion that is used to calculate the whey, W-H-E-Y,



1 value undervalues that milk. And in particular, they  
2 compare the value of the whey in the 4, Arabic 4(b)  
3 formula to the value of the whey, W-H-E-Y, in the  
4 Federal order formula in Class III. And they have  
5 concluded, and they have made quite clear in any number  
6 of publications that that difference is enormous,  
7 unnecessary, unfair, and any number of other things.

8           Their conclusion is that in a Federal order,  
9 and they've tried in their view to try to get CDFA to  
10 fix that, and their view is that CDFA has -- is not --  
11 they haven't been satisfied. I will let them  
12 characterize, but that's -- you know, that's why we're  
13 here in a nutshell in the end. If -- if -- I would  
14 submit that if California had addressed the concerns the  
15 way of dairy farmers of California wanted them to with  
16 respect to the whey value, that they wouldn't have  
17 requested the hearing, and clearly from their cover  
18 letter, that's what this is about.

19           There is an alternative scenario. The  
20 alternative scenario is that the value of whey in the  
21 Class III formula as presently used in Federal orders  
22 overvalues the value of whey. We in our initial  
23 proposal attempted to address that issue in coming up  
24 with some alternative way -- manner, sorry, that was  
25 W-A-Y, as it's manner -- to address the issue.

1           Upon our submission in April and made public  
2 by the Department, a lot of industry discussion was  
3 generated, partly because of what happens in the dairy  
4 industry, we had a number of meetings in April around  
5 the country over a lot of issues, and in particular  
6 meetings of the American Dairy Products Institute, ADPI,  
7 in Chicago. Also the Dairy Economists' meeting under  
8 the aegis of Cornell and others in Portland, Oregon, and  
9 even at the Pasteurized Milk Ordinance Meeting headed by  
10 FDA, also in Portland.

11           So in a nutshell, and I'm now getting outside  
12 a nutshell, but the bottom line is that we as a result  
13 of those discussions came up with another way -- sorry,  
14 another manner of looking at the whey factor. And that  
15 is what this alternative proposal is.

16           Because as discussed in the May 27th letter,  
17 which discusses some of this public discussion, the  
18 alternative proposal would use liquid whey and not dry  
19 whey as the formula factor to address how to calculate  
20 the whey contribution to the Class (b) price because  
21 that, in our view, may be the real world marketable  
22 product most produced for the market today.

23           We ought not to simply because 15 years ago in  
24 Federal order reform a formula was adopted and amended a  
25 little bit after that in the 2000 time frame, 2002, we

1 ought not to be straitjacketed, and as I will discuss in  
2 my opening statements somewhat related, this is an order  
3 formulation hearing. We aren't, as any other hearing  
4 I've ever been at, amending an existing order. We're  
5 formulating an order. And in formulating an order, it  
6 is appropriate to consider all alternatives and frankly  
7 to prove everything.

8 So that's the nutshell. The argument is much  
9 longer.

10 JUDGE CLIFTON: Understand. And I appreciate  
11 the nutshell version very much.

12 All right. I think what we should do -- now,  
13 you're not -- you're not going to give me all the detail  
14 that you would give me when it's your turn to present  
15 your proposal now, are you?

16 MR. ENGLISH: No. No. I'm going to discuss  
17 in further detail why it's appropriate -- and I also  
18 want to go back to what you said on Tuesday, because I  
19 actually seek to persuade the participants, including  
20 the USDA, but also my colleague Mr. Beshore who's  
21 indicated he's going to oppose this, that this really is  
22 the correct price, and that maybe in the spirit of  
23 rulemaking that we can come to a conclusion that this is  
24 a good document.

25 If I can't, then obviously, you know, we have

1 to look at other issues with respect to that, but I  
2 really do seek to persuade. And I am delighted there  
3 are so many people, both from the Department and from  
4 the Cooperative side, that are in the room today to hear  
5 what we have to say about this.

6 But, no, I am not going to go -- first of all,  
7 I'm the wrong person to go into the details of this, but  
8 rather, what I want to do is I seek to persuade to allow  
9 this to be considered as part of this hearing.

10 JUDGE CLIFTON: And that failing, to establish  
11 a record for appeal?

12 MR. ENGLISH: Your Honor, obviously what I'm  
13 actually doing is making a motion pursuant to 900.7, and  
14 if necessary, yes, I say that, but there's multiple  
15 levels here. First I seek to -- to persuade. Second  
16 I'm effectively making a motion pursuant to 900.7 and  
17 pursue those avenues, if necessary. And, third, if  
18 denied, under 900.7 or otherwise, seek to make an offer  
19 of proof under 900.8(c)(6), an offer a proof which then  
20 pursuant to the provisions should somebody at some day  
21 consider we were right and it should have been  
22 considered, I submit that as much as we all love Fresno  
23 today that we don't all want to come back to reopen the  
24 proceedings, and so that's why I seek to persuade that  
25 we don't need to do that.

1 JUDGE CLIFTON: Thank you. And you may  
2 proceed.

3 MR. ENGLISH: Thank you, Your Honor.

4 So I'm going and try not to repeat myself, but  
5 again, after we made our original submission in April  
6 and the Department published on its website the  
7 proposal, there was a significant amount of industry  
8 discussion with respect to this particular issue, that  
9 is the issue of how to value the whey contribution to  
10 the Federal Order Class III formula should there be a  
11 Federal order for California.

12 And in response to that, we submitted what is  
13 proposed Exhibit 15, and we believe -- well, so let me  
14 backtrack. Exhibit 15 or proposed Exhibit 15 is one  
15 paragraph within Proposed Section 1050 and is proposed  
16 paragraph (q), which by definition means we have an (a),  
17 (b), (c), (d), et cetera, through (p), so there's one  
18 paragraph, (q), of an entire proposal for a Federal  
19 order.

20 And the alternative, we believe, is consistent  
21 with the whey factor pricing concept submitted --  
22 frankly there was a hearing, as we know, we've had some  
23 discussion with what CDFA did, but the Dairy Institute  
24 submitted for consideration at the CDFA hearing that was  
25 held in June. My letter incorrectly says 2014, it

1 should say 2015. And the underlying basis for our  
2 alternative proposal is that liquid whey, not dry whey,  
3 could be the formula factor used to calculate the whey  
4 contribution to the Class (b) price because it may be  
5 the real world marketable product most produced for the  
6 world today.

7 Now, just because a proposal is submitted  
8 doesn't mean it gets adopted. That's part of my  
9 discussion here. But if it were to be heard and if the  
10 evidence at the hearing supports the concept, the whey  
11 contribution end product formula would be based on the  
12 sales value and manufacturing costs of liquid, WPC, all  
13 caps for Whey Protein Concentrate, WPC hyphen 34, and  
14 the yield of WPC hyphen 34 from skim. And we urge the  
15 Department to include the proposal.

16 I'm not going to read the rest of the letters  
17 into the record, it's not the point of this. The  
18 Department position is, it's included in its letter, as  
19 I read it their conclusion is that since it wasn't part  
20 of our original April commission, it was an alternative,  
21 it was not properly before the Department. Our response  
22 is that, candidly, I'm not sure we need it in the  
23 hearing notice. I thought fairness indicated that it  
24 was a good idea. But my argument today is while I would  
25 like the Department to consider re-noticing the hearing,

1 I don't think that's necessary, and -- and that is a  
2 large part of -- of my argument today.

3 That is to say it is our view that the hearing  
4 as noticed with Proposal 1 from the Cooperatives, which  
5 includes of course a whey formula based upon the current  
6 Federal order formulas and a whey formula that is our  
7 submission, which is somewhat different, opened the door  
8 to alternative discussions of the whey factor.

9 As an aside, I would note that we've heard  
10 testimony, the Dairy Institute Proposal had two concepts  
11 for some of these price formula concepts, price  
12 proposals. One was to use a Western States-based value,  
13 and in the event a Western States value wasn't  
14 available, a default. From the testimony we heard from  
15 the Department, it is my strong suspicion that our  
16 Western States values are going to be problematical  
17 because the Department's view is that they can't break  
18 that testimony -- that information down for  
19 confidentiality. That makes all the more urgent that  
20 given the fact that we opened the issue that we are  
21 allowed to discuss alternatives of how the whey factor  
22 could be addressed.

23 Let me -- in my letter, and Mr. Beshore of  
24 course responded in -- about one of the cases. In my  
25 letter, I -- I had mentioned two cases, my letter dated

1 September 9th. I'm sorry, the August 17th letter that  
2 is dated -- that is Exhibit 17.

3 And -- and I mentioned what happened when the  
4 National Farmers Association submitted a proposal with  
5 respect to Orders 1, 2, and 4 that was not included.  
6 And Mr. Beshore is absolutely correct, there were other  
7 facts in that case, and USDA did some things, I would  
8 suggest that's why Mr. Beshore was able to go into  
9 federal court and during the hearing get the  
10 extraordinary remedy of getting a court to order.

11 I'm not going to give up my options here, but  
12 I recognize that Mr. Beshore represented farmers in that  
13 proceeding, I represent -- I represent handlers in this  
14 proceeding, and I am well aware that there are different  
15 rules about when we may be able to go to court, so I --  
16 I nonetheless think that the case is instructive.

17 I want to talk about the Alto Dairy case at  
18 some length and then tie it back to other proceedings,  
19 because there are some other proceedings that have some  
20 interesting conclusions that support our position today.  
21 So in Alto Dairy, and ironically, I think all the  
22 lawyers who participated in oral argument before the --  
23 the 7th Circuit are here today. So we -- we can  
24 certainly talk about Alto Dairy from every single  
25 perspective.



1           Basically we've heard already in this  
2 proceeding that there were a number of hearings  
3 post-2000 Federal order reform that address the  
4 questions of pooling, depooling, producer association  
5 requirements. The good news is I don't have to ask  
6 questions about that, I'm happy to talk about it in oral  
7 argument about what those proceedings were about, and  
8 one of those proceedings involved, I believe it's the  
9 Mid East, the Mid East order, and in fact, there were  
10 two hearings, but this is one of those hearings, and  
11 there were various proposals by producer interests and  
12 processor interests that address the question of what  
13 you do with producer association.

14           And the Department adopted a proposal that was  
15 not actually submitted. It was a modification, and the  
16 plaintiffs submitted that it was a significant  
17 modification and not properly before the Agency, much  
18 less that the Agency could make the decision on its own.  
19 And I'm going to leave aside the standing issue, because  
20 we don't need to talk about that. So there are two  
21 issues before the court, one was whether Alto Dairy  
22 Company has standing, and the other was the merits. The  
23 court found standing and therefore it proceeded to the  
24 merits.

25           So the question for the merits was whether or

1 not the notice was adequate, that is to say to address  
2 an issue that was not specifically before the Agency.  
3 And I'm going to try not to be too -- again, but I want  
4 to -- I want to read more extensive than my quote in the  
5 letter since my quote in the letter was unpersuasive.

6 "The Administrative Procedure Act requires  
7 published notice of proposed rulemaking." I'll omit  
8 citations, and I'm reading from 336 F.3d 560, Alto Dairy  
9 versus Veneman, decided on July 15th, 2003. And for the  
10 page reference, I'm on 569, and I'll tell you when I  
11 turn over to 570.

12 So "The Administrative Procedure Act requires  
13 published notice of proposed rulemaking, but does not  
14 specify how detailed the notice must be. We have said  
15 that, quote, 'notice is adequate if it apprises  
16 interested parties of the issues to be addressed in the  
17 rulemaking proceeding with sufficient clarity and  
18 specificity to allow them to participate in the  
19 rulemaking in a meaningful and informed manner,'" citing  
20 the case of American Medical Association versus United  
21 States. "But, quote, 'while the agency must explain and  
22 justify its departures from a proposed rule, it is not  
23 straitjacketed into the approach initially suggested on  
24 pain of triggering a further round of  
25 notice-and-comment.' Quote, 'The law does not require

1 that every alteration in a proposed rule be reissued for  
2 notice-and-comment. If that were the case, an agency  
3 could, quote, 'learn from the comments on its proposals  
4 only at the peril of' subjecting itself to rulemaking  
5 without end," citing First American Distributing Corp.  
6 versus CFTC. "The purpose of a rulemaking proceeding is  
7 not merely to vote up or down the specific proposals  
8 advanced before the proceeding begins, but to refine,  
9 modify, and supplement the proposals in the light of  
10 evidence and arguments presented in the course of the  
11 proceeding. If every modification is to require further  
12 hearing at which that modification is set forth in the  
13 notice, agencies will be loath to modify initial  
14 proposals, and the rulemaking process will be degraded."

15           Next question, and it's actually -- now we'll  
16 go to page 570. "The notice that the Department issued,  
17 Milk in the Mideast Marketing Area, et cetera, stated,  
18 quote, 'A public hearing is being held to consider  
19 proposals that would amend certain pooling and related  
20 provisions of the Mideast order. Proposals include  
21 decreasing the amount of producer milk that can be  
22 diverted to nonpool plants for varying months of the  
23 year; and increasing the minimum amount of milk that a  
24 producer needs to deliver to pool plants in order to  
25 qualify as a producer and to be eligible to be pooled on

1 the order, bracket, [and] eliminating a provision that  
2 currently permits pool plant to have both a pool and a  
3 nonpool portion.'" We used to call that split plant  
4 provision, that's not in the language. "And  
5 establishing a net shipment provision for milk received  
6 at pool plants for determining pooling eligibility," end  
7 quote.

8 Now, this next sentence I think is very  
9 interesting based upon your "rocket science" comment  
10 earlier. "Though, this is gobbledygook to an outsider,  
11 insiders such as plaintiffs would realize that the focus  
12 of the proceeding would be on their eligibility to be  
13 pooled with the Mideast Producers, paren, that is what  
14 being 'pooled on the Mideast order,' end quote, means."  
15 That is what it means.

16 "What is true is that none of the proposals  
17 was identical to the amendment that the Department  
18 adopted at the end of the proceedings, namely the  
19 prohibition of paper pooling with distant plants. But  
20 paper pooling was one of the principal methods by which  
21 the plaintiffs got to pool with the Mideast producers,  
22 so they had to assume that it would be one of the issues  
23 in the proceeding and a possible target for reform.  
24 They knew their aggressive inroads into the Mideast were  
25 controversial; they knew that in engaging in paper

1 pooling with Mideast farmers they were exploiting the  
2 loophole created by the Department's abolition in 2000  
3 for the price penalties for such pooling."

4 It goes on, but that's enough.

5 The 7th Circuit concluded that the Department  
6 had the ability to -- and -- to make that change. And I  
7 think that's critical in this hearing.

8 Before I turn back to some more of the  
9 history, I'd like to turn to the hearing notice  
10 involved. As published Exhibit 1, on page 47235, we  
11 have a Proposal Number 3 that's submitted by the  
12 California Producer Handler Association. Proposal  
13 Number 3 does not have, and by the way, this is not  
14 unique, I -- I -- there are definitely other hearing  
15 notices out there where this occurs -- Proposal 3 lacks  
16 specific language. It is a concept. It's there, it  
17 says what it is, but we don't have the specific  
18 language. The Department can and should be able as a  
19 result of this hearing to nonetheless craft specific  
20 language if it determined that this provision should be  
21 adopted. Now, make no mistake about it, my clients are  
22 against this proposal. But we are absolutely in favor  
23 of the concept that it be heard. And I submit that if  
24 our proposal cannot have the alternative, that creates a  
25 straitjacket with respect to Proposal 3. And I think

1 that's an incorrect result. I think Proposal 3 should  
2 be heard. Again, we're against it.

3 We also are not writing on a blank slate.  
4 We've had some discussion thanks to the technical  
5 experts with respect to Order 30 about the formation of  
6 orders and mergers. Going back a little farther in  
7 time, that is to say to the mid 1970's, the Upper  
8 Midwest order was created out of the Minneapolis/North  
9 Dakota Order, the Southeast/Minnesota/North Iowa Order,  
10 the Minnesota/Saint Paul Minnesota Order, the  
11 Duluth/Superior Order, and the Eastern South Dakota  
12 Order. The hearing notice for that hearing can be found  
13 at -- excuse me. Volume 39, Federal Register 37164,  
14 that didn't work, published on October 17th, 1974.

15 So it's a little different from this  
16 proceeding in that it was a merger of existing orders.  
17 Now, you can look in that notice as I have provided it  
18 to you in vain for a provision that showed up in the  
19 final decision, actually in the recommended decision and  
20 in the final decision. And that final decision can be  
21 found at 41 Fed Reg 12436 published on March 25th, 1976.

22 JUDGE CLIFTON: Give me the cite again,  
23 please.

24 MR. ENGLISH: Sorry. 41 Federal Register,  
25 page starting at 12436, and it's the March 25, 1976

1 issue of the Federal Register.

2 So in putting those orders together, there was  
3 a significant discussion of another issue we discussed a  
4 lot in here with respect to supply plants. You can look  
5 in the notice of hearing for the word "reserved supply  
6 plant," and you will not find it. Where did the idea of  
7 reserve supply plant come from? It came from the  
8 Agency.

9 So in this instance, the -- the solution the  
10 Department provided was to create a provision that  
11 hadn't even been noticed for hearing, but it was open  
12 for consideration, Your Honor, and I submit it was  
13 proper for the Department to consider it, it was proper  
14 for the Department to adopt it, and that's been the  
15 Department's policy, and we ought to look at that as  
16 guidance for today.

17 We're not done. There was an order adopted  
18 that has since been merged with another order and then  
19 since voted out, and that was the Southeastern  
20 Oregon/Idaho Order, and that order was adopted after  
21 being initially denied, but it was adopted by the  
22 Department in a proposed rule dated Tuesday, April 14th,  
23 1981, Volume 46, starting on page, sorry, 21944. So  
24 it's 46 Fed Reg 21944, Tuesday, April 14th, 1981.

25 A principal issue in that proceeding, and I

1 think not ironically in the proceeding that led to the  
2 termination of the order, was how to deal with  
3 association with that market. And the co-ops made some  
4 proposals and Kraft Foods which operated some plants  
5 made some proposals. Neither proposal was adopted;  
6 neither the Co-op proposal or the Kraft proposal. The  
7 Kraft proposal had to do with unit pooling and supply  
8 plant. And so quoting from page 21954, "Neither the  
9 cooperative's nor Kraft's proposals should be adopted in  
10 all respects. While Kraft's proposal would provide for  
11 certain marketing efficiencies by allowing market  
12 pooling and direct deliveries, these efficiencies can be  
13 realized more simply through the Proprietary Bulk Tank  
14 Handler Provision adopted herein and discussed later in  
15 this decision."

16 The Department created an entirely new  
17 section. It adopted something nobody testified about,  
18 nobody talked about, but the evidence supported it. As  
19 it happens, Your Honor, the Dairy Institute Proposal  
20 includes a Proprietary Bulk Tank Handler Provision.

21 JUDGE CLIFTON: A proprietary what?

22 MR. ENGLISH: A Proprietary Bulk Tank Handler  
23 Provision.

24 Again, now, as it happens, I represented  
25 clients later who thought that that provision was vastly



1 abused and should be terminated and maybe should never  
2 have been in the order in the first place, but it was  
3 lawful and proper, and it was the Department's and the  
4 Agency's decision that based upon the evidence, it could  
5 and should adopt the provision.

6           Your Honor, we're not going anywhere near as  
7 far as what the Department did with Order 68 and with  
8 the Southeast/Idaho order, because nowhere in the  
9 hearing, even in the discussion, were these things  
10 discussed. We're open about it. We -- we sent it out,  
11 everybody had it on the website, obviously not part of  
12 the hearing notice, but we sent it out in May, industry  
13 has discussed it, we're prepared to talk about it, and  
14 it really is the case that -- okay, let me talk about  
15 other statements.

16           There's going to be other issues that are  
17 going to be controversial, obviously, but we wouldn't be  
18 here today but for the issue raised by the difference  
19 between the Federal order and the California based upon  
20 the whey factor contribution to the cheese process, just  
21 as we wouldn't have been in the Upper Midwest if  
22 entities had not been paper pooling. There is no  
23 difference.

24           The Department on three occasions, and I  
25 imagine there's more, these are the ones I've been able

1 to find, on three occasions has properly exercised its  
2 authority to address issues by creating provisions that  
3 were not discussed in the hearing. We're actually  
4 giving you the language. Whether it be liquid whey or  
5 dry whey, they are not different enough to prevent the  
6 issue from being heard.

7 I really do urge the Agency to reconsider.  
8 I -- I understand what some of the concerns may be about  
9 having such an issue, but in the end, if this issue  
10 isn't discussed, and again, I'm making it as a motion if  
11 the Department can't agree to it now, I nonetheless make  
12 a motion for it. If the motion is denied, we will  
13 pursue those avenues, and we will certainly be making an  
14 offer of proof, Your Honor. And if at the end of the  
15 day it is concluded by someone that it really should  
16 have been considered, whether it is the Secretary,  
17 whether it is an Administrative Law Judge, or whether it  
18 is another judge, I submit to you as pleasant as these  
19 weeks are going to be in Fresno, we don't want to come  
20 back.

21 I respectfully submit that the alternative  
22 whey factor proposal found in Exhibit 15 be open for  
23 consideration at this proceeding.

24 JUDGE CLIFTON: Don't leave the microphone.

25 Does anyone want to ask Mr. English any

1 questions before I then hear from others as to their  
2 response to what he's presented or their statement as to  
3 why it would disadvantage them if those were to be  
4 considered by the Secretary at this hearing?

5           So that was a lot. What I meant was let's  
6 start with whether anybody has any questions they wanted  
7 to ask Mr. English, and if you do, come to the podium,  
8 and you will take turns talking right into the  
9 microphone, but you can both stay there.

10           The first question that comes to mind for me,  
11 Mr. English, is you would be switching from a statistic  
12 that USDA creates to a statistic created by a private  
13 industry; is that correct?

14           MR. ENGLISH: No, Your Honor. Just as the  
15 Agency today -- we're asking the Agency to create the  
16 statistic and to -- to adopt it similar to what they do  
17 with the others. So, no, we're not asking for it to be  
18 based on private industry in any way other than the  
19 fact, of course, that private industries' prices will  
20 factor into it, just as today private industry prices  
21 factor into the formulas. But we would submit, and this  
22 is part of why I discussed this issue with witnesses  
23 earlier, that under the Mandatory Product Price  
24 Reporting Act and the regulations which are subjected to  
25 notice and comment rulemaking, those could be amended to

1 cover new calculations much more quickly than in this  
2 formal process, so if the Department as part of a  
3 proposed rule were for any purpose to create a new  
4 formula, they would be able to more quickly in the  
5 notice-and-comment adopt a reporting mechanism, and that  
6 would -- that would be some form of conforming change,  
7 but of the rules of 1170, the mandatory product price  
8 reporting were adopted initially on an emergency basis,  
9 very quickly, and then subject to comment and -- and  
10 amended to some extent.

11 But those -- that would -- let me shorten my  
12 answer. We are not looking for private information to  
13 substitute, it would be USDA collecting the data, which  
14 we would exactly believe is more readily available than  
15 the available data that's being used today.

16 JUDGE CLIFTON: What other questions are there  
17 for Mr. English before I hear from others about his  
18 request? I see none.

19 You may be seated, Mr. English.

20 Who would like to speak? Mr. Vetne.

21 MR. VETNE: Your Honor, John -- hello. Hello.

22 JUDGE CLIFTON: Try again.

23 MR. VETNE: Hello. Okay. John Vetne for  
24 Hilmar Cheese Company. I'm rising in support of the  
25 motion that Mr. English has to present to the judge

1 pursuant to Rules of Practice. Dairy Institute has  
2 members that are cheese companies and members that are  
3 not cheese companies. Hilmar Cheese is particularly  
4 interested in cheese, and this -- this proposal and the  
5 provision that governs the pricing of cheese and cheese  
6 byproducts is critical to Hilmar's business.

7 I'd like to -- I'd like to add a little  
8 perspective here if I could. I'm not trying to be  
9 redundant. I was counsel for opponents that were  
10 benefited from the Bulk Tank Handlers Unit when the  
11 Idaho Order was created.

12 JUDGE CLIFTON: Would you spell the name of  
13 that unit?

14 MR. VETNE: Bulk Tank Handler, which was the  
15 provision to which Mr. English refers that it was not in  
16 the notice and was adopted. It was an innovation by the  
17 Department in the course of decision-making.

18 And I was counsel for the unsuccessful  
19 plaintiffs, Alto Dairy, in the Alto Dairy case.  
20 Mr. English and Mr. Beshore were -- were on the other  
21 side of that case. It may be that to the extent that  
22 these rules -- the system in part would be helped by  
23 some institutional memory. I -- I -- I might serve as  
24 that. Because these things go back, just like  
25 Mr. Schaefer said, well, some of these rules were

1 adopted in a hearing record that preceded his time, so  
2 they're more than 30 years old, so you have to go back  
3 more than 30 years and find the record or the decision  
4 that supports something that's in the Federal order  
5 reform which was not subject to hearing.

6 But where I want to start, Your Honor, is in  
7 the -- the procedural protocol with which I'm familiar  
8 and which I've worked for 40 years for milk order  
9 hearings. Mr. English referred to notice of hearing and  
10 the notice of hearing discussion in the Alto case. The  
11 notice of hearing requirement that applies to milk  
12 orders is no different than general notice of comment  
13 rulemaking, it's in Section 553(b) of the Administrative  
14 Procedure Act. Terms, substance of a rule, or  
15 description of what's going to go on.

16 Where milk marketing order departs comes after  
17 the content of the notice of hearing. It goes on in  
18 Section 553(c) of the Administrative Procedure Act,  
19 after notice, here's what we do, take your comments, but  
20 if it is subject to an on-the-record proceeding, then at  
21 this point you go to Section 556 and 557, which is the  
22 hearing requirement. So the notice that we're talking  
23 about and the jurisprudence that governs the notice on  
24 which Alto Dairy relies is no different than any  
25 rulemaking, whether it's formal rulemaking or

1 notice-and-comment rulemaking. That's what governs.

2           So we -- and we have -- an additional  
3 important reason for this discussion early on in the  
4 proceeding, the notice of hearing in this proceeding,  
5 like every proceeding that I've been familiar with,  
6 contains an invitation to interested parties to appear  
7 or testify and offer appropriate modification on things  
8 that have been noticed, and that's what was at issue in  
9 *Alto v. Veneman*. That was what at -- not at issue, but  
10 that's what happened in the Idaho proceeding in 1981.  
11 That's what happened in the Upper Midwest merger in --  
12 in the 70's. Appropriate modification.

13           So this -- this modification that is being  
14 offered by the Dairy Institute, and the Administrative  
15 Law Judge's response to it, will really set the tone and  
16 either constrain or not constrain the ability of parties  
17 to offer appropriate modifications as we go along in the  
18 hearing. What I -- what I hope -- what I hope will take  
19 place here is not a difference in approach where --  
20 where a modification was offered in advance of the  
21 hearing, and the modification is offered during the  
22 course of the hearing. I believe there is no  
23 difference.

24           Now, I want to go past the hearing notice part  
25 of the APA to the Rules of Practice that have been in

1 existence -- I found some same language in the 1940's,  
2 and they were adopted immediately after the  
3 Administrative Procedure Act was enacted by Congress,  
4 and the Attorney General released the Attorney General's  
5 Guidelines for the Administrative Procedure Act. The  
6 Rules of Practice appeared within months after that.

7           And the Rules of Practice, although the terms  
8 are different, but the Rules of Practice then and now  
9 describe functions, governmental functions in the  
10 process of three entities. One is the Administrator,  
11 the Administrator of AMS. Another function, currently  
12 Administrative Law Judge, previously Hearing Examiner,  
13 another function in the Rules of Practice during the  
14 course of the hearing. And a third function is function  
15 by the Secretary during the course of the hearing and  
16 decision-making. They're distinct and those terms are  
17 used differently.

18           In the Rules of Practice, the Administrator is  
19 charged with responsibility to consider and review  
20 proposals received, decide whether to go to hearing or  
21 not, and issue a notice, and the content of the notice  
22 of hearing is in the -- is in the responsibility of the  
23 Administrator of the -- of AMS.

24           Once a hearing notice is issued, the Rules of  
25 Practice say at this point, motions and requests shall



1 be admitted -- submitted to the Administrative Law  
2 Judge, and a request to modify to -- to -- for  
3 appropriate modification at that point moves from the  
4 Administrator to the Administrative Law Judge. And  
5 that's the point in which we are now, Your Honor.

6 I hope the Administrative Law Judge in this  
7 case does not feel somehow that her hands are tied  
8 because the staff's position, the AMS position, the  
9 function of AMS has been expressed in letters to  
10 Mr. English. That would be no different than during the  
11 course of this proceeding, if someone were to offer a  
12 modification as invited in the notice, and -- and  
13 Mr. Hill got up and said, "We don't think that's part of  
14 the notice of hearing." The judge still has to rule on  
15 it, and the judge need not accept it.

16 The importance of that is, as for example in  
17 Mr. Beshore's case, the NFO case, payment two times a  
18 month or three times a month, the inclination or  
19 disinclination of AMS, the staff's position to hear an  
20 issue may be simply because, "well, it's not supported,  
21 why take the time" or "we don't want to deal with that."  
22 But the APA requirements and the Rules of Practice  
23 superimposed upon them and jurisprudence say you don't  
24 have to like it, but you have to hear it and consider  
25 it, and you may ultimately reject it.

1           And really that is where we are now. No  
2 different than the modification we offered before the  
3 hearing or after the hearing, the Rules of Practice  
4 transfer the decision-making function to the  
5 Administrative Law Judge. The Administrative Law Judge  
6 has an obligation and responsibility to consider that  
7 jurisprudence, and the rules and the APA on  
8 modifications, and the modification proposed here, where  
9 we're indicating a promulgation, every provision of a  
10 milk order is at issue. And all this does is ask  
11 that -- for provisions that value whey byproduct when  
12 making cheese, that a dataset, commercially available  
13 dataset be used to set that value rather than a dataset  
14 that is incorporated in the current proposal.

15           So it's perhaps unfortunate that -- that  
16 Mr. English's first letter to the Department on this  
17 used the term "alternative proposal" rather than  
18 "modification," as though the term analogy used is  
19 dispositive of the issue, and the Administrative Law  
20 Judge has previously in the prior two days used the term  
21 extra issue or additional topic. It is not an extra  
22 issue. It's not an additional topic. The topic is how  
23 whey is priced.

24           And every solution to the marketing problem  
25 that comes up in this hearing, the remedy ought to be on

1 the table for the Department to consider, whether they  
2 like it or not, but at least it's on the table so the  
3 parties can advance that remedy and perhaps persuade the  
4 Department that their initial reaction may have been  
5 premature.

6 Thank you.

7 JUDGE CLIFTON: That was quite good,  
8 Mr. Vetne. Thank you.

9 Who else would like to be heard?

10 MR. VU: Good morning, Your Honor. Bao Vu on  
11 behalf of the California Producer and Handlers  
12 Association. I just want to make a quick clarification  
13 for the record, because we take issue with the way  
14 Mr. English characterized our client's proposal.

15 I would submit that the arguments he made  
16 considering our proposal are neither here nor there,  
17 unrelated whatsoever to the issues that the USDA  
18 apparently has with his client's proposal.

19 First, we made an initial proposal that was  
20 timely. Everything else that we have submitted in  
21 support of our proposal has been consistent with our  
22 proposal. Mr. English apparently raises issues as to  
23 the specificity of our proposal, and I would note that  
24 the issue that the USDA took with his client's proposal  
25 is not as to the specificity of it, specifically at

1 Exhibit 18 in third paragraph, the USDA states this  
2 issue with Mr. English's client's proposal, quote, "DIC  
3 initial proposal establishes an 'other solids' component  
4 of the Class III price relying on a 'Western' dry whey  
5 survey price computed under the Dairy Product Mandatory  
6 Reporting Program administered by USDA. The additional  
7 proposal submitted abandons the Western survey idea  
8 entirely and instead relies on the Whey Protein  
9 Concentrate, WPC, 34 percent price. In a letter dated  
10 August 5th, 2015 we," being the USDA, "indicated this  
11 modification to the original DIC proposal was, in fact,  
12 an entirely new proposal, and would not be issued in the  
13 Notice of Hearing issued on July 27th, 2015."

14 That clearly is different than anything that  
15 he attempts to raise with our proposal. Our proposal  
16 has been submitted to the USDA, accepted by USDA without  
17 any objection, and listed -- and listed and repeated in  
18 the notice. So we would object to any characterization  
19 of Mr. English's to our client's proposal, and at the  
20 appropriate time we reserve all rights to argue and  
21 brief that issue if appropriate. We don't think it's  
22 appropriate that we are left to argue and defend these  
23 eleventh-hour proposals and attacks on our client's  
24 submission.

25 Thank you.

1           JUDGE CLIFTON: Mr. Vu, I -- I didn't hear any  
2 attack on your proposal. What I heard from Mr. English  
3 was we have room to consider a lot of different ideas  
4 here. We shouldn't be straitjacketed was the word he  
5 used into being so rigid that if the words -- if all the  
6 words necessary to enact a rule are not precisely stated  
7 in the notice that we can't go forward and consider.

8           So I -- I am glad you're so strongly defending  
9 your proposal, but I don't think you need to. I -- it's  
10 not under attack.

11           MR. VU: Great. Well, to the extent it is,  
12 that is our position. To the extent it's not, like I  
13 said, our position is that any issue raised in our  
14 proposal is entirely different than the one presently  
15 before Your Honor.

16           JUDGE CLIFTON: But -- but you -- you point  
17 out exactly the contrast. Those things that were on  
18 time with the schedule that was set got published. One  
19 of the issues, I think, was the timeliness of the  
20 presentation, so I'll deal with that. But I think that  
21 you -- you show the contrast there between yours being  
22 submitted on time and being consistent, there weren't  
23 any changes, and Mr. English having come up with a new  
24 idea.

25           Now, I personally think new ideas should be

1 considered by the Secretary. This is going to be an  
2 enormous job for the Secretary, I -- I can't even  
3 imagine it. But all ideas are good to think about.

4 Now, the big issue for me is is adequate  
5 notice given to the parties who are not in favor of the  
6 wording proposed by Mr. English's group so that they  
7 have an adequate opportunity to address it at this  
8 hearing. Is it fair? Is it fair that it be brought up?  
9 So that's where I'm going. And your proposals are fine.

10 MR. VU: Thank you.

11 JUDGE CLIFTON: You're welcome.

12 Who else would like to be heard?

13 MS. REED: Thank you, Your Honor. Kristine  
14 Reed for Select Milk Producers. I don't think I've ever  
15 argued anything in a forum wearing jeans, so I feel a  
16 little bit out of sorts here, but I wanted Your Honor to  
17 understand that Mr. English had foreshadowed a little  
18 bit for us that Mr. Beshore may be making an objection  
19 to this on behalf of the cooperatives he represents.

20 I think it's important to understand that this  
21 isn't necessarily an issue of handler versus cooperative  
22 as we're going to hear a lot of those during this  
23 proceeding. Again, I represent Select Milk Producers.  
24 Select is a cooperative, and it has been involved in,  
25 routinely, in USDA rulemaking proceedings, was also

1 involved in the Alto case.

2           Select does not have an opinion at this point  
3 about the underlying merits or any of the issues  
4 regarding how they will be valued, but I do stand to  
5 express my support of Mr. English in terms of the  
6 procedural aspects of this.

7           The scope of this rulemaking is very broad.  
8 There have been other rulemaking proceedings which did  
9 focus on a narrower issue within a -- a certain order,  
10 for instance, but I do agree and believe that the  
11 hearing notice in this instance, that the proposals that  
12 are out there, and the fact that this is a rulemaking  
13 involving a promulgation of a brand new order all  
14 support the idea that Mr. English's -- Mr. English and  
15 his issue should be included in this proceeding.

16           I believe that the dairy industry is on notice  
17 when it's a promulgation hearing that virtually all of  
18 those many sub parts that we've been talking about could  
19 come into play, and so we do support the idea that this  
20 is very broad, and that this is certainly something  
21 that's within the scope of this proceeding.

22           I also just want to mention that we support a  
23 resolution of this matter today, if possible, just  
24 because this is going to already be a very long  
25 proceeding, and I think in order to expedite this

1 process, having a decision on this would be important.

2 Thank you.

3 JUDGE CLIFTON: Who else would like to be  
4 heard?

5 MR. BESHORE: Marvin Beshore. Marvin Beshore  
6 for the Cooperatives, proponents of Proposal Number 1.  
7 We support the Government's position on this, on -- on  
8 the proposal as stated in -- in the letters, Exhibit --  
9 Exhibits -- in the colloquy back and forth in 14 through  
10 18. And there are two stages to the issues here, and  
11 I -- I gather the first one, whether it was properly in  
12 the notice or not is, you know, while not being  
13 abandoned has been -- is secondary to the issue -- to  
14 the second -- to the second level consideration of  
15 whether it's an appropriate modification in this  
16 hearing, but we really need to -- to understand the full  
17 contention here, why this is not in the hearing notice.

18 Everyone knows in the industry, and certainly  
19 Mr. English and his clients, that the request for this  
20 hearing has been under, by my clients, has been under  
21 preparation for literally more than one year, I mean,  
22 years. Everyone who is involved in the industry knew  
23 that was -- that was underway. And of course when the  
24 ultimate request was made to the Department, the  
25 Department circulated to everyone and gave everyone 60



1 days to develop and propose modification or additional  
2 proposals, which was done.

3 This was not included, you know, they -- they  
4 missed it. I mean, they didn't include it, for whatever  
5 reason. Timing as is, you know, stated in, you know,  
6 the correspondence and as has been noted, is an issue  
7 here, and it was properly not included in hearing  
8 notice.

9 Now, the question is -- and -- okay.

10 So what are the implications of that? Well,  
11 one of the -- one of the issues is or one of the factors  
12 there is that the -- the Class III price modification  
13 that was in hearing notice uses a Western price series.  
14 The proposed, you know, the proposed Attachment 3 uses  
15 a, you know, presently non-existent national WPC price  
16 series, and you've got impacts there that obviously  
17 relate to different -- a different geographic segment of  
18 the industry and which would -- would -- the notice of  
19 which would trigger the interest and likely  
20 participation of different sets of parties.

21 So it wasn't probably in the hearing notice.  
22 If it would have been, it would have triggered the  
23 interest obviously from its content of different sets of  
24 parties and that's -- you know, that's one of the  
25 contexts in which the issue of whether it should be

1 heard as a modification needs to -- needs to be  
2 considered.

3           There's got to be -- you know, there's a limit  
4 to what goes in the hearing notice, timing of submission  
5 is properly one of the considerations there, and was  
6 properly considered by the secretary.

7           There also has to be a limit to what potential  
8 theoretical modifications to any proposal can be -- can  
9 be heard and should be heard, and this is one that I  
10 think is properly outside of the limits because -- for a  
11 number of reasons. Not being in the area of notice, the  
12 hearing doesn't -- hasn't attracted the attention of  
13 individuals who would be interested if it were  
14 published.

15           Beyond that, the timing of hearing or for  
16 consideration for adoption of a proposal which proposed  
17 use of a dataset that doesn't exist and a dataset which  
18 would require a separate rulemaking proceeding by the  
19 Department. Timing is a big factor in that. And timing  
20 is extremely important to my clients in this hearing.  
21 It's an urgent matter, it means, you know, a lot of  
22 money to dairy farmers in California who have been  
23 suffering, if I might say, under the -- the  
24 administration of the California Department of Food and  
25 Agriculture for years.

1           You know, this is a proposal which by its  
2 nature extends for an amount of time that is indefinite,  
3 the possibility of implementation of an order because  
4 the data set has to be created after another rulemaking  
5 occurs, so there has to be an outside limit to what  
6 modifications are appropriately fully heard and -- and  
7 discussed in a hearing, and I think this is properly  
8 outside, outside that framework.

9           I won't go into the -- you know, any of the  
10 other cases except that one comment about Alto, I mean,  
11 obviously Alto involved, you know, a modification to the  
12 proposal for that order. And it was -- you know, it was  
13 within the scope of discussion as Judge Posner said,  
14 everybody there knew the elements that were being talked  
15 about it, it was an appropriate modification.

16           The '76 merger hearing for Order 68, you know,  
17 it was the same thing. They may not have -- people may  
18 not have talked -- used the terminology "reserve supply  
19 plant," but they talked about what the pooling was going  
20 to be for these orders, the five orders were merged,  
21 there were recommended discussions on what the pooling  
22 plants were, and that -- you know, I might say that that  
23 was -- there was a -- a court case that challenged the  
24 final order in that case, and the courts found that it  
25 was proper. It didn't focus on the reserve supply plant

1 provision but other aspects of that -- of that decision.

2 So proponents of Proposal Number 1, California  
3 Dairies, Land O'Lakes, and Dairy Farmers of America  
4 supports the Department's position and oppose the  
5 expansion of the hearing to include this modification as  
6 something that could be adopted from this hearing.

7 There might be discussion about it, about hypothetical  
8 things, but it should not be as part of the hearing as  
9 something that could be adopted.

10 MR. HILL: This is Brian Hill. So really I'm  
11 here just to talk about the process by which the  
12 Department came to its discussion, how the Administrator  
13 came to the decision. We have a lot of testimony here  
14 so far from the other attorneys -- not testimony, but a  
15 lot of argument here from the other attorneys, and so we  
16 know that obviously we're here from a proposal that  
17 began with the Dairy -- not the Dairy Institute, the  
18 cooperatives in February. And after that, the  
19 Administrator subsequently gave a time limit of  
20 April 10th for new proposals.

21 The Dairy Institute of California did in fact  
22 submit a new proposal, a timely proposal on, April the  
23 10th. On the heels of that, there were three listening  
24 sessions or informational sessions, one of which  
25 happened right here in Fresno County, and I actually

1 attended, in which -- in which all of the proponents  
2 were allowed to come and discuss their proposals with  
3 the public, with interested persons, take questions, and  
4 alert people how their proposals were to work.

5 At that point, each of the proponents was  
6 given until May 27th in order to tweak their proposals,  
7 to modify their proposals, mostly for housekeeping  
8 issues, improper references, improper cites, poor word  
9 choices, and so on.

10 As you can see from Exhibit Number 14, and  
11 which is Mr. English's letter, I'm going to read part of  
12 it, and he says, "We attach three documents: (1) a  
13 revised complete proposed Order for California; (2) a  
14 track changes version of the proposed Order that is  
15 otherwise identification to document (1); and third, an  
16 alternative, but not a substitute, proposal for one  
17 paragraph of one section of the proposed order." And  
18 that, of course, is the language which is at issue here.

19 When the Administrator looked at that  
20 language, we determined -- it was determined that that  
21 was a new proposal, an alternate proposal, even if it  
22 was just that one section, it was not a small change, it  
23 was a fairly significant change, and it was determined  
24 that that was a new proposal. And as such, it became a  
25 fairness and equity issue for the Administrator because

1 other persons who did not file anything, any submissions  
2 by April 10th, they were not -- we were now in the  
3 position where if we accepted the Dairy Institute's new  
4 submission, those persons who did not submit anything by  
5 the April 10th deadline could therefore come forward and  
6 claim maybe that we were being impartial, we had granted  
7 some special favor to just the Dairy Institute in  
8 allowing them to submit something that was new. So  
9 there was a bit of a conundrum for the Administrator in  
10 this issue. We couldn't allow ourselves to be looked at  
11 as being impartial, playing favoritism --

12 JUDGE CLIFTON: As partial.

13 MR. HILL: As -- as being partial, sorry, as  
14 being partial and granting favoritism, not being fair  
15 and consistent with the direction that we had given  
16 before. I mean, after all, the Administrator did in  
17 fact set the rules of engagement for this, and the rules  
18 of engagement for this were that April 10th was the  
19 deadline. May 27th was just for the minor -- minor  
20 modifications. So therefore the Administrator could not  
21 go backwards on that and so it was kept out of the  
22 hearing notice.

23 I wouldn't want to find myself standing here,  
24 if we had put this in the hearing notice, find myself  
25 standing here against two or three other persons who did

1 not meet the April 10th deadline, maybe would have  
2 supplied something after these listening sessions but  
3 didn't think they could, and then therefore came  
4 forward, and they'd be arguing with me right now about  
5 why it's unfair that their April 17th submission or  
6 May 1st submission or May 20th submission is also not in  
7 the hearing notice. We had to have some sort of a  
8 cut-off date, otherwise we could not move forward with  
9 these proceedings. So the Administrator really had no  
10 choice but to deny the alternate proposal, which again,  
11 we look at as a new proposal.

12 Now, I do understand that this is a  
13 promulgation hearing, and as such there's going to be a  
14 wide variety of testimony on pretty much every topic  
15 that we can think of. As such, we're going to leave it  
16 to Your Honor to decide whether or not this is properly  
17 noticed as -- as whether DIC can go forward with this.  
18 If Your Honor rules against the Department, against AMS  
19 in this matter, we are willing to abide by that and move  
20 forward. If not, we continue our objection.

21 Thank you, Your Honor.

22 JUDGE CLIFTON: Thank you, Mr. Hill.

23 Mr. English, please do come to the mic. I've  
24 got a couple questions before you tell me what else  
25 you're thinking.

1 MR. ENGLISH: Let me ask the requests before I  
2 forget something. I just want to move the admissions of  
3 Exhibits 14, 15, 16, 17, before I forgot.

4 JUDGE CLIFTON: Ah, good plan.

5 MR. ENGLISH: Because I forgot the first time.

6 JUDGE CLIFTON: All right. Let's -- let's do  
7 that housekeeping matter first. I'm going to take them  
8 one at a time.

9 Is there any objection to the admission into  
10 evidence of Exhibit 14?

11 MR. HILL: No, Your Honor.

12 JUDGE CLIFTON: There are no objections.  
13 Exhibit 14 is admitted into evidence.

14 (Whereupon Exhibit 14 was admitted  
15 into evidence.)

16 JUDGE CLIFTON: Are there any objections to  
17 the admission into evidence of Exhibit 15?

18 MR. HILL: No, Your Honor.

19 JUDGE CLIFTON: Exhibit 15 is admitted into  
20 evidence.

21 (Whereupon Exhibit 15 was admitted  
22 into evidence.)

23 JUDGE CLIFTON: Are there any objections to  
24 the admission into evidence of Exhibit 16?

25 MR. HILL: No, Your Honor.



1 JUDGE CLIFTON: There are no objections.  
2 Exhibit 16 is admitted into evidence.

3 (Whereupon Exhibit 16 was admitted  
4 into evidence.)

5 JUDGE CLIFTON: Are there any objections to  
6 the admission into evidence of Exhibit 17?

7 MR. HILL: We have none, Your Honor.

8 JUDGE CLIFTON: And there are none. Exhibit  
9 17 is admitted into evidence.

10 (Whereupon Exhibit 17 was admitted  
11 into evidence.)

12 JUDGE CLIFTON: Are there any objections to  
13 the admission into evidence of Exhibit 18?

14 MR. HILL: The Administrator has no objections  
15 to 18, Your Honor.

16 MR. ENGLISH: Wait a minute. I thought we  
17 were done. I'm sorry, I apologize. I apologize. I've  
18 lost one thing.

19 JUDGE CLIFTON: That's all right. And there  
20 are none. Exhibit 18 is admitted into evidence.

21 (Whereupon Exhibit 18 was admitted  
22 into evidence.)

23 MR. ENGLISH: So just to correct the record, I  
24 think I only asked for the admission of 14 through 17,  
25 so now I'm asking for 18 as well, and you've already

1 granted it. I neglected to say 18, Your Honor. That's  
2 why I got confused.

3 JUDGE CLIFTON: Very good.

4 So to confirm, Exhibit 18 is also admitted  
5 into evidence.

6 All right. My first question, Mr. English, is  
7 shouldn't the proposal that you would like to have  
8 considered for California only be the subject of a  
9 nationwide hearing?

10 MR. ENGLISH: No, Your Honor.

11 JUDGE CLIFTON: Why?

12 MR. ENGLISH: Because we're here for  
13 California, and we're going to be discussing a number of  
14 issues that are particular to California, and we're here  
15 to establish a California Federal order in a  
16 promulgation proceeding, and there is nothing that says  
17 that a California order has to in the end adopt  
18 identical provisions. In fact, noticed for hearing are  
19 provisions in the original proposal that's in Exhibit 1  
20 for the Dairy Institute of California that would have a  
21 different price for Class III than exists in all the  
22 other Federal orders.

23 JUDGE CLIFTON: I'm not -- I'm not asking my  
24 question because I think that California is not allowed  
25 to be peculiar in some manner. I'm asking it because if

1 it's such a good idea, shouldn't it be addressed in more  
2 orders than just California's?

3 MR. ENGLISH: Well, but we don't have that  
4 opportunity, Your Honor, because we don't have Part 1000  
5 open. We are here being asked to adopt an order for  
6 California, and it should be adopted based on current  
7 marketing issues and current facts, and whether or not  
8 that would mean that a Federal order hearing should be  
9 held on a national basis should something be adopted for  
10 California that's different between us and nationally,  
11 that -- that is entirely different, and that's also not  
12 been used as a justification for turning us down.

13 JUDGE CLIFTON: No.

14 MR. ENGLISH: So I don't think that's -- I  
15 don't think that's --

16 JUDGE CLIFTON: I'm not looking for  
17 justifications to turn you down.

18 MR. ENGLISH: Well, but I mean it wasn't used  
19 by the Department, so I don't think it -- on our appeal  
20 now, I don't think it gets -- it's -- but --

21 JUDGE CLIFTON: Now --

22 MR. ENGLISH: -- but I do want to say that --

23 JUDGE CLIFTON: -- let me stop you right  
24 there. "Wasn't used by the Department," do you want me  
25 to confine myself --

1 MR. ENGLISH: No.

2 JUDGE CLIFTON: -- to a consideration just on  
3 whether you were untimely?

4 MR. ENGLISH: Well, no, because I absolutely,  
5 like Mr. Vetne, that there's really two issues here.  
6 Whether it's timely or not, and I will get to that in a  
7 moment, is irrelevant as to whether it's an appropriate  
8 modification. The Department cannot modify the rules of  
9 practice by setting up some idea that, well, just  
10 because you didn't submit something, you can't come  
11 modify it.

12 And you do think that there's an issue here  
13 underlying this whole thing for the hearing going  
14 forward if we start talking about having modifications,  
15 and I worry that -- that -- and I understand  
16 Mr. Beshore's argument, but I -- I respectfully disagree  
17 with him when this whole hearing is about the why  
18 factor. That's why we're here. And everybody knows  
19 that's why we're here. Everybody knows that the value  
20 of why is a principal issue.

21 But going back to the questions you just  
22 asked, there's a number of issues in this hearing that  
23 one could say are national. The other side has claimed  
24 they want inclusive pooling, we call it mandatory  
25 pooling. Well, maybe that should be part of a national

1 hearing, Your Honor. The proponents want to establish  
2 within the context of -- of this proposal, you know, the  
3 prices using the existing Federal order prices, but you  
4 know what, there are a number of people who would love  
5 to have a Federal order hearing to address whether those  
6 current make allowances and yields are correct, because  
7 they're old, and wouldn't that be appropriate for a  
8 national hearing. And I think that's exactly what the  
9 Department has tried to prevent happening here by not  
10 opening Part 1000.

11           And -- and the fact of the matter is that  
12 we're in a promulgation hearing, and when a proponent  
13 comes up and says, "I want X price," it's going to have  
14 an impact, whatever is adopted by the Department will  
15 have an impact in the national world, but that would  
16 mean we can't have this hearing. The adoption of a  
17 Class III price that is identical to or different from  
18 Federal order based on current marketing conditions will  
19 necessarily have an impact on national, and we can say  
20 then that everything that is open here for consideration  
21 that has not been recently addressed by the Federal  
22 order could be considered in a national hearing, and  
23 we're not asking for that.

24           JUDGE CLIFTON: I am waiting for the sigh of  
25 relief that I think I would hear, but --

1           MR. ENGLISH: I mean, I -- I -- we -- you  
2 know, it is true that if the Administrator -- let me  
3 back up. And I know, you know, I got my opening  
4 statement, I don't want to do it now. Mr. Beshore  
5 should get to go first. But, you know, it's clear from  
6 our letter to the Department that we don't think there  
7 are disorderly marketing issues sufficient to have a  
8 Federal order. If the Administrator disagrees with us  
9 and proposes a Federal order, I suggest that no matter  
10 what it -- the Administrator proposes there are going to  
11 be national hearings resulting from that.

12           JUDGE CLIFTON: Now, let me go to a point that  
13 Mr. -- now, that -- my asking you why it shouldn't be  
14 addressed in a national hearing was based on my  
15 recognition that it may provoke a lot of response for  
16 and against, and as Mr. Beshore pointed out, we may not  
17 have that here.

18           So let me ask you the other issue that  
19 Mr. Beshore raised that is -- is especially intriguing  
20 to me, and that is how does the Secretary promulgate a  
21 rule that requires further rulemaking to have the basis  
22 to have the rule operate?

23           MR. ENGLISH: Well, I would submit that the  
24 Department had to do that as part of Federal order  
25 reform when it initially had NASS collect the prices,

1 Your Honor. And it did it, it did it successfully,  
2 and -- and it did it simultaneously, and -- and it could  
3 do it in the context of issuing a proposed rule and  
4 saying now we're going to go do this, and because of  
5 notice-and-comment rulemaking, you could do it a whole  
6 lot faster.

7 Let's face it, it's our anticipation that  
8 should this be permitted, we would provide what we think  
9 that price series is going to look like. We'll find a  
10 mechanism through an expert witness to come in and  
11 provide what we think that price series would look like.  
12 Yes, the Department would then have to go collect the  
13 data, but that's precisely what happened when it issued  
14 a proposed rule in 1996 for the final Federal order  
15 reform, and then final rule two years later. It had  
16 more than sufficient time in that timeframe to start  
17 collecting the data through NASS.

18 JUDGE CLIFTON: Now, answer me this: You  
19 could have an expert witness available. The Department  
20 doesn't have the model that it might have created with  
21 this variable in it if it had known this was going to be  
22 the subject of the hearing. I don't know if the other  
23 participants in the hearing would have an opportunity to  
24 respond. That is a basically fairness issue, and how do  
25 you respond on that?

1           MR. ENGLISH: Well, I think that this hearing  
2 is going to be plenty long, and there's plenty of  
3 experts available. You know, Mr. Beshore talked about  
4 how urgent this is and moving forward. They took a  
5 number of years to come up with a proposal, and we had  
6 very little time to respond. And so, you know, it's all  
7 going to be for everybody, you know.

8           You know, I would mention that of course the  
9 Department did publish -- did put up on the website and  
10 I shared a file with -- with Mr. Beshore what we were  
11 filing. And, you know, for the next couple of months,  
12 or month and a half, you know, for all the costs, it  
13 could have been noticed for hearing. And so, you know,  
14 they -- they didn't just have to ignore it. So I think,  
15 you know, on that respect, you know, there is an issue.

16           Again, I don't want to get too much in my  
17 opening statement, but I believe that there are maybe  
18 two, and I don't know, maybe Your Honor, too, three  
19 people in this room who have attended a promulgation  
20 hearing, and I readily admit I'm not one, but I've gone  
21 back and read the transcripts, and I know this,  
22 everything must be proved.

23           That means when we come to paragraph 50, and  
24 all the subsections of paragraph 50, we're writing on a  
25 blank slate. There is no whey factor today. There is



1 none. So you have to prove what it is. By definition,  
2 proving what it is means you must also disprove  
3 alternatives. This is an alternative. The cooperatives  
4 will have the burden of proving that it ought to be what  
5 it is, and not allowing us to present alternative  
6 evidence that it shouldn't be that, by definition  
7 undermines the nature of the promulgation hearing,  
8 and --

9 JUDGE CLIFTON: You lost me.

10 MR. ENGLISH: Well, okay. How about this?

11 JUDGE CLIFTON: Do that sentence again.

12 MR. BESHORE: Let me do the sentence  
13 differently.

14 JUDGE CLIFTON: Okay.

15 MR. ENGLISH: I propose today there be no whey  
16 factor issues in the cheese price as an appropriate  
17 modification. There is no whey factor today. It has to  
18 be proven up that we need a whey factor in California.  
19 It can't just be assumed, it can't come from the air,  
20 and I have an appropriate modification, Your Honor, that  
21 the whey factor should be eliminated. But guess what,  
22 I'm not eliminating it, I'm saying it shouldn't be  
23 adopted because it doesn't exist now. All right. I'm  
24 not doing that.

25 I'm saying that given this is a promulgation

1 hearing, given the fact that everything must be proved  
2 and nothing can be assumed, this record has to stand on  
3 its own, and maybe Mr. Beshore is going to disagree with  
4 me, but that's our legal decision, that every single  
5 provision must be proved. And there is no whey factor  
6 in a California Federal order, because there is no  
7 California Federal order today, and that means that  
8 whoever wishes to prove up a whey factor must prove it.  
9 And that means if there is contrary evidence, even if we  
10 don't have a modification, that it shouldn't be X, that  
11 instead it should be Y, then you can't adopt X.

12 JUDGE CLIFTON: You know, what you've just  
13 said is very persuasive to me, Mr. English, because what  
14 you're talking about is presenting issue on -- excuse  
15 me, presenting evidence on an issue, and of course you'd  
16 be allowed to do that, even if you hadn't given us a  
17 heads-up as to where you're going.

18 MR. ENGLISH: Exactly, Your Honor. But we're  
19 giving a heads-up, and we're saying it can't be X, and  
20 the reason it shouldn't be X is that the liquid whey  
21 value is a more appropriate mechanism, and we are giving  
22 notice, and okay, didn't have it in the notice of  
23 hearing, but we certainly submitted and sent it to  
24 everybody, and here I am, I raised it on Tuesday, we've  
25 all known this discussion is coming, it's been on the

1 Internet. Everybody knows. And besides that, everybody  
2 knows the only reason we're here in Fresno is because of  
3 the whey factor. That's it. That's why we're here. So  
4 to say we're not going to be able to argue about the  
5 whey factor and present alternative evidence about what  
6 whey factor should be, and yes, we're giving a heads-up.

7 JUDGE CLIFTON: The other thing I love about  
8 this particular hearing is that audio feed, and the fact  
9 that when it becomes briefing time, people from all over  
10 the county can weigh in on it. Excuse me.

11 MR. BESHORE: You're the first one that used  
12 W-E-I-G-H today.

13 JUDGE CLIFTON: Being heard on this topic.  
14 All right.

15 Does anyone else --

16 MR. ENGLISH: May I just a couple --

17 JUDGE CLIFTON: Not -- not yet.

18 MR. ENGLISH: Okay.

19 JUDGE CLIFTON: Does anyone else want to ask  
20 questions of Mr. English at this point?

21 All right. Now, Mr. English, you may say  
22 whatever else you have.

23 MR. ENGLISH: Well, I think you and I covered  
24 a lot of it, but I do want to emphasize that the  
25 Department in its own letter, Exhibit 16, called it a

1 modified proposal, and whether it's modified or  
2 alternative is irrelevant, the Department recognized  
3 that it was a modified proposal, and that's what we're  
4 trying to do now is modification.

5 But I also think in our colloquy I -- we have  
6 discussed the concept that we can present the evidence  
7 anyway as an alternative, and that's why we think it  
8 ought to be open and known that we intend to do so, and  
9 that alternative is better in our view. Now,  
10 Mr. Beshore is going to say no, it's not.

11 And -- and then finally, I -- I want to go  
12 back. There was certainly no attack on the  
13 producer-handler proposal, except for I said we're going  
14 to oppose it, but that's the substance. In procedure,  
15 when and if they come up with actual language, if it  
16 doesn't track the hearing notice, I commit that I will  
17 not be objecting to that. I may argue that if that's  
18 done, what's sauce for the goose is sauce for the  
19 gander, but I will not argue against it on the process.

20 This hearing, Your Honor, is unprecedented in  
21 my legal career, and I've been doing this now since  
22 1985. It is -- there was a promulgation hearing in  
23 Idaho as we talked about in 1981. Obviously Idaho has  
24 grown a great deal since then, back then it wasn't quite  
25 the milk supply that it is, we are talking about an

1 enormous -- 20 percent of the nation's milk supply. By  
2 definition, everybody in this country involved in the  
3 dairy industry knows that this proceeding will impact  
4 them, and they are fairly on notice based upon the  
5 procedures that are well-known that there are  
6 modifications that can be made.

7           And I hope there are modifications made to  
8 proposals going forward, because I think that there will  
9 be testimony that suggests there should be  
10 modifications. And when those modifications are made,  
11 they ought to be permitted on a procedural basis because  
12 otherwise, yes, there's a straitjacket, and this hearing  
13 can't have a straitjacket. It is a promulgation  
14 proceeding.

15           I urge you to allow us to actually discuss  
16 this issue as a proposal as opposed to simply -- as  
17 opposed to simply evidence against, which we will do  
18 regardless.

19           Thank you.

20           JUDGE CLIFTON: Who else would like to be  
21 heard?

22           Mr. Vetne. Keep it short.

23           MR. VETNE: Amen. I'd like -- John Vetne for  
24 Hilmar.

25           I like the way that we've come into focus on

1 this hearing. I want to express gratitude to -- to  
2 Brian Hill for explaining the Administration's position,  
3 when he uses the term "Administrator," and at the end  
4 agreed with me that it's up to Your Honor.

5           What we have here is we have a straitjacket.  
6 In the Rules of Practice, the Administrator's function  
7 is develop a notice of hearing, write and recommend a  
8 decision. The Secretary's function in the Rules of  
9 Practice come in at the end, which tracks Section 557 of  
10 the Administrative Procedural Act. After a staff  
11 recommendation in Section 775, the Agency head issues a  
12 final decision. That's when the Secretary comes in.

13           So if there's a straitjacket here, it would be  
14 a straitjacket in the flexibility of the Secretary to  
15 determine the appropriate remedy when it comes --  
16 finally comes to the agency head's desk. Now, in their  
17 recommended decision, the Administrator can hear all of  
18 the evidence on modifications of proposals, and in its  
19 recommended decision determine "we don't think this  
20 ought to be adopted because the economics don't support  
21 it" or "we think we ought not do it here, but it might  
22 be a good idea, let's take it to national hearing." All  
23 of those reasons can be staff recommendations to the  
24 Secretary, but if you don't open the floor to consider  
25 it, the Secretary doesn't have the opportunity to

1 exercise that thought in the final process.

2 And only one other footnote here, the -- the  
3 AMAA, which authorizes milk marketing orders, also  
4 authorizes food and vegetable milk marketing orders.

5 JUDGE CLIFTON: You don't mean food and  
6 vegetable milk marketing orders.

7 MR. VETNE: I don't. Those are smoothies.

8 Authorizes fruit, vegetable, and tree fruit  
9 and all other crop marketing orders, and the way they  
10 work is you have a formal hearing like this in which  
11 evidence is received, and a marketing order is developed  
12 that provides the parameters of restrictions, and  
13 immediately every effective rule governing marketing is  
14 thereafter created by notice-and-comment rulemaking,  
15 which was addressed earlier, what happens if we, you  
16 know, we have this, and we have to go to another  
17 rulemaking. That, in fact, is how most of the  
18 Department's marketing orders operate. You have a  
19 structure, and then you have fine tuning by a  
20 notice-and-comment rulemaking, so it's not unusual.

21 Thank you.

22 JUDGE CLIFTON: Thank you, Mr. Vetne.

23 Who else would like to be heard?

24 MR. BESHORE: Just very briefly. We don't  
25 object, though it's implied, to the notion that there

1 will be mod -- that there can be modifications or  
2 appropriate modifications, we're going to have some of  
3 our language, some tweaks here and there, some things  
4 that need to change, so that's -- I don't think that's  
5 really an issue on the table here. It's like what's the  
6 scope and possible modifications that can be -- that can  
7 lead to results in -- in orders from this hearing.

8 I completely reject the suggestion or the  
9 argument in Mr. English's arguments, if I understood it  
10 right, that there's something different in terms of the  
11 rules of scope of notice or -- or rules of discussion  
12 with respect to promulgation hearing versus any other  
13 hearings. There's nothing anywhere in the Rules of  
14 Practice or the Act that says there's any difference  
15 there. And within that, I completely reject the -- the  
16 statement that -- that the proponent in this hearing of  
17 rules must disprove, and this is what was stated, as its  
18 burden must not only prove something, what it wants, but  
19 disproves every possible alternative. I mean, that  
20 opens up literally the universe.

21 And so the universe isn't here because it's a  
22 promulgation hearing. We don't have to disprove every  
23 other possible alternative in the universe in order to  
24 have something on the table that can be adopted, and  
25 that whole concept of -- of, you know, expanding



1 infinitely because it's a promulgation hearing what  
2 should be discussed and needs -- needs to be rejected.

3 And, by the way, the evidence can be  
4 discussed, you know, hypotheticals can be discussed in  
5 the hearing. The issue is what can be adopted. I  
6 think, you know, it's quite possible that out of a  
7 hearing such as this, and two steps like this have  
8 occurred in the past of a hearing such as this, an order  
9 can be adopted and it can be followed by another notice  
10 of hearing to -- with -- to consider issues in a broader  
11 context. If they need to be considered nationally, as  
12 some of these do -- would if they were to be subject to  
13 adoption.

14 MR. HILL: This is Brian Hill.

15 I do just have to take issue with one thing  
16 that Mr. English said. I think he -- I believe that he  
17 said in talking about Exhibit Number 16 that the USDA  
18 AMS acknowledged that this was a modified proposal.  
19 That just simply is not true. We were responding to  
20 Mr. English's letter of May 27th, which was Exhibit  
21 Number 14, and previously that, we had called for  
22 modifications, and this -- his Exhibit Number 14 was his  
23 letter to discuss his proposed modifications, and so we  
24 used that language.

25 But it's quite clear in Exhibit Number 16 from

1 the letter, you can read it yourself, but I'll read it  
2 on the record, "The modification to your proposal is not  
3 included in the Notice of Hearing issued on July 27,  
4 2015. USDA finds that your submission constitutes a new  
5 proposal, not a reasonable modification to your initial  
6 proposal submitted on April 10, 2015."

7 I just want to add that on the record we do  
8 not acknowledge that this was a -- appropriate  
9 modification was made. Thank you.

10 JUDGE CLIFTON: Does anyone else want to be  
11 heard on this issue? There is no one.

12 First of all, the -- the denial letters are  
13 entirely proper, and I agree with Mr. Hill that if you  
14 set deadlines and then ignore them, you're in danger of  
15 showing partiality, which is not what we're about. This  
16 opportunity for the Secretary of Agriculture, the United  
17 States Secretary of Agriculture to draft the best milk  
18 marketing order in the country is quite unique. All of  
19 the experience that the Secretary has so far in  
20 administering the other orders, all of the good work  
21 that's gone into this hearing. We have an enormous  
22 amount of experience, of data, of heavily qualified  
23 people who will present.

24 There are a number of areas where we're  
25 already aware that the issues are very thought provoking

1 and will require very careful consideration. Because I  
2 believe this alternate proposal of the proponents of  
3 Proposal Number 2 is worthy of consideration, I think it  
4 should be part of this hearing. The only reason I would  
5 exclude it is if I found that it was just too  
6 fundamentally unfair to those who will oppose it because  
7 of it being a surprise or sprung upon them or there not  
8 being adequate time to address it, and here I don't find  
9 any of those is actually true.

10 So, Mr. English, you will be permitted to  
11 retain your ideas that are expressed in Attachment III,  
12 which is Exhibit 17, as if they were an original  
13 proposal.

14 MR. ENGLISH: Exhibit 15.

15 JUDGE CLIFTON: 15. Thank you. 15.

16 Does anyone want to ask me any questions about  
17 my ruling or ask for any further findings? There is no  
18 one.

19 Let's break for lunch. Will an hour and 15 be  
20 sufficient?

21 MR. HILL: That's fine, Your Honor.

22 MR. ENGLISH: Thank you, Your Honor.

23 JUDGE CLIFTON: You're welcome.

24 All right. It's almost 12:15. Please come  
25 back at 1:30 ready to go.

1 (Whereupon a break was taken.)

2 JUDGE CLIFTON: We're back on record now at  
3 1:35.

4 I think opening statements are next. Do we  
5 have an agreed order upon which to proceed? Will we go  
6 with Proposal 1 first, and then Proposal 2, and Proposal  
7 3 and 4?

8 MR. ENGLISH: Except that Proposals 3 and 4  
9 are going to be held in abeyance.

10 JUDGE CLIFTON: Thank you for reminding of  
11 that, that's correct.

12 All right, then we'll begin.

13 MR. BESHORE: Marvin Beshore.

14 Thank you, Your Honor. We've never, to my  
15 knowledge -- we have a lot of institutional knowledge in  
16 the room here, I've got some of it. I don't -- I'm not  
17 aware that we've ever had opening statements in a  
18 federal order hearing before. Vetne might contradict me  
19 or correct me, but I'm -- appear to be first, I guess,  
20 and I thank you for the opportunity.

21 On behalf of the dairy members of California  
22 Dairies, Inc., Dairy Farmers of America, and  
23 Land O'Lakes, we've developed and proposed in Proposal  
24 Number 1 for this hearing a Federal milk marketing order  
25 for the State of California.

1           These cooperatives are owned by dairy farm  
2 families who represent more than 75 percent of the milk  
3 produced in California. And in addition, the  
4 cooperatives operate in 12 plants producing various  
5 dairy products here in California: Butter, cheese,  
6 milk, cottage cheeses. We also market bulk milk into  
7 intermediate and fluid products to a majority of the  
8 State's buyers.

9           The State of California is the largest  
10 milk-producing state in the United States with more than  
11 20 percent national production, and this hearing is  
12 requested and this proposal is supported, as I've  
13 indicated, by a substantial majority of the farmers who  
14 produce the milk in this largest producing state in the  
15 country, and the only major milk production region in  
16 the country which has not had a Federal milk marketing  
17 order. If adopted, this order would be the largest  
18 order in the Federal Milk Marketing Order system with  
19 monthly poolings of around 3.4 billion pounds.

20           In spite of California's significance and  
21 influence in the United States dairy industry, it's not  
22 been a part of the federal order system, but it has had  
23 since the 1930's a state regulatory system, which has  
24 involved a milk marketing order. Interestingly, from  
25 the very beginning, there was a federal milk product

1 order under the Agricultural Marketing Agreement Act in  
2 the State of California. And the California statutes  
3 from the very beginning, as far as I can determine,  
4 recognized and explicitly provided for the possibility  
5 that a Federal order could preempt and supersede the  
6 state regulations, but over the years the order in  
7 California was administered by the state in a manner  
8 that made it reasonably consonant with the national  
9 system and made it reasonably acceptable to the dairy  
10 farmers and others who were affected by it so that it --  
11 it continued -- or continued to be state regulation of  
12 minimum prices for raw milk to dairy farmers in  
13 California through all these years.

14 But that state system, which over the years  
15 maintained a reasonable accommodation between the  
16 national markets and the national system and -- and  
17 California broke down, has broken down in recent years.  
18 And in particular since around 2010 it has become  
19 effectively dysfunctional as far as relating to the  
20 interests of California dairy farmers. The dysfunction  
21 in the California system, the dairy farmers in the state  
22 have repeatedly attempted to have changes to the pricing  
23 in the system during that period of time without  
24 success, without substantial success, and that's why  
25 we're here.

1           The dysfunction in the state system, which has  
2 meant that California dairy farmers where milk has  
3 received minimum prices substantially less than those  
4 applicable to basically the rest of the country through  
5 the Federal Milk Marketing Order system, it has cost  
6 California dairy farm families millions and millions of  
7 dollars. The trade -- one of the trade associations in  
8 the state has denominated this, the California discount  
9 in calculating it regularly, so that the cumulative  
10 impact of this dysfunction in California's minimum milk  
11 price regulations to California dairy farm families has  
12 approached and maybe even exceeded two billion dollars.

13           Because of that, this proposal has been  
14 requested, and we thank the Department for providing  
15 this hearing to remedy this intolerable situation to  
16 California dairy farmers.

17           So what's our proposal? We -- we submitted a  
18 comprehensive proposal. Looking at the -- the May --  
19 the May letter I submitted there were 57 pages of -- of  
20 proposed -- in the proposed order language, mostly  
21 single spaced, it's about seven or eight pages in the  
22 Federal Register. It's an A-to-Z proposal, it's a full  
23 proposal. But when we look at it, and I want to talk  
24 about and get to and mainly talk about the -- the  
25 controversial issues as Your Honor has requested, or the

1 issues that have, you know, drawn the most attention.

2           When you look at the proposal, we did not and  
3 are not here to reinvent the wheel. Okay. Of the 57  
4 pages, probably, and I haven't counted it, 90 percent of  
5 it at least is a proposed adoption of the basic  
6 infrastructure of the Federal order system, which has  
7 evolved and been proven and is -- and workable over the  
8 years, and which is in place in the rest of the system:  
9 The so-called part 1000 and uniform provisions. We're  
10 not going to -- we're not going to reinvent them, and  
11 frankly we don't think we have the obligation to come  
12 into this hearing and file a patent for the re-invention  
13 of that wheel.

14           The basic infrastructure is in our proposal.  
15 There's already been testimony about it. There will be  
16 more testimony about it. We think it should be in place  
17 and should be adopted in California.

18           Now, in addition to those -- to the basic  
19 provisions which include, you know, classification of  
20 milk, boarding and payments, equalization, audits, you  
21 know, administrative assessments, Marketing Service  
22 assessments, many of the various basic -- basic  
23 definitions that aren't in dispute, all of those things.

24           In addition to those items, I just want to  
25 identify and talk about five areas that are going to be



1 the subject of, you know, discussion and debate. And  
2 the first one is really a threshold issue, which has  
3 been highlighted even today by -- by Mr. English and  
4 which is highlighted in the Dairy Institute proposals,  
5 and that is the assertion, quite incorrectly, that we --  
6 in order to have a Federal order in California, we must  
7 prove that there is some serious, utterly serious, I  
8 guess, state of chaos in the industry. We don't think  
9 that's correct.

10 In fact, just talk about three things. The  
11 Agricultural Marketing Agreement Act nowhere says that  
12 there is a -- that a hearing may only be held and orders  
13 may only be issued if there is a prior finding of some  
14 level of measurable magnitude of disorder or chaos or  
15 whatever. There's nothing in the Act that says whatever  
16 preliminary finding there is before there's an order.  
17 The Act says that producers may petition, parties may  
18 petition, you can have hearings, and orders may be  
19 promulgated with the intention of establishing and  
20 maintaining orderly marketing.

21 I'd also note that in terms of the need to  
22 have any -- some preliminary proof of -- of substantial  
23 disorder, or chaos, I guess, Congress -- we're here  
24 because Congress authorized this hearing, and in  
25 authorizing it, it was obviously well-aware that there

1 was in California a system of market-wide pooling,  
2 minimum pricing for handlers or producers, and a quota  
3 program, which it expressly authorized could be part of  
4 a Federal order.

5 Now, if the predicate or the necessary  
6 preliminary proof for an order is that there be utter  
7 disorder, Congress knowing that there was minimum  
8 pricing and pooling and a market-wide system in  
9 California, regulatory system including quota, what it  
10 would have -- Congress would never have said you can  
11 have a hearing. If the regulations mean there's dis --  
12 there's not disorder, that authorization by Congress  
13 would be nugatory, I mean, it would be nonsense.

14 So Congress knew what the system was and it  
15 authorized this hearing, and it authorized a Federal  
16 order that incorporates quota, and it also said -- of  
17 course California, California law has recognized side by  
18 side with this Act for years, decades, that a Federal  
19 order was possible at any time and could supersede  
20 California law.

21 So the threshold argument that some level of  
22 proof of disorder or chaos is wrong on the law, but even  
23 if it wasn't wrong on the law, we'll show that it was  
24 wrong -- and that it's wrong with facts because the  
25 facts show that in the markets -- in the marketplace in

1 California versus the rest of the country, versus its --  
2 its adjoining areas and the rest of the country, there  
3 is substantial and material misalignment of prices in  
4 all classes of milk for handlers, and as a result, a  
5 substantial disadvantage and misalignment of producer  
6 prices.

7 So the threshold issue of whether there's  
8 enough to even promulgate an order, the Dairy Institute  
9 petition -- position is wrong both on the law and the  
10 facts.

11 Second issue: Quota. We're going to propose  
12 and we do propose that the present California quota  
13 system, in which producers hold and have the right to  
14 trade, to sell, and purchase quota, without going into  
15 the details of the definitions at all, that it be --  
16 that it be maintained as authorized by the congressional  
17 legislation in a manner that, quote, "recognizes quota  
18 value," that's what the law says should be done.

19 Our proposal provides that it would be  
20 co-administered with CDFA. Basically the quota system  
21 would remain in place and the quota values with CDFA  
22 administering it hand in glove with the Market  
23 Administrator of the federal market order pool, and the  
24 quota values would be part of the entitlement to the  
25 pool revenues for those who hold quota, and other

1 producers would receive the over base or the federal  
2 minimum blend price plus quota.

3           We respectfully suggest that a proposal which  
4 would result as the USDA's economic impact analysis  
5 indicated, that would result in the elimination of quota  
6 value after a couple decision points, two, three, four,  
7 five months, whatever it is. That system does not  
8 follow the legislation, which says it must recognize  
9 quota value. Value which on the balance sheets of dairy  
10 farmers in California, dairy farm families in California  
11 is worth at market prices, it's sold monthly, daily,  
12 weekly, there are transactions every month, which at  
13 market price is worth about 1.2 billion dollars.

14           Third issue is prices, you know, minimum class  
15 prices. And of course we had some -- we had some  
16 argument this morning that goes -- goes towards this in  
17 a way. But the basic -- our basic position in our  
18 proposal is that California should become part of the  
19 national Federal order system minimum price grid, Class  
20 prices I through IV. Why? The USDA in the Federal  
21 order system has held for at least 40'ish years or so  
22 that national made -- that the markets for manufactured  
23 dairy products, for Class III and IV products are  
24 national. I mean, that's been a finding that has been  
25 made by USDA and has continued to be made and reiterated

1 and iterated, and -- and therefore adopted in the  
2 Federal order system in uniform national Class III and  
3 IV prices, most recently and universally in the Federal  
4 order system and in the Federal order reform process.

5 California should be part of that --  
6 California is part of that national market, and  
7 California dairy farmers should have those national  
8 minimum regulated prices. That's our proposal. The  
9 Class I prices, the Federal order system has already set  
10 Class I prices for California, and they should be  
11 adopted, as should Class II, which is -- which is driven  
12 off of Class IV.

13 The great irony in the pricing discussion for  
14 California is that California dairy farmers supply the  
15 milk, which is made into the manufactured dairy  
16 products, the sale price of which is a factor, a major  
17 factor, in some cases a determining factor, in the  
18 end-product price formulas in the Federal order system.  
19 We also either own or supply the plants, the make  
20 allowances for which are in the end-product formulas in  
21 the Federal order system, in some cases exclusively,  
22 only California make allowances are in -- in the -- are  
23 factored into the make allow -- only California plant  
24 costs are factored into the make allowances for one of  
25 the products in the, you know, in the Federal order

1 system, but all California costs are factored into all  
2 the products.

3 California producers and the California dairy  
4 industry has supplied everything to the Federal order  
5 system for manufactured prices, but California dairy  
6 farmers have been denied the minimum values, which are  
7 represented by the product prices and those make  
8 allowances. They should have those -- those minimum  
9 values.

10 Two other issues that -- that -- that are in  
11 the hearing that are not -- not part of the 1000 issues  
12 that have some substantial discussion coming with them,  
13 presumably transportation credits. We have a  
14 transportation credit provision which is similar to  
15 provisions in Order 30 and in the Southeast Orders 5 and  
16 7, but not identical. In the California pool, we're  
17 proposing that milk be -- that credits be allowed to  
18 move milk from the production areas to the high  
19 population demand areas. Not to -- not to plants all  
20 over the state, but to Class I and Class II plants in  
21 the high population demand areas through a  
22 transportation credit system, the reimbursement for  
23 which is driven off of actual costs of transporting milk  
24 and -- and ability of fuel adjustment to -- to keep  
25 the -- keep the credit market or price -- price

1 sensitive on a current basis.

2 It's a similar system to that which is in the  
3 California state system, not identical. Similar to that  
4 which is in some Federal orders but not identical, but,  
5 you know, authorized as a type of provision that can go  
6 into pools under the Marketing Agreement Act.

7 Final issue, and the one that's probably  
8 addressed the most, perhaps -- perhaps the most common,  
9 of course, is pooling, or some pooling. And -- and  
10 here's where I think -- I think it's really important to  
11 understand the context that we're working under in terms  
12 of the Agricultural Marketing Agreement Act. You know,  
13 part of the genius of this Act, which is -- the core of  
14 which has basically, you know, remained in place since  
15 it was adopted in -- in the '30's, 1937 the bulk of it.  
16 The genius of it is that there's a baseline of mandatory  
17 requirements in the Act that has continued, and that's  
18 uniform pricing to producer and uniform pricing to  
19 handlers, that's an inviolable baseline, and so you got  
20 the Supreme Court -- the Supreme Court cases that have  
21 addressed the Act after the constitutionality was upheld  
22 in Rock Royal in 1939 that have addressed the substance  
23 of the Act, they've addressed whether -- whether certain  
24 provisions violated producer price uniformity or handler  
25 price uniformity. There's been some cases on procedure,

1 but the baseline is what's -- what's been litigated  
2 mostly because it's inviolable, and we don't touch it,  
3 but the genius is that the rest of the requirements of  
4 federal milk orders are not dictated by the Act. And  
5 when it comes to pooling, here's what the Act says. The  
6 Act says the orders can have uniform prices to all  
7 producers irrespective of the use to which their milk is  
8 put by the handler to which their milk is delivered.  
9 Pools can be established -- now that's quoted, I'm  
10 paraphrasing or going back over it. It authorizes pools  
11 which establish uniform prices to all producers  
12 irrespective of the use to which their milk is put by  
13 the handler to which their milk is delivered. It says  
14 nothing about priority of one use over another. There's  
15 nothing there that says Class I is the only use that can  
16 be pooled -- the only value that can be pooled on a  
17 uniform basis. There's nothing there that says  
18 anything, in fact, about the limitation by which the  
19 orders can be fashioned to require that, those uniform  
20 prices and uniform pooling.

21           So what we find over the years and what we  
22 find at present is that pooling provisions are  
23 determined on the basis of the individual market. You  
24 got ten orders out there now. Every one of them, every  
25 one of them have different pooling provisions. Now,



1 some parts of them are the same, but no two of them are  
2 identical, and if I went back into, you know, and looked  
3 at the CFR in 1960 when there were 80 orders, I don't --  
4 I would wager that every one of those orders had  
5 different pooling provisions, none of them were  
6 identical because they're tailored to the marketplace,  
7 all of those provisions, producer deliveries, plants, et  
8 cetera.

9           So we've studied this marketplace, we've  
10 studied the class uses, the class prices, the dynamics,  
11 and we have proposed a pooling system which fits this  
12 marketplace. It's perfectly permissible under the Act  
13 and which the record that we will present will justify.

14           The pooling provision is one. It's not  
15 surprising it's unique since we've never had a Federal  
16 order that had quota of the type we have here in  
17 California, for instance. We've also had never -- never  
18 had a Federal order this big. And, you know, there are  
19 various other unique characteristics of California, but  
20 what our record will establish, what our testimony will  
21 show, what the analysis will show is that it's important  
22 to return uniform prices to dairy farmers in California  
23 that all the milk be pooled regularly, and therefore our  
24 definition of a pool plant, or one -- our -- one of our  
25 key definitions for a pool plant is any plant in the

1 State of California receiving Grade A milk from a  
2 California milk -- milk producer.

3 So this is a very important hearing to  
4 California dairy farm families that we represent. We  
5 really appreciate the opportunity, and we look forward  
6 to presenting the data that we've assembled and having  
7 it examined and scrutinized for this hearing so that we  
8 can have a positive result at the end of the day for  
9 California dairy farm families. Thank you.

10 JUDGE CLIFTON: Thank you.

11 MR. ENGLISH: Before I begin, there was a  
12 reference copy. Can I borrow?

13 MR. HILL: That's fine.

14 MR. ENGLISH: Are you sure it's not marked up?

15 Good afternoon. Thank you, Your Honor. I --  
16 I agree with Mr. Beshore that this is a unique, but I  
17 also think it is a wonderful opportunity, and I think  
18 it's great for everybody to be able to hear in sort of  
19 an organized format, a road map of what we're looking  
20 at.

21 And by the way, I actually very much  
22 appreciated your questions during the last, so if you  
23 want to interrupt and ask questions, I have no problem  
24 with that.

25 So -- is the mic on or not? I'm sorry, Chip

1 English. The judge didn't ask.

2 And I will try to organize my comments a bit  
3 along the line of Mr. Beshore to respond, but also using  
4 the tentative schedule, so in a way I'm going to start  
5 with an opening statement, and I also will talk about  
6 what things are controversial and are not controversial.

7 I think it's interesting that Mr. Beshore  
8 effectively said I'm a strawman and then knocked it  
9 down. He used words that I certainly have not used and  
10 don't intend to use. He used "utter chaos," "serious  
11 chaos." That's not the standard. The standard is  
12 disorderly market.

13 And while it may or not be in the Act, it is  
14 in the rules, and whether or not the Department needed  
15 to do this ahead of time, we're here to hear it, but  
16 nonetheless, under 900.3, the job of the Secretary  
17 ultimately is to conduct an investigation -- well, this  
18 hearing can be the investigation and consideration. And  
19 the Administrator, then, would be concluding that the  
20 proposed marketing agreement or marketing order will  
21 tend or not tend to effectuate the desired policy of the  
22 Act.

23 The point is do we have disorderly marketing  
24 at all, and we say no. At the very beginning, there is  
25 not disorderly marketing. I don't say utter chaos, I

1 don't say anything else, I say disorderly marketing.

2           The term "disorderly marketing" comes to us  
3 after 70 or more years of USDA promulgation, the  
4 decisions that Ms. Taylor, Mr. Hill, have mentioned  
5 that we had with respect to these orders. And the  
6 declared policy of the Act, which is to bring forth an  
7 adequate supply for milk for fluid use. Mr. Beshore  
8 mentioned a number of Supreme Court cases. Those same  
9 Supreme Court cases refer to an adequate supply of milk  
10 for fluid use.

11           We have the Department's own witnesses  
12 recognize that this market is most akin to the Upper  
13 Midwest. Yes, there's differences, but the primary  
14 similarity is that both markets are very low in Class I  
15 utilization. There is clearly adequate supply of milk  
16 for fluid use in California, and that cannot be  
17 contested. So what the co-ops have to do is prove, and,  
18 yes, if you're going to change the policy of 70 years,  
19 you do have to prove that they need to do something  
20 different for California.

21           Let me quickly run through what is  
22 controversial and non-controversial, but again in the  
23 context of this is a promulgation hearing, and one place  
24 where I think we do disagree -- and first let me correct  
25 something from -- either I incorrectly stated it or,

1 Mr. Beshore, you incorrectly heard it. It is not the  
2 case that you have to both prove your case and disprove  
3 ours. I'm not saying that. What I was saying is that  
4 if we provide an alternative, it needs to be considered  
5 by the Department, and the Department has to consider  
6 ultimately which one prevails. But I'm not saying you  
7 have to disprove ours.

8 But the idea that there is, you know, a patent  
9 on solutions when there's a promulgation hearing is  
10 incorrect, and that is most important because to the  
11 extent there are national provisions that affect  
12 economic decisions that have -- that date back to  
13 Federal order reform, and thus economic facts from '96,  
14 '97, '98, or economic facts that may have been amended  
15 in make allowance hearings, those are all dated, and you  
16 can't simply say because of uniformity, we get to have  
17 that.

18 And, frankly, the Department has recognized  
19 that in a different Upper Midwest decision. It rejected  
20 the goal of uniformity in light of the fact that what  
21 was proven wasn't sufficient to go that way. So, yes,  
22 it may be the Secretary can conclude at the end of the  
23 day that some of these prices should be like they are in  
24 the Federal order, but they have to prove it and justify  
25 it. You can't simply say because it's in the other

1 Federal orders, we get it. That's a controversial  
2 issue.

3 There are some definitions that are not  
4 controversial. We haven't proposed different product  
5 classifications, except to the extent there's a  
6 shrinkage issue for ESL facilities.

7 The marketing area is not controversial.  
8 While we disagree over the interpretation of the  
9 statute, it's clear that what Congress intended, what  
10 the Federal order for California only, if somebody had a  
11 bright idea of making an Arizona and Southern California  
12 order and before the MREA Northern Nevada and San  
13 Francisco Federal order, that isn't an order, and so we  
14 don't disagree on the marketing area.

15 But we do disagree about pooling. And  
16 Mr. Beshore turns the argument on its head and wants to  
17 talk about, well, we have these pooling provisions and  
18 here's the pricing, but that has to be read, again, in  
19 the context of 70 years of history, and the 70 years of  
20 history in bringing forth an adequate supply of fluid  
21 milk. What happens -- they call it inclusive pooling,  
22 we call it mandatory pooling.

23 What happens when every single plant is a pool  
24 plant in California? You have no performance standards.  
25 You have no need to move one truck of milk to a Class I

1 plant paying Class I differentials. You can't find that  
2 in another Federal order. And I submit that the statute  
3 doesn't go that far as to permit a complete rewrite  
4 simply because the dairy farmers want all the plants to  
5 be pooled. There are consequences to that.

6 Another consequence of that is even as the  
7 dairy farmers complain that the whey factor in  
8 California is undervalued -- and we think it might be  
9 overvalued in the Federal orders -- the fact that you  
10 have inclusive pooling, as shown in the exhibits already  
11 submitted, would put California handlers purchasing  
12 products on mandatory pooling at Class III and Class IV  
13 prices at a disadvantage to their principal competitors,  
14 especially in Order 30, who are able to buy milk at  
15 nonpool prices. That's the whole thing. That's why we  
16 have eligible milk not pooled. So you're going to  
17 create a mechanism that discriminates against California  
18 manufacturers as opposed to the entities in Federal  
19 orders who are able to keep all their milk.

20 In fact, we heard from the Market  
21 Administrator that there is milk residing inside the  
22 marketing area next to or adjacent to milk that is  
23 pooled. That does not affect their ability to  
24 administer the order, except to the extent when it drops  
25 significantly and they don't have enough money, and

1 that's a different issue in interest. But you can't  
2 have mandatory pooling at a higher price.

3 California has a form of mandatory pooling but  
4 at lower prices. And the consequence of the cooperative  
5 proposal is to result in prices that are not market  
6 clearing. So we will be arguing about market clearing.

7 Let's face it, in the end this comes down  
8 largely to a legal argument. Mr. Beshore conveniently  
9 rewrote the statute. He used the phrase "incorporates  
10 the existing quota." He used the phrase "quota is  
11 maintained." Well, I've done a lot of statutory  
12 interpretation of the issue, and that's not what the  
13 statute says. What the statute says is the order  
14 covering California shall have the right, it's not the  
15 obligation, the right to reblend and distribute order  
16 receipts -- notice the "order receipts," it doesn't say  
17 "order prices," it says "receipts" -- to recognize quota  
18 value.

19 "Recognize" is a very, very vague word. It  
20 does not mean maintain, it does not mean incorporate,  
21 and to write it differently is to write the statute  
22 differently. And if we're going to change policy, then  
23 a clearer statute is necessary, and that is just not  
24 present.

25 I'm not going to quibble much about the 40



1 years of national pricing, I think we had differences in  
2 the West sometimes in the past, and we may have them  
3 again, but I do get back to the following: Just because  
4 a minimum price exists in the Federal order system today  
5 does not mean it automatically comes in here. And that  
6 is true of all class prices, including Class I.  
7 Whatever Congress did in 1998 it did in the face at a  
8 time that California had not asked for a Federal order,  
9 and therefore the prices they set actually had no impact  
10 except on partially regulated plants. It did not have  
11 an impact.

12 Mr. Beshore says Congress knew what it was  
13 doing. I agree. It understood that if it wanted more,  
14 it should have been maintain, it should have said  
15 incorporate, and it should have said if they do it in  
16 the future to get these Class I prices.

17 Do you know what? A lot has changed in 15 or  
18 16 years on Class I. A whole lot has changed. We all  
19 in this room know what has happened to Class I  
20 utilization and Class I plants as fluid milk sales  
21 decline year over year over year.

22 Ladies and Gentlemen, Class I differentials  
23 must be proven, the need for them and the level of them.  
24 They cannot be assumed. And I'm not sure they can be  
25 justified now.

1 I think when we get down to transportation  
2 credits, the controversy isn't that significant. There  
3 are some substantive issues, but it's no -- it's nothing  
4 compared to the question of mandatory pooling, and  
5 pricing, and finally quota.

6 So as we speak about quota, I want to  
7 acknowledge and explain what we did and why and why we  
8 may be prepared to modify it but why there's a risk of  
9 our modifying it.

10 First let's start with Mr. Beshore's comments  
11 that Congress knew what it was doing. When the Act was  
12 enacted, Congress knew or should have known -- I know we  
13 have this fiction that Congress knows all these  
14 things -- it knew or should have known that the  
15 California system had no power and did not attempt to  
16 regulate out-of-state milk. The cooperative proposal  
17 doesn't just maintain or incorporate the quota system as  
18 it exists today, it sucks out-of-state milk into it and  
19 would provide out-of-state milk a value that is the over  
20 base. We submit that would violate the AMAA and the  
21 provisions against trade barriers.

22 And as it happens, we have a little history of  
23 that problem. And if you want to read it, it's called  
24 Hillside Dairy versus Kawamura. And the short version  
25 is California already tried that, and the courts found

1 that it discriminated against out-of-state milk. Now,  
2 I'm not saying you can't bring out-of-state milk into  
3 the pool, but you can't differentially treat, and that  
4 is the starting point for our actually establishing two  
5 pools, first a traditional Federal order blend price,  
6 and at a minimum, we cannot concede that that milk that  
7 is coming from out of state would receive a price that  
8 is lower than the traditional blend price.

9 Go a step further and go back to the language  
10 of the Farm Bill. No effort was made in the language of  
11 the Farm Bill to amend the actual language in the  
12 Agricultural Marketing Agreement Act. And that means  
13 you have to read the acts in conjunction, you cannot  
14 read out provisions, and so all the other provisions,  
15 such as trade barriers, such as equal pricing, all have  
16 to be read. And there's nothing in the AMAA that  
17 provides for a differential price, especially for  
18 producers who are not located in California. So that  
19 was our starting point for establishing two pools.

20 Now, this is where we may have a concession,  
21 especially after we heard the evidence about what would  
22 happen after the third decision point, but I want to  
23 explain why we got to where we were and why we still  
24 have a concern. We believe that there are dairy farmers  
25 within California who historically, you know, maybe not

1 as long as the Clark County plant has been around, but  
2 basically sell their milk across the border into a plant  
3 in another state, and I'm not going to name names, but a  
4 hypothetical plant that is then regulated on a Federal  
5 order, and that if a California Federal order is adopted  
6 and if that plant does not change its route disposition,  
7 that plant would under its identical marketing  
8 conditions today be instead regulated under the  
9 California order. And our reading of the cooperative  
10 proposal is that those dairy farmers who today are  
11 receiving a traditional Federal order price,  
12 congratulations, you're still the Federal order, but  
13 it's a different Federal order, and now you get the over  
14 base price. And I don't represent any of those  
15 interests, but frankly that troubled us. And that is  
16 why we came up with the concept of the voluntary  
17 association within the quota for in-state milk.

18 I believe we are prepared to concede that you  
19 could make that mandatory and that would address the  
20 issue of decision milk, but we don't want to forget that  
21 that might create for the Department a equal protection  
22 argument for such parties whose status changes. I'm not  
23 going to represent them, but that was our principal  
24 concern when we wrote the language the way we did.

25 We have no grief against the California quota

1 system, we're not here to remove it, but we think the  
2 federal government has some additional concerns that  
3 would have to be addressed.

4 The rules of practice and procedures governing  
5 MA's and order provisions are not controversial, but  
6 again, they have to be proved. It may not take much,  
7 but it has to be proved.

8 The rules of practice and practice governing  
9 handlers: Proved. Especially -- I want to go back to  
10 the comment made at one point I think by Mr. Schaefer,  
11 there are certain provisions, I think there's seven or  
12 eight of them, that would actually be in part 1000 prior  
13 to the Federal order reform, and I could see how those  
14 provisions, because they were part 1000 provisions,  
15 because they really were general applicability, may have  
16 a different level of proof, but once you get to other  
17 provisions that have direct operation and economics, I  
18 think there's a different issue.

19 Mr. Beshore made much of the fact that, you  
20 know, most of their provisions are redundant, and I will  
21 have to acknowledge that we ended up with a number of  
22 sections that don't point to part 1000, that's why I  
23 asked those questions about the pointer to 1000 per. We  
24 11 -- we had 1150, the Department had 1151 of the  
25 proposed, and point 50. We don't point to that because

1 we have some differences.

2 I would note that for a number of those  
3 sections that end up without a pointer, it's really a  
4 conforming change. Some of that conforming change is  
5 that there is a reference to part 1000 in a number of  
6 sections to the now defunct order 1135, and we didn't  
7 see the Department adopting order language that refers  
8 to a provision that is defunct. That's the mere reason  
9 why we did that, so I don't think there's really much to  
10 the fact about the language because in the end, the same  
11 amount of language is actually proposed to be changed.

12 In summary, Your Honor, and Ladies and  
13 Gentlemen, this is an important hearing, we agree, and  
14 we hope that California dairy farmers are listening  
15 because we think that they have the wrong -- their eyes  
16 on the wrong problem, and the problem is not the whey  
17 factor as addressed in the California order.

18 We respectfully submit there aren't disorderly  
19 marketing conditions, there need not be a California  
20 Federal order, but if there is going to be a California  
21 Federal order, it should be as drafted in Proposal 2  
22 with a whey factor along the lines that we have now --  
23 well, one of those two whey factors we will submit  
24 evidence on, submit it on both, but we submit Proposal 2  
25 is the right answer. Mandatory pooling is not taking

1 out-of-state milk and saying if you now get an over base  
2 price is not the answer. The statute -- Farm Bill does  
3 not amend the statute, and that positive law must be  
4 read in conjunction.

5 Thank you very much.

6 JUDGE CLIFTON: I find both opening statements  
7 to be excellent and very helpful. I find them to be  
8 somewhat exhausting. I think we should take a break.  
9 Let's be back ready to go at 2:35.

10 (Whereupon a break was taken.)

11 JUDGE CLIFTON: This record resumes at 2:35.

12 Mr. Beshore, you may call your first witness.

13 MR. BESHORE: Thank you, Your Honor. We call  
14 Mr. Elvin Hollon.

15 JUDGE CLIFTON: I'll swear you in in a seated  
16 position. Would you raise your right hand, please?

17 Do you solemnly swear or affirm under penalty  
18 of perjury that the evidence you will present will be  
19 the truth?

20 THE WITNESS: I do.

21 JUDGE CLIFTON: Thank you. Please state and  
22 spell your name.

23 THE WITNESS: Elvin, E-L-V-I-N. Hollon,  
24 H-o-l-l-o-n.

25 JUDGE CLIFTON: Thank you.

1 Mr. Beshore, you may proceed.

2 MR. BESHORE: Okay. So before asking  
3 Mr. Hollon any questions, I would like to just indicate  
4 we have two stapled document sets here, one is the  
5 testimony of Elvin Hollon First Statement, which we have  
6 identified for our purposes as Cooperatives' Exhibit 1  
7 in the lower right-hand portion. I understand that  
8 we'll have a hearing record exhibit also. It's 25 -- 25  
9 pages.

10 And then we have a second stapled set of  
11 documents with an index of the cover page, and it's  
12 Exhibits of Elvin Hollon First Statement, with Tables  
13 1.A through 1.K indicated on the index and then  
14 assembled behind the -- behind the cover page.

15 I would ask that those documents be marked for  
16 identification purposes as hearing exhibits prior to  
17 Mr. Hollon providing more -- providing his testimony.

18 JUDGE CLIFTON: Mr. Beshore, whatever the next  
19 number is, it may be 19, but I'm going to confirm that  
20 with Ms. Frisius, which of these do you want to have  
21 that first number?

22 MR. BESHORE: The statement, Cooperatives'  
23 Exhibit 1.

24 JUDGE CLIFTON: Okay. So the document that  
25 has indeed the case caption on it, and, Ms. Frisius, is



1 that Exhibit 19.

2 MS. FRISIUS: It is.

3 (Whereupon Exhibit 19 was marked for  
4 identification.)

5 JUDGE CLIFTON: And then, Ms. Frisius, the  
6 exhibits of Elvin Hollon would be Exhibit 20?

7 MS. FRISIUS: Correct.

8 (Whereupon Exhibit 20 was marked for  
9 identification.)

10 JUDGE CLIFTON: Did everyone receive a copy  
11 who wanted one?

12 MR. BESHORE: Hopefully we have enough copies  
13 for everybody in the room that -- that wants one.

14 JUDGE CLIFTON: If anybody wants one that  
15 didn't get one, if you'd raise your hand to get a copy  
16 of Exhibit 19 and a copy of Exhibit 20. All right. And  
17 there are some additional copies in the back if you need  
18 to -- to pick those up.

19 All right. Mr. Beshore, you may proceed.

20 MR. BESHORE: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. BESHORE:

23 Q. Mr. Hollon, before I ask you to -- to read  
24 your statement, which has been marked as Exhibit 19, I'd  
25 just like you to provide for the -- for the hearing

1 record, this is the first time you've testified in this  
2 hearing, your professional and educational background.

3 A. I'm an agricultural economist. I have a  
4 bachelor's degree in Dairy Science and a master's in  
5 Agricultural Economics from Louisiana State University.  
6 I've been employed by Dairy Farmers of America or its  
7 predecessor since 1979.

8 My job duties have included support of our  
9 agricultural policy groups, day-to-day milk marketing,  
10 buying and selling of milk in most every market in the  
11 country, dealing with regulatory affairs, such as  
12 Federal Milk Marketing Order hearings, congressional  
13 hearings, and just the day-to-day business operations of  
14 Dairy Farmers of America.

15 On a weekly basis, I touch bases with all of  
16 our marketing operations folks as far as selling,  
17 buying, supply, demand, long, short milk supplies, as  
18 well as our series of plants that provide balancing  
19 services for our members in various markets.

20 Q. Have you ever testified before?

21 A. I have testified at several Federal Milk  
22 Marketing Order hearings, not from the fourth grade, but  
23 I've testified for quite a few.

24 Q. Just over -- over what period of time roughly?

25 A. From the middle 1980's, there were hearings in

1 the Midwest markets, through the early '90's, the 3A  
2 decisions, the National Federal order hearing decisions  
3 in the mid '90's, Federal order reform process, those  
4 documents that created the reform decision, and all of  
5 the hearings, whether they be regional or national,  
6 since 2000.

7 Q. In those hearings, did you present your  
8 testimony and your opinions as an -- as an expert  
9 witness in agricultural economics, milk marketing, and  
10 Federal Milk Marketing Orders?

11 A. I did.

12 MR. BESHORE: I would offer and intend to  
13 present Mr. Hollon's testimony in those areas of  
14 expertise with that status and would make him available  
15 for any examination on those -- on those areas at this  
16 time before he reads his statement if that would be  
17 appropriate.

18 JUDGE CLIFTON: He's clearly an expert in  
19 Agricultural Economics. Now, he has some  
20 subspecialties, I don't know whether you want to specify  
21 those. Clearly milk is his specialty. How would you,  
22 either of you, describe in what he would be regarded as  
23 an expert?

24 MR. BESHORE: My proposed subject areas was  
25 milk marketing and Federal Milk Marketing Orders.

1 JUDGE CLIFTON: Does anyone wish to question  
2 Mr. Hollon about his expertise, particularly in milk  
3 marketing and Federal Milk Marketing Orders?

4 Is there any objection to my accepting  
5 Mr. Hollon as an expert in milk marketing and Federal  
6 Milk Marketing Orders? There's none.

7 Mr. Hollon, I accept you as an expert in milk  
8 marketing and Federal Milk Marketing Orders.

9 THE WITNESS: Thank you.

10 MR. BESHORE: Is that in addition to  
11 agricultural economics?

12 JUDGE CLIFTON: Now you're getting me  
13 confused. Yes.

14 I also find you to be an expert in  
15 agricultural economics.

16 That probably covers it, doesn't it?

17 MR. BESHORE: That's -- that's all we request.

18 JUDGE CLIFTON: All right. Very good. Yes,  
19 clearly you are an expert in agricultural economics as  
20 well as milk marketing and Federal Milk Marketing  
21 Orders.

22 MR. BESHORE: With that, I would then ask  
23 Mr. Hollon to proceed to present his testimony as  
24 represented in Exhibit 19, and after which we will have  
25 some additional questions concerning the tables,

1 exhibits, and perhaps some other areas.

2 JUDGE CLIFTON: Now, Mr. Hollon, you've heard  
3 the other people be told to go slowly for the benefit of  
4 the transcript.

5 THE WITNESS: I'll practice my Southern style.

6 JUDGE CLIFTON: You may proceed.

7 STATEMENT OF ELVIN HOLLON

8 THE WITNESS: I'm Elvin Hollon. I'm employed  
9 by Dairy Farmers of America, Inc., as the Director of  
10 Fluid Marketing and Economic Analysis. My office is  
11 located at 10220 Ambassador Drive, Kansas City,  
12 Missouri, 64153. I'm testifying today in support of  
13 Proposal 1, the proponents of which are California  
14 Dairies Inc., Dairy Farmers of America, Inc., and Land  
15 O'Lakes, Inc.

16 All of the proponents are member-owned dairy  
17 cooperatives. Dairy Farmers of America, DFA, my  
18 employer, is a member-owned Capper-Volstead cooperative  
19 with approximately 14,000 members with 9,000 dairy farms  
20 in 48 states, including California. Three proponents  
21 cooperatives' farmer members together represent over  
22 75 percent of the milk produced in California.

23 Section I. Why a California order?

24 A California Federal Milk Marketing Order,  
25 FMMO, is necessary in order to recognize for California

1 dairy producers the fully nationally defined value from  
2 all uses of milk produced and marketed in the state, as  
3 well as to achieve a common regulatory minimum prices to  
4 all processors in the country. The Federal Milk  
5 Marketing Order proposed by the cooperatives would not  
6 only promote and enhance orderly market conditions, but  
7 would also address longstanding conditions of disorderly  
8 marketing. In order to achieve this result, a  
9 California Federal Milk Marketing Order must be fully  
10 integrated into the Federal Milk Marketing Order system.  
11 A stand-alone California State Order, CSO, no longer  
12 achieves these results operating as a separate pricing  
13 entity.

14 Federal Milk Marketing Order --

15 MR. ENGLISH: Your Honor, I think the court  
16 reporter is having a hard time.

17 THE COURT REPORTER: Slow down just a little  
18 bit.

19 THE WITNESS: Okay. I missed the wink, I'm  
20 sorry.

21 The Federal Milk Marketing Order Reform  
22 process established a national uniformity of  
23 manufacturing milk values and broad regional marketing  
24 order marketwide pools. The California state system,  
25 however, has not adopted, leading to marketing

1 conditions that have become increasingly difficult for  
2 California dairy farmers --

3 JUDGE CLIFTON: Let me stop you, Mr. Hollon.  
4 Start that sentence again, please.

5 THE WITNESS: The California state system,  
6 however, has not adopted, leading to --

7 JUDGE CLIFTON: Is that adopted?

8 THE WITNESS: Ah, adapted.

9 JUDGE CLIFTON: Thank you. Go ahead. Start  
10 that sentence again.

11 THE WITNESS: The California state system,  
12 however, has not adapted, leading to market conditions  
13 that have become increasingly difficult for California  
14 dairy farmers in the operation of the cooperatives they  
15 have built. The failure of California regulations to  
16 establish minimum prices to California producers which  
17 recognized -- which reflect national values for  
18 classified milk uses has cost California dairy farmers  
19 more than 1.5 billion dollars since 2010, according to  
20 published industry estimates. The Cooperatives' dairy  
21 farmer members have carefully studied the operation --  
22 operations and impacts of a Federal Milk Marketing Order  
23 and have concluded that a California Federal Milk --  
24 Milk Marketing Order is imperative in order for them to  
25 have the opportunity to achieve returns that are in

1 parity with those of other dairy farm enterprises in the  
2 country.

3 Federal Milk Marketing Orders are crafted  
4 singly and individually to address marketing conditions  
5 present in the areas they govern. The Secretary is both  
6 authorized and required to recognize unique and  
7 individual conditions that also have explicit  
8 relationships with other marketing orders to form a  
9 coordinated national system. In order to craft the  
10 proper provisions for a California Federal Milk  
11 Marketing Order, the Secretary must understand the  
12 unique conditions of the California marketing area, as  
13 well as the integrated relationships firmly established  
14 by existing order provisions between the California  
15 dairy industry and the remainder of the Federal Milk  
16 Marketing Order system, and strike the proper balance  
17 between the prevailing interests of the entire system  
18 and the interests and conditions present in the  
19 California market.

20 We will demonstrate that California producer  
21 milk returns are well below those of similarly situated  
22 Federal Milk Marketing Order producers throughout the  
23 country and that minimum regulatory price to processors  
24 are not in -- not in accordance with Federal Milk  
25 Marketing Order national pricing grid which is derived



1 from common uniform pricing provisions applicable to all  
2 Federal Milk Marketing Order processors and based on a  
3 series of market driven prices that represent national  
4 values.

5 Finally, we will show that based on the unique  
6 marketing situation in the California market, our  
7 proposed pooling provisions must be incorporated in the  
8 California Milk Marketing Order pooling standards so  
9 that the Federal order will function as intended.

10 Section II. The California Dairy Marketplace.

11 The state of California is the largest  
12 milk-producing state in the US with more than 20 percent  
13 of national production. According to United States  
14 Department of Agriculture, USDA, statistics, California  
15 is the leading dairy state. In 24 categories where a  
16 pound --

17 JUDGE CLIFTON: I'm sorry, this -- this is  
18 important. California is?

19 THE WITNESS: The country's leading dairy  
20 state.

21 JUDGE CLIFTON: Okay.

22 THE WITNESS: In 24 categories where a pound,  
23 a gallon, a cow, a farm, or a plant can be counted,  
24 California is the top-ranking state in 13 categories,  
25 number two in six categories, number three in two

1 categories, number four in one category, and number  
2 seven in one category, and number eight in one category.  
3 These statistics were published in the National  
4 Agricultural Service publications, Milk Production,  
5 February 2015, Dairy Products Annual, April 2015, and  
6 Production, Distribution and Income, April 2015.

7 JUDGE CLIFTON: That last phrase is what?

8 THE WITNESS: Production, Disposition and  
9 Income, April 2015.

10 California is first, and these statistics,  
11 category in percent of US total where applicable, in  
12 total state milk production, 21 percent; number of milk  
13 cows, 19 percent; production of Italian cheese,  
14 32 percent; mozzarella cheese, 37 percent; Hispanic  
15 cheeses, 52 percent; condensed skim milk unsweetened,  
16 37 percent; nonfat dry milk human grade, 41 percent;  
17 butter, 33 percent; dry buttermilk, 47 percent; ice  
18 cream, 17 percent; ice cream mix, 17 percent; sherbert  
19 mix, ten percent; and the total value of milk production  
20 at \$9.346 billion, 19 percent, for 2014.

21 The California dairy industry is ranked second  
22 in the production of all types of cheeses, 21 percent;  
23 American style cheeses, 14 percent; other than American  
24 style cheeses, 21 percent; sour cream, 14 percent;  
25 low-fat ice cream, six percent; and low-fat ice cream

1 mix production, six percent. The industry ranks third  
2 for production of creamed cottage cheese, nine percent,  
3 and the number of dairy plants, nine percent. The  
4 industry ranks fourth in cheddar cheese production,  
5 12 percent, and seventh in the number of dairy farms,  
6 three percent, and eighth in milk production per cow.

7           If California's milk producers adopt a Federal  
8 Milk Marketing Order, it would be the largest order pool  
9 with a monthly average volume of slightly below 3.4  
10 billion pounds, eclipsing Order 30's average 2014  
11 monthly pool volume of 2.7 billion pounds. In terms of  
12 Class I volume it would be the third largest of the  
13 orders behind Order I, approximately 760 million pounds  
14 in 2014, and Order 33, approximately 520 million pounds  
15 in 2014, with an estimated monthly volume average  
16 438 million pounds.

17           In spite of its significance nationally,  
18 California has been the most important region in the  
19 country which has not been part of a Federal order --  
20 Federal Milk Marketing Order System. For many decades,  
21 the California Department of Food and Agriculture, CDFA,  
22 has administered the state milk order, CSO, and has  
23 reasonably balanced -- and has reasonably -- reasonably  
24 balanced industry interests to the satisfaction of  
25 California dairy farmers. In recent years, US milk

1 markets have become more regional and national in scope,  
2 and Federal Milk Marketing Order regulations have  
3 evolved with those developments. However, regulations  
4 in California have not responded to the shifts taking  
5 place in the national marketplace.

6 In 2014 Congress provided a necessary  
7 prerequisite for correcting this condition when it  
8 reauthorized the language in the 1996 Farm Bill allowing  
9 the USDA to promulgate a California Federal Milk  
10 Marketing Order while retaining the California state  
11 quota program. CDFA records indicate there are  
12 2,233,428 pounds of solids not fat quota issued on a  
13 daily production basis. Recent CDFA published records  
14 indicate quota was traded for \$525 per pound of solids  
15 not fat per day yielding an aggregate market value of  
16 \$1.173 billion. That Congressional authorization makes  
17 clear that a California Federal Milk Marketing Order  
18 will have all the benefits and characteristics of the  
19 other ten Federal Milk Marketing Orders while  
20 maintaining the unique California system of sharing milk  
21 sales revenues through the state quota program.

22 MR. ENGLISH: Your Honor, I object.

23 JUDGE CLIFTON: I'll hear your objection.

24 MR. ENGLISH: The witness is first qualified  
25 as a economist. Now he's testifying as to law, which I

1 think there's a significant dispute over. He's used the  
2 word "retaining the California state quota program," the  
3 word doesn't appear anywhere in the statute. And the  
4 latest sentence, he says, "That Congressional  
5 authorization makes clear that California Federal milk  
6 Marketing Order, FMMO, will have the benefits and  
7 characteristics of the other ten FMMO's while  
8 maintaining" again, "maintaining the unique California  
9 system of sharing milk sales revenues through a state  
10 quota program." I object to the statement on the  
11 grounds that he's making a legal statement.

12 JUDGE CLIFTON: I'm not going to strike his  
13 testimony, but your objection is lodged.

14 MR. BESHORE: May I just -- this is not  
15 related to the objection, but, Mr. Hollon, you're free  
16 to say "FMMO" where it's typed in the -- the  
17 abbreviation as opposed to spelling it all out if that's  
18 more convenient. You can do it either way, but you  
19 don't need to feel captive to spell it out, spell it out  
20 every time it appears in your statement. Same thing  
21 with -- with CSO, you've indicated what it stands for,  
22 and it's several times in the statement. Just -- just a  
23 note. Thank you.

24 THE WITNESS: Very good.

25 Section III. Price Alignment Issues: The

1 California Dairy Market Place and the United States:  
2 Producers Price Misalignment: Mailbox Price Comparison.

3 One of the requirements the regulatory system  
4 is charged with is assuring a standard of uniformity and  
5 equity in both producer and handler prices. Data  
6 indicates that by having the California dairy industry  
7 regulated outside the national FMMO pricing and  
8 marketing grid there is significant producer -- producer  
9 misalignment, I'm sorry -- there is significant producer  
10 price misalignment with this standard. While many  
11 factors in the operation of a dairy farm are localized,  
12 several key factors are increasingly becoming regional,  
13 national, and even international. We will have  
14 testimony from members who will discuss issues related  
15 to competition for feedstuffs, labor, dairy production  
16 items and capital. Our members in California find it  
17 increasingly difficult to bid for resources when faced  
18 with lower returns than their counterparts around the  
19 country and in the world.

20 As a reliable and reasonable measure to  
21 demonstrate the price disparity for similarly situated  
22 producers, we reviewed a comparison of the Mailbox Milk  
23 Prices, MMP, series published by AMS. This price series  
24 has been available since at least 1998 and has been  
25 calculated on a consistent basis. As stated in the

1 USDA/AMS publications, the price series is an at-test,  
2 all revenues included and net of marketing expenses.

3 There are MMP's published for 20 different  
4 market regions. For comparison purposes we isolated the  
5 three states that comprise the majority of the Upper  
6 Midwest Order marketing area with high production of  
7 cheese, butter, and nonfat dry milk and lower Class I  
8 utilization of milk. They are Wisconsin, Minnesota and  
9 Illinois. We note and agree with the assertion in the  
10 Dairy Institute proposal that there are many market  
11 similarities between those regions and the California  
12 market.

13 MR. BESHORE: Mr. Hollon, at this point would  
14 you read the footnote that appears on page six of  
15 Exhibit 19, which was a footnote to the -- to your  
16 reference to AMS earlier on that page. And then go on  
17 after you've completed the footnote, just note you've  
18 completed it and go on to the text on page seven.

19 THE WITNESS: Footnote 1 states Areas for  
20 which the Mailbox Milk Price series is reported  
21 represent at least 75 percent of the milk marketed under  
22 Federal milk orders. The Mailbox Milk Price reflects  
23 the net pay prices received by dairy farmers for milk --  
24 prices reflect all payments received for milk sold and  
25 all costs associated with the mark -- with marketing the

1 milk. Prices are weighted averages of the prices  
2 reported for all orders receiving milk from the  
3 reporting area and are reported at average butterfat  
4 test. Prices include, for the most part, the  
5 assessments under the Cooperatives Working Together, CWF  
6 program, source, Dairy Market News, USDA/AMS, August 21,  
7 2015. That's the end of the footnote.

8 We also selected the Northwest States series  
9 composed of data from Oregon and Washington for  
10 comparison. These states compromise a significant  
11 portion of Federal Order 124, the Pacific North --

12 JUDGE CLIFTON: Let --

13 THE WITNESS: -- West orders.

14 JUDGE CLIFTON: Let me have you start again,  
15 Mr. Hollon, that sentence.

16 THE WITNESS: These states comprise a  
17 significant portion of Federal Order 124, the Pacific  
18 Northwest Order. Like Order 30 the California -- and  
19 the California market, the Northwest states have  
20 significant manufactured dairy product output. The  
21 region shows high use in both Class III and Class IV  
22 products. Additionally, the Northwest States are  
23 similarly situated geographically as western states and  
24 face similar competitive situations in the marketing of  
25 manufactured dairy products to both eastern domestic



1 markets and westward export markets.

2           The Upper Midwest and Pacific Northwest  
3 regions have many similarities with the California dairy  
4 marketplace. However, a similar Mailbox Milk Price is  
5 not one of the common characteristics describing these  
6 markets. We measured the period August 2012 to the most  
7 recent data available prior to July 2015. This period  
8 marks the most recent "non-temporary" upgrade of the  
9 "whey pricing bracket" used in the CDFA pricing  
10 formulas. Additionally --

11           JUDGE CLIFTON: Now, let me just ask you about  
12 that phrase in parentheses. What is that phrase?

13           THE WITNESS: Whey bracket pricing.

14           JUDGE CLIFTON: All right. Thank you.

15           THE WITNESS: Additional details on the time  
16 period for comparison will present -- will be presented  
17 in a following section of this statement. Since the  
18 Mailbox Milk Price is an at-test price, we adjusted the  
19 price for components in each region to the Federal Order  
20 standard for butterfat of 3.5 percent, for protein of  
21 2.9915 percent, and for other solids of 5.6935 percent  
22 in order to arrive at a standard price for comparison.

23           We used the monthly Federal Milk Marketing  
24 Order price per pound of each component in the  
25 calculation to compute a cents per hundredweight value.

1 We used the Order 30 average producer milk price  
2 component at -- component test for the Midwest Order  
3 states as Order 30 does not publish state-level  
4 component tests. California does not publish a protein  
5 or other solids component value, so we used DFA producer  
6 component tests for the California averages under the  
7 assumption that since our producers account for  
8 approximately 20 percent of the state's milk supplies it  
9 would be generally representative of the state's  
10 averages -- test averages. For the North --

11 JUDGE CLIFTON: Now, let me stop you there a  
12 minute. I thought your producers produced 80 percent.

13 THE WITNESS: This is DF -- this is DFA's  
14 producers --

15 JUDGE CLIFTON: Oh.

16 THE WITNESS: The proponents of the proposal  
17 were -- is 75 percent.

18 JUDGE CLIFTON: Okay. Good. Thank you. Now  
19 I understand.

20 THE WITNESS: For the Northwest states, we use  
21 the Order 124 market tests in each case, the monthly  
22 test was compared to the standard test and the  
23 difference over or under the standard was subtracted or  
24 added to the Mailbox Milk Price based on the difference.

25 For the recent period of August 2012 to May of

1 2015, there are 34 monthly observations from the states  
2 listed. See Table 1.A, four pages, "Comparison of  
3 Mailbox Milk Prices Standardized for Butterfat, Protein,  
4 and Other Solids tests, California, and Selected  
5 Markets, August 2012 to May 2015." For the 34 months  
6 and the four Mailbox Milk Price regions for comparison,  
7 136 observations, in no month did California have a  
8 higher or even close to equal Mailbox Milk Price. The  
9 average difference over all observations was \$1.85 per  
10 hundredweight lower. The single largest difference was  
11 minus \$4.27, that was in Wisconsin on December of 2012,  
12 and the narrowest was a minus \$.43, Northwest states,  
13 March 2015. The California region averaged \$2.12 per  
14 hundredweight lower than the Wisconsin region for the 34  
15 months; it was \$2.05 lower than the Minnesota region; it  
16 was \$2.22 lower than the Illinois region; and it was  
17 \$1.01 lower than the Northwest region.

18 Using the Mailbox Milk Price as the proxy for  
19 producer prices shows there are wide differences for  
20 farms in similarly situation -- situated regions of the  
21 US. Our proposal will correct the misalignment of  
22 producer prices.

23 Section IV. Overview/Comparison of California  
24 State Order and Federal Milk Marketing Order class  
25 Prices, Classification and Formulas.

1           While both systems use classified pricing, the  
2 class definitions are not identical, and in some cases  
3 are a cause of disorderly marketing. General Class I,  
4 Roman numeral in the Federal Milk Marketing Order system  
5 and Arabic numeral 1 in the California State Order  
6 regulations, represents milk consumed in fluid form.  
7 Class II, Roman numeral in the Federal Milk Marketing  
8 Order system and Arabic numerals 2 and 3 in the  
9 California State Order regulations, represents milk  
10 products such as cream-based items, ice cream, ice cream  
11 mixes, yogurt, dips, cultured products, cottage cheese,  
12 and milk used to produce items such as evaporated and  
13 condensed milks. The Federal Milk Marketing Order  
14 system includes all these products in a single class  
15 while the California State Order System divides them  
16 into two classes. Ice cream and ice cream mixes and  
17 frozen products are in Class 3, and Class 2 contains  
18 yogurt, cottage cheese, and other immediate products  
19 such as condensed and evaporated milk. Milk used to  
20 produce cheese and whey products is Class III, Roman  
21 numeral in the Federal order system and Arabic  
22 numeral -- Arabic numeral Roman letter 4b in the  
23 California State Order regulations. Lastly, Class IV,  
24 Roman numeral in the Federal Milk Marketing Order system  
25 and Arabic numeral Roman letter 4a in the California

1 State Order regulations, represents milk used to produce  
2 butter and milk powders. Our proposal will use the  
3 existing Federal Milk Marketing Order classification  
4 system now.

5 While both systems use end-product pricing  
6 formulas to determine class prices, the various  
7 underlying commodity prices, the effective dates will  
8 determine the product -- for determining the prices used  
9 in the formulas, the yield constants, and the make  
10 allowances are not identical, and, in some instances,  
11 are a cause of disorderly marketing. The California  
12 State Order system includes a factor in the Class 4a and  
13 Class 4b pricing formulas that adjust the dairy product  
14 price commod -- I'm sorry, I'm going to start that  
15 sentence over again.

16 The California State Order system includes a  
17 factor in the 4a and Class 4b pricing formulas that  
18 adjust the dairy product commodity price to reflect  
19 special pricing differences. The Federal Milk Marketing  
20 Order system does not make any such adjustment. All  
21 Federal Milk Marketing Order prices for Classes 2, 3,  
22 and 4 are uniform across the country. The fact that  
23 minimum base class prices and resulting dairy ingredient  
24 prices, for example, California Class 2 skim fat --  
25 skim fat price versus Federal Milk Marketing Order skim

1 fat prices, use different underlying dairy product  
2 commodity prices and different periods to determine the  
3 base prices impacts milk market decisions and in some  
4 cases causes disorderly marketing.

5 In the following sections of the testimony  
6 references will be made to class price averages for  
7 fixed periods. These dates which highlight the price  
8 differences were chosen purposefully. Prior to  
9 December 2007, the California State Order regulations  
10 used an end-product price formula to assign value to  
11 whey in the Class 4b price formula similar to that used  
12 in the -- used to establish class prices and similar in  
13 construct to those used in Federal Milk Marketing  
14 Orders. When this method was used, this spread between  
15 the California State order and Federal Milk Marketing  
16 Order prices was much narrower and more consistent. The  
17 California State Order, however, discontinued the  
18 end-product price approach to valuing whey after  
19 November 2007.

20 Since 2007, the California State Order has  
21 changed the whey component pricing factor contained  
22 within the Class 4b formula three different times. The  
23 first relationship established a fixed \$.25 per  
24 hundredweight contribution to the Class 4b milk price  
25 regardless of the reported market value for dry whey.

1 This became effective in December 2007. The second  
2 relationship, which was implemented in September of  
3 2011, established a bracket system or look-up table that  
4 changed the per hundredweight contribution to the Class  
5 4b price at fixed rates depending on the reported market  
6 value for whey. The table included a floor of \$.25 per  
7 hundredweight and a ceiling of \$.65 per hundredweight.  
8 The last change, effective August 2012, retained the  
9 whey value contribution table but modified the integral  
10 range and increased the ceiling to \$.75 percent per  
11 hundredweight.

12 There has been another price formula change  
13 that became effective August 1, 2015. That change  
14 increased the California State Order 4b price and  
15 increased producer mailbox prices. However, that change  
16 is temporary, it expires July 31, 2016, and there will  
17 be little data to evaluate for this record because of  
18 the timing of the hearing. As it is temporary and could  
19 only be extended through the result of another hearing,  
20 its long-term impact is both tenuous and not measurable.

21 Section A. Class I -- let me read -- Class I,  
22 Roman numeral I, Class 1, Arabic numeral 1, Price  
23 Misalignment for Similarly Situated Handlers.

24 One of the tenets of the Federal Milk  
25 Marketing Order is common terms of trade that at the

1 regulatory minimum price level are uniform and  
2 transparent. Observing the Class I price structure  
3 across the United States, it is clear that there's a  
4 pattern for the Class I price surface and an orderly  
5 transition in the price surface as it changes across the  
6 country.

7 JUDGE CLIFTON: I just want you to spell  
8 "surface" as you've used it a couple of times in that  
9 sentence.

10 THE WITNESS: S-U-R-F-A-C-E.

11 JUDGE CLIFTON: Thank you.

12 THE WITNESS: Is there another spelling of  
13 surface?

14 JUDGE CLIFTON: Well, it -- it sounds like --

15 THE WITNESS: Service?

16 JUDGE CLIFTON: -- S-E-R-V-I-C-E.

17 THE WITNESS: Oh, okay.

18 JUDGE CLIFTON: And I just want the transcript  
19 to get it right the first time.

20 THE WITNESS: Okay.

21 The graphic below, taken from the USDA/AMS web  
22 page, depicts the Class I price surface. Clearly it has  
23 a differentiated regional bias and not a uniform  
24 national bias.

25 JUDGE CLIFTON: And read that one again,



1 please.

2 THE WITNESS: Okay. Uniform national basis.  
3 The principles --

4 JUDGE CLIFTON: Go ahead and read the whole  
5 thing.

6 THE WITNESS: Clearly this has a  
7 differentiated regional basis and not a uniform national  
8 basis.

9 JUDGE CLIFTON: Thank you.

10 THE WITNESS: The principles for this price  
11 structure are outlined and defined in the Reform  
12 Decision, footnote 1, as follows. And footnote 2 says  
13 "Reform Decision" refers to the final decision in the  
14 Federal order reform process issued April 2nd, 1992, and  
15 published at 64 Federal Register 16026 dash 16926, open  
16 paren, 1999, close paren. That is the end of the  
17 footnote.

18 And back to the testimony, a quote from that  
19 final decision is: 3. Class price -- Class I Pricing  
20 Structure. This decision adopts a Class I pricing  
21 structure that provides incentives for greater  
22 structural efficiencies in the assembly and shipment of  
23 milk and dairy products. In conjunction with other  
24 reforms discussed in this decision, the adopted Class I  
25 pricing structure -- price structure provides the

1 necessary changes needed to improve milk pricing in the  
2 consolidated markets. The adopted pricing structure --  
3 I'm sorry.

4           The adopted Class I pricing structure utilized  
5 the USDSS model results adjusted for all known plant  
6 locations and establishes differ -- differential levels  
7 that will generate sufficient revenue to assure adequate  
8 supply of milk while maintaining equity from among  
9 handlers in the minimum prices they pay for milk bought  
10 from dairy farmers.

11           Background. Although not required by the 1996  
12 Farm Bill, the legislation provided authorization for  
13 the Secretary to review the Class I price structure as a  
14 part of the consolidation of the orders including the  
15 consideration of utilization rates and multiple basing  
16 points for developing a pricing system. In any event,  
17 the consolidation of orders requires the review of the  
18 pricing system because historically Class I pricing  
19 provisions, as well as other Federal order provisions  
20 have been reviewed primarily on an individual market  
21 basis. The reform effort provides the opportunity to  
22 consider and establish a nationally coordinating Class I  
23 pricing surface that uses location adjustments to the  
24 differential levels to price milk for fluid use in every  
25 county in the United States.

1           64 Federal Register at 16108, open paren,  
2 1999, close paren, emphasis added.

3           JUDGE CLIFTON: Now, I'm going to stop you  
4 there just so we can all take a five-minute stretch  
5 break right -- right where we sit, particularly the  
6 court reporter.

7           (Whereupon a break was taken.)

8           JUDGE CLIFTON: We're back on record at 3:23.  
9 We'll go until 4:30 today. The reason we must stop  
10 early is we need to clear out of the room we're in.  
11 This is where we'll be on Monday morning at 9:00, but it  
12 will be used over the weekend for one or more other  
13 events.

14           Mr. Hollon, you may resume your testimony on  
15 page 12.

16           THE WITNESS: Finally, the adopted Class I  
17 pricing structure meets the requirements of the AMAA.  
18 The broad tenet of the AMAA is to establish and maintain  
19 orderly marketing stability and orderly marketing  
20 conditions for milk. The Federal Milk Marketing Order  
21 will continue to achieve these goals primarily through  
22 classified pricing and marketwide pooling. As to the  
23 pricing requirements, the AMAA objective to stabilize  
24 the marketplace with minimum prices and not set market  
25 prices is also achieved. As a national Class I pricing

1 structure, it specifically addresses and adequately sets  
2 appropriate Class I differential levels that will result  
3 in milk prices that are high enough to generate  
4 sufficient revenue for producers so that an adequate  
5 supply of milk can be maintained while continuing to  
6 provide equity to handlers.

7 64 Federal Register at 64118, open paren,  
8 1999, close paren, emphasis added.

9 The Reform Decision clearly intended to  
10 establish a uniform national price surface for Class I  
11 milk prices. As a part of that emphasis, the Decision's  
12 price surface included provisions and prices for the  
13 California marketing area as proposed here. The  
14 California dairy industry had the option to be included  
15 in the reformed orders and provided input to the  
16 decision, but did not choose that option. Footnote 3 of  
17 the Legislative and Background Requirements of the  
18 Reform Decision notes: The Omnibus Consolidated and  
19 Emergency Supplemental Appropriations Bill, passed in  
20 October 1998, extended the time frame for implementing  
21 Federal Milk Order Reform Amendments from April 4, 1999,  
22 to October 1, 1999. The extension specifies that the  
23 final decision, defined as the final rule for purposes  
24 of this legislation, will be issued between February 1  
25 and April 4, 1999, with the new amendments becoming

1 effective on October 1, 1999. The legislation also  
2 provides that California has from the date of issuance  
3 of the final decision until September 30, 1999, to  
4 become a separate Federal Milk Marketing Order.

5 64 Federal Register at 16027, open paren,  
6 1999, close paren.

7 In addition to submitting comments and  
8 participating in industry and congressional proceedings,  
9 California dairy interests had approximately six months  
10 to review the provisions of the Reformed Orders and did  
11 not submit a petition for an order at that time. The  
12 California state orders separate Class 1 pricing surface  
13 compromise the uniformity of the national pricing grid  
14 and becomes a source of disorderly marketing.

15 Table 1.B, five pages, "Comparison of FMMO  
16 Class I Announced Prices in the Marketing Area and CSO  
17 Class 1 Prices, 2000 through July 2015," shows price  
18 comparisons between the national grid and the California  
19 state order grid for in-state markets. Table 1.C, five  
20 pages, "Comparison of California State Order minimum  
21 Class 1 Announced Prices in the Marketing Area with  
22 Surrounding Market -- Federal Milk Marketing Order  
23 minimum prices, February 2000 to January 2015," details  
24 price comparisons between key California markets and  
25 their natural competitor markets in the adjacent state

1 as provided by the Federal Milk Marketing Order grid.

2 The national pricing grid establishes five  
3 differential zones in the proposed marketing area. See  
4 Map 1.D "Federal order Class I Differentials California  
5 Marketing Area." Those range from \$2.10 in the San  
6 Diego dash Los Angeles area; \$2.00 in the Southeast  
7 corner of the state; \$1.80 from east and north of the  
8 \$2.10 and \$2.00 zones north up to the Pacific coast,  
9 including the San Francisco and Bay areas, to Oregon.

10 JUDGE CLIFTON: Now, after you've given that  
11 \$2.10 slash \$2.00, would you read from there again,  
12 please.

13 THE WITNESS: Zones north up the Pacific  
14 coast, including the San Francisco and Bay areas, to  
15 Oregon; \$1.60 in the central part of the state with the  
16 largest milk production areas; and \$1.70 -- and a \$1.70  
17 zone north of the \$1.60 region bordering Nevada and  
18 Oregon, which includes the second largest production  
19 region in the state.

20 The California State Order has two pricing  
21 regions. See Map 1.E "California Department of Food and  
22 Agriculture Milk Marketing Areas." The Southern  
23 California marketing area generally encompasses the  
24 major population regions of Los Angeles and San Diego.  
25 The Northern California marketing area extends to the

1 northern border of the state and includes the population  
2 centers of Sacramento and the San Francisco and Bay  
3 areas. Map 1.D also displays both pricing grids on a  
4 single map.

5 For the in-state comparisons we computed  
6 differences between the national Federal Milk Marketing  
7 Order grid and the California State Order grid in each  
8 of the Federal Milk Marketing Order differential area.  
9 There are counties in each differential area that  
10 overlap the corresponding California State Order  
11 Marketing Area. Table 1.B, five pages, details the  
12 differences from July 2000 to July 2015 with Table 1.B,  
13 page five, being a summary using the average comparisons  
14 for the previously noted periods. I'm sorry, for the  
15 periods noted previously.

16 JUDGE CLIFTON: Now, Mr. Hollon, while you're  
17 stopped, so would you look real quick at Table 1.B, and  
18 tell us what the dates are. It shows the differences  
19 from what range of dates?

20 THE WITNESS: Are you asking me from beginning  
21 to end?

22 JUDGE CLIFTON: Yes, the beginning and the end  
23 dates.

24 THE WITNESS: There is data in Table 1.B  
25 beginning in January of 2000 and ending in July of 2015.

1 JUDGE CLIFTON: All right. So if you had  
2 previously read July 2000, that wasn't correct, it's  
3 actually -- that's -- 2000 begins with January?

4 THE WITNESS: Correct.

5 JUDGE CLIFTON: All right. Thank you.

6 THE WITNESS: In the higher population zones  
7 the California State Order Class I price is below the  
8 Federal Milk Marketing Order grid for all years and  
9 periods measured. Note that the period shown for  
10 comparisons matched the period since 2000 where the  
11 California State Order made a change in the method for  
12 calculation -- calculating the contribution of whey to  
13 minimum prices. For the most recent period of  
14 August 2012 to July 2015, the shortfall is 37 and 27  
15 cents per hundred. In the lower priced zones, there  
16 were some periods prior to September 2011 where the  
17 California State Order Northern California zone price  
18 was above the Federal order grid price but at small  
19 levels. And for the months since then, the Northern  
20 California price has been below the Federal milk  
21 Marketing Order grid each year by a low of 2 cents per  
22 hundredweight in the \$1.60 zone to 33 cents in the \$1.80  
23 zone.

24 Table 1.C makes similar Class I price  
25 comparisons with California State Order prices and with



1 out-of-state Federal Milk Marketing Order Class I price.  
2 The method used for comparison was to establish the  
3 Federal Milk Marketing Order grid difference by netting  
4 both Class I differentials and then comparing that value  
5 with the difference between the California State Order  
6 price and the prevailing Federal Milk Marketing Order  
7 price. The locations chosen represent locations of  
8 processing plants and likely competitors.

9           The first comparison is between the minimum  
10 prices in the Phoenix, Arizona market with those of the  
11 Los Angeles/San Diego, in parens, LA slash SD, market.  
12 The Los Angeles/San Diego market differential is  
13 \$2.10 percent per hundredweight and the Phoenix  
14 differential is \$2.35 so the Federal Milk Marketing  
15 Order grid spread price differential is minus 25 cents.  
16 When comparing the annual California State Order  
17 Southern California price with the announced Federal  
18 Milk Marketing Order price, at Phoenix the difference  
19 averages minus 62 cents. The difference is negative for  
20 all the collective average time periods shown.

21           For the Las Vegas, Nevada, to the Los  
22 Angeles/San Diego markets, the Federal Milk Marketing  
23 Order grid difference is the plus 10 cents per  
24 hundredweight. When the Los Angeles/San Diego  
25 differential of \$2.10 is compared to the Las Angel --

1 Las Vegas differential of \$2.00. However, comparing the  
2 Southern California announced price with the Las Vegas  
3 price results in a difference of minus 27 cents per  
4 hundredweight average for the August 2012 to July 2015  
5 period. All period measures are negative.

6 For the Reno, Nevada, to Sacramento market  
7 comparison, the Federal Milk Marketing Order grid  
8 difference is zero. However, the Northern California  
9 price compared to the Reno Federal Milk Marketing Order  
10 price averages a negative 23 cents per hundredweight for  
11 the August 2012 to July 2015 period. All period  
12 measures are negative.

13 In the case of comparison in -- start over.

14 In each case of comparison, the California  
15 State Order pricing system returns a different, lower,  
16 price to producers in the proposed marketing area than a  
17 Federal Milk Marketing Order price would yield. In  
18 addition, the market-to-market comparison does not yield  
19 the results provided by the Federal Milk Marketing Order  
20 Class I pricing grid as established in the Federal Milk  
21 Marketing Order Reform process. These price differences  
22 contribute to a marketing situation where milk buyers  
23 are impacted by different minimum pricing conditions  
24 instead of the uniform -- a single uniform pricing grid.

25 1. Pricing of Out of State Milk.

1           There are additional disorderly marketing  
2 conditions present in the California market that cannot  
3 be cured by the presence of a state order, and in fact  
4 are caused by the presence of the state order. First,  
5 there is milk produced on California dairy farms located  
6 outside the state that is marketed to Class I processing  
7 plants.

8           JUDGE CLIFTON: Could you read that sentence  
9 again, please?

10           THE WITNESS: First, there is milk produced on  
11 dairy farms located outside the state that is marketed  
12 to Class I processing plants. These deliveries cannot  
13 be regulated by the state order. This practice removes  
14 Class I revenues from the California State Order as well  
15 as lowering the price for the purchasing handler who  
16 would not make the purchase if it cost more than  
17 California State Order minimum. This is a regular  
18 occurrence in the marketplace -- in the marketing area.  
19 CDFA data has indicated this volume totaled  
20 547 million pounds in 2014. Ponderosa Dairy has in fact  
21 proposed at that hearing that they be allowed to  
22 continue this practice if a Federal Milk Marketing Order  
23 is implemented and have their milk priced by the Federal  
24 Milk Marketing Order at terms preferential to other  
25 producers in the order.

1           The disordering situation arising from the  
2 inability of a California State Order to price milk  
3 produced out of the state and delivered to processors in  
4 the state would be cured by the implementation of the  
5 California Federal Milk Marketing Order.

6           Additionally, producer milk regularly leaves  
7 the California market and in our estimation delivers to  
8 a plant or plants pooled by Federal Milk Marketing Order  
9 131 that market the milk back into the California  
10 market. The returns from this transaction are pooled in  
11 Federal Milk Marketing Order 131 due to the requirements  
12 of the Milk Regulatory Equity Act. These actions also  
13 constitute disorderly market conditions and would be  
14 cured by the implementation of a California Federal milk  
15 Marketing Order.

16           B. Price Misalignment for Manufacturing Class  
17 Handlers.

18           This proposal uses the Federal Milk Marketing  
19 Order manufacturing class prices. These prices are  
20 different from the California State Order prices, and  
21 the differences are one of the reasons for this proposal  
22 and a source of disorderly marketing. The Federal Milk  
23 Marketing Order manufactured produces pricing grid, that  
24 is, the prices for Class II, Roman numeral Class II,  
25 Class III, Roman numeral CIII, and Class IV, Roman

1 numeral CIV, are clearly national prices. There is only  
2 one month -- monthly price for each -- for each for the  
3 entire grid. They are national prices because the  
4 markets they compete in are national in nature, in many,  
5 if not most cases, the raw they're -- they are produced  
6 from are bought and sold on a national basis. Based on  
7 the NASS dairy product production data, there are clear  
8 regional differences where dairy products are produced.  
9 Regional population density does not match production  
10 density, and thus product must move between regions to  
11 satisfy demand. A California Federal Milk Marketing  
12 Order would include -- would assure that California  
13 Federal Milk Marketing Order regulated handlers pooling  
14 milk sold to manufacturing class processors pay the same  
15 uniform minimum prices.

16           Traditional fluid milk commerce, however,  
17 remains regional in nature chiefly due to the  
18 perishability of the finished product. Whiles labels or  
19 brand may be national for these products, Borden's or  
20 Dairy Pure, for example, the procurement of the raw  
21 material and the processing and distribution of the  
22 finished product are most generally regional. And in  
23 cases, the predominance of retail sales is composed of  
24 local brands or store brands that are processed within  
25 the region.

1           Manufactured dairy products can easily be  
2 produced in one region of the US and marketed in other  
3 regions. Examples are many and product brand names  
4 might include Tillamook Cheese, Blue Bunny ice cream,  
5 Yoplait, Chobani or Dannon Yogurt, Eagle Brand sweetened  
6 condensed milk, Crystal Farms cheese, Ben and Jerry's  
7 ice cream or Land O'Lakes, Challenge, and Plugra butter.

8           This concept of a national supply and demand  
9 relationship is clearly articulated in the Reform  
10 Decision when the manufacturing class prices are  
11 discussed.

12           The formulas in this decision use national  
13 commodity price theories, thereby reflecting the  
14 national supply and demand for dairy product -- I'm  
15 sorry. I'm going to start this -- this cite over.

16           The formulas in this decision use national  
17 commodity price series thereby reflecting the national  
18 supply and demand of dairy products and the national  
19 demand for milk.

20           64 Federal Register at 16096, open paren,  
21 1999, close paren, emphasis added.

22           1. Class II. Sorry, Class Roman numeral II,  
23 Class Arabic 2/3 Price Misalignment for Similarly  
24 Situated handlers.

25           The Federal Milk Marketing Order Class II

1 price is computed using the nationwide grid and is the  
2 Federal order -- Federal Milk Marketing Order Class IV  
3 price plus a fixed 70 cents per hundredweight  
4 differential. While the California State Order Class 2  
5 and Class 3 classifications include essentially the same  
6 products as the Federal Milk Marketing Order Class II  
7 classification, there are disorderly marketing  
8 implications resulting from regulatory differences which  
9 do not reflect market -- market fundamental. In the  
10 California State Order system, announced Class 2 and 3  
11 prices apply for two months at a time and are based on  
12 butter and milk powder commodity price averages from the  
13 prior two months. For example, the August and September  
14 Class 2 prices is based on commodity price data from  
15 June and July. Federal Milk Marketing Order Class II  
16 price is announced monthly and is based on data from the  
17 prior month. Market conditions can change swiftly, and,  
18 in some cases, noticeably over the four-month period  
19 spanned by this calculation. Perhaps the extreme  
20 example would be the August and September California  
21 State Order Class 2 price, generally the lowest months  
22 of production in California, where calculations are  
23 based on market data for June and July, which are  
24 generally higher months for milk production. These  
25 cyclical production patterns over time and reflected in

1 price differences.

2 An example, a large Class Roman numeral II  
3 slash Arabic 2 price difference is for the months of  
4 July 2014 through December of 2014 where the California  
5 State Order price was lower than Federal Milk Marketing  
6 Order price by 96 cents per hundredweight in July, \$1.37  
7 per hundredweight in August, \$2.14 per hundredweight in  
8 September, and then higher by \$2.01 in October, \$4.03 in  
9 November, \$1.39 cents in December, and \$4.30 in January  
10 of 2015.

11 Cream, condensed skim milk, open parens, CSM,  
12 close, and sweetened condensed skim milk, open  
13 parentheses, SCSM, close, are dairy ingredients commonly  
14 used in many products from product formulations and  
15 carry Class II, Roman numeral, and Class 2 or 3, Arabic  
16 numeral classifications. They are transported long  
17 distances in bulk tankers and hundreds or even thousands  
18 of miles -- mile deliveries are not uncommon.

19 Because of the bulk nature of these condensed  
20 products, they are more prone to opportunistic  
21 situations. These price differences can create  
22 disorderly market conditions when dairy ingredients  
23 enter markets generally on a spot basis to exploit  
24 short-term -- short-term price disparities. In  
25 addition, there are classification differences which



1 cause further disorderly market -- marketing conditions  
2 when these types of ingredients -- ingredient products  
3 cross the different classification definitions and  
4 boundaries. As the two major proponents seek to unify  
5 the classification definitions using the Federal Milk  
6 Marketing Order terms, these classification differences  
7 should dissolve.

8           Table 1.F, five pages, "Comparison of Federal  
9 Milk Marketing Order Class II Announced Prices,  
10 California State Order Announced Class 2 and 3 Prices,  
11 2000 through July 2015," captures these announced price  
12 differences from 2000 to July 2015. Columns D, F, and J  
13 compare the differences between the California State  
14 Order Southern California, Northern California Class 2  
15 price and the respective Federal Milk Marketing Order  
16 Class II price and the California State Order Class 3  
17 price with the Federal Milk Marketing Order Class II  
18 price. After January 2009, California State Order Class  
19 3 prices are the same for both Northern and Southern  
20 California. The California State Order price 2 and 3  
21 was lower than the Federal Milk Marketing Order Class II  
22 price in all of the compared average periods except  
23 during September 9, 2011, through July 7, 2012.

24           Over the entire time period 2000 through  
25 July 2000 --

1 JUDGE CLIFTON: I'm sorry. I'm sorry. This  
2 is small, but go back to the bottom of page 19, if you  
3 will. So the time period there is?

4 THE WITNESS: September 2011 through  
5 July 2012.

6 JUDGE CLIFTON: Thank you.

7 THE WITNESS: Over the entire time period 2000  
8 through July 2015, the Federal Milk Marketing Order  
9 Class II price versus the California State -- I'm sorry,  
10 California State Order Southern California Class 2 price  
11 difference averaged minus 24 cents per hundredweight.  
12 Between January 2000 and November 2007, the difference  
13 averaged minus 24 cents. Between December 2007 and  
14 August 2011, the average difference was minus 30 cents.  
15 Between September 2011 and July 2012, the average  
16 difference was positive 50 cents. And between  
17 August 2012 and July 2015, the average difference was  
18 minus 39 cents. The largest positive difference with  
19 Federal Milk Marketing Order greater than California  
20 State Order was \$4.30 in January 2015. And the largest  
21 negative difference was minus -- California State Order  
22 greater than Federal Milk Marketing Order \$3.05 in  
23 September of 2012. The primary reason for the wide  
24 range in prices is the two-month pricing period in the  
25 California State Order price formula. The trends for

1 the Federal Milk Marketing Order Class II, Northern  
2 California, California State Order Class 2 price series  
3 were similar.

4 Trends for the Federal Milk Marketing Order  
5 Class II price and the California State Order Class 3  
6 price for the same comparison periods are also similar  
7 and noted in Table 1.F, column J.

8 2. Class IV and Class 4a Price Misalignment  
9 for Similarly Situated Handlers.

10 The Federal Milk Marketing Order Class IV and  
11 California State Order Class 4a prices are used to value  
12 milk in the manufacture of butter and milk powders. The  
13 Federal Milk Marketing Order price is a nationwide price  
14 for similar reasons as noted for Class II products. The  
15 Federal Milk Marketing Order and California State Order  
16 price differences are shown in Table 1.G, five pages,  
17 "Comparison of Federal Milk Marketing Order Class III  
18 and IV prices," and now -- I'm sorry, Class III and IV  
19 Announced Prices and California State Order Class 4a and  
20 4b Price, 2000 through July 2015. Column E is the  
21 Federal Milk Marketing Order Class IV price, Column F is  
22 the California State Order Class 4a price, and Column G  
23 is the difference between, the two California State  
24 Order less Federal Milk Marketing Order. There are no  
25 years where the annual average California State Order

1 price was greater than the Federal Milk Marketing Order  
2 price. Over the entire time period, 2000 through  
3 July 2015, the difference averaged minus 29 cents per  
4 hundredweight. Between January 2000 and November 2011,  
5 the difference average minus --

6 JUDGE CLIFTON: Let me stop you there.

7 THE WITNESS: Oh, 2007.

8 JUDGE CLIFTON: Yes.

9 THE WITNESS: Start that sentence over.

10 JUDGE CLIFTON: Please.

11 THE WITNESS: Between January 2000 and  
12 November 2007, the difference average minus 38 cents.

13 Between December 2007 and September 2011 --

14 JUDGE CLIFTON: Or?

15 THE WITNESS: Ah. August 2011, the difference  
16 average was minus 19 cents. Between September 2011 and  
17 July 2012, the average difference was minus 26 cents.

18 And between August 2012 and July 2015, the average  
19 difference was minus 20 cents. This difference is  
20 reflected in Chart 1.H, "California State Order Class 4a  
21 less Federal Milk Marketing Order Class IV" showing  
22 annual variations from 2000 to 2014. With the exception  
23 of 2007, the variations in the differences were similar.

24 3. Class III/Class 4b Price Misalignment for  
25 Similarly Situated Handlers.

1           The Federal Milk Marketing Order Class III and  
2 California State Order Class 4b prices are used to value  
3 milk used in the manufacture of cheese and whey  
4 products. The Federal Milk Marketing Order price is a  
5 nationwide price for similar reasons as noted in the  
6 other manufacturing -- in the other classes of  
7 manufacturing products.

8           The Federal Milk Marketing Order and  
9 California State Order price differences are shown in  
10 Table 1.G, five pages, "Comparison of Federal Milk  
11 Marketing Order Class III and IV Prices, Announced  
12 Prices, and the California State Order 4a and 4b price,  
13 July 2000 to July 2015."

14           JUDGE CLIFTON: Your dates there?

15           THE WITNESS: 2000 to July 2015.

16           JUDGE CLIFTON: Thank you.

17           THE WITNESS: Column B is the Federal Milk  
18 Marketing Order Class III price, Column C, the  
19 California State Order Class 4b price, and Column D, the  
20 difference between the two California State Order less  
21 Federal Milk Marketing Order. In the 187 months between  
22 January 2000 and July 2015, the Class IV price has  
23 exceeded the Class 4b price 100 --

24           JUDGE CLIFTON: You've got a different Roman  
25 numeral there.

1 THE WITNESS: The Class III price has exceeded  
2 the Class 4b price 161 times. For the entire period,  
3 January 2000 to July 2015, the difference average minus  
4 91 cents per hundredweight, but the range of difference  
5 has increased significantly in recent years. Between  
6 January 2000 and November 2007, the difference averaged  
7 minus 39 cents. Between December 2007 and August 2011,  
8 the difference was minus 91 cents. Between  
9 September 2011 and July 2012, the difference -- the  
10 average difference was minus \$2.22. And between  
11 August 2012 and July 2015, the average difference was  
12 minus \$1.89.

13 There are no years where the annual difference  
14 shows the California State Order price greater than the  
15 Federal Milk Marketing Order Price. The widest  
16 difference was in November 2014 where the California  
17 State Order 4b price was \$3.24 cents per hundredweight  
18 less than the Federal Milk Marketing Order Class III  
19 price. Chart 1.I "California State Order 4b less  
20 Federal Milk Marketing Order Class III" depicts the  
21 annual average price differences over the 2000 to 2014  
22 periods.

23 A. Whey Contribution to the Class III/4b  
24 Price.

25 On Chart 1.I there is a clear difference in

1 the trend that appears in 2010. This difference is best  
2 explained by noting the changes in the manner in which  
3 the California State Order computes the whey  
4 contribution to the 4b price versus the way that the  
5 Federal Milk Marketing Order performs the similar  
6 contribution calculation. The resulting difference  
7 between the two whey calculation methods ranges from  
8 significant to extraordinary. The Federal Milk  
9 Marketing Order whey contribution calculation uses the  
10 product price formula method generally described as  
11 market price less the cost to make times the yield  
12 factor. This method moves penny for penny with changes  
13 in the whey market prices. When whey market prices are  
14 at their high, the contribution to the Class III price  
15 is high; and conversely, when low, the contribution is  
16 reduced.

17 The California State Order formula has a  
18 look-up table structure that assigns a contribution to  
19 the milk value based on the relationship of the whey  
20 price bracket to the associated contribution rate.  
21 However, the California State Order caps the  
22 contribution at 75 cents per hundredweight. This value  
23 is reached when the whey price is 60 cents per pound or  
24 higher. It also floors the low end of the contribution  
25 at 25 cents any whey price level below 25 cents. Note

1 that the temporary adjustment in place currently in the  
2 California State Order regulations has a zero  
3 contribution value if whey is below 21 cents,  
4 contributes \$2 and one-half cent per hundredweight to  
5 the Class 4b price if whey is 60 cents or more and has a  
6 higher contribution value in the intervening brackets  
7 than any prior bracket structures.

8           Dry whey's market prices reaches extended  
9 periods of higher prices for the period August 2012  
10 through July 2015. Since 2012, the California State  
11 Order's average 26th to 25th Western Dry Whey Mostly  
12 Average Price published by USDA/AMS/Dairy Market News  
13 whey price has averaged 57 cents per pound, with a range  
14 from 40 cents to 67 cents and nine consecutive months  
15 where the price was above 60 cents.

16           JUDGE CLIFTON: Now, that sentence was just  
17 exact except the very first phrase, so where you start  
18 since.

19           THE WITNESS: Since August 2012.

20           JUDGE CLIFTON: All right. Thank you.

21           THE WITNESS: The California State Order  
22 formula cap at a white right -- at a whey price of 60  
23 cents per pound vastly undervalued the 4b price in  
24 relation to the Class III price. Table 1J -- I'm sorry,  
25 Table 1 dot J, five pages, "Comparison of Monthly



1 National Dairy Product Sales Report and Dairy Market  
2 News Western Mostly 26th through 25th Whey Prices and  
3 the Value Contribution to the Federal Milk Marketing  
4 Order Class III and California State Order 4b Price 2000  
5 to July 2015" details the extent of the difference in  
6 contribution in whey value for the period August 2012  
7 through July 2015. While the average differences in the  
8 underlying commodity whey prices were approximately 2  
9 cents, the contribution of the National Dairy Product  
10 Sales Report price to the Federal Milk Marketing Order  
11 Class III price averaged \$2.38 cents per hundredweight.  
12 Over the same time, the California State Order  
13 calculation using the Western Whey Mostly Price averaged  
14 from 26th of the prior month to the 25th of the current  
15 month contributed 68 cents per hundredweight to the  
16 California State Order Class 4b price. The difference  
17 was \$1.70. The smallest difference was 68 cents in  
18 July 2015, and the largest \$2.23 in July of 2014.

19 Consequences of the Class Price Misalignment.

20 It is difficult to accept or explain the class  
21 price differences of this magnitude for what amounts to  
22 deliveries to plants manufacturing identical products  
23 and sold into similar situated markets. Cheese and whey  
24 products produced in California plants and priced using  
25 the California State Order prices are marketed and sold

1 nationwide directly alongside similar products produced  
2 in Federal Milk Marketing Order areas priced under  
3 California Federal -- I'm sorry, start this sentence  
4 over again.

5 Cheese and whey products produced in  
6 California plants and priced using the California state  
7 order prices are marketed and sold nationwide directly  
8 alongside similar products produced in Federal milk  
9 Marketing Order areas priced under Federal Milk  
10 Marketing Order terms. The difference in pricing may  
11 cause marketplace decisions that are solely due to  
12 different regulations and not to market fundamentals.  
13 This clearly does not promote orderly market --  
14 marketing conditions.

15 Said another way, a dairy farm operator with  
16 two facilities, one in California priced at Class 4b and  
17 one in a Federal Milk Marketing Order area priced at  
18 Class III, would have experienced two vastly different  
19 regulatory minimum prices for milk used to produce  
20 similar cheese and whey products. On average, this  
21 difference would be \$1.89 per hundredweight lower for  
22 milk from the California dairy than milk from a dairy  
23 operating in the Federal Milk Marketing Order for the  
24 period August 2012 through July 2015. This is the most  
25 significant reason for the difference in producer

1 mailbox prices between farms located in California and  
2 those located in Federal Milk Marketing Order areas.  
3 This difference places the California farmer in a much  
4 less competitive position to bid for land, cattle, feed,  
5 facilities, services, operating capital and labor than  
6 his counterpart whose milk is priced by Federal Milk  
7 Marketing Order pricing regulation. This disorderly  
8 market condition should be remedied by having the  
9 Federal Milk Marketing Order pricing grid include the  
10 California market.

11           Class pricing following California State Order  
12 provisions results in different and lower minimum prices  
13 than does Federal Milk Marketing Order class prices for  
14 each class. The price differences can be significant  
15 for the Class III/Class 4b price relationship in terms  
16 of both multi-month periods and at times with only a few  
17 months of comparisons. While not as great over most of  
18 the multi-month periods, there are nonetheless many  
19 monthly periods where the comparisons are significant  
20 and impact marketplace decisions solely on the basis of  
21 regulatory differences and not based on market price  
22 differences.

23           The class price differences we have  
24 demonstrated ultimately result in producer prices for  
25 California dairy farm businesses that are -- that are

1 significantly below those of similarly situated dairy  
2 farm businesses whose milk is priced by Federal Milk  
3 Marketing Order provisions. We demonstrated earlier  
4 that producers' prices, as measured by component  
5 standardized AMS Mailbox Milk Prices, vary widely in  
6 markets that similarly to California have high  
7 utilizations of manufactured products, and additionally  
8 in the case of the Northwest States geographic  
9 similarity. This difference results in marketing  
10 conditions which do not effectuate the purposes of the  
11 underlying Federal Milk Marketing Order enabling  
12 legislation.

13 Roman numeral IV. Impact on Price Risk  
14 Management Strategies.

15 If a California Federal Milk Marketing Order  
16 utilizes the same class price formulas as the rest of  
17 the country, we feel the implementation of a California  
18 Federal Milk Marketing Order will increase the future's  
19 market liquidity in Class III and Class IV. This  
20 will -- this will lead to increased use of hedging  
21 strategy by California dairymen, helping them reduce  
22 their financial operating risk.

23 The use of hedging by California dairy farmers  
24 has been limited, in part, because of the uncertainty of  
25 using a Federal Milk Marketing Order base price to hedge

1 a California class price due to the overall difference  
2 in the two pricing series. This difference in the two  
3 pricing series creates greater basis risk, that is the  
4 difference between the hedged instrument, which would be  
5 the Federal Milk Marketing Order Class III or IV price  
6 and the actual pay price in a California dairy farmer's  
7 milk check. This is a significant contributing cause to  
8 why there is a lower use of hedging by California dairy  
9 farms.

10 Thus, the benefit of a California Federal Milk  
11 Marketing Order may be more and greater applications of  
12 hedging by California dairy farms which brings better  
13 long-run financial ability to them and ultimately to the  
14 processors that buy their milk.

15 JUDGE CLIFTON: That's better long-run  
16 financial?

17 THE WITNESS: Stability.

18 JUDGE CLIFTON: Thank you.

19 THE WITNESS: To them and ultimately to the  
20 processors that buy their milk.

21 Roman numeral VIII. Conclusion.

22 JUDGE CLIFTON: Roman numeral?

23 THE WITNESS: VII. Conclusion.

24 Current prices for both producers and handlers  
25 in California are out of line with national pricing and

1 national values for milk. A California Federal order is  
2 necessary to bring the California dairy industry into  
3 the federal system of national class prices for dairy  
4 farmers and processors in the state, and to enhance and  
5 maintain orderly marketing conditions.

6 DIRECT EXAMINATION

7 BY MR. BESHORE:

8 Q. Thank you, Mr. Hollon. The -- Judge Clifton  
9 was -- was very helpful in interrupting from time to  
10 time where you may have misread or misstated a word or  
11 two in your -- in your prepared text. If the transcript  
12 reflects a word stated differently than that which is in  
13 typed in Exhibit 19, was it your intention to read what  
14 is typed precisely, and the typed exhibit should prevail  
15 over what may have been spoken on the spot?

16 A. Yes.

17 Q. Okay. Now, let's look at --

18 JUDGE CLIFTON: However, I must say I really  
19 appreciate that Mr. Hollon used the whole word instead  
20 of just the initials. As many times as I've heard them,  
21 it still makes more sense to me to hear the words, so he  
22 repeatedly did that, and I'm so grateful. But I  
23 understand your question to him is if the data are being  
24 expressed, the confidence is in Exhibit 19.

25 MR. BESHORE: Yes.

1 JUDGE CLIFTON: It's a remarkable piece of  
2 work.

3 BY MR. BESHORE:

4 Q. Remarkable piece of work, Mr. Hollon.

5 A. Thank you, Judge Clifton.

6 Q. Okay. Let's look at Exhibit 20.

7 A. I'm sure others will have different voice  
8 inflection than you.

9 Q. Do you have -- do you have the compilation of  
10 Tables 1.A through 1.K stapled together in Exhibit 20?

11 A. I do.

12 Q. Okay. Now, did you prepare these tables?

13 A. I did.

14 Q. Personally?

15 A. I did.

16 Q. Let's -- and you've -- your statement has --  
17 has talked about them, and it's very difficult to read a  
18 statement and read a table at the same time, so I want  
19 to go back through them with you a little bit and -- and  
20 have you describe -- describe them to some extent while  
21 we're able to just focus on the table.

22 Starting with --

23 JUDGE CLIFTON: Let's -- let's -- let's take a  
24 little stretch break, and then it will more quiet, and  
25 the court reporter can stretch again. Just very few

1 minutes, just right here at our chairs.

2 (Whereupon off the record.)

3 JUDGE CLIFTON: Let's go back to work at 4:08.

4 BY MR. BESHORE:

5 Q. So looking, then, Mr. Hollon, at the document  
6 that's titled Cooperatives' Table 1.A, Comparison -- on  
7 the first page, top.

8 JUDGE CLIFTON: I'm sorry, I -- there's too  
9 much competition from the back. We really can hear you.  
10 I hope you don't have to move the copy machine out of  
11 this room.

12 MS. MAY: Yeah, we do.

13 JUDGE CLIFTON: Oh, dear. That's big.

14 MS. MAY: It is.

15 JUDGE CLIFTON: Shall we -- shall we stop now?  
16 They have to move that copy machine, that's a problem.

17 MR. ENGLISH: The building needs to move it.

18 MR. BESHORE: We need to move it for the  
19 building.

20 MS. TAYLOR: No. They're here to pick it up.  
21 They're here to pick it up.

22 MR. BESHORE: They're here to pick it up.

23 MS. MAY: They said it will take them about  
24 ten minutes to move it out.

25 JUDGE CLIFTON: Let's see. We would -- if we



1 did that, we'd only have ten more minutes of testimony.  
2 Let's -- let's call it a wrap. Is that fine with you,  
3 Mr. Beshore?

4 MR. BESHORE: That's acceptable.

5 JUDGE CLIFTON: Thank you. All right. We'll  
6 stop for the day. We're -- we're losing about 20  
7 minutes, but that -- it's a huge problem.

8 So I'll see you all here Monday at 9:00. We  
9 go off record now at 4:10.

10 (Whereupon the proceedings recessed  
11 at 4:10 p.m.)

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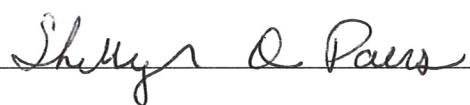
I, SHELLY A. DAVIS , hereby certify:

I am a duly qualified Certified Shorthand Reporter, in the State of California, holder of Certificate Number CSR 8947 issued by the Court Reporters Board of California and which is in full force and effect.

I am not financially interested in this action and am not a relative or employee of any attorney of the parties, or of any of the parties.

I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

Dated: October 8, 2015

  
\_\_\_\_\_

	812:10	689:17;796:19;	784:4;786:12;	<b>administer (2)</b>
<b>\$</b>	<b>\$9,346 (1)</b>	798:13	787:11;821:3	694:13;780:24
	799:20	<b>account (3)</b>	<b>adapted (2)</b>	<b>administered (11)</b>
<b>\$1.01 (1)</b>	/	680:2,14;807:7	796:8,12	672:3,9,10;692:8;
808:17		<b>accountability (1)</b>	<b>add (3)</b>	694:10,18;695:4;
<b>\$1.173 (1)</b>	/// (1)	678:13	679:7;722:7;759:7	701:8;729:6;763:7;
801:16	693:25	<b>accounted (2)</b>	<b>added (5)</b>	800:22
<b>\$1.37 (1)</b>		679:10;690:4	679:22;807:24;	<b>administering (2)</b>
829:6	[	<b>accounting (7)</b>	816:2;817:8;827:21	759:20;768:22
<b>\$1.39 (1)</b>		667:17;678:6,19;	<b>adding (1)</b>	<b>administrators (1)</b>
829:9	[and] (1)	680:8;681:8,10,11	679:7	674:13
<b>\$1.60 (3)</b>	713:1	<b>accurate (2)</b>	<b>addition (8)</b>	<b>administration (2)</b>
<b>\$1.70 (3)</b>	A	668:12;687:24	673:25;762:3;	674:21;735:24
819:15,17;821:22		<b>achieve (4)</b>	765:18,24;793:10;	<b>Administration's (1)</b>
819:16,16;838:17		795:3,8;796:25;	818:7;823:18;	755:2
<b>\$1.80 (2)</b>		816:21	829:25	<b>Administrative (19)</b>
819:7;821:22	<b>abandoned (1)</b>	<b>achieved (1)</b>	<b>additional (12)</b>	652:13;701:8;
<b>\$1.85 (1)</b>	733:13	816:25	664:12;667:11;	711:6,12;719:17;
808:9	<b>abandons (1)</b>	<b>achieves (1)</b>	724:2;727:21,22;	723:13,18;724:14;
<b>\$1.89 (2)</b>	729:7	795:12	729:6;734:1;786:2;	725:3,5,12;726:1,4,
835:12;839:21	<b>abbreviation (1)</b>	<b>acknowledge (3)</b>	790:17;793:25;	6;727:5,5,19;755:10;
<b>\$2 (1)</b>	802:17	759:8;783:7;	806:15;824:1	765:21
837:4	<b>abeyance (1)</b>	786:21	<b>Additionally (4)</b>	<b>Administrator (33)</b>
<b>\$2.00 (4)</b>	761:9	<b>acknowledged (1)</b>	805:22;806:10;	655:11,17;664:15;
819:6,8,11;823:1	<b>abide (1)</b>	758:18	825:6;841:7	675:10;686:2;
<b>\$2.01 (1)</b>	740:19	<b>AcMoody (2)</b>	<b>address (19)</b>	691:22,24;694:15;
829:8	<b>ability (5)</b>	658:13,13	658:16;662:3;	695:5;699:16;
<b>\$2.05 (1)</b>	714:6;724:16;	<b>acquaintance (1)</b>	663:11;664:9;672:1,	700:22;725:10,11,
808:15	771:24;780:23;	662:23	1;702:23,25;703:19;	18,23;726:4;737:12,
<b>\$2.10 (5)</b>	842:13	<b>acquainted (1)</b>	710:3,12;711:1;	19;738:19,25;739:9,
819:5,8,11;822:13,	<b>able (13)</b>	663:2	719:2;731:7;746:5;	16,20;740:9;742:14;
25	662:23,24;664:8;	<b>across (4)</b>	760:8;785:19;795:7;	747:2,8,10;755:3,17;
<b>\$2.12 (1)</b>	709:8,15;714:18;	785:2;810:22;	797:4	768:23;776:19;
808:13	718:25;721:4;752:4;	813:3,5	<b>addressed (18)</b>	780:21
<b>\$2.14 (1)</b>	775:18;780:14,19;	<b>Act (32)</b>	666:10;668:23;	<b>Administrator's (1)</b>
829:7	844:21	673:7,10;711:6,	672:21;699:3;	755:6
<b>\$2.22 (2)</b>	<b>abolition (1)</b>	12;720:24;723:14,	700:20;702:14;	<b>admission (6)</b>
808:16;835:10	714:2	18;725:3,5;755:10;	708:22;711:16;	741:9,17,24;742:6,
<b>\$2.23 (1)</b>	<b>above (2)</b>	757:14;763:1;	744:1;746:21;	13,24
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