UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the Secretary of Agriculture
Under Secretary for Marketing and Regulatory Programs

Milk in the Mideast Marketing Area 7 C.F.R Part 1033 DA 05-01	)))	Hearing Clerks's Dkt AO 166-A72

COMMENTS AND EXCEPTIONS ON BEHALF OF
WHITE EAGLE COOPERATIVE FEDERATION, ET AL
To the
INTERIM FINAL DECISION OF THE
ACTING ADMINISTRATOR, AMS
70 Fed. Reg. 43335 (July 27, 2005)

White Eagle Cooperative Federation, Inc., Family Dairies USA, Superior Dairy, United Dairy, Guggisberg Cheese, Brewster Cheese and Dairy Support, Inc., pursuant to 5 U.S.C. §577 and 7 C.F.R. §900.13a, respectfully submit the following comments and exceptions for final decision and review by the Secretary of Agriculture of recommendations contained in the interim decision of the Acting Administrator, AMS, to amend the Mideast Milk Marketing Order.

Pursuant to the Rules of Practice and the APA, the filing of comments and exceptions to recommendations of the Administrator allows (and requires) the Secretary to independently review the findings of fact, conclusions of law, and policy judgments of his subordinates in AMS and its Dairy Programs staff following a formal APA hearing. 7 C.F.R. §§900.12 – 900.13a. The function of a subordinate's recommendations in this process is intended to be "the sharpening of the issues for subsequent proceeding," bridging the gap between employees who hear the evidence and write initial recommendations and agency heads who are responsible for implementing policy. U.S. Department of Justice,

The Attorney General's Manual on the Administrative Procedure Act 81 – 85 (1947), http://www.oalj.dol.gov/public/apa/refrnc/agtc.htm.

The Administrator's recommendations are intended to provide such sharpening of the issues for benefit of the Secretary and interested parties by, among other things,

> containing a description of the history of the proceedings, a brief explanation of the material issues of fact, law, or discretion presented on the record, and proposed findings and conclusions with respect to such issues as well as the reasons or basis therefor; (2) *a ruling upon each proposed finding or conclusion submitted by interested persons*….

7 C.F.R. §900.12(b) (emphasis supplied).[1] The Secretary has similar obligations in a final decision, and must additionally make "a ruling upon each proposed finding and proposed conclusion not previously ruled upon in the record, [and] a ruling upon each exception filed by interested persons." 7 C.F.R. §900.13a. "The purpose of this requirement is 'to preclude later controversy as to what the agency had done'" and "to advise the parties and any reviewing court of their record and legal basis." *The Attorney General's Manual* at 85-86.

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[1] "The requirement that the agency must state the basis for its findings and conclusions means that such findings and conclusions must be sufficiently related to the record as to advise the parties of their record basis. Most agencies will do so by opinions which reason and relate the issues of fact, law, and discretion. Statements of reasons, however, may be long or short as the nature of the case and the novelty or complexity of the issues may require.

Findings and conclusions must include all the relevant issues presented by the record in the light of the law involved. They may be few or many. A particular conclusion of law may render certain issues and findings immaterial, or vice versa. Where oral testimony is conflicting or subject to doubt of its credibility, the credibility of witnesses would be a necessary finding if the facts are material. It should also be noted that the relevant issues extend to matters of administrative discretion as well as of law and fact. This is important because agencies often determine whether they have power to act rather than whether their discretion should be exercised or how it should be exercised. Furthermore, without a disclosure of the basis for the exercise of, or failure to exercise, discretion, the parties are unable to determine what other or additional facts they might offer by way of rehearing or reconsideration of decisions. Sen. Rep. pp. 24-26, H.R. Rep. p. 39. (Sen. Doc. pp. 210-211, 273)." Quoted in *The Attorney General's Manual* at 86.

Exception No. 1 – Absence of Meaningful Findings and Reasons.

The Secretary's task is made more difficult, yet more essential, in this case because the Acting Administrator made few findings of his own and no rulings on proposed findings submitted by White Eagle or by other parties. *Compare* post-hearing briefs and requests for findings, http://www.ams.usda.gov/dairy/me_pool_prov/me_pool_prov.htm, *with* the content of the interim decision of the Acting Administrator.

The difficulties facing the Secretary in this case are aggravated by the fact that the Administrator's recommendations were issued in the form of an interim final decision,[2] omitting a recommended decision, in a proceeding fraught with "sharply contested issues of fact," – a circumstance in which "agencies should not as a matter of good practice take advantage of the exemptions" to issuance of a recommended decision.[3]

The Acting Administrator's decision reveals very little about actual controversies of the hearing and even less about policy criteria that now govern the agency's decisions on milk order "pooling standards." The decision managed constant repetition of the notion that pooling standards – rules that determine which dairy farmers are eligible to participate in and benefit from milk orders – should identify and include only "producers who are providing regular and consistent service in meeting the Class I needs of the market," *E.g.* 70 Fed. Reg. at 43340 (col. 2); that current pooling standards are "inappropriate," "inadequate" and "insufficient;" and that amendments should

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[2] The Rules of Practice vest only in the Secretary, not in the Administrator, the authority to issue a final decision or to omit the issuance of a recommended decision. 7 C.F.R. §§900.12(d), .13a.

[3] Senate Docket No. 248, 79th Congress, Second Session, Page 216; Senate Docket No. 248, 79th Congress, Second Session, Page 262; Senate Docket No. 248, 79th Congress, Second Session, Page 273.

be made to provide "appropriate," "adequate," and "legitimate" pooling standards. Apart from the descriptive hortatory, the Acting Administrator's decision provides no explanation or criteria to measure how the controlling adjectives were dispositively applied in this case or how this policy may be applied to non-transparent, adjective-driven decisions in the future.[4]

Exception No. 2 – Failure to Rule on Interested Parties' Proposed Findings and Conclusions

In its post-hearing brief, White Eagle submitted 29 proposed findings, and addressed four specific issues of law. The Administrator neither ruled upon nor discussed any of these factual and legal issues, as required by 7 C.F.R. §900.12(b). He likewise did not rule upon 32 findings proposed by Dean Foods, nor 36 findings proposed by DFA, although a few of these were addressed in the narrative decision.

White Eagle incorporates herein its post-hearing brief and requests the Secretary to make "a ruling upon each proposed finding and proposed conclusion not previously ruled upon in the record." 7 C.F.R. §900.13a.

Exception No. 3 – Findings Inconsistent With the Record.

Interspersed in the Acting Administrator's lengthy generalizations are a few findings summarizing the testimony of parties and making conclusions of fact. Among these few findings are some that are plainly inconsistent with or

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[4] We confess agreement with DFA in its similar comments, on the Administrator's recent recommended decision denying a proposed Southeast-Appalachian merger, as follows: "The recommended rejection of the order merger is most difficult to understand and accept when there is no objective standard (or standards) identified which we can objectively evaluate in order to understand the Secretary's position, past, present and future. The iterated and reiterated references to the 1999 merger decision do not elucidate the objective basis for that decision; they simply invoke the decision. There are numerous references to "major" versus "minor" overlap in sales and procurement areas, but there is no explanation of either the objective (%) or subjective (quality) standards which differentiate major and minor market interfaces. We believe that the industry, and the Department, would be well served by more transparent decision-making criteria." DFA comments on partial recommended decision, Docket Nos. A)-388-A15 and A)-366-A44, July 18, 2005.

unsupported by the record. For example, the Administrator attributed to a White Eagle witness testimony that "lowering diversion limit standards… will remove milk located in Wisconsin, Illinois, Minnesota and Iowa from pooling on the Mideast order." 70 Fed. Reg. at 43338 (col. 2). This is not an accurate summary of the testimony. The witness testified that White Eagle markets diverted milk to manufacturing plants in Ohio, Indiana, Michigan, Wisconsin and elsewhere (Leeman, Tr. 671, 719-720) and that the DFA/MMPA diversion limit proposal would cause some diverted White Eagle milk to be ineligible for pooling (Tr. 682-83, 933).[5]

With transparent hostility to testimony by a White Eagle expert in economics and anticompetitive market behavior, the Acting Administrator stated (italics supplied):

> The witness *hypothesized* that the reduction in milk volume pooled would have increased the PPD [for October 2004 milk] by about 2 cents per hundredweight (cwt.) for milk remaining pooled, but would have decreased the relative PPD by about $0.73 per cwt. on the milk that was not able to be pooled because of lowered diversion limit standards.

This testimony was not mere hypothesis, but a statement of fact from USDA's exhibits prepared for the hearing. A gain of 2 cents per hundredweight gain to the PPD from removing excess diversions as proposed by DFA/MMPA, during October 2004, the month of greatest diversions in 2003-2004, was calculated by the Market Administrator in Exhibit 7 p. 44; and applying the same approach to the entire 24-month period, the gain to the PPD would probably be less than a penny A 73-cent loss to milk that thus would become ineligible for pooling was also not hypothesis, but a simple reference to the fact that the PPD

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[5] The White Eagle Witness' testimony attributed to DFA/MMPA a stated objective or removing milk from Wisconsin from the pool (Tr. 675-76), but it the record does not reveal whether the proposals would meet that goal, particularly in view of apparent expansion by DFA of member milk or accommodation milk located in Wisconsin that is pooled by DFA in the Mideast. Tr. 680-81.

for October 2004 was 73 cents. Ex. 6, Table 4. The Administrator's disregard of this testimony "hypothesis," without making a finding supporting the Market Administrator's own data, is critical to reasoned decision making because it reveals that the problem, if any, (1) was of *de minimus* proportions, and (2) that other findings of "large volumes" of excess diversions (70 Fed Reg. at 43340) causing "unwarranted erosion of the blend price" of emergency proportions (p. 43341) are simply untrue.

Exception No. 4 – Failure to Make a Regulatory Flexibility Analysis

The Acting Administrator's decision rejected the need for a Regulatory Flexibility Analysis because the proposed rules, purportedly, "do not have any different economic impact on small entities as opposed to large entities." The record does not support this conclusion. White Eagle post-hearing proposed findings 16 – 24, incorporated by reference, explained how the DFA/MMPA and Dean Foods proposals would aggravate market access difficulties uniquely for small cooperatives in a market where the fluid milk supply is dominated by DFA and its marketing partners, and access to fluid markets is further limited by long-term, full supply agreements such as the DFA – Dean Foods agreement (which neither DFA or Dean Foods would discuss beyond information in SEC filings). As further noted by White Eagle (post-hearing brief at 7, n.3, citing 41 Fed Reg. 12436), USDA has previously concluded that limited market access is a source of marketing disorder; the Administrator's failure to reconcile his decision to aggravate market access problems with regulatory precedent underscores the superficial and arbitrary nature of the decision.

Exception No. 5 – Failure to Reconcile the Class I Pooling Criterion with Contrary Authority in 7 U.S.C. §608c(5)(B)(ii).

The Acting Administrator's decision is replete with the notion that federal milk order policy should not allow producers to be eligible to share in

the market-wide pool unless a sufficient quantity of their milk will "regularly and consistently service the marketing area's Class I needs." 70 Fed. Reg. at 43340-41. This criterion is, apparently, applied by the Administrator even though there is no evidence that the market's Class I needs are short or in danger (White Eagle post-hearing brief, finding No. 11); there is, to the contrary, plenty of evidence that access to Class I outlets is severely limited under current conditions of cooperative and handler consolidation. The AMAA, in 7 U.S.C. §608c(5)(B)(ii), as construed in *Blair v. Freeman,* 370 F.2nd 229, 237 (D.C. Cir. 1966), and *Zuber v. Allen,* 396 U.S. 168, 183 (1969), forbids the Secretary from limiting pool participation to producers on the basis of use made of their milk.

CONCLUSION

For the foregoing reasons, and those stated in White Eagle's hearing testimony and post-hearing brief, the Secretary should promptly reverse the decision of the Acting Administrator and terminate this proceeding.

Respectfully submitted,

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