

**UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

Milk in the Pacific Northwest and)	Docket Nos. AO-368-A32
)	AO-271-A37
Arizona-Las Vegas Marketing Areas)	DA-03-04

**MOTION TO SUPPLEMENT RECORD
DUE TO *EX PARTE* COMMUNICATIONS**

I. Introduction

In prior correspondence with the Office of the Secretary, Sarah Farms called to the Department's attention rumors involving the pending formal rulemaking concerning producer-handlers in the Pacific Northwest and Arizona-Las Vegas Marketing Areas. The Department declined to investigate these rumors for lack of specificity but promised, "to continue to ensure that *ex parte* communication prohibitions are not violated in any Federal milk order decisional process." (Exhibit A.) Sarah Farms is a producer-handler that produces more than 3 million pounds of milk per month and, therefore, its status is the subject of the above referenced rulemaking proceeding.

Unfortunately, Sarah Farms now moves for the Department to place on the record all pertinent information related to an apparent *ex parte* communication by Gary Hanman ("Hanman"), the President and CEO of Dairy Farmers of America directed to Dana Coale, Deputy Administrator of USDA, AMS Dairy Division. This communication took place on October 12, 2004 and is in plain violation of both 5 U.S.C. § 557 and 7 C.F.R. § 900.16. These

comments came to the attention of counsel for Sarah Farms on or about March 29, 2005. Hanman's comments are attached hereto as Exhibit C, as transcribed by Associated Court Reporters.

Dairy Farmers of America ("DFA") is the proponent of proposals before the Department to limit the producer-handler exemption in the Pacific Northwest Marketing Area and the Arizona-Las Vegas Marketing Area. The Department had closed the hearing record on these proposals when Hanman re-argued DFA's position to the Department at the Dairylea meeting. His comments have the potential to influence the hearing process.

In addition, DFA is the proponent of two other producer-handler limitations now before the Department related to the Appalachian Marketing Area and the Southeast Marketing Area. While not directly affected by the conditions in these marketing areas, Sarah Farms is also a participant in those hearings and has an interest in the protection of the producer-handler exemption in all Orders. Hanman's comments violate the ban on *ex parte* communications in those hearings, as well.

Sarah Farms, in bringing this issue to the Department's attention, does not intend to criticize the past or future beneficial involvement of Department officials in producer functions. Based on the information now known and presented herein, it seems that any improper communication was conveyed to the Department by DFA in a moment of opportunity. The criticism of Hanman's poor judgment should not be construed as a criticism of the Deputy Administrator's attendance at the Dairylea meeting, an event we presume she was attending as an invited guest in an interest to provide information to Dairylea's membership.

II. The Ongoing Producer-Handler Hearings and Ex Parte Prohibitions

As this Motion is written, the Department is preparing a decision on a contentious hearing concerning producer-handlers in the Pacific Northwest and Arizona-Las Vegas Marketing Orders. Undeniably, the hearing process has been lengthy. The Department first issued a hearing notice on this matter on August 5, 2003. 68 Fed. Reg. 46505 (August 6, 2003).

That hearing notice established that formal rulemaking provisions of the APA applied. *Id.* at 46506. The hearing notice also contained the following prohibition on *ex parte* communication:

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an *ex parte* basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture,
Office of the Administrator, Agricultural Marketing Service,
Office of the General Counsel,
Dairy Programs, Agricultural Marketing Service (Washington office)
and the Offices of all Market Administrators.

Id. at 46509; *See also* 5 U.S.C. § 557(d)(1)(C), 7 C.F.R. § 900.16(c). The Deputy Administrator is included among those to whom the prohibition applies.

III. Gary Hanman's Comments of October 12, 2004

On October 12, 2004, Dairylea Cooperative, Inc. held its 97th annual meeting in Liverpool, New York. Dairylea invited Hanman to speak at the meeting. (Exhibit B). Dana Coale, the newly appointed Director of USDA-AMS, Dairy Programs, also attended the meeting, but was not listed among the guest speakers in Dairylea's press release.

Hanman's comments directly addressed what DFA perceived as "problems" in the Federal Order System. Hanman singled out the Deputy Administrator and directed specific and

pointed comments to her regarding the producer-handler hearing, which are reproduced below:

Dana Coale is here as Dwight has indicated. She is the new boss of Federal milk marketing orders. We are glad to have her. And what I've shown on the screen as deficiencies in the program are not her fault, but they are something she and us have to solve.

It takes too long for us to have a hearing, to get a hearing in the first place, build a record, and then get the results of that record into place. We need some way to help her make that decision sooner.

We think in our case that we have too much participation in some of these fluid pools from milk sources that do not intend to satisfy that market demand. They are not in there to sell milk for the fluid market, which is what the Federal orders are designed to price, but they are in there really to just siphon some milk out of the pool. And so in our case and I think in DMS's case, our goal is to tighten those pools and ask that if you participate in the pool you've got to perform.

We have a major problem with what we call producer handlers. You may call it producer distributors. As these dairy farmers have gotten larger, they have looked at selling their milk off of the farm in gallon jugs or half gallon jugs instead of in 5600-gallon tankers, and **they have gone to some major supermarkets and have cut some deals on gallons and half gallons of milk.** And as a result of that, Federal milk orders do not price their sales. They are exempt.

When the Federal orders were passed in the early or the late '30s, when we got the authority for Federal orders, there were a lot of small farms that were selling milk out the back door of their milk house and they were excluded. Producer distributors, producer handlers were excluded from regulations under order, and since that time we have not been able to cause regulations to apply. And so now we have a lot -- they are [sic, bottler] like a Dean Foods who has to comply with an order in a classified system of pricing. It means that his milk that he puts in a bottle he gets class one cost for that, and if his competitor is a producer handler, a dairy farmer, who is looking at a less of a return his cost might be less for his milk in a jug, in a gallon jug, than Dean. So we have to be --as an industry, **we have to help Dana and the Federal milk order program make regulations totally applicable, whether producer distributors or whether they are regulated handlers like Dean. If we don't, and if we can't get that done, and that will take new legislation, the classified system of pricing that we've known will go away.**

* * *

We mentioned the producer handler issue, and **there is a very large dairy in the west who now is packaging milk for Costco and Costco is taking reduced cost -- apparently reduced cost of milk to the marketplace and giving our customers all kinds of fits in the marketplace.** And they've had to meet that lower price at retail and at wholesale and they've backed up to us, our customers have backed up to us, say you got to keep us competitive. We are not competitive with these producer handlers. They are selling class one milk on the blend. We've got to have a reduction in our cost of milk. So that's the pressure we are feeling by reason of this, and **the solution to it is obviously regulation of producer handlers the same as we have regulated handlers.**

Gary Hanman Tr. 11-13, 25-26 (full transcript attached as Exhibit C).

Hanman's comments establish the following:

1. Dana Coale, a USDA representative subject to the prohibition on *ex parte* communications who Hanman described as "the new boss of Federal Milk marketing orders" was present for Hanman's comments.
2. Hanman presented visual material, which may include electronic and documentary exhibits not a part of the hearing record, to the audience and the Deputy Administrator.
3. Hanman described producer-handlers as a "major problem" and implored the Department and the Deputy Administrator specifically to "help address these problems" and to make
4. Hanman attempts to present an explanation for the existence of the producer-handler exemption, an explanation that was vigorously contested at the on the record hearing encompassing eleven days of testimony subject to cross-examination by other interested parties and the Department.
5. Hanman's comments were motivated, in part, by Dean Foods Company and other customers of DFA who allegedly have pressured DFA for price concessions. These facts

were either not presented or contested at the hearing.

6. Hanman implicitly threatens the demise of the Federal Orders and, indirectly, the jobs of the Deputy Administrator and other Department employees.
7. Hanman alludes to problems caused by the inability of DFA's customers to compete with producer-handler sales to Costco. Again, this topic was the subject to extensive testimony and cross-examination at the hearing. In fact, DFA's expert witness conceded that DFA was not only competing on such sales in to the Pacific Northwest, but was actually supplying the stores through its joint venture with Wilcox Dairy.
8. Hanman asserts, without any support whatsoever, that producer-handlers are "selling milk on the blend."
9. Hanman characterizes the solution as "the regulation of producer-handlers." Not coincidentally, this solution mirrors DFA's proposals on producer-handlers in Orders 124, 131, 5 and 7.

Hanman's comments are no mistake or simple indiscretion. As the leader of the nation's largest cooperative, he directly exploited the presence of a USDA representative to re-present and re-argue DFA's argument in favor of its proposals to cap producer-handlers. No party opposing DFA's proposals was notified of this *ex parte* contact either in advance or in hindsight.

With his opportunistic comments, Hanman has patently and undeniably violated the Department's clear and unequivocal prohibition on *ex parte* communications:

No person interested in the proceeding shall make or knowingly cause to be made to an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding an *ex parte* communication relevant to the merits of the proceeding except as provided in paragraph (a) of this

section.

7 C.F.R. § 900.16(b).

Rather than adhere to the rules that bind all hearing participants and interested parties, Hanman seized an opportunity to exert undue influence on the Department to the detriment of those who oppose his organization's proposals. Hanman spoke explicitly about alleged marketing conditions that, although never documented, he asserts necessitate regulatory change. Hanman made specific comments about Sarah Farms and implored the Deputy Administrator to take action. Other interested parties have no opportunity to address these comments.

The context of DFA's comments is also disconcerting. In a presentation dated February 15, 2005 to the Southern Dairy Conference, the Deputy Administrator gave a presentation on the Federal Orders and the hearing process. According to the time line presented there, the producer-handler hearing was at a critical stage (identified as "Phase Three"). At this phase, the record is analyzed and economic and policy decisions are made. (Exhibit D). While these important decisions were being made regarding producer-handlers, DFA was presenting its arguments for a second time to the Department in a private setting.

As troubling as DFA's actions is that in responding to earlier *ex parte* concerns, counsel for DFA argued that no investigation of possible *ex parte* concerns was necessary. (Exhibit E). ("The requested investigation of alleged improper conduct, and the necessary accompanying delay in the rulemaking process, is wholly unwarranted . . . [W]e urge you to reject the request and proceed to the long awaited decision in the matter.") When initial allegations of possible improper communications were raised, either DFA failed to determine whether its employees violated the rules or chose to ignore its own improper actions. While all participants are eager for a decision, at least some desire a decision that results from a fair and transparent process.

IV. The Department Must Act to Preserve the Hearing Record

There can be no argument that DFA intentionally violated the *ex parte* rules. DFA is an interested party; Hanman's comments were heard by (in fact directed to) an agency representative subject to *ex parte* restrictions, concerned matters at issue in the pending proceeding, and were presented during the prohibited period.

Faced with this unarguable violation of both Federal statutes and Department regulations, the only remaining question is what steps need to be taken to guarantee the fairness of this hearing. The law and regulations provide one mandatory course of action and leaves the Secretary with discretion whether to take additional remedial steps. As a minimum, both the APA and the applicable regulations mandate full disclosure of improper contacts:

a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

- (i) all such written communications;
- (ii) memoranda stating the substance of all such oral communications; and
- (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;
- (iv)

5 U.S.C. § 557(d)(1)(C). *See also* 7 C.F.R. § 900.16(c).

The Department must promptly place on the record any written copies of Hanman's comments and copies of the presentation he references in his spoken remarks. In addition, the Deputy Administrator must provide a written account of this and any other *ex parte* communications she received while at the Dairylea meeting. To alleviate any concerns of hearing participants, the Deputy Administrator should provide a description of why she was in attendance at the Dairylea meeting, an account of any information she provided to the gathering,

and a full account of her interactions with DFA representatives or representatives of any other interested party at the meeting.

Once this material is placed on the public record and reviewed by other interested and opposing parties, an opportunity for comment is appropriate. Until the time of such disclosure, the extent of the harm to the integrity of the hearing, if any, will remain unknown. Additional action by the Department may be required. All that is certain is that Sarah Farms, whose status is placed at issue by this proceeding, is very concerned that the powerful and moneyed interests who initiated this hearing have taken advantage of an opportunity not available to all participants. Faith in the fairness of this process needs to be restored.

V. **Future Actions and Conclusion**

This is not an attempt to further delay any decision on this matter. Although some delay may result, the delay is occasioned by improper *ex parte* communications that are only the fault of Hanman. Sarah Farms shares the repeatedly expressed desire that a decision be issued as soon as possible. This decision must, however, be transparent, fair, and supported by a proper administrative record.

Sarah Farms calls upon all other hearing participants and the Department to take this opportunity to set out the details of this incident and any other incident where an interested party either provided to the Department or received from the Department information material to this hearing that remains outside the hearing record.

Other *ex parte* contacts that may come to light will need to be addressed. For example, the March 28, 2005 edition of *Dairy Profit Weekly* recounts Hanman's comments at the DFA annual delegate meeting of March 22-23, 2005 concerning producer-handlers, "If we can't regulate producer-handlers, the whole classified system of pricing will come tumbling down

around our shoulders. It has to be No. 1 on our hit parade.” (Exhibit F). The article notes that the DFA conference was attended by “1,100 dairy producers and industry leaders.” The article does not mention whether USDA representatives were among the industry leaders present. If the Dairylea meeting is any indication, the attendance of USDA representatives would not stop DFA from discussing matters in violation of the *ex parte* rules.

The Department must act accordingly.

Respectfully submitted,
HEBERT SCHENK P.C.

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CERTIFICATE OF SERVICE

The foregoing was Statement was served upon the following parties on April 7, 2005, by overnight mail and/or e-mail as indicated.

VIA E-MAIL AND OVERNIGHT MAIL

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/s/ Alfred W. Ricciardi

EXHIBIT A:

**USDA Correspondence
to Yale Law Office, LP
Dated March 8, 2005**



United States
Department of
Agriculture

Agricultural
Marketing
Service

1400 Independence Avenue, SW
Washington, DC
20250

RECEIVED MAR 14 2005

March 8, 2005

Benjamin Yale, Esq.
Yale Law Office, LP
Post Office Box 100
Waynesfield, Ohio 45896-0100

Dear Mr. Yale:

Thank you for your letter of February 16, 2005, to Secretary Johanns, on behalf of Mallorie's Dairy, Smith Brothers Farms, Edaleen Dairy, and Sarah Farms, regarding the integrity of the Federal milk marketing order hearing process. You expressed concern over certain persons claiming to know the result of the series of hearings held regarding producer-handlers in the Arizona Las-Vegas and Pacific Northwest marketing areas. The Secretary has asked me to respond on his behalf.

Since your allegation of *ex parte* communications does not cite specific occurrences, we do not believe it provides a sufficient basis to warrant an investigation of *ex parte* violations. In addition, a review of records responsive to your Freedom of Information Act (FOIA) request, regarding Department of Agriculture (USDA) communications about the producer-handler hearing, revealed one letter which is being filed with the Office of the Hearing Clerk. This letter will be provided to you as part of the FOIA response.

As you know, USDA employees involved in the decision process are prohibited under the rules of *ex parte* communications from discussing the merits of any issues addressed at the hearing. Only after the issuance of a final decision may a USDA employee discuss any issues addressed at the hearing with the public.

Maintaining the integrity of the hearing process is of utmost importance to USDA and we will continue to ensure that *ex parte* communication prohibitions are not violated in any Federal milk order decisional process.

Thank you for your interest in the Federal milk marketing order program.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth C. Clayton".

Kenneth C. Clayton
Acting Administrator

EXHIBIT B:

**Dairylea Press Release
dated October 6, 2004**



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FOR IMMEDIATE RELEASE
October 6, 2004

**DAIRYLEA COOPERATIVE'S 97TH ANNUAL MEETING
TO FEATURE TOP INDUSTRY SPEAKERS**
Nearly 1,000 Members and Industry Guests Expected to Attend

SYRACUSE, NY – The 97th Annual Meeting of Dairylea Cooperative will be held on Tuesday, October 12, and Wednesday, October 13, at the Holiday Inn in Liverpool, N.Y. The meeting will include reports from senior management, presentations from top executives in the dairy industry, and educational sessions.

At the annual meeting, Dairylea's members will hear from Dairylea President Clyde Rutherford and Chief Executive Officer Rick Smith, who will provide an overview of the Cooperative's accomplishments and financial performance over the past year, as well as reflect on events in the dairy industry. The meeting is also an occasion where members are recognized for progressive farming and the production of top quality milk, scholarships are awarded to Dairylea youth and 50-year members are recognized.

Dairylea has again secured top executives in the dairy industry to speak during the two-day event. Speakers include Gary Hanman, President and Chief Executive Officer of Dairy Farmers of America; Jay Waldvogel, Chief Operating Officer of Fonterra Cooperative Group Ltd.; and Jack Gherty, President and Chief Executive Officer of Land O'Lakes, Inc. All speakers will participate in a question and answer session at the end of the day, on Tuesday.

Day two of the event features Jerry Kozak, President and Chief Executive Officer of the National Milk Producers Federation. The day's program will also include a panel discussion on biosecurity and environmental issues. The panel will be moderated by Tom Shephard, President, Agri-Edge Development and Vice President, Agri-Financial Services, and will include Agnes Schafer, Vice President Corporate Communications, Dairy Farmers of America; Leon Graves, Director of Industry Affairs, Dairy Marketing Services; Karl Czymmek from ProDairy and dairy producers Shelley Stein of LeRoy, NY and Dale Hemminger of Seneca Castle, NY. Closing the program will be the Cooperative's annual business meeting and passage of resolutions.

Dairylea Cooperative Inc. is a farmer-owned agricultural marketing and service organization based in Syracuse, NY. It has more than 2,500 members located throughout the Northeast. Dairylea is a provider of resources such as insurance coverage, loan programs, milk price risk management services, business planning, livestock marketing and investment and retirement planning through its holding company, Agri-Services, LLC.

EXHIBIT C:

Transcript of Gary
Hanman's comments to
Dairyalea
(October 12, 2004)

1 DFA Yesterday, Today and Tomorrow
2 Presentation by Gary Hanman
3 Dairylea Cooperative Annual Meeting
4 October 12, 2004
5

6 MR. GARY HANMAN: Thank you, Clyde. I
7 don't know what publication he's been reading but
8 there's some I'll send you that you didn't read, if you
9 are trying to look at, certainly, my pedigree. When
10 Greg and Rick asked me to come in and give a
11 presentation to you here today at your 97th annual
12 meeting, what they thought might be of interest to you
13 would be to give a little thought about DFA yesterday,
14 what we looked at at that time when we put it together,
15 where we are today, and then what we see down the road
16 as we look into tomorrow. And so the topic they
17 assigned me to cover this afternoon was DFA yesterday,
18 today and tomorrow. Yesterday and today are a lot
19 easier to cover obviously than tomorrow, but let me
20 start with that and see if we can get through this.
21 And hopefully as I go through this, if you have
22 questions you will write them down on either the DFA or
23 Dairylea scratch pads you picked up.

24 As you know we came together, DFA came
25 together on January 1 of 1998, and at that time there

1 were several things that were bugging the people that
2 put DFA together. I might add that the leadership that
3 put DFA together took almost a full year, the year of
4 1997, to design it because we had to totally redesign a
5 new dairy marketing cooperative. It was the first one
6 that anybody had ever put together on a national scale.
7 Up to that time we've had local cooperatives that had
8 been merged into regional cooperatives, but nobody had
9 put one together coast to coast on a national scale.
10 And there were several things that were bothering our
11 leaders at that time, and we want to cover some of
12 those. Concentration. The end of price supports and
13 maybe even Federal milk orders which meant that those
14 two basic government programs that had supported us
15 through the years were possibly going to be eliminated.
16 And then the whole issue of trade onshore and offshore
17 and the issue of trade barriers. And so they were
18 looking at how do we deal with these issues, issues
19 such as purer and purer numbers of dairy farmers when
20 you think in terms of concentration. The best data I
21 think for the number of dairy farmers come from the
22 Farm Bureau and they say now we have less than 70,000
23 commercial dairy farmers in the United States. Not
24 dairy farmers with milk cows, but dairy farmers,
25 farmers who have cows that they milk on a commercial

1 basis for an income stream. And so when you think in
2 terms of what we and Clyde and Rick are dealing with
3 and others, that all sugared-down group is very small
4 compared to what we used to think about when we look at
5 census data and we think there's a half a million or
6 more dairymen in the country. We don't have that many
7 commercial dairymen. So when we think about the
8 politics and government relations, how much are 75,000
9 dairy farmers and their families, how much are they
10 entitled to. Not only had concentration been occurring
11 at the farm, but the markets that we were facing
12 continued to shrink, and the biggest shrinkage was
13 occurring in the liquid milk side of our business.

14 The green bars that you see there, each one
15 of those are ten years apart. Those are the number of
16 plants that we had in 1975, '85, '95 and 2002. And so
17 we have seen a very rapid concentration of the market
18 that we were serving, not so much on the manufacture
19 side, cheese plants, the butter powder plants, those
20 that are making products that have extended shelf life.
21 But all of those are continuing to concentrate, and
22 that concentration was occurring because people to whom
23 they sold milk and dairy products were also getting
24 together, getting bigger, covering more geography. You
25 can see here the major retailers how they have changed

1 from '97, that's when DFA started doing the planning to
2 put our cooperatives together, and where they were last
3 year and you can see the percentage growth. I would
4 estimate that these six, five retailers sell about
5 close to 40 percent of the retail business. So our
6 formulators, our designers, our organizers were looking
7 at this concentration at the retail level in the market
8 where they sell their milk and then the demise of the
9 number of farmers geographically dispersed which led
10 them to a conclusion that we need a cooperative that
11 reaches shore to shore, border to border, so that we
12 can deal with this concentration.

13 They looked at the possible end to the price
14 support program and the end of the Federal milk
15 marketing order program because in 1996 when that
16 Freedom to Farm Act was passed Congress made a very
17 significant decision relative to how they were going to
18 maintain income to rural America. They were going to
19 do it in the form of direct payments, not in the form
20 of prices of things you as farmers sold. That was a
21 very major change in the way government was to address
22 rural America's economic well being. And that probably
23 more than anything was what put our group at least on
24 their toes to think that if we are going to direct
25 payments, do we need federal milk orders, do we need

1 price support, how about import and export assistance.
2 As Ed said this morning, we saw the price support over
3 time move from a percent of parity to a specific
4 hundredweight number and then down to 990 which really
5 was a truly low economic safety net but not a market
6 maker. And then with that, as Ed said this morning, we
7 have seen tremendous increases in price volatility
8 because when you have a perishable agricultural
9 commodity like milk and you have all changes in demand
10 or supply you get wild and wide price fluctuations.
11 And so with economic price support low and with that
12 variation above that level, we had wild price
13 fluctuations to deal with.

14 So how did we go about looking at some of
15 these trade barrier eliminations, what was at stake
16 with that. Well, the budget that was put together said
17 in six years we are going to do away with GAPP and we
18 were going to have NAFTA, and the whole trade trend in
19 international markets was one of opening up markets,
20 eliminating trade barriers. And these domestic markets
21 look like we are going to be a market of choice for
22 those around the world. Clyde mentioned to you in his
23 address this morning that we escaped the bullet in the
24 Australian free trade, put that in quotes, "free trade"
25 agreement, in that it is not a, quote, free trade

1 agreement, and that we do have restrictions,
2 limitations, quotas on dairy products that come in, but
3 over time those volumes, those volume limitations,
4 increase on a percentage basis working towards open and
5 free competition, long term. Long term. Our
6 organizers felt like our markets were going to be open.
7 Maybe not totally open, but much more open than they
8 have seen in the past.

9 In the past our domestic dairy policy had
10 been one of building a wall around the United States,
11 tailoring domestic supply to our domestic demand and
12 not aiming to do any export business, but at the same
13 time not allowing any outside intervention, outside
14 product to come in. And what would this change in
15 government attitude, the '96 farm bill. What our
16 organizers saw was that this wall was going to come
17 down one brick at a time over time, and that we had to
18 get ourselves in a position where we could do more
19 things ourselves and rely less and less on government
20 assistance and less and less on government protection.
21 Imports from lower cost countries were a threat. You
22 will hear from Jay Vogel this afternoon, not that he's
23 a threat, but the dairymen in his country produce milk
24 all on grass. And the products that are made from
25 their milk have a very low input cost because of that

1 relatively inexpensive feed source, and I would guess
2 their cost of milk to a manufacture plant would be half
3 of what our cost would be. So if we are going to have
4 free and open markets, and if we are the market of
5 choice, are we looking at and do we have to deal with
6 and be competitive with seven dollar milk. That's not
7 what we are talking about. That's not what we need to
8 plan for. We need to look at how do we stack up in the
9 world as far as cost of production, and then can we
10 compete in a different world environment. And I think
11 as our planners put DFA together that was the future
12 that they saw, and that we've got to learn how to not
13 only compete at home, but we've also got to learn how
14 to be an exporter and a participant in the world market
15 ourselves.

16 Where is DFA today. What are we doing today
17 in order to fulfill the mission, the vision the DFA
18 leaders had at that time. You already heard Clyde and
19 Rick talk about how we have all come together to be one
20 when we go to the marketplace. We recognize, I think
21 all of us recognize that it is going to be impossible
22 to get all dairy farmers in the United States into one
23 single marketing organization. If there is not an
24 alternative, history tells me, and I've been at it for
25 42 years, farmers will create an alternative at the

1 farm. Farmers will have a choice at the farm barn yard
2 gate. And that's not where it is important that we be
3 together. Where it is important that we be together is
4 when that milk arrives or starts toward a market or
5 when products made from your milk starts to compete in
6 the marketplace. And in order to have the maximum
7 effect on price, to do the best job in the marketplace,
8 the more of that milk that we can collectively market
9 together the better off we will be. And so you can see
10 how we have changed DFA's approach to representation
11 and marketing.

12 Our first recognition I think was with
13 Dairylea and St. Albans when we invited them, we asked
14 them would they consider becoming a member of DFA for
15 marketing purposes to where we could go hand in hand to
16 market together. Not to merge. Be separate in the
17 country, but be together when we went to town. Then we
18 had an option, an opportunity to take more market
19 responsibility for the dairy farmers who were selling
20 their milk, proprietary handlers, not through
21 cooperatives but as what we would call nonmembers. And
22 we organized a system whereby we could represent those
23 farmers in the marketplace where it counted for a price
24 and terms of sale were decided we needed to be one.
25 And so we created DMS, and we are very proud of that

1 and we need to give Rick and Greg and Clyde a lot of
2 credit and our Northeast council and Harold and Ralph
3 and Leon for putting this altogether and keeping it
4 altogether. That was no small matter. Within a period
5 of 90 days they reached out and assumed market supply
6 responsibility for in excess of 3,000 individual dairy
7 farms, picking up the milk, to dispatch the milk, to
8 move that milk to market, to bill it, to price it, and
9 to pay the member. And we did that. With a few
10 hitches, but we did that all within a very short period
11 of time, and you can thank Rick for doing that.

12 Then we also created what we call common
13 marketing agencies. Under the Capper-Volstead Act it
14 allows farmers not only to come together as
15 cooperatives into cooperatives, but also lets those
16 cooperatives create what the Act calls agencies in
17 common, which means that farmers get together and
18 market through cooperatives. They can ask those
19 cooperatives to do things together without being in
20 violation of any trust laws. The Capper-Volstead
21 exemptions lets us do that, create agencies in common.
22 We now call them common marketing agencies. What you
23 see on the map are common marketing agencies that we
24 are a part of that markets milk collectively with
25 multiple cooperatives being a part of that agency.

1 Some of these agencies are fairly primitive or basic in
2 that all we do, and that's significant, is we meet, we
3 have a board meeting, we all assess the supply and
4 demand for milk in that large bracket area, and we
5 decide collectively what we should charge for milk for
6 the next period of time, whether it is a month or a
7 quarter or whatever, and then we go home and charge it
8 ourselves. We do what we say we will do in that
9 agency.

10 There are other agencies that are much more
11 formal and tough and complete and what you might call
12 comprehensive, such as the one in the Southwest or the
13 one in the Southeast. In that case, those cooperatives
14 set down, they agree on a price, they agree on what
15 costs to supply that market they are going to share,
16 and in fact they've agreed they are to share them all.
17 Whether it is going outside the market and bringing in
18 supplemental milk and if that cost money, share that
19 cost. If it means getting rid of surplus within that
20 area, milk that is produced that we can't sell locally,
21 those costs are also shared in that agency. They have
22 also harmonized the producer program, what their
23 members, our members, their members receive in the
24 country relative to all types of producer programs so
25 that we are giving the right signals to members in the

1 country to produce the kind of milk, the volume of
2 milk, the quality of milk, the hauling situation so
3 that we are all the same.

4 And then they've taken another step just
5 recently. And you probably have read in the Dairy
6 Press we are building a very large cheese plant
7 outside -- five miles outside of Clovis, New Mexico, in
8 partnership with an Irish cooperative, and as a result
9 of that decision Glanbia and the dairy farmer had to
10 each raise \$30 million in equity capital to build this
11 plant, and that agency in the Southwest is raising
12 those dollars for that equity base from that super pool
13 program in the Southwest. So they really have taken a
14 larger step in pricing and pooling and sharing costs
15 and distributing dollars and now in equity generation.
16 But what we see on this map are all types of agencies.
17 They all work. Some are more comprehensive than others
18 and some of them might work better than others.

19 Federal order reform, we kept Federal orders
20 when the law was passed, if you remember, but we still
21 have some problems as we look today. Dana Coale is
22 here as Dwight has indicated. She is the new boss of
23 Federal milk marketing orders. We are glad to have
24 her. And what I've shown on the screen as deficiencies
25 in the program are not her fault, but they are

1 something she and us have to solve. It takes too long
2 for us to have a hearing, to get a hearing in the first
3 place, build a record, and then get the results of that
4 record into place. We need some way to help her make
5 that decision sooner. We think in our case that we
6 have too much participation in some of these fluid
7 pools from milk sources that do not intend to satisfy
8 that market demand. They are not in there to sell milk
9 for the fluid market, which is what the Federal orders
10 are designed to price, but they are in there really to
11 just siphon some milk out of the pool. And so in our
12 case and I think in DMS' case, our goal is to tighten
13 those pools and ask that if you participate in the pool
14 you've got to perform.

15 We have a major problem with what we call
16 producer handlers. You may call it producer
17 distributors. As these dairy farmers have gotten
18 larger, they have looked at selling their milk off of
19 the farm in gallon jugs or half gallon jugs instead of
20 in 5600-gallon tankers, and they have gone to some
21 major supermarkets and have cut some deals on gallons
22 and half gallons of milk. And as a result of that,
23 Federal milk orders do not price their sales. They are
24 exempt. When the Federal orders were passed in the
25 early or the late '30s, when we got the authority for

1 Federal orders, there were a lot of small farms that
2 were selling milk out the back door of their milk house
3 and they were excluded. Producer distributors,
4 producer handlers were excluded from regulations under
5 order, and since that time we have not been able to
6 cause regulations to apply. And so now we have a
7 lot -- they are like a Dean Foods who has to comply
8 with an order in a classified system of pricing. It
9 means that his milk that he puts in a bottle he gets
10 class one cost for that, and if his competitor is a
11 producer handler, a dairy farmer, who is looking at a
12 less of a return his cost might be less for his milk in
13 a jug, in a gallon jug, than Dean. So we have to be --
14 as an industry, we have to help Dana and the Federal
15 milk order program make regulations totally applicable,
16 whether producer distributors or whether they are
17 regulated handlers like Dean. If we don't, and if we
18 can't get that done, and that will take new
19 legislation, the classified system of pricing that
20 we've known will go away.

21 And then we have to deal with negative EPDs.
22 That is the most difficult Federal order feature that
23 you have ever asked us to explain. And I'm not sure
24 that I can do an adequate job in doing that. How in
25 the world can you sell your milk in a month in a market

1 and then wind up getting a bill for it. We have to sit
2 down with Dana and work on how we eliminate under the
3 orders negative EPDs without, without giving up the
4 value that we got out of the marketplace for things
5 that we made from that milk. We think it can be done.
6 Some of our problems.

7 DFA, I think I have told you before,
8 believes in being a market maker. We believe it is not
9 only running businesses for profits and running
10 businesses for market access, but if possible using
11 those businesses for price enhancement to you and your
12 milk check. Each year prior to our -- the start of our
13 fiscal year, which is January to December, we sit down
14 with all of our manufacturing plants and we total up
15 what we think we will make for the next year, just like
16 the people in New Zealand do. And we, by design, plan
17 to make, to manufacture less American style cheese than
18 we sell, so we will be a buyer of cheese. To be a
19 buyer of cheese we think that puts us in a position to
20 put upward pressure on price, assuming that our company
21 can stay with it, such as our Gordon cheese company.
22 And so this last year our plan was to be 400 loads of
23 cheese deficit and to buy some of that cheese on the
24 CME. Chicago Merchantile Exchange is the tide that
25 moves all hopes up or down. As that market moves,

1 since that market is the basis on which all people sell
2 cheese, if you can have a positive influence on that
3 market, you can have a positive influence on that
4 price.

5 And what I've got here on this map is a very
6 busy chart, but across the bottom of it are times from
7 January 5 to September 27. Up the left axis of this
8 chart are numbers that represent the number of loads of
9 cheese that were purchased on that day, 45,000 pounds,
10 40-pound blocks of cheddar cheese. On the right hand
11 axis of this graph are dollars per pound for a block,
12 40-pound block of cheddar cheese. The red line through
13 the middle is the price that occurred that day on the
14 CME. And the spikes at the bottom are -- indicate
15 whether DFA was a buyer or somebody else was a buyer.
16 So you can see when we went into this February 2 to
17 about the 26th of April we were not a buyer. We were
18 not in the market. We were not in the CME. We were
19 not involved. We did not put cheese to \$2.20 a pound
20 which is the peak that you see of that red line that
21 occurred there in April, the middle of April. The
22 market started to collapse. That company that moved
23 that market to 2.20 we think were Schreiber Foods.
24 Apparently they had missed their guesses on sales and
25 inventory, so they were in the market looking for

1 cheese to satisfy their customer needs with. And as
2 that market started to fall we interceded some. You
3 can see at the first level of \$2.00 we made a stand and
4 backed off. We did make a long significant stand at
5 1.80 a block. And you will note all along the bottom
6 the big spikes each day, we were the main buyer of
7 cheese on the CME trying to make a statement to the
8 trade that we thought 1.80 was about the right price
9 for 40-pound blocks of cheddar cheese. And notice on
10 one day, about the 7th of June, we, DFA, bought 52
11 loads of cheese on that market that day, a record
12 number of transaction. After we had bought the cheese
13 that we needed for our market, for our customers, for
14 our demand, we backed out, and when we did the market
15 you can see it fell to about 1.36. What we are trying
16 to show with this gray area in the middle is what
17 effect we had on milk prices as a result of that. I
18 would also call your attention to our activity since
19 about the 16th of August when that market fell and then
20 recovered some, and our sales improved. We needed
21 about another 100 loads of cheese. We were back in the
22 market holding that market roughly at 1.55. But our
23 guys have made some estimates of what that has meant to
24 you and to DFA members based on those months and based
25 on the difference between \$1.80 cheese and \$1.36

1 cheese, CME. Our estimate is that that action, our
2 planning and our ability to be a market maker, our
3 ability to buy cheese on the exchange for our customers
4 put \$1.3 billion in the dairy farmers' pockets, and to
5 the DFA members that was \$278 million, our estimate of
6 that activity. Our ability to be in the cheese
7 business, to be a market maker, and then to fulfill our
8 needs in the marketplace is what caused, what led to
9 that price enhancement. This is the market since we
10 stepped out. We quit buying on October the 4th, and
11 you can see that as a result of DFA not being there,
12 that market adjusted very significantly. That was
13 lately. Incidentally, it did go up today, 40-pound
14 blocks are up two, I believe, two and three-quarters
15 today.

16 The question is where will this market be,
17 is 1.35, 1.36 the right level. I don't know. You can
18 see the CWT trigger points 1.40 for 40-pound blocks of
19 cheddar cheese and I would guess that we have seen the
20 peak for this year at least for 40-pound blocks, and I
21 think you will see CWT kick in and start doing some
22 export of cheese. I was visiting with Jerry Kozak at
23 lunch today. We have between 12 and \$15 million left
24 in the CWT coffers to help with exports of cheese.

25 Part of the plan of DFA when our organizers

1 put it together was to put together facilities, plants,
2 some of which buy milk, some of which just use dairy
3 ingredients in the process. You saw Rick's map of
4 Dairylea's spattering around where their customers are.
5 These are our own either wholly owned or joint venture
6 locations of facilities. The green ones are those that
7 are balancing plants, plants that we have to run
8 because we have milk. Balance plants are those that
9 take surplus milk when the fluid market doesn't need it
10 and give it up when the demand in the marketplace is
11 there. Those are area council responsibilities. The
12 yellow spots that you see are the ones that we run
13 because we have a market for what they make, whether
14 that's American cheese, whether that's mozzarella
15 whether that's Frappachino, whether that's Enfamil.
16 The joint ventures are in red, and our joint ventures
17 are those that we have with Fonterra, those that we
18 have with Dean -- excuse me, with Hood, with MBH, with
19 Wilcox, with Stremik in California, with dairy farms in
20 the middle of the country. Those bottling plants that
21 we joint venture with others are now about 60 plants.
22 We have a joint venture with LOL. Jack Garrity will be
23 here with them on a cheese plant in Minnesota. We have
24 a joint venture with some butter operations with some
25 partners in Hotel R. Keller. We like joint ventures.

1 It let's us specialize in specific management for that
2 kind of an operation and it helps us leverage our
3 balance sheet. That DFA plant system was what our
4 organizers wanted, created so that they could be
5 involved in the markets across the United States on a
6 national basis.

7 Where are we going to be tomorrow. Well, we
8 said we needed to be in the export business. These are
9 the products that we have exported in the year '01,
10 '02, '03. We don't have '02 on here yet. I would say
11 that most of our nonfat domestically -- no, let me say
12 it a different way. All of the nonfat dry milk that we
13 produce, and we produce quite a bit in all of our
14 balancing plants, is sold through DairyAmerica, a
15 cooperative of cooperatives, a common marketing agency
16 for nonfat dry milk. And DairyAmerica has taken one
17 more step and they have said to Fonterra, this New
18 Zealand cooperative, you know how to market nonfat in
19 the world. If we get out there selling a dab of
20 nonfat, we are liable to screw up your major market
21 nonfat. Why don't you be our agent offshore and let's
22 create another common agency for our sales offshore.
23 And so not only are the cooperatives collectively using
24 DairyAmerica that sells together domestically, but we
25 are using Fonterra to sell internationally. And if you

1 talk to Rich Louis at DairyAmerica who is the manager
2 of DairyAmerica, he will tell you that he believes that
3 relationship with Fonterra offshore has meant at least
4 a nickel a hundredweight higher nonfat prices than if
5 we were out there doing it ourselves.

6 We are big business in export. Last year we
7 exported about \$64 million worth of products offshore.
8 Again remember when we said we were organizing a
9 company to get ourselves ready to be able to export or
10 be able to compete domestically. It doesn't mean we
11 are going to give up. We are still asking for some
12 regulations, tariff regulations, on a loophole in the
13 WTO agreement that we negotiated. A product called
14 milk protein concentrate wasn't even around when we
15 negotiated the deal and it is starting to roll in on an
16 increasing quantity. That's the one on the left you
17 see there. And casein, which is the one on the right
18 which is nothing more than the milk fraction of the
19 milk protein that you have in skim milk. We have not
20 been able to get the tariff commission or the commerce
21 commission to get that defined as a dairy product. It
22 is called a food ingredient, so there's no way under
23 present rules to put a quota on it. But we now have as
24 you can see 37 members of the Senate and 198 members of
25 the House who have agreed to co-sponsor this

1 legislation. And we are not asking for full total
2 elimination of this import. We are just asking for a
3 cap. Put a cap on it so it doesn't continue to grow or
4 sky rocket. You will see us continuing to partner not
5 only with you and DairyLea, but you will see us
6 partnering internationally with Fonterra, and I
7 mentioned a minute ago our chief plant in Clovis, New
8 Mexico, with a co-op out of Ireland called Glanbia.
9 You will see us partnering with processors where they
10 bring something unique to a business, either money or
11 management skills or technology. And we're even
12 partnering as you know, as Rick just said, with dairy
13 farmers who choose not to be a member of DairyLea or
14 St. Albans or DFA, but will allow us to market their
15 milk as it leaves their barn yard gate, which is what
16 is important. DFA also had a plan and still has a plan
17 to retire and return to members earnings and retains
18 that we have retained in their business. This is an
19 expression of those different kinds of equity
20 retirements since we started. If you total all those
21 bars up we have early equity retirement for age, we
22 have estate settlement for sure, we have tenure
23 certain, we have had an early equity retirement on a
24 good basis. We have lots of different kinds of equity
25 retirement. And since we started in 1998 we have

1 retired \$198 million of member equities that those
2 farmers brought in the DFA and what we have earned for
3 them since we started.

4 What are some of our challenges, what about
5 tomorrow. You all know the Department of Justice is in
6 a full investigation of us at DFA, and what we think
7 they are trying to decide is whether or not we have
8 lost our separate stead of unity by reason of things
9 that we have done through force or intimidation or
10 causing dairy farmers to become members of DFA that
11 don't want to be members of DFA. And so they are now
12 involved in a full scale investigation of DFA. And I
13 guess you could say -- first off, we will cooperate
14 with them 100 percent. And many of your cooperative
15 friends around the country has probably received
16 requests from the Justice Department for information in
17 trying to get a feel from other cooperatives how they
18 feel relative to DFA and whether we have strong-armed
19 them, intimidated them, used coercion to cause them to
20 do certain things. But you could say that we are being
21 looked at because we are active. We have no qualms but
22 when they get through they won't find any strong-arm
23 tactics or any coercion or anybody being asked,
24 required or demanded to do something they don't want to
25 do. They are also asking some of our board members how

1 involved they are in the operation of the DFA. And
2 somehow I think they believe there's 196 DFA area
3 council board members that serve on our seven area
4 council are not involved in the operation of DFA.
5 That's what we think is involved. But we are involved
6 and will vigorously defend ourselves against this full
7 scale D of J investigation. And maybe it is because we
8 just won one with them. We own 50 percent of a single
9 plant joint venture with a fellow by the name of Bob
10 Allen in Somerset, Kentucky. Bob Allen was the
11 president of the board at one time and he and us bought
12 a single plant. He manages. He's the partner that
13 runs it. And you can see where Somerset, Kentucky is.
14 About 30 miles down the road from Somerset, Kentucky,
15 is a plant owned by National Dairy Holdings, called
16 Flav-O-Rich in London, Kentucky. And in extreme
17 eastern Kentucky -- excuse me, western Kentucky there
18 are 40-something counties where only Southern Belle,
19 which is the one in Somerset, and Flav-O-Rich are the
20 only two bidders on school milk. And since DFA owns
21 half of one and half of the other, Justice has brought
22 a suit against us because of our interest in Southern
23 Belle indicating that we were in a position to get
24 sensitive information from both companies and to
25 instruct them on how to bid for school milk so we could

1 maximize profit, take advantage of the school
2 districts. We indicated we can't do it under our
3 contract while managers. We don't do it since we do
4 not have that access. We were deposed. Allen Meyer of
5 MDH was deposed. So was Bob Allen. We asked the
6 court, a Federal Court in Kentucky, for what lawyers
7 call a summary judgment which means judge, look at the
8 facts, look at the law, and let's not have a trial
9 because there's no basis to have a trial. Normally you
10 don't get judges to agree with you to not have a trial,
11 not be heard, but in this case this judge said to the
12 Department of Justice you don't have any basis to sue
13 based on what we see, and they granted our summary
14 judgment and threw Justice out of court. Now the
15 question is will they appeal. They have 60 days from
16 August 31st to make that decision and we don't know
17 what they will do. And it could be that our success in
18 this case has given them some added figures to look at
19 on the other deal.

20 You heard a lot of about CWT. And it is
21 great. And it will make a very significant
22 contribution to your economic well being this year.
23 But don't expect miracles. We are, as you heard,
24 planning to take 49,000 cows out of the nation's dairy
25 herd through the herd retirement feature of CWT and

1 we've set up the amount of money we allocated for that
2 part of the program. But from May to August, according
3 to USDA numbers, in all the states of the country, not
4 just the 20 that they get regular monthly data on, they
5 estimate we have increased the number of cows we are
6 milking by 53,000 head. So when we take 49,000 out of
7 the CWT we will merely be removing most of those that
8 we have kept since May until now. And CWT's herd
9 liquidation, herd retirement does not start, even
10 though the bidding process is in place, the cows, the
11 town will not start until December. So we have some
12 time between now and the time those cows go to market
13 while that milk is still flowing. So my question to
14 you, I guess, is if we want to have a significant
15 continuing market influx, to balance supply with
16 demand, five cents a hundredweight may not be enough in
17 the future to have the same impact that we had in the
18 past of this year. We mentioned the producer handler
19 issue, and there is a very large dairy in the west who
20 now is packaging milk for Costco and Costco is taking
21 reduced cost -- apparently reduced cost of milk to the
22 marketplace and giving our customers all kinds of fits
23 in the marketplace. And they've had to meet that lower
24 price at retail and at wholesale and they've backed up
25 to us, our customers have backed up to us, say you got

1 to keep us competitive. We are not competitive with
2 these producer handlers. They are selling class one
3 milk on the blend. We've got to have a reduction in
4 our cost of milk. So that's the pressure we are
5 feeling by reason of this, and the solution to it is
6 obviously regulation of producer handlers the same as
7 we have regulated handlers.

8 The industry challenge, the industry
9 challenges, I might add, as you know are dairy
10 promotion. The producer side of our dairy promotion
11 plan is under review by the Supreme Court. The last
12 court to review, the Court of Appeals declared the 15
13 cents that you are contributing for promotion is
14 illegal, an unfair restraint of free speech. There is
15 some great hope I think in the promotion community that
16 the Supreme Court will hear that and will rule that it
17 is not a violation of free speech and continue the
18 plan. If it is not, if it does not, it finds that the
19 Court of Appeals will agree with that, we have some
20 major restructuring to do in our promotion community if
21 we want to continue the generic advertising and
22 promotion plan. So that is one of the major challenges
23 I see.

24 Fluid processors, they contribute 20 cents,
25 you know, to the White Mountain Mustache Program.

1 Theirs is not being challenged, only yours. And our
2 per capita consumption of class one continues to go
3 down. And another challenge that we need to address is
4 the round packages that we are putting out, the waivers
5 we are putting in them, and the more avenues of
6 distribution that we are gaining, such as McDonald's
7 and Wendy's is the right place, the right time, putting
8 those packages into schools is the right thing to do,
9 but you can see we have a long history of reducing your
10 class one market on a per capita basis. Today the
11 largest single market for your milk in the United
12 States is not class one. It is cheese. We produce --
13 we make more cheese out of more milk which you produce
14 than we do sell as class one. A challenge. Additional
15 ones we've got to deal with is the animal
16 identification and that hinges back into whether or not
17 the Canadian border will be open. Our guess is that it
18 won't be open until we have a reliable, universally
19 applicable, individual animal identification plan in
20 place so that we can trace from birth to death every
21 animal, every piece of livestock that we have. We've
22 got this whole issue we mentioned this morning of
23 safety, of homeland security, and quality assurance and
24 traceability where we can trace a pound of cheese all
25 the way back through the system to your individual farm

1 to know what was in that piece of cheese, and that's
2 going to be increasingly more difficult. And the
3 biggest challenge I see we have at DFA is keeping Rick
4 and Greg and Clyde challenged. Because they can eat up
5 more work than anybody I have ever seen and we are
6 extremely fortunate to have them working for us in
7 addition to working for you. Thank you very much.

8 (Applause.)

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EXHIBIT D:

Slides from USDA
Presentation on Federal
Order hearing process
(February 15, 2005)

Where Are Federal Orders Headed: A Washington Update



By:

Dana H. Coale
Deputy Administrator
Dairy Programs-AMS-USDA

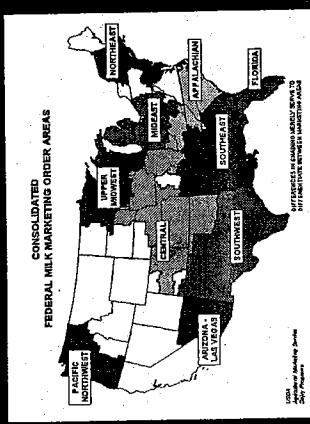
Dairy Programs

USDA



Federal Order Issues

- ✓ Western Order Termination Impacts
- ✓ Pricing/Pooling Issues
- ✓ Decision Time Requirements
 - ✓ Hearing to Effective Interim Amendments:
 - ✓ 9 months
 - ✓ Hearing to Effective Amendments
 - ✓ 14 months
- ✓ Possible legislation to address



Federal Order Rulemaking

Phase III:

AMS controls process
(2.5 months)

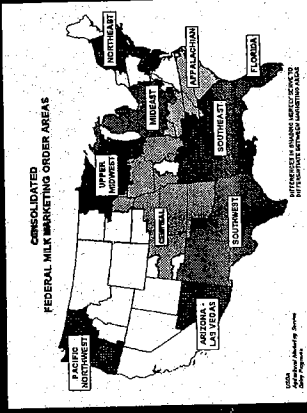
Record analyzed and economic and policy decisions made
(10 weeks)

Determine type of decision to issue which affects implementation schedule:

- 1) Tentative/Interim Final Decision
 - issue if hearing record data supports emergency marketing conditions exist to warrant immediate implementation
- 2) Recommended Decision
 - issue if hearing record data does not support immediate implementation of provisions

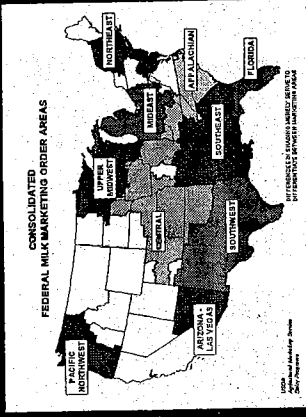
(1 month)

Decision sent to OGC for legal sufficiency



Dairy Programs

Federal Order Rulemaking



Phase V:

USDA controls process
(1 month)

Review and Department Clearance

(Decision cleared by AMS, MRP, OBPA, OCE, OSEC, others)

Phase VI:

FR controls process
(3-5 days)

Decision Issued and Published in Federal Register

Dairy Programs



EXHIBIT E:

DFEA/Dean Foods
correspondence to
USDA on *ex parte*
communications dated
February 25, 2005

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February 25, 2005

VIA FEDEX

The Honorable Mike Johanns
Secretary of Agriculture
U.S. Department of Agriculture
Whitten Building/Room 200-A
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: **Milk in the Arizona Las-Vegas and Pacific Northwest Marketing Areas,
Docket No. AO-368-A32; AO-271-A37; DA-03-04**

Dear Mr. Secretary:

This letter is submitted on behalf of Dairy Farmers of America, Dean Foods Company, United Dairymen of Arizona and Shamrock Foods Company all of whom were proponents of certain hearing proposals in the above-referenced proceeding regarding the regulatory treatment of so-called producer-handlers. We write, reluctantly, in response to a February 16, 2005 letter submitted by counsel for Mallorie's Dairy, Smith Brothers Farms, Edaleen Dairy, and Sarah Farms.

The requested investigation of alleged improper conduct, and the necessary accompanying delay in the rulemaking process, is wholly unwarranted and would do a great disservice to your staff, as well as work an injustice on all hearing participants. For the reasons which follow, we urge you to promptly reject the request and proceed to the long-awaited decision in the matter.

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The Honorable Mike Johanns
February 25, 2005
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There is no indication, since the persons who allegedly received such information are unknown to all who received the letter, that such person or persons "is a person with an interest in the proceeding" (deemed to be a party). In an industry wherein rumors regularly circulate (there is even a so-called newspaper dedicated to the propagation and spread of dairy industry rumors), it can hardly be surprising that rumors may circulate about a proceeding as important as this one. What is shocking is the contention that the mere existence of such rumors could ever justify an investigatory demand of the type requested here. Moreover, there is no statutory or regulatory justification for such drastic action. The proper course, if any so-called *ex-parte* communication from the Department to a "person with an interest in the proceeding" has occurred, is simple and absolute - let it be spread upon the record of the proceeding. 7 C.F.R. 900.16(c).

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Finally, we have additional concerns about the nature of the "information" being relied upon in the letter because after some checking, we believe that one person from California whom we believe to have close ties to one of the producer-handler opponents herein has indeed repeatedly told one or more other persons in California that "word on the street is that USDA will come down hard" on the producer-handlers or at least the one in Arizona. This person has been questioned as to the source of his information, but has refused to divulge it other than to repeat mysteriously that his source is -- "word on the street." First, if this is the source for the February 16 letter, his ties to the other side do not support an investigation directed either at the Department or proponents. Second, his repeated statements, especially given his refusal to divulge his sources, have not been taken seriously by the industry and cannot be the basis for a Department investigation. But, finally, if allies of the maker of such statements can use those statements alone to achieve the delay in the process which they desire, it would mean that any participant (or their allies and agents) could manufacture rumors and use them to their advantage.

Opponents themselves label their evidence as "the recent rash of rumors or other innuendo." Their contention that information of this nature "call[s] into question the reliability of the entire structure of the Federal Milk Marketing Order system" borders on the preposterous, and should not be honored with weighty deliberation. Rumors and innuendo cannot and should not be the basis either for an investigation or for any further delay this process. The hearing

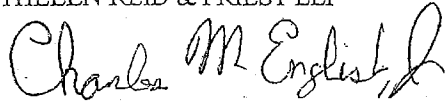
The Honorable Mike Johanns
February 25, 2005
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Thelen Reid & Priest LLP

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Sincerely yours,

THELEN REID & PRIEST LLP



Charles M. English, Jr.

LAW OFFICES OF MARVIN BESHORE



Marvin Beshore

CME/sf

cc: Undersecretary William T. Hawks
Kenneth Clayton
Joyce Dawson
Dana Coale
Sharlene Deskins, Esq.
Benjamin Yale, Esq.
Alfred Ricciardi, Esq.
Northwest Dairy Association
Roger Cryan, NMPF
Constance Tipton, IDFA

DC #186810 v1

EXHIBIT F:

**Dairy Profit Weekly
March 28, 2005 (p. 1)**

Dairy Profit Weekly

a DairyBusiness Communications Publication www.dairyprofit.com

Class Prices

Federal Orders

February

III: 3.5%, \$14.70/cwt.

IV: 3.5%, \$12.74/cwt.

California February

4b: 3.5%, \$13.93/cwt.

4a: 3.5%, \$12.46/cwt.

Leaders to meet

The National Dairy Leaders Conference, bringing together producers, co-op executives, processors, federal order officials, university economists and other industry leaders, will hold its 7th annual meeting, April 10-12, on the outskirts of Boston. Conference theme is 'Going to Bat in Boston: Dairy Leaders Step Up to the Plate.'

For information, contact Jim Bird at 262-786-3120 or Tom Jenkinson at 303-451-7721.

This Issue

- DFA annual delegate meeting
- DPW regional
- DPW markets
- DPW industry: processors, products
- DPW Washington: Ag budget; western opposition to MILC; GAO & FDA; trade with Egypt and Vietnam

DFA delegates meet in Kansas City

Under the theme of "Building Bridges," about 1,100 dairy producers and industry leaders attended the 2005 Dairy Farmers of America (DFA) annual delegate meeting in Kansas City, Mo., March 22-23. Created seven years ago with the merger of several regional dairy cooperatives, DFA – through partnerships, joint ventures and its own manufacturing facilities – now markets and processes about one-third of all the milk produced in the United States annually.

As you might expect on the heels of record 2004 milk prices, the meeting was upbeat. For the fiscal year ended Dec. 31, 2004, DFA payments to members increased 29% to a record \$5.8 billion, up from \$4.5 billion in 2003. DFA also reported record revenues of \$8.49 billion on sales, up from \$6.93 billion in 2003, for an increase of 23%. DFA marketed 57.2 billion lbs. of milk for member and nonmember dairy farmers in 2004.

Other financial highlights include:

- Cash flow generated from operations increased to \$90.2 million.
- Selling and administrative expenses decreased 9% to \$76 million, from \$83.1 million in 2003.
- Net savings grew 17%, from \$55.6 million in 2003 to \$65.1 million in 2004.
- Total members' equity increased 5% to \$691.1 million, compared with \$656.5 million at the end of 2003. In 2004, DFA retired \$21.1 million of equity.
- For the fourth consecutive year, DFA issued a special allocation to dairy farmers of \$10 million from the gain on the sale of Suiza Foods Group L.P., one of the co-op's fluid milk joint ventures.
- Last September, members who marketed their milk through DFA in 2003 received \$25.1 million in member patronage, of which more than \$6.6 million in cash was paid to 16,501 farmers.

Addressing two issues that have resulted in negative publicity of late, president and CEO Gary Hanman said DFA is cooperating fully with ongoing investigations by some states and the U.S. Department of Justice regarding business practices and antitrust issues. "Every joint venture we have put together has required Justice scrutiny, so we've been down this road before. We aren't sure what they're trying to prove. We have not been charged. They have not told us what they're looking at, or whether they will sue us, and if so, why. Eventually, we will find out if there is a specific problem."

In his initial report to delegates, Tom Croner, DFA secretary-treasurer and a dairy producer from Berlin, Pa., told delegates that DFA had ended 2004 with investment-grade credit rating of BBB+ from Standard & Poor's, unchanged from the previous year. Additionally, DFA had a Baa1 rating from Moody's Investor Services, but that Moody's would likely lower DFA's rating by one grade. Later, however, Croner, Hanman and other DFA officials said that comment was in error, and that the co-op's investment rating was under review by Moody's, but that DFA had received no such indication of a lower rating. The ratings are used as a measure of a business's ability to access capital at competitive interest rates. DFA officials said their organization was not alone in investment grade scrutiny, and that market volatility in dairy and agriculture may be behind the concerns.

Federal milk marketing order depooling and producer-handler issues continue to be troublesome, according to Hanman.

"If we can't regulate producer-handlers, the whole classified system of pricing will come tumbling down around our shoulders. It has to be No. 1 on our hit parade," said Hanman. DFA is also aggressively pursuing tightening federal order pooling provisions. Other issues in the national and international arena include an impending Supreme Court decision on the constitutionality of the national beef checkoff and its impact on the dairy checkoff; seeking restrictions on milk protein concentrate imports; and federal dairy and domestic ag policy impacts from the Doha round of World Trade Organization talks, as well as a proposed trade agreement with New Zealand.

Continuing on the "bridge building" theme, DFA chairman Tom Camerlo said the changing dairy industry will require construction of additional bridges, including spanning the gap between small and large producers. He said that while DFA represents a wide range in producer size and milk volume, less than 25% of its farmer-members now produce about 80% of its milk supply. "There's a growing gap in what each of size needs," Camerlo said. Also, he challenged dairy farmers to lead the industry in creating alternative ways to price milk, in light of pending international trade agreements; and asked members to lead the way on the 2006 farm bill, environmental regulations and food safety issues.

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF ADMINISTRATIVE LAW JUDGES
HEARING CLERK'S OFFICE

REQUEST FOR SPECIAL SERVICE

REQUEST FOR MESSENGER DELIVERY OF DOCUMENTS TO OGC
REQUEST BY THE HEARING CLERK'S OFFICE, Phone No. 720-4443, Room 1081-S

Request Date

2/28/2005

DOCUMENTS FOR DELIVERY

TIME SENSITIVE

1. DA-03-04 - Letter dated Feb. 25, 2005 addressed to the Secretary from Charles English and Marvin Beshore.
2. DA-04-06 - Opposition to motion to reopen hearings submitted by Dean Foods Company, signed by Charles English.
3.
4. Carol S. Warlick
AMS - Room 2963 South Building

DELIVER TO

Received by (Please Print)

Carol Warlick

Date of Delivery

3-1-05

Signature

Carol S. Warlick

[Handwritten Signature] 3-1-05

Special Instructions

2005 FEB 28 AM 9:16

Tel. 202.508.4000
Fax 202.508.4321

www.thelenreid.com

Charles M. English, Jr.
202.508.4159 Direct Dial
202.654.1842 Direct Fax
cenglish@thelenreid.com

RECEIVED

February 25, 2005

VIA FEDEX

The Honorable Mike Johanns
Secretary of Agriculture
U.S. Department of Agriculture
Whitten Building/Room 200-A
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: **Milk in the Arizona Las-Vegas and Pacific Northwest Marketing Areas,
Docket No. AO-368-A32; AO-271-A37; DA-03-04**

Dear Mr. Secretary:

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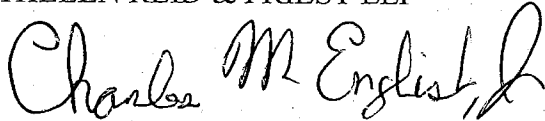
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