

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

IN RE: X DOCKET NOS. AO-368-832,  
X AO-271-837, DA-03-04  
PACIFIC NORTHWEST AND X HELD JANUARY 21, 2004  
ARIZONA-LAS VEGAS X 9:00 A.M.  
MARKETING AREAS X Embassy Suites Hotel  
X 1900 Diagonal Road  
X Alexandria, Virginia

VOLUME X OF XI

APPEARANCES:

FOR USDA:

HON. MARC HILLSON  
ADMINISTRATIVE LAW JUDGE  
USDA  
Washington, D.C.

COUNSEL FOR USDA:

CHARLENE DESKINS, ESQ.  
U. S. Department of Agriculture  
Office of the General Counsel  
Marketing Division  
Room 2331 South Building  
Mail Stop 1417  
1400 Independence Avenue S.W.  
Washington, D.C. 20250

JACK ROWER, Marketing Specialist  
GINO TOSI, Marketing Specialist  
RICHARD CHERRY, Marketing Specialist  
U. S. Department of Agriculture  
Agricultural Marketing Service  
Dairy Programs  
Room 2965 South Building  
1400 Independence Avenue S.W.  
Washington, D.C. 20250

OPPONENTS:

ON BEHALF OF EDALENE DAIRY, SMITH BROTHERS, MALLORIE'S DAIRY, SELECT MILK PRODUCTS, CONTINENTAL MILK PRODUCTS:

BENJAMIN F. YALE, ESQ.

KRISTINE REED, ESQ.

RYAN MILTNER, ESQ.

Benjamin F. Yale & Associates, L.P.A.  
102 West Wapakoneta Street  
Waynesfield, Ohio 45896

ON BEHALF OF SARAH FARMS:

ALFRED W. RICCIARDI, ESQ.

Hebert Schenk, P.C.

Missouri Commons

Suite 125

1440 East Missouri Avenue  
Phoenix, Arizona 85014

PROPONENTS:

ON BEHALF OF DAIRY FARMERS OF AMERICA:

MR. MARVIN BESHORE, ESQ.

Milspaw & Beshore

130 State Street

P. O. Box 946

Harrisburg, Pennsylvania 17108-0946

ON BEHALF OF UNITED DAIRYMEN OF ARIZONA:

MR. SYDNEY BERDE, ESQ.

11126 East Cannon Drive

Scottsdale, Arizona 85429

ON BEHALF OF DEAN FOODS & SHAMROCK FOODS:

MR. CHARLES M. ENGLISH, JR., ESQ.

Thelen, Reid & Priest

701 Pennsylvania Avenue, N.W.

Suite 800

Washington, D.C. 20004

ON BEHALF OF NATIONAL MILK PRODUCERS FEDERATION:

ROGER CRYAN, Director of Economic Research

National Milk Producers Federation

Suite 400, 2101 Wilson Boulevard

Arlington, Virginia 22201

REPORTER: \_\_\_\_\_ MR. BOB ADDINGTON

CONTRACTOR (NOT PRESENT): \_\_\_\_\_ R & S TYPING SERVICE

R & S TYPING SERVICE - (903) 725-3343  
5485 S. Live Oak, Gilmer, Texas 75644

I N D E X

	<u>Page</u>
<u>VOLUME X:</u>	
Opening, by the Court	2746
<u>ELVIN HOLLON</u>	
Direct Testimony, by Mr. Hollon	2746
Direct Examination, by Mr. Beshore	2756
Cross-Examination, by Yale	2760
Cross-Examination, by Mr. Ricciardi	2797
Redirect Examination, by Mr. English	2806
Redirect Examination, by Mr. Berde	2811
Recross-Examination, by Mr. Tosi	2811
Recross-Examination, by Mr. Rower	2813
Recross-Examination, by Ms. Deskins	2816
Further Recross-Examination, by Mr. Tosi	2819
Further Recross-Examination, by Ms. Deskins	2822
Further Redirect Examination, by Mr. Beshore	2824
Further Recross-Examination, by Mr. Yale	2827
Further Recross-Examination, by Mr. Ricciardi	2834
Further Recross-Examination, by Mr. Tosi	2836
Further Recross-Examination, by Mr. Yale	2842
Further Redirect Examination, by Mr. Berde	2849
<u>WILLIAM C. VAN DAM</u>	
Direct Testimony, by Mr. Van Dam	2851
Cross-Examination, by Mr. Yale	2869

1	<u>Cross-Examination, by Mr. Ricciardi</u>	2902
2	<u>Cross-Examination, by Mr. Tosi</u>	2912
3	<u>Redirect Examination, by Mr. Berde</u>	2927
4	<u>Redirect Examination, by Mr. Beshore</u>	2929
5	<u>Redirect Examination, by Dr. Cryan</u>	2934
6	<u>Recross-Examination, by Mr. Yale</u>	2940
7	<u>Hearing Concluded</u>	2953

8	<u>E X H I B I T S</u>		
9	<u>EXHIBIT NO.</u>	<u>MARKED</u>	<u>RECEIVED</u>
10	<u>Exhibit No. 64</u>	<u>2762</u>	<u>----</u>
11	<u>Exhibit No. 65</u>	<u>2869</u>	<u>2869</u>

P R O C E E D I N G S9:00 a.m.

1  
2  
3 THE COURT: Good morning. It's January 21st, the  
4 tenth day of our hearing. We're in Alexandria, Virginia.  
5 I'm Marc Hillson.

6 We were talking late yesterday afternoon, and  
7 Mr. Ricciardi has a couple of witnesses that probably aren't  
8 going to be en route -- that probably won't get here until  
9 sometime late Thursday, if that, so the proponents had some  
10 rebuttal witnesses they wanted to put on. And Mr. Beshore,  
11 you're going to call the first witness?

12 MR. BESHORE: Yes.

13 THE COURT: Or recall the first witness, I guess.

14 MR. BESHORE: Recall Mr. Hollon, Elvin Hollon.  
15 Marvin Beshore, for Dairy Farmers of America.

16 THE COURT: And you look like someone who's  
17 testified earlier in these hearings, Mr. Hollon, so your  
18 oath still stands, I don't need to swear you in again, I'll  
19 just turn it over to Mr. Beshore for questioning.

20 MR. BESHORE: Thank you, Your Honor. Mr. Hollon  
21 has prepared and distributed a written statement, the first  
22 eight pages of which are simply what has already been  
23 predistributed and admitted as Exhibit 45. What we would  
24 intend to do is -- the written statement we're not going to  
25 mark as an exhibit but Mr. Hollon is going to present the

1 written statement, beginning on Page 9, after the written  
2 materials relating to language of the order, which has  
3 already been received in the record as Exhibit 45. We're  
4 not going to read the language into the record, but he's  
5 going to present his testimony, beginning, just for  
6 everyone's information, we're not making this an exhibit,  
7 but beginning on Page 9 of the document that's been  
8 distributed to everyone, with everyone's permission -- with  
9 Your Honor's permission and with everyone's understanding of  
10 how we're going to proceed, that's --

11 THE COURT: That sounds okay by me. So there's  
12 no document for me to mark at this point for identification.

13 MR. BESHORE: There's no document to mark.

14 THE COURT: There's no document to mark, okay.  
15 So with that preliminary, Mr. Hollon, could you proceed with  
16 your comments with respect to Exhibit 45 and its intent and  
17 the other rebuttal subjects that you seek to address. Why  
18 don't you state and spell your name for the record again.

19 THE WITNESS: E-l-v-i-n, H-o-l-l-o-n.

20 ELVIN HOLLON, PROPONENT'S WITNESS, PREV. SWORN

21 DIRECT TESTIMONY

22 BY THE WITNESS:

23 The intent of these modifications is to further  
24 clarify that the burden of proof and the responsibility for  
25 providing all of the details that substantiate such proof to

1 the Market Administrator is on the producer-handler.

2 After his -- and this "his" is the Market  
3 Administrator, his satisfactory review of the details  
4 submitted, the Market Administrator can provide the  
5 "producer-handler" designation.

6 Two, with regard to the newly-inserted Section  
7 (d), situations that would cause the loss of producer-  
8 handler status resulting either from route dispositions and  
9 transfers of packaged fluid milk products in excess of  
10 3 million pounds per month or purchases of fluid milk  
11 products in excess of 150,000 pounds per month, would cause  
12 the loss of producer-handler status for the month in which  
13 the violations occur.

14 These types of violations would be the general  
15 type, that would be revealed on an audit after the fact.  
16 Loss of designation for this case would be limited to the  
17 month in which the violation occurs. Loss of designation  
18 from violating any of the other limitations -- for example,  
19 not designating all of the forms that are a source of milk  
20 supply for the producer-handler operation -- in the  
21 regulations would result in loss of status from the point  
22 the violation occurred until status was again obtained by  
23 proof satisfactory to the Market Administrator.

24 If violations of these type are discovered after  
25 the fact, the penalty would still be assessed back to the



1 date of violation, a situation similar to that accompanying  
2 any federal order audit adjustment.

3 In general, the loss of designation resulting  
4 from violating the operational structure of a producer-  
5 handler would carry a more severe penalty, loss of status  
6 until the status is regained, than an operational procedure  
7 violation. Loss of status is limited to the month the  
8 violation occurred.

9 With regard to Section (a)(6), and for the  
10 purposes of this explanation I will refer to this as the  
11 common label language, we intend for this prohibition to  
12 apply to the relationship between the producer-handler and  
13 an entire chain or group of stores and not just a single  
14 store within a chain or group of stores.

15 The language is intended to address a situation  
16 where a producer-handler, a retailer, and a second supplier  
17 operate to balance the producer-handler by commonly  
18 packaging in the same label, and thereby transferring  
19 balancing costs back to the entire pool.

20 MR. BESHORE: Mr. Hollon, did you mean to  
21 indicate "the same label and container" in that statement,  
22 not just "same label"?

23 THE WITNESS: Yes.

24 MR. BESHORE: Okay. Thank you.

25 BY THE WITNESS:

1           This would occur as follows: The producer-  
2 handler packages, for example, gallons of whole milk for the  
3 retailer under the My Store label. The retailer also  
4 contracts with regulated handler X to package gallons in the  
5 same -- My Store -- label. The price from the producer-  
6 handler is much lower, along the lines as has -- presented  
7 in other testimony at this hearing, so the retailer wants  
8 the maximum quantity of My Store product that the producer-  
9 handler can process.

10           This benefits the producer-handler's operating  
11 cost as well as getting the retailer the lowest-cost  
12 product.

13           The second supplier or regulated handler produces  
14 the same product, in the same label, at the same -- at the  
15 regulated price. The retailer orders the difference between  
16 his needs less the portion provided by the producer-handler  
17 from a second supplier. The second supplier sources his  
18 milk supply from pool handlers, and thus the other dairy  
19 farmers in the pool fill the fluctuation in supply.

20           This situation is doubly negative to the pool  
21 producers because they incur the balancing costs but get no  
22 Class I price for the portion of the sale made by the  
23 producer-handler.

24           Our proposal would prohibit this type of  
25 balancing cost-sharing from happening and thus treat pool

1 suppliers fairly with regard to balancing services to  
2 producer-handlers and also maintain the intent that  
3 producer-handlers provide for their own balancing.

4 Rebuttal testimony with regard to the statement  
5 of Dr. Ron Knutson. The text in italics on the following  
6 pages were taken from Dr. Knutson's testimony, as published  
7 on the internet. In his testimony, Dr. Knutson made several  
8 statements about either the position taken by the proponents  
9 or the data used to support their position. We would offer  
10 the following reply.

11 MR. BESHORE: Now, since we don't have the  
12 statement and don't see the italics in the record, when you  
13 read what you're quoting from Dr. Knutson could you just  
14 make sure you indicate where the quote begins and where it  
15 ends.

16 THE WITNESS: Okay.

17 BY THE WITNESS:

18 Dr. Knutson's statement, on Page 4, quote:

19 "It is ironic to me that Mr. Hollon, on behalf of  
20 DFA, would testify against the interests of the 380 dairy  
21 farms, who are the largest and most efficient small business  
22 operations in the dairy industry. It is even more  
23 surprising that this growing segment would be referred to as  
24 'statistical outliers' when they account for 15 percent of  
25 the milk production. In the future these dairies will

1 account for the majority of DFA's volume or it will not  
2 exist as a cooperative." Close quote.

3 "Outliers" refers to the numbers of business and  
4 not pounds of production. Market Administrator data shows  
5 that 373 out of 66,021 producers are larger than the  
6 2.5 million pounds of milk production or 6/10ths of  
7 1 percent of the total -- of the population.

8 The number of farms in this grouping is small and  
9 well beyond the average size of all farms. The size  
10 qualifier that we propose to use to measure whether or not  
11 to grant producer-handler status would encompass these  
12 producers. The table, the USDA table, from which these data  
13 were taken would show that the producers in the 50  
14 percentile -- in the 50th percentile, based on farm count,  
15 would have an average monthly production of between 49,999  
16 pounds and 99,999 pounds, or 33 times larger than the  
17 median-sized producer.

18 The producer limitation we have proposed would  
19 affect the 3 million-pound producer whose daily production  
20 is larger than the monthly production of the median-sized  
21 producer based on farm count. The term "outlier" seems to  
22 be an accurate description for these farms. It seems  
23 unusual to pursue a policy that grants a tremendous price  
24 advantage, or subsidy, to the largest 6/10ths of 1 percent  
25 of the population.

1 Knutson's statement, Pages 10 and 11, quote:

2 "Mr. Hollon likewise falls into the trap of using  
3 statistics and statistical methods that are not sound,  
4 including: ...";

5 Point 2: "The statement that producer-handler  
6 numbers and/or volume are 'growing rapidly' was not  
7 substantiated. In fact, utilizing his own estimates,  
8 combined with historically USDA data, would appear to  
9 suggest the contrary.

10 "Specifically, from 1980 to 1998, the last year  
11 for which USDA reported producer-handler data, the volume of  
12 milk sold in the United States by producer-handlers declined  
13 from 1.47 billion pounds, 1.14 percent of production, to  
14 1.16 billion pounds, .73 percent of production.

15 "Mr. Hollon's estimates indicate that in 2003 the  
16 volume remained at 1.16 billion pounds. These data do not  
17 confirm the rapidly-growing P-H segment that Mr. Hollon  
18 indicates."

19 Three: "Data on current producer-handler numbers  
20 and volume were set forth where USDA indicates that no such  
21 reliable data exist." Close quote.

22 Dr. Knutson disparaged several conclusions  
23 arrived at regarding the number and size of producer-  
24 handlers by saying the data did not exist or was last  
25 published in 1998. It is clear from his "mis drawn" [sic.]

1 conclusions and actual assertions that he did not read all  
2 of the data presented, North did he know that data that was  
3 used to support the stated conclusions were obtained from  
4 Market Administrator statistics that either have been  
5 published or computed from pool data more recent than 1998,  
6 which was introduced and accepted as an exhibit and  
7 discussed in my testimony.

8 Furthermore, he seemed ignorant of or chose to  
9 ignore data put into the record by United Dairymen of  
10 Arizona and computed by Market Administrator sources on the  
11 growth of producer-handler volumes in Order 131, that being  
12 Exhibit 6, Table 11.

13 Open quote: "4) Estimates were made by  
14 Mr. Hollon of the number of stores served by producer-  
15 handlers based on incomplete and therefore unreliable data.  
16 They are by design the smaller stores that are disappearing,  
17 just as are small milk producers and procedures." Close  
18 quote.

19 Dr. Knutson disappeared several conclusions  
20 arrived at regarding the impact of producer-handler volumes  
21 on retail stores but was ignorant of or chose to ignore the  
22 nature of the IRI sales data as presented in my testimony,  
23 which is marked Exhibit 33-B.

24 Knutson, Page 13, open quote: "Mr. Hollon's  
25 testimony also contains a number of generalizations and

1 assumptions that are erroneous and/or are not substantiated,  
2 including:"

3 "1) No data are presented on the prices  
4 producer-handlers receive for either Class I milk that is  
5 purchased or surplus that is sold. Instead Mr. Hollon  
6 assumed that the federal order prices prevailed. My  
7 interviews with producer-handlers indicate that cooperatives  
8 pay substantially less than the federal order minimum price  
9 for surplus milk purchased from producer-handlers." Close  
10 quote.

11 Dr. Knutson, in stating that my assertions about  
12 cooperative payments to producer-handlers for balancing milk  
13 purchases were unreasonably low, ignored my direct testimony  
14 that DFA paid producer-handlers the lower of Class III or IV  
15 for their purchases.

16 Furthermore, the record indicates that producer-  
17 handlers arrange for far more of the balancing services from  
18 handlers with a high proportion of Class I and Class II  
19 sales, which would indicate that those handlers are not  
20 cooperatives but in fact proprietary plants.

21 Knutson, Page 13, open quote: "Mr. Hollon's  
22 testimony also contains a number of generalizations and  
23 assumptions that are erroneous and/or are not substantiated,  
24 including:

25 "He assumed that increased competition results in

1 disorderly marketing. In the process, he ignored retail  
2 price evidence indicate there was no disorder created in the  
3 structure of milk prices. New competition and account-  
4 switching is normal market behavior and is certainly not  
5 evidence of chaos." Close quote.

6 Dr. Knutson indicated that there was no evidence  
7 that the switching of accounts from regulated handlers to  
8 unregulated handlers was an indicating of disorderly  
9 pricing. However, he ignores the weight of evidence that  
10 shows the producer-handlers do not pay the same prices as  
11 regulated handlers (disorderly); the testimony from every  
12 regulated handler that the price at which they lost business  
13 to producer-handlers was at a level far greater than what  
14 prices they normally see when business changes hands, and  
15 the detailed testimony of Mr. Herbein that outlined that for  
16 a major and significant portion of the market (box stores),  
17 such that they could not sell milk at prevailing retail  
18 prices and pay a regulated price to suppliers. The  
19 proponents' witness Mr. Morrison ultimately affirmed his  
20 calculations.

21 Knutson, Page 14, open quote: "Mr. Hollon's  
22 testimony also contains a number of generalizations and  
23 assumptions that are erroneous and/or are not substantiated,  
24 including:

25 "He assumed that it is the role federal milk



1 marketing orders to enforce over-order premiums. Orders  
2 only set minimum prices for milk that is sold." Close  
3 quote.

4 Nowhere did I assert, North do I now assert, that  
5 a function of federal orders is to enforce over-order  
6 prices, as indicated by Dr. Knutson.

7 Testimony with regard to minority ownership in  
8 Dairy Farmers of America membership:

9 Finally, the issue of ownership and operation in  
10 businesses by minorities and women has been raised, with the  
11 implication that somehow our proposals would have a negative  
12 impact on those population groups. Furthermore, the  
13 implication is that minority and women owners who are  
14 involved in the ownership and operation of producer-handlers  
15 are or should be a privileged subclass.

16 I reviewed DFA membership records for Washington  
17 and Oregon. Our membership is adversely affected by the  
18 current producer-handler regulations. Of the total DFA  
19 membership, 43 percent are female, 2 percent are minority,  
20 and 2 percent are minority and female. In addition, our  
21 members employ Hispanic and other minority employees on  
22 their farms. The estimated extent of minority employment is  
23 significant, above 50 percent in Washington and  
24 approximately 50 percent in Oregon.

25 DIRECT EXAMINATION

1 BY MR. BESHORE:

2 Q. Now, Mr. Hollon, I'd like to address your  
3 attention for a moment to Proposition 4, Proposal 4, which  
4 is the so-called "double-dipping" proposal. Now, you made  
5 some comments in support of that proposal in your Direct  
6 testimony, when you testified --

7 A. That's correct.

8 Q. -- the first time. What -- do you have any  
9 additional comments that you'd like to make with respect to  
10 that proposal and with respect to the information we'd like  
11 the Secretary to consider in support of it.

12 A. Yes. That language that's been proposed in our  
13 draft is identical -- or it was supposed to be identical to  
14 what has been adopted in other orders, Order 32, Order 33,  
15 Order 30, Order 135, Order 124, and the concept is similar,  
16 the language is not identical I don't think, in Order 1, but  
17 the concept is similar, and we think that those records  
18 would certainly -- and those hearing decisions -- would  
19 certainly provide the Secretary with the information to make  
20 a similar finding in this proceeding and in these -- in  
21 Order 131.

22 The concern for dual pooling is a real concern,  
23 it is -- in all of the orders that we just mentioned, it  
24 occurred in some, it is still occurring, and without some of  
25 these -- you know, without this language, it is likely to

1 occur or someone will try to do the same thing in Order 131.

2 It is unreasonable to think that the same pound  
3 of milk should receive the benefit from two pools, and as  
4 long as the provisions are available, someone is going to  
5 try to do it because they have their duty of doing their --  
6 performing their job duties, to do whatever they can to  
7 achieve revenues.

8 So this is a provision that needs to be included  
9 in federal orders prior to federal order reform and in post  
10 federal order reform, the basic principle has been -- as is  
11 very clearly stated, you can't pool, you know, milk, the  
12 same pounds of milk on two federal orders at one time, and  
13 this should simply be adopted here.

14 There were several alternative proposals during  
15 the course of these pooling hearings that were made, we made  
16 and supported one, but as the process went on, we decided to  
17 -- because of the weight of evidence and the finding of the  
18 Secretary to support this proposal that was made, and we  
19 support it here.

20 MR. BESHORE: We'd like to request, if official  
21 notice has not already been taken -- it probably has, I'm  
22 not certain -- that the decisions of the Secretary which  
23 adopted the so-called "double-dipping" prohibitions in the  
24 orders mentioned by Mr. Hollon, that those decisions be  
25 officially noticed in this proceeding, and those are the

1 decisions for Orders 124, 33, 32, and 30. I'm sorry, not in  
2 33. 30, 32, and 124, and 135.

3 THE COURT: I don't remember exactly everything  
4 -- I haven't keep track of everything we've noticed, but we  
5 can take official notice of that. Do you have a problem  
6 with it?

7 MR. YALE: Yes. Ben Yale, on behalf of Edaleen,  
8 Smith Brothers Farms, and Mallorie's. We don't object to  
9 taking official notice of the hearing, but we absolutely  
10 positively object to any effort to suck into this record  
11 testimony and the record that was made in those proceedings  
12 to support this position.

13 THE COURT: I don't think they asked for that. I  
14 think they asked --

15 MR. YALE: Well, that's the implication in  
16 Mr. Hollon's testimony. We just want to make sure that  
17 there's a difference. They can look at the decision, but  
18 whatever the facts are, and those decisions, were based upon  
19 that record and they cannot be used as facts based on this  
20 record.

21 THE COURT: I'm assuming the facts will be  
22 independently briefed by the parties after this is over.

23 MR. BESHORE: The request stands as made.

24 THE COURT: And it's granted as made.

25 MR. BESHORE: We'd also like to request that -- I

1 think this has been taken, but out of an abundance of  
2 caution -- request that official notice be taken of the  
3 final order relating to federal order reform, which the  
4 Secretary made in 1999, effective in 2000, all elements of  
5 that decision, including, you know, in particular, the  
6 published impact statements that went with the decision.

7 THE COURT: Okay. You don't have any problem  
8 with that, Ms. Deskins?

9 MS. DESKINS: No.

10 BY MR. BESHORE:

11 Q. Do you have any other things you'd like to add at  
12 this time, Mr. Hollon?

13 A. No.

14 MR. BESHORE: The witness is available for  
15 cross-examination.

16 THE COURT: Mr. Yale, are you going to go first?

17 MR. YALE: I'd be happy to. Ben Yale, on behalf  
18 of Smith Brothers Farms, Edaleen Dairy, and Mallorie's  
19 Dairy.

20 CROSS-EXAMINATION

21 BY MR. YALE:

22 Q. Good morning, Mr. Hollon.

23 A. Good morning, Mr. Yale.

24 Q. Let's take up this California double-dipping,  
25 because that's really the only state that is in the area of

1 131 that the potential of double-dipping exists, as you  
2 characterize it. Is that correct?

3 A. That's correct.

4 Q. All right. Now, as I understand it, the idea of  
5 double-dipping is that you --

6 A. Mr. Yale, can I ask you --

7 Q. Sure.

8 A. When you stood up a while ago, are you -- who are  
9 you representing?

10 Q. Mallorie's Dairy, Smith Brothers Farms, and  
11 Edaleen Dairy.

12 A. And that's all?

13 Q. That's all I'm standing here to represent in this  
14 position.

15 A. Okay, and this is -- so you -- you've mentioned  
16 several --

17 Q. I'm not answering your questions. That's who I  
18 stood up to represent and that's it. Okay?

19 A. Okay.

20 Q. Now, on this deal with California, you're aware,  
21 are you not, that California -- well, first of all, describe  
22 what a producer that is benefiting from the state pool in  
23 California gets, what kind of -- how's that pricing work?

24 A. I don't claim to be an expert on all of the  
25 mechanics of the California pool. There's a market-wide

1 pool, they have classified pricing, and to the extent that  
2 there are revenues above the base level, the manufacturing  
3 level, producers share in those.

4 Q. That's your position, that they share in revenues  
5 above the manufacturing prices; right?

6 A. Yes.

7 Q. And your concern is that to the extent that  
8 producers in California -- well, and then -- that's also the  
9 case in the federal order system; right?

10 A. Yes.

11 Q. -- that you have producers who share in --  
12 generally, if you keep them pooled -- prices in excess of  
13 the manufacturing prices; right? The blend price tends to  
14 exceed the III and IV price; right?

15 A. Correct.

16 Q. And as I understand, the fear is, is that a  
17 producer -- not the fear or -- whatever, the concern, is  
18 that a producer in California could be delivering to a  
19 cheese plant under the state order and then through some --  
20 however they touch base on qualification or anything, but  
21 also qualify under the federal order -- right?

22 A. That's correct.

23 Q. -- and then would be able to receive a value in  
24 excess of the manufacturing prices in California, plus a  
25 value in excess of the manufacturing price under the federal

1 order. Is that right?

2 A. That -- it would be possible for a producer to  
3 share in both pools, and that would -- that's our complaint.

4 Q. Isn't it true, Mr. Hollon, that in California  
5 there really are two -- I'm -- what did I say?

6 MR. YALE: Did you tell me to say something?  
7 Somebody made a comment back there, that threw me off.

8 BY MR. YALE:

9 Q. Mr. Hollon, isn't it true that in California  
10 there are really two pools, there's a core price and an  
11 overbase price; right?

12 A. Yes, there are.

13 Q. And have you, in support of this proposal,  
14 indicated or made any analysis of what the overbase price  
15 was in light of the manufacturing prices?

16 A. No detailed analysis. From time to time I see  
17 those prices, but I'm not familiar with them.

18 MR. YALE: Your Honor, we have an exhibit we wish  
19 to mark.

20 THE COURT: Okay. It will be Exhibit -- mark it  
21 as Exhibit 64.

22 (Exhibit No. 64 was marked.)

23 BY MR. YALE:

24 Q. By the way, the overbase prices are published,  
25 are they not, in the California -- I mean you can get that



1 off the website and --

2 A. They are.

3 Q. All right. And so if anybody wanted to check  
4 these numbers, they could go to the website and find those;  
5 is that right?

6 A. This is not my exhibit so I don't -- I don't know  
7 that.

8 Q. I understand. But I mean they -- I just want to  
9 talk about: that these numbers can be --

10 MR. YALE: Your Honor, I'm getting some noise  
11 from the back, that I cannot hear the witness.

12 THE COURT: Yes, okay. If we can keep the  
13 whispering at whispering level rather than a low-talking  
14 level, it might be better. Thank you.

15 BY MR. YALE:

16 Q. All right.

17 A. And Ben, I didn't -- again, I didn't prepare  
18 these, but do you know if they've all be adjusted for  
19 standard -- you know, with California prices? They're not  
20 always on a 3/5 basis, so are you sure that these are all  
21 3/5 prices?

22 Q. These are supposed to be standard prices under  
23 CDFR, at 3/5, okay?

24 A. Okay. So --

25 MR. YALE: And we would request, Your Honor -- I

1 think it's already been done, but we would request that  
2 official notice be taken of the published prices put out by  
3 the California Department of Food & Agriculture, for their  
4 4A/4B overbase and quota prices for the period of January  
5 2000 through the current.

6 THE COURT: Is there a specific website citation  
7 you have?

8 MR. YALE: We will get you the specific website.  
9 It is available. I think there's even a link on the federal  
10 -- the dairy programs, to get there.

11 MS. DESKINS: Also, Judge Hillson -- this is  
12 Charlene Deskins, for USDA.

13 Are they published, do you know if they're  
14 published in a booklet form or anything like that?

15 MR. YALE: I know they send them out on a daily  
16 -- on a monthly basis, but we've only relied upon the  
17 federal -- or on the website.

18 MS. DESKINS: Because our concern is just that it  
19 be enough of an indication of where it is so it can be  
20 located.

21 MR. YALE: All right. Well, we'll get that exact  
22 -- we'll get the exact website to you here. I apologize, I  
23 was -- I thought I had it here on this sheet, and it doesn't  
24 show up, and I apologize.

25 BY MR. YALE:

1       Q. Now, the point that -- in a producer who is  
2 shipping milk to a manufacturing plant in California is only  
3 going to get the overbase price, right, unless he gets --  
4 first of all, all producers who ship -- and let me state  
5 this. All producers who ship to a plant in California get  
6 the overbase on their milk that goes in there --

7       A. Ben, I'm sorry, I'm just not going to -- I just  
8 don't know that detail, and I think -- I think that's in the  
9 record, though. I think that in Phoenix, if I'm not --  
10 who's the president of -- not Tillison [phonetic].

11       MR. BESHORE: Marsh [phonetic].

12       A. Marsh. I think he went into extensive detail  
13 over how that worked.

14 BY MR. YALE:

15       Q. Okay. So let me understand this. You're telling  
16 the Secretary that we've got double-dipping and we've got to  
17 put in a regulation to control it, but you don't know the  
18 rules of the dipping that they're doubling in. Is that --

19       A. I think that mischaracterizes. What I said was  
20 that there's -- the option of benefiting from two pools is  
21 not -- is what we want to prohibit --

22       Q. Okay.

23       A. -- and that I'm not intimately familiar with the  
24 operations of the California pool.

25       Q. All right. But the truth is, is that unless you

1 have quota, that the overbase price consistently runs below  
2 the federal order manufacturing prices; right?

3 A. I'm just -- Ben, I'm just not familiar enough  
4 with those price series. You know, they're -- that's a  
5 matter of record.

6 Q. All right. So if it establishes that a producer  
7 going to a cheese plant has overbase, is receiving less than  
8 the federal order Class III price, he more than likely is  
9 receiving less than the federal order blend price; right?

10 A. That would be likely true.

11 Q. So it's not really a double-dip, then, is it, at  
12 that point? -- he's got a negative and he's got a positive.

13 A. Is that producer pool in the California pool or  
14 not?

15 Q. It would be in their pool as an overbase  
16 producer, isn't -- if that -- if the record -- if the  
17 numbers would establish --

18 A. That's not always the fact..

19 Q. What's the other fact?

20 A. That the producer may not be pooled in  
21 California.

22 Q. And then if he's not pooled in California --?

23 A. Then he could be pooled in a federal order if he  
24 chose to and met the performance standards.

25 Q. All right. So I mean my point is, under the

1 double-dipping, okay --

2 A. Uh-huh.

3 Q. -- that you're referencing --

4 A. Yeah.

5 Q. -- that a producer delivering milk to a cheese --  
6 a California producer delivering milk to a California plant,  
7 that's subject to that statewide pool -- okay?

8 A. Okay.

9 Q. -- could be receiving, would be receiving, an  
10 overbase price, and that overbase price is less than the  
11 Class III price, under the federal order, as shown by this  
12 table, and could be established by anybody's independent  
13 analysis of official records that are part of this hearing,  
14 which is, generally speaking, the Class III is less than the  
15 blend price in the federal orders. Right?

16 A. It's conceivable that could happen.

17 Q. Well -- and if the producer in fact is receiving  
18 less than a blend price, or even less than a manufacturing  
19 price, as part of participation in a statewide pool --

20 A. Uh-huh.

21 Q. -- how can he be double-dipping, under your  
22 analysis?

23 A. Well, you're picking just any point in time?

24 Q. I'm talking -- look at Exhibit 64. It appears to  
25 be a fairly consistent move, with some few exceptions.

1 A. In those months, but there could be, sometimes,  
2 and they're --

3 (Pause.)

4 Q. Now, in -- you referenced 124 has this provision  
5 put in.

6 A. Uh-huh.

7 Q. How many non-pool plants, cheese plants, are in  
8 the Pacific Northwest and available to plants in the Pacific  
9 Northwest to balance their production?

10 A. Half a dozen.

11 Q. In Order 131 how many plants?

12 A. Probably UDA's plant.

13 Q. One plant.

14 A. (No audible response.)

15 Q. Now, if you have a -- you would acknowledge,  
16 would you not, that there's a juxtaposition between  
17 California and Arizona, that there is the ability of milk to  
18 move from California farms to Arizona plants or from Arizona  
19 plants -- or farms to California plants; right?

20 A. You mean can milk move back and forth?

21 Q. Right.

22 A. Yes, it can.

23 Q. And in fact it is moving; right?

24 A. Yes, it does.

25 Q. Subject to, I think, a proprietary Supreme Court

1 case that we talked about yesterday; right?

2 A. There's milk that moves between --

3 Q. Right.

4 A. -- the two states.

5 Q. And the -- you're also aware, are you not, that  
6 in California now, that a producer has to choose to be in  
7 the pool for at least 12 months; are you -- right?

8 A. Yes, I'm aware of that.

9 Q. All right. So isn't it -- so if you have a  
10 situation with a processor, or a producer in California  
11 wishes to supply milk to a plant in Arizona, or some other  
12 federal order, New Mexico or out of California into Oregon  
13 or Washington, okay, that they would have to make a  
14 long-time commitment to do that; right?

15 A. Not in every case, but for the most part, yes.

16 Q. Why wouldn't they in every case?

17 A. There are ways to do that.

18 Q. And how's that?

19 A. I don't care to provide those for the record.

20 Q. Now, if the producer -- let's go back, let me  
21 kind of back up. Let's say that the producer, in  
22 California, decides to go to a federal order plant and he  
23 still stays a participant of the statewide order, okay, how  
24 will that milk be priced at the federal order plant, under  
25 your proposal?

1 A. One more time, a producer in California --

2 Q. Okay, it's a California producer.

3 A. Uh-huh.

4 Q. He ships milk to a pool plant in a federal order.

5 A. Okay.

6 Q. But under your proposal, he still retains his  
7 position in the statewide pool.

8 MR. ENGLISH: Your Honor, objection -- Charles  
9 English, for Dean Foods and Shamrock Foods -- that's a  
10 mischaracterization of how the California system works; you  
11 cannot be pooled on California if the milk is received  
12 outside of California, and I think we have a lot of  
13 discussion about this, going the wrong way, from people --  
14 you know -- it just can't happen.

15 THE WITNESS: That is true.

16 MR. ENGLISH: So that's just a  
17 mischaracterization.

18 THE COURT: What's your response? I mean, I --

19 MR. YALE: Well, I mean the point is, Your Honor,  
20 let them ask the question. this is their expert testifying  
21 on the proposal, if he knows that. I've asked him the  
22 question; he doesn't seem to have explained it --

23 THE COURT: That's true, he can answer the  
24 question as asked, and if there's something wrong with it, I  
25 guess it's up to him to point that out.



1 MR. YALE: Right.

2 BY MR. YALE:

3 Q. I mean, let's -- if a producer ships milk to a  
4 federal order pool plant in California and he still retains  
5 his ability -- you know, I mean it could be a cheese plant,  
6 in the federal order, right, that could be a pool plant,  
7 right, and he retains his -- he's still part of the  
8 statewide system, okay?: How would his milk be priced,  
9 under the federal order plan, under your proposal?

10 A. Again, we wouldn't -- our proposal would have  
11 the effect of: not being able to be in both pools. So what  
12 has typically happened, for example, in Order 30, after the  
13 language went in place, was the Order 30 Market  
14 Administrator would make contact with the folks in  
15 California, the California CDFA would tell the Order 30  
16 market administrator: this producer is -- or is not -- part  
17 of the California pool.

18           If he were not a part of the California pool,  
19 then he could be pooled in the federal order pool and  
20 receive whatever benefits there were. If he was a part of  
21 the California pool, then he could not be pooled in the  
22 federal order and would not be able to receive benefits.

23 Q. All right. And what price would he receive for  
24 the milk he delivers, if he -- under that scenario?

25 A. I would presume: the lowest Class price.

1       Q. Okay. Now, going back to the objection of  
2 Mr. English, and his comment was that if you move your milk  
3 out of California, into a pool plant in the federal order,  
4 that you lose the ability to have that milk part of the  
5 statewide pool; right?

6       A. Uh-huh, under most circumstances.

7       Q. Okay. Now, if that puts that producer in a  
8 situation he can no longer participate, he's made a decision  
9 to de-pool his milk for 12 months, he --

10      A. In California?

11      Q. Under the California provision.

12      A. Okay. So a California producer has elected not  
13 to be part of --

14      Q. Right.

15      A. -- the California pool for 12 months.

16      Q. That would be his only -- he would have to make  
17 that decision -- to move his milk into the federal order --  
18 to receive more than just the Class price, he would not be  
19 able to receive the blend price otherwise; right?

20      A. Haven't had time to think that through, but on  
21 the surface, that sounds correct.

22      Q. So in fact aren't we creating a trade barrier for  
23 California producers to move into federal order plants by  
24 your proposal?

25      A. Didn't we just say that they had the choice to do

1 that?

2 Q. But it's a heavy choice, is it not? -- for 12  
3 months.

4 A. Choice is choice, isn't it? Is "heavy" a  
5 characteristic?

6 Q. Now, one of the things -- you're also aware that  
7 some producers can receive a base; right?

8 A. In California?

9 Q. -- quota price. I'm sorry.

10 A. Correct.

11 Q. All right.

12 A. Yes.

13 Q. And that's over and above the overbase; right?

14 A. Correct.

15 Q. Not all producers receive that.

16 A. That's correct. That's my understanding. Again,  
17 I'm not an expert in California, but --

18 Q. But quota is based upon milk that is marketed in  
19 California; right?

20 A. Correct.

21 Q. And the producers own that quota, they have an  
22 ownership interest in that quota; right?

23 A. Yes.

24 Q. And they get it -- those who own it get it, and  
25 those who don't, don't.

1 A. You mean those who have the quota --

2 Q. Have -- right.

3 A. -- get the benefit of the quota and those who do  
4 not have --

5 Q. Right.

6 A. -- quota do not get that benefit.

7 Q. Right.

8 A. Correct.

9 Q. All right. So it's as much a function of their  
10 ownership as it is of their marketing choices; right?

11 A. I think that is correct.

12 Q. I want to come back to your original thing with  
13 your changes, let's shift gears here a minute and talk about  
14 your proposals.

15 First of all I have one question: Are you  
16 proposing that 124.10 also read the same way as this?

17 A. Yes.

18 Q. Okay. So if you would, let's -- I'd like to --  
19 I'm just going to look at -- rather than the exhibit, let's  
20 look at Page 3 of your testimony. And the charges that  
21 you're talking about are your changes from the notice  
22 provision; right?

23 A. That is correct.

24 Q. Okay.

25 A. The changes that I'm testifying now are those

1 marked with a double underline. Any of the other changes  
2 that were in those were testified to in Seattle.

3 Q. Okay. What is the reason for the change -- I  
4 think I know, but I mean let's just go -- the change in the  
5 definition of the distribution or the disposition. Why --  
6 what's wrong with just saying that there's distribution  
7 within the marketing area?

8 A. I've covered all that in the -- in Seattle, so  
9 again, I'm testifying now just on the changes that are  
10 marked with a double underline, so if you'd direct those  
11 questions to -- those otherwise were in the record already.

12 Q. So you're not going to answer that question.

13 THE COURT: You can answer -- I mean, he can ask  
14 the question again, it's been a few months, if there's an  
15 easy way to -- if there's a not-long way to answer it.

16 THE WITNESS: Okay.

17 A. I don't remember what I answered before.

18 BY MR. YALE:

19 Q. All right. Let me ask you this question. Is  
20 this language change necessary if the Secretary finds  
21 there's no need to put a cap on the size of a producer-  
22 handler?

23 A. Yes, we would want the -- want that language in  
24 place, if there was no cap, but our proposal calls for a  
25 cap, and that's what our expectation is.

1 Q. I understand that's your expectation.

2 Now, part of this is to deal with this -- I think  
3 it's provision 6, with the distribution to other -- I'm  
4 sorry, it's not 6 -- to the milk that is delivered to -- I'm  
5 sorry, it's 5(i)(i) -- to a non-pool distributing plant.

6 That is part of the reason you need that change,  
7 right, because it's not distribution only but it's also  
8 distribution to a non-pool distributing plant; right?

9 A. Would you -- try your question again.

10 Q. All right. Let's start over again, okay?

11 A. (No audible response.)

12 Q. You're saying that if the -- that this language  
13 you want irrespective of whether the Secretary imposes a  
14 3 million cap. Is that your testimony?

15 A. Yes.

16 Q. All right. And the only real difference in here  
17 is that it talks about this distribution to other  
18 distributing plants. You see that, in your proposed change?

19 A. Again, I think these are all things that we  
20 covered in Seattle, so --

21 (Pause.)

22 Q. So you're not going to answer the question.

23 A. No.

24 Q. Okay. You think that you've got everything in  
25 the record you need to establish -- to impose a 3 million

1 cap and to prohibit the distribution of milk to non-pool  
2 plants outside the federal order, is that your position?

3 A. Yes.

4 Q. Okay. That we could close the hearing today and  
5 the Secretary has sufficient record to do that?

6 (Pause.)

7 A. Yes.

8 Q. And the Secretary has the authority under the Act  
9 to impose a producer-handler to pay into the pool for milk  
10 that he owned at his farm, he never sells, except in  
11 packaged form, to a retail customer?

12 A. I think we've been through that, but: Yes.

13 Q. You must have attended some days I didn't, so --  
14 okay. All right. You testified today, under Section 6,  
15 that -- about this idea of the wholesale customer; right?

16 A. The label --

17 Q. The label change.

18 A. Yes.

19 Q. Is there any difference in that language from the  
20 language that currently exists under Order 1131.10?

21 A. I don't think so.

22 Q. Now, you would agree, would you not, that unless  
23 a producer-handler is big enough to supply an entire chain,  
24 that they are going to be prohibited from selling milk to  
25 those chains? Is that right?

1 A. I disagree with that.

2 Q. Why do you disagree with that?

3 A. This language is pretty specific in its  
4 application and its interpretation even today, and it is,  
5 you know, label and container.

6 Q. All right. So let's talk about a private label  
7 that the store -- let's say that, you know, the chain store  
8 has a label that they call Happy Farm, that they use as  
9 their private label for all of their milk.

10 A. Yes.

11 Q. 50 stores.

12 A. Yes.

13 Q. All right. And they only sell it in gallons, and  
14 they got --

15 A. Okay, they only sell it in gallons, that's one of  
16 the farms --

17 Q. Gallons.

18 A. Okay.

19 Q. Then the four, the skim, the reduced, the low  
20 fat, and the whole fat. All right?

21 A. Yes.

22 Q. All right. Now, first of all, is your labeling  
23 talking about: if a producer-handler delivered all the  
24 whole milk under Happy label to all of the stores, is that a  
25 violation of this provision?



1 A. If the producer-handler --

2 Q. Delivered all the whole milk but none of the  
3 reduced fat, skim, or low fat. Is that a similar or is that  
4 a different label?

5 A. I would say that that would be a violation.  
6 We're talking about container and label. So gallons of  
7 Happy Store --

8 Q. Right.

9 A. -- would be the qualifier and it would be -- if  
10 there -- it would prohibit there being a sharing of gallons  
11 of Happy label, Happy --

12 Q. Irrespective of whether it's --

13 A. Yes.

14 Q. -- reduced or whole fat --

15 A. Yes. Yes.

16 Q. Okay.

17 A. But it would not affect half-gallons or quarters  
18 or ice cream or pints or sour cream.

19 Q. Okay. So at this point, if a producer-handler  
20 wished to distribute the private label, Happy Farm, to these  
21 chain stores in the gallon form, it would have to supply all  
22 of the gallon mixes.

23 A. Yes.

24 Q. Now, would that include the chocolate milk?

25 A. Gallons?

1 Q. Yes.

2 A. Yes.

3 Q. All right. So they'd have to provide all the  
4 chocolate milk --

5 A. Container and label are the qualifiers.

6 Q. -- and the whole milk, the reduced fat --

7 A. Yes.

8 Q. -- all of that.

9 A. Yes.

10 Q. Okay. At all the stores.

11 A. Yes.

12 Q. And if they can't do that, they can't have part  
13 of it.

14 A. Correct.

15 Q. All right. Now, isn't the Secretary already  
16 empowered and have the authority to investigate, under this  
17 provision, under the interpretation he has now, to see  
18 whether or not the producer is riding -- or the producer-  
19 handler is riding the pool? Does he need any new  
20 interpretation?

21 A. I'm not sure I understand your question.

22 Q. Well, let me -- terrible question. Let me start  
23 all over again.

24 What evidence do you have, under the current  
25 language and interpretation, that a producer-handler is

1 riding the pool?

2 A. Again, I'm not sure I understand what your  
3 question is.

4 Q. All right. Why do we need a change in  
5 interpretation, that you've proposed in your testimony?

6 A. Okay. Over the course of, you know, developing  
7 our position, we looked at this language that's currently in  
8 Order 131 and we liked the idea. We went back and looked at  
9 the order hearing that put it in place, we looked at some of  
10 the rationale for why it was put in place, and we  
11 incorporated the language, between -- when we made the  
12 modification, we felt like that our position wasn't as clear  
13 as we wanted it to, so we're providing additional detail  
14 today.

15 Many times you perhaps think you understand how  
16 -- you know, what something -- what the language means and  
17 how it may or may not be interpreted, and it seems to be  
18 that the things that -- if you want them clear, you need to  
19 try to provide detail at the hearing to give the Marketing  
20 Administrator some guidelines and direction, you know,  
21 later.

22 Q. Do you know how much market share that would deny  
23 producer-handlers?

24 A. I do not.

25 Q. Do you care?

1 A. I don't know the answer. I don't know how much  
2 market share it would or would deny.

3 Q. You would agree that the -- increasingly milk is  
4 sold through chains -- grocery stores and box stores and  
5 warehouse stores, right?

6 A. (No audible response.)

7 Q. -- that the increasing amount of milk sold to  
8 consumers goes through chain grocery stores or warehouse  
9 stores or other multiple store --

10 A. Yes, retail supermarket outlets are the --

11 Q. -- growing thing.

12 A. -- predominance.

13 Q. Right. Okay. And that that would deny those  
14 stores the opportunity to purchase milk from another vendor  
15 if it's a producer-handler?

16 A. Again, the requirement label-/container-specific  
17 and not the entire product line.

18 Q. So if they said Happy Producer-Handler Farm,  
19 instead of Happy Farm, they could do that.

20 A. We have thought of that, and there would --  
21 probably be some market administrator discretion that'd have  
22 to eventually, you know, incur, and that also exactly points  
23 out the need for some type of volume cap because of the  
24 innovative opportunities to get around some of the  
25 provisions.

1       Q. Okay. Let's look over on Page 12 of your  
2 testimony.

3       A. Okay.

4       Q. And you talk about a price advantage or a  
5 subsidy.

6       A. Yes.

7       Q. What's the subsidy that Mallorie's Dairy receives  
8 under Order 124? How much subsidy did they receive in  
9 December of 2003?

10      A. Where are you talking about on Page 12, Ben?

11      Q. Where it says "The term 'outliers' seems to be an  
12 accurate description of these farms."

13      A. Oh.

14      Q. "It seems unusual to pursue a policy that grants  
15 a tremendous price advantage (subsidy) to the largest  
16 .6 percent of the population.

17      A. Okay. The price advantage I'm implying there is  
18 the difference between the Class I price and the blend, that  
19 had been pointed out in several exhibits that -- as part of  
20 the advantage to a producer-handler.

21      Q. Okay.

22      A. It's been testified to.

23      Q. But it's never been testified to by any  
24 producer-handler; right? No producer-handler said they get  
25 the difference between Class I and the blend; right?

1 A. I don't know that I heard anybody say that.

2 Q. Okay. Now, does the federal order pay them this  
3 subsidy?

4 A. Does the federal order pay them --

5 Q. -- a subsidy. Isn't a subsidy: receiving a  
6 payment? I mean, do they receive a subsidy?

7 A. Well, if there's a semantical challenge here, the  
8 thought in my statement -- or what I intend to say is that  
9 it seems to have an unusual policy that -- to grant the  
10 largest percentage of the population a price advantage.

11 Q. And the price advantage is they get this  
12 difference between the Class I and the blend.

13 A. That's right. They're not obligated to settle  
14 with the pool for the Class I price.

15 Q. Now, so I understand this, so that -- you take,  
16 you know, whatever the size of that producer-handler, you  
17 take that times that difference between his classified plant  
18 price and this blend price and he pays that into the pool;  
19 right?

20 A. The normal pool operations --

21 Q. Right.

22 A. -- would be of -- a handler accounts to the pool  
23 at the Class prices on the pay inside and then they draw out  
24 the blend price.

25 Q. And who does that money go to, that he pays it?

1       A. It goes into the pool and is distributed to all  
2 producers.

3       Q. To the producers who deliver milk to his Class I  
4 competitors?

5       A. To all producers who deliver to the pool.

6       Q. It would include the producers that deliver to  
7 his Class I competitors; right?

8       A. Yes, it would.

9       Q. And it include includes milk -- money that would  
10 be paid to producers who produce cheese.

11       A. It would.

12       Q. Or powder.

13       A. It would.

14       Q. All right.

15       A. It would.

16       Q. That he doesn't get any of.

17       A. His producers -- is he now a member of the pool,  
18 in your example?

19       Q. Well, at some point he became a pool, because he  
20 has to pay into it; right?

21       A. Yes. So he would draw back out of the pool, just  
22 like all of those other producers that you just mentioned,  
23 or "she."

24       Q. Okay. In the -- the next item you have there on  
25 Page 12 -- and you have this thing, "Dr. Knutson disparaged

1 several conclusions," et cetera.

2 A. Yes.

3 Q. Okay. What is the amount of rapid growth that's  
4 occurred in the Pacific Northwest among producer-handlers in  
5 the last six months, what's that rate of growth?

6 A. The predominance of growth that's been shown thus  
7 far has been in Order 131.

8 Q. And what's the growth in Order 131 in the last  
9 six months?

10 A. That I can't tell you; I don't know.

11 Q. So his statement that it was not substantiated,  
12 if you can't tell us, is probably a pretty accurate  
13 statement, isn't it?

14 A. No, that's not true. He said that there was no  
15 way to draw any conclusions because there had been no data  
16 published since 1998, and there has been data -- there's  
17 data in the record since 1998, there's data put in that  
18 showed small volumes growing to larger volumes. There's  
19 data showing the growth of, in one case, Sarah Farms'  
20 operations, all that data has been in the record. There's  
21 data from the market administrators, that was introduced as  
22 a part of our testimony, that showed volumes of Class I  
23 sales by producer-handlers by order, and Dr. Knutson did not  
24 seem to be aware that that data was in place.

25 Q. Now, you also mention, over on the next page,



1 something about -- that -- selling milk to cooperatives  
2 under Class. You don't know -- first of all, do you know if  
3 DFA's purchased any milk from any of my clients?

4 A. Yes.

5 Q. And are they the only cooperatives that purchase  
6 milk from producer-handlers?

7 A. "Is DFA" --

8 Q. Yes.

9 A. -- "the only cooperative that purchases milk" --

10 Q. In Order 124.

11 A. I do not have direct knowledge. I have heard  
12 Mr. Van Dam and Mr. Marshall say -- and Mr. McBride, I think  
13 he testified also that they from time to time purchase milk  
14 from producer-handlers, but I'm not aware of the details of  
15 that transaction.

16 Q. And you don't know what price they paid for it.

17 A. I do not.

18 Q. And you also -- the next question is -- you have  
19 an ownership in Wilcox, is that -- I think was your comment?

20 A. Yes.

21 Q. And that they buy milk at Class III or IV?

22 A. DFA buys milk from producer-handlers and procures  
23 milk for Wilcox.

24 Q. Okay. And is that a standing offer at III or IV  
25 or is it: depends on the market, if you need it and you'll

1 pay it, otherwise it's --

2 A. You mean any day of the week would we buy milk --  
3 I don't think that's the case. The -- we buy milk from  
4 producer-handlers in varying quantities. I do see those  
5 quantities, you know, through some other duties that I do at  
6 my job, I have some responsibilities for the promotion  
7 payments that are made by DFA.

8 So when you buy milk from a producer-handler, you  
9 become the reporting party, so I do see those quantities and  
10 volumes. It's varying, some months it's zero, some months  
11 it's been, you know -- I think probably the most has been:  
12 over a million pounds, and when I inquired about the people  
13 who do the invoicing, I asked them specifically about the  
14 payment rates, and I was told that we pay for that milk the  
15 lower of Class III or IV, less any 15-cents promotion  
16 payments, which we in turn funnel on to the promotion  
17 agencies.

18 Q. Moving on over to Page 14, you talk about "the  
19 weight of evidence that shows the producer-handlers do not  
20 pay the same prices as regulated handlers," and you used the  
21 term "disorderly."

22 A. Yes.

23 Q. Okay. And is your definition that that alone  
24 makes it disorderly; right?

25 A. The thought process there is that one of the

1 functions of orders is to attend -- is to attempt to assure  
2 that all handlers pay the same minimum prices, and that's to  
3 ensure competitive equity at the minimum price level in the  
4 marketplace, and so in this case it's our belief that it  
5 doesn't occur, and we think that testimony is substantiated  
6 by many of the handlers, who have testified in both Phoenix  
7 and Seattle.

8 Q. Now, yesterday there was put into evidence two  
9 exhibits, one produced by the USDA, showing the gallon costs  
10 for milk. Do you recall that? I can't remember the  
11 numbers. I pulled out the wrong copy.

12 MR. BESHORE: 63 and 62.

13 MR. YALE: 63 and 62. Thank you.

14 BY MR. YALE:

15 Q. Do you recall those?

16 A. These?

17 Q. Yeah, you have them in your hand.

18 A. Okay.

19 Q. All right.

20 A. I think these belong to Mr. Hettinga, though.

21 Q. Yeah, I know they do, they deal with  
22 Mr. Hettinga. But my question first off is, is there  
23 anything else in the record that shows actually what any  
24 producer-handler sells milk for on a specific month, on a  
25 specific unit, to a store, in the record, other than this?

1 Is there anything else in here, in the record?

2 A. There was -- there was data that was inserted or  
3 was put in the record by Mr. Herbein.

4 Q. In terms of what actual producer-handler --

5 A. Is there an actual price announcement?

6 Q. Actual price announcements by any other producer-  
7 handlers.

8 A. I do not recall any others in these.

9 Q. Okay. Any other price announcements for -- well,  
10 let's just use this period of time, October through January  
11 -- October of 2003 through January 2004, any price  
12 announcement from any regulated handlers?

13 A. I do not recall. I don't think there were any.

14 Q. In the same market. Right?

15 A. I don't think so.

16 Q. You would agree that if those records were in,  
17 that you could show -- you could see whether or not the  
18 prices were different, that the producer-handlers were  
19 selling different than the handlers; right?

20 A. I think there had been opportunities to do that.

21 Q. And whose obligation is it to prove in this  
22 hearing, what's your understanding?

23 A. Well, I think both sides have putting in what  
24 they think -- that they can provide to the Secretary to make  
25 his or her decision.

1 Q. You don't understand that the proponents have the  
2 burden to convince the Secretary to make a change.

3 A. "The proponents have a burden." The proponents  
4 have put in a preponderance of evidence to convince the  
5 Secretary.

6 Q. Okay. Now, there is -- but there's no other  
7 statement in the record, that says: Safeway will sell  
8 gallon milks at this price.

9 A. I think there were some statements made by some  
10 of the -- some of the producer-handlers, about their markups  
11 and their prices and how they operate.

12 Q. Now, I don't know whether you looked at these  
13 numbers, but I think you can do a quick compare and you can  
14 see that these prices, anyhow, indicate that the price sold  
15 to -- or offered to -- what was it, Veterans Market, exceeds  
16 the minimum Class I prices. Right?

17 A. I did not examine these numbers.

18 Q. But if it exceeds the Class I price of the  
19 market, how can you say that it's disorderly?

20 A. Again, I did not examine these numbers. I don't  
21 -- I don't --

22 Q. I mean, the record will show for itself --

23 A. I don't make any claim to be able to take apart  
24 the retail, wholesale prices.

25 Q. All right. Look, I think, at -- look at the one

1 that says Sarah Farms.

2 A. Okay.

3 Q. For 3.25 percent whole milk, and what are they  
4 selling that for?

5 A. It's at \$1.73 per unit.

6 Q. And looking over here on the other market, from  
7 the Market Administrator for Order 131, for January, what's  
8 the price per gallon, minimum price for milk?

9 (Pause.)

10 A. It's at 121.13.

11 Q. And how much analysis does it take to determine  
12 whether 121 is less than 173?

13 A. Not any, if there's comparable prices.

14 Q. So how can you take the position -- and  
15 unfortunately, this is all we have in the record, but how  
16 can you take the position that this price is disorderly?

17 A. Again, I don't have all of the detail about how  
18 it was composed, don't have all of the details about, you  
19 know, what was in it or what was in it, you know. I do know  
20 that, you know, there was no settlement with the Market  
21 Administrator and the pool and the producers at this price,  
22 so --

23 Q. We understand, we agree with that.

24 A. Okay.

25 Q. But the point is, is that this -- the announced

1 price exceeds the Class I price in that market; right?

2 A. Yes.

3 Q. Okay. And whatever difference in there would  
4 have to encompass any processing costs and packaging costs  
5 and transportation; right?

6 A. Yes.

7 Q. Okay. Now, if -- and I think there was testimony  
8 that -- well, I don't need to go there. All right. The  
9 only difference, then -- I'm going to start over.

10 Assume for a moment that you have two plants, and  
11 for the moment we're going to call them regulated plants.  
12 Okay?

13 A. Okay.

14 Q. They're in the market, plant A and plant B.  
15 Plant A is supplied by producers or a co-op over here, and  
16 plant B is supplied by your co-op. Okay?

17 A. Okay.

18 Q. And they pay the same minimum prices into the  
19 pool.

20 A. Okay.

21 Q. The same size plants. And you're supplying the  
22 milk, and this plant over here, plant A, has the ability to  
23 process milk at three cents a gallon than plant B.

24 A. Uh-huh.

25 Q. All right?

1 A. Okay.

2 Q. And it takes advantage of that and it sells it to  
3 its customers at a lower price.

4 A. Yes.

5 Q. And plant B over here is starting to lose sales.

6 A. Yes.

7 Q. Which would be a logical thing, in a free,  
8 dynamic market; right?

9 A. Yes.

10 Q. All right. And plant B came to you and said --  
11 and you're just selling it at the Class prices. I can't  
12 stay in business with this guy because he's selling milk  
13 cheaper than me, because he's got plant costs less than  
14 mine.

15 A. Yes.

16 Q. Is that disorderly marketing?

17 A. Are they both paying the regulated price?

18 Q. They're paying the regulated price, they're both  
19 regulated handlers.

20 A. Then if I'm a supplier, I don't have too much to  
21 say about that. I'm in that position from time to time.

22 Q. That's right. Because the Secretary doesn't have  
23 authority --

24 A. They're both paying the same regulated price, so  
25 if either of those suppliers come to me with, you know, some



1 marketing issue and they're both paying the minimum price,  
2 that's about the extent of it as a supplier, I can or I'm  
3 willing to do something about.

4 Q. Okay.

5 A. I don't think that has anything to do with the  
6 Secretary's authority.

7 Q. Let's go to -- let's go to another situation, and  
8 assuming that plant A and plant B still have the same costs  
9 for their raw milk --

10 A. Okay.

11 Q. -- one may not be paying into the pool, but one  
12 is paying into the pool. Okay?

13 A. Okay.

14 Q. Maybe there are two different pools or --

15 A. Okay.

16 Q. -- a different deal, but they're paying the same  
17 price, and plant B comes to you and says -- and yours is the  
18 regulated handler -- and says, "Those guys are beating me 2,  
19 3 cents a gallon, I'm losing business, and it won't be long:  
20 I won't be able to use your milk anymore."

21 Now, is that a concern of the Secretary's?

22 A. And are both plants in this case paying into the  
23 pool?

24 Q. They're not both paying in the pool but they're  
25 both -- their costs are basically the same.

1       A. My concern would be: is one regulated and one  
2 not, and what might be the implications of that.

3       Q. So you would use the regulation of this plan A so  
4 that your plant, that's poorly-regulated, that's less  
5 efficient, can have an advantage, or at least bring back  
6 some kind of competitive balance, by using the regulations;  
7 right?

8       A. I don't think that's what I said. Back in your  
9 first example, where everybody was on the same regulatory  
10 standard, I said at that point I don't think I could have  
11 much to say about their efficiency, and I think the same  
12 thing holds here.

13       Also, I would be concerned about, you know, were  
14 both plants regulated, if one was not, you know, how that  
15 might affect marketing, and that, I think, has been  
16 consistent in the theme of this hearing.

17       Q. I don't disagree that you've been consistent,  
18 Mr. Hollon, on that position. My question comes down to,  
19 though -- but isn't --

20       The real issue is that if the -- the real  
21 advantage between a producer-handler in, say, Kent,  
22 Washington, or Lynden, Washington, is the fact that it's  
23 created an efficient ability to process milk and distribute  
24 it, and that's its advantage over its competitor.

25       What business does the Secretary have in

1 regulating that producer-handler, to take away that  
2 advantage by assessing the difference between Class I and  
3 blend?

4 A. Well, you've pointed out all the efficiencies and  
5 the entrepreneurial skills and the good operators and --  
6 I've heard some pretty amazing stories of some  
7 entrepreneurial skills and good operators. I presume they  
8 would be just as entrepreneurial and just as good and  
9 skilled an operator if they were regulated or if they  
10 weren't?

11 MR. YALE: I have no other questions, Your Honor.

12 THE COURT: I'm going to let the opponents doing  
13 their questioning, it just sort of gives a little more  
14 symmetry. Mr. Ricciardi.

15 MR. RICCIARDI: Thank you, Your Honor.

16 Al Ricciardi, for Sarah Farms.

17 CROSS-EXAMINATION

18 BY MR. RICCIARDI:

19 Q. Good morning, Mr. Hollon.

20 A. Good morning, Mr. Ricciardi.

21 Q. Mr. Hollon, I'm going to ask you a couple  
22 questions that are based principally upon some of the  
23 statements made on Page 14 of your statement, although we  
24 haven't admitted that in evidence; you read it in, and we've  
25 testified to it.

1       A.    Okay.

2       Q.    You're not aware of any specific information as  
3 to what any box store, located either in Order 131 or  
4 anywhere else, has paid for milk; correct?

5       A.    The information that I have would have been what  
6 was put together in Mr. Herbein's testimony.

7       Q.    And you recall Mr. Herbein said he didn't have  
8 any data from any stores in 131; correct?

9       A.    What I recall is that he had -- he based his data  
10 off of retail price and margin expectations and his  
11 experience at cost structure.

12       Q.    And he didn't have any specific data as to what  
13 was actually paid by any box store anywhere for any milk;  
14 correct?

15       A.    That's correct.

16       Q.    But it is your testimony, as I understand  
17 Paragraph -- or Page 14, that essentially a regulated  
18 handler can't compete with a producer-handler for a box  
19 store customer. Correct?

20       A.    The analysis, that we've put into the record, and  
21 the scenario that I outlined a while ago, starting with the  
22 retail price on the store shelf and working backwards, with  
23 the best data that we have, indicates that fact.

24       Q.    You're aware of Wilcox Dairy?

25       A.    Yes.

1 Q. They're regulated?

2 A. Yes.

3 Q. They in fact have agreements in Washington and  
4 Oregon, I believe, with Costco; correct?

5 A. I'm sorry, I'm not privy to that. That may well  
6 be true, but I'm not privy to the retail agreements.

7 Q. Assume for a moment that they do.

8 A. Okay.

9 Q. If Wilcox, a regulated handler, in fact has  
10 agreements with a box store like Costco to sell in Oregon  
11 and Washington, then obviously they are able to compete with  
12 producer-handlers in Order 124; correct?

13 A. Again, under the assumptions there, it would be:  
14 yes. Don't know what all the mix of business is, that they  
15 have.

16 Q. If that's true, would that call into question the  
17 conclusions reached by you and by Mr. Herbein that someone  
18 who's regulated cannot compete for box store business with a  
19 producer-handler?

20 A. Again, you have to look at the broader mix of  
21 business. I think, you know, Mr. Herbein's example, again,  
22 worked through with Mr. Morrison, was on a stripped-down,  
23 you know, model, that it reached the conclusion that a  
24 handler could not pay a regulated price at the prices in the  
25 markup that were in place, and again, you know, I don't know

1 that those markups are always uniform, but that was based on  
2 Mr. Herbein's experience.

3 Q. But you would agree with me that the analysis of  
4 a regulated handler like Wilcox being able to make a deal  
5 with Costco means that it contradicts Mr. Herbein's  
6 conclusions and your conclusions?

7 A. If you have the right set of circumstances, it  
8 could happen.

9 Q. You were here for the examination by Mr. Beshore  
10 of Mr. Hettinga yesterday; correct?

11 A. Yes.

12 Q. Your position at DFA, again, is what?

13 A. Director of fluid marketing and economic  
14 analysis.

15 Q. How long have you worked there?

16 A. For Dairy Farmers of America?

17 Q. Yes, sir.

18 A. For it or its predecessor since 1979.

19 Q. So you're familiar in general with the business  
20 of DFA since 1979

21 A. In general.

22 Q. Are you familiar with the order requirements,  
23 such as permanent injunctions, which DFA is subject to,  
24 preventing anti-competitive and predatory behavior by it or  
25 its predecessors?

1       A. I am generally familiar, I'm not in a legal  
2       capacity, but I'm generally familiar.

3       Q. Are there current permanent injunctions that DFA  
4       is currently operating under, whether state or federal?

5       A. There are some consent degrees that are binding  
6       on DFA.

7       Q. Mr. Hettinga can remember that, but you do recall  
8       those?

9       A. There are some.

10       Q. Again I want to talk about some of the  
11       information on your -- Page 14 of your testimony. Again,  
12       the assumption you raise, about the middle of that  
13       testimony, is that producer-handlers don't pay the same  
14       prices as regulated handlers; correct?

15       A. Yes.

16       Q. And it's that alone, you say, that is disorderly;  
17       your opinion would be that that is, by itself, a definition  
18       of "disorderly marketing." Correct?

19       A. That's -- that's the major function, that  
20       producer-handlers don't settle with the pool at Class price  
21       values.

22       Q. Let's assume that a producer-handler is paying  
23       the same price as a regulated handler. Is that disorderly,  
24       in that particularly market?

25       A. In your example, are they paying it to the pool?

1       Q.    No.

2       A.    Again, our complaint, if you will, is that they  
3 don't settle with the pool at regulated prices.

4       Q.    But if they're paying the same price as a  
5 regulated handler in that particular market, whether they  
6 pay it into the pool or not, why is that disorderly?

7       A.    If it's paid into the pool, then they're on the  
8 same regulated minimum price as every other handler, it's  
9 transparent, it's clear, and those values are shared equally  
10 in the pool, which is part of the function -- those are main  
11 functions of federal orders, which are, you know, policies  
12 that we have established by Congress.

13       Q.    Let's assume that you have a producer-handler  
14 that is trying to compete for business with a regulated  
15 handler and the regulated handler offers the customer milk  
16 at less a price than the producer-handler can produce the  
17 milk for. Is that an example of disorderly marketing?

18       A.    As long as both handlers are pool handlers and  
19 are paying the pool at Class prices, you know, those types  
20 of transactions that -- I don't have a dog in that hunt.

21       Q.    But at that -- that's not what I asked.

22       A.    I understand that.

23       Q.    My question, Mr. Hollon, was this: You have a  
24 producer-handler and a regulated handler competing for  
25 business, for a particular customer, the regulated handler



1 offering the customer a price lower than the producer-  
2 handler can manufacture for and sell for. Is that an  
3 example of disorderly marketing?

4 A. That's a difficult question to answer, and I'm  
5 going to tell you, I don't think so, I think that -- but the  
6 qualifier -- I have to start off with my assumptions, you  
7 know, at a different spot than you, I have to start: that  
8 they are both regulated handlers, and from there, their  
9 behavior is, you know, both beyond the pale of regulatory  
10 authority and to some extent beyond the pale of where I, as  
11 a supplier -- I start to run into legal issues if I get  
12 involved in those kind of things, and I'm not sure that  
13 that's a place, you know, that I can care about, if you  
14 will.

15 So I understand the example that you're placing,  
16 but I don't think that that's a -- that's disorderly in the  
17 sense of, you know, a federal order hearing or federal order  
18 regulation or something that the Secretary going to, you  
19 know, have a say-so with.

20 Q. Okay. Well, I have a couple of things, and then  
21 I'll -- then I'll sit down. Well, first of all, I've got  
22 people on the left side of the room that really do care  
23 about that --

24 A. Uh-huh.

25 Q. -- because it impacts their business and whether

1 they can stay in business. But let's start it this way.

2 Your assumptions have been that a producer-  
3 handler isn't regulated. In fact a producer-handler is  
4 regulated, isn't it, it's subject to the regulations  
5 currently in place as to whether or not it is going to meet  
6 the qualifications of a producer-handler and subject to  
7 audit by the Market Administrator, et cetera; correct?

8 A. They are required to report, you know, to the  
9 regulation, they are not subject to minimum pricing  
10 regulations, that's obviously the key factor, but you have  
11 outlined some of the things that they are required to do.

12 Q. Okay. So the Secretary, because a producer-  
13 handler is subject to some regulations, in my example would  
14 have at least a concern if in fact the producer-handler  
15 couldn't compete in that particular market with a regulated  
16 handler on price because, based upon your own definition,  
17 that's disorderly.

18 A. I don't think that your conclusion is right. I  
19 mean, the -- dairy farmers go in and out of business every  
20 day, and that's not the Secretary -- from the federal order  
21 standpoint, that's not the Secretary's concern. The  
22 Secretary of Agriculture may be concerned that they're more  
23 or less producers of anything, but dairy farmers go in and  
24 out of business, processors go in and out of business, dairy  
25 farmers get larger and smaller, accounts get traded back and

1 forth, those kind of -- are not federal order regulatory  
2 concerns.

3 Q. Dairy farmers can go out of business in an area  
4 even if there isn't disorderly marketing; correct?

5 A. Yes.

6 Q. Dairy farmers can go out of business because they  
7 can't compete with other regulated handlers because their  
8 efficiencies aren't as good; correct?

9 A. Dairy farmers and --

10 Q. Excuse me, I apologize. Processors can't compete  
11 with other processors --

12 A. Yes.

13 Q. -- because their efficiencies aren't as good.

14 A. Yes.

15 Q. Dairy farmers can't compete with other dairy  
16 farmers because their farm practices aren't as good. I  
17 mean, there are a variety of reasons why farmers or  
18 processors will go out of business.

19 A. Those types of reasons might be a Farm Services  
20 Administration question, but they're not a federal order  
21 question.

22 MR. RICCIARDI: Nothing further. Thanks.

23 THE COURT: This might be a good time for a  
24 break. Let's take a morning break, let's take a 15-minute  
25 break and reconvene about 20 minutes before the hour. Off

1 the record.

2 (Off the record and reconvened.)

3 THE COURT: On the record. Mr. English, you were  
4 going to ask some questions.

5 MR. ENGLISH: Thank you, Your Honor. Charles  
6 English, for Shamrock Foods and Dean Foods.

7 REDIRECT EXAMINATION

8 BY MR. ENGLISH:

9 Q. Mr. Hollon, just one or two general questions and  
10 then some questions about Exhibit 64. You were asked a  
11 number of questions by Mr. Yale that were prefaced with or  
12 ended with the idea of a prohibited transaction by a  
13 producer-handler or denied a market.

14 A. Yes.

15 Q. Is that characterization correct, in your view,  
16 as to what's attempted to be done?

17 A. Well, the dual pooling is choice of a market --

18 Q. This isn't a dual pooling issue; this is  
19 producer-handler.

20 A. Ah. Okay. No. No. There's always -- if a  
21 producer-handler can be a producer-handler, they can be a  
22 producer and they can be a handler. So there's plenty of  
23 choices involved in that. Denial would not be the right  
24 word.

25 Q. And now going to the double-dipping, Proposal 4,

1 issue. You've essentially answered one of the questions,  
2 which is: You view that as a choice as well?

3 A. Yes.

4 Q. That the same milk can draw a blend price.

5 A. That is correct. When you draw both benefits, or  
6 both blend prices, it's not always uniform as to who can  
7 draw those, therefore you don't have a uniform sharing of  
8 producer values, and in some cases handlers have differing  
9 abilities to pay, and differing prices, and that's what  
10 strikes at the disorderly marketing part.

11 Q. Being the same issue for the whole hearing, which  
12 is: uniform pricing; correct?

13 A. Yes, that's true.

14 Q. Uniform prices paid to producers and by handlers;  
15 correct?

16 A. Yes, that's correct, in both cases.

17 Q. Let's look at Exhibit 64 for a moment. Based  
18 upon your understanding, as Exhibit 64 has listed it,  
19 California overbase price and federal order Class III price,  
20 are they announced based on identical components?

21 A. No, they aren't. I did ask Mr. Yale that  
22 question, and: they're not based on identical components.  
23 They may be from time to time by happenstance, but they're  
24 not announced on a uniform basis, both cases.

25 Q. So if the Secretary is to look at this

1 information and -- somebody's got to standardize it at some  
2 point.

3 A. That's correct.

4 Q. And the California overbase price is nonetheless  
5 a blend price; correct?

6 A. There are more factors than just the value of  
7 cheese, whey, protein, et cetera, that's in the -- the Class  
8 III federal order price is designed to be a price for  
9 manufacturing Class III products, the California overbase  
10 price has other values that are pieced together in it.

11 Q. But it is an enhanced price over the lowest  
12 surplus price available for a farmer in California.

13 A. That's its intent. I don't know if it always  
14 achieves that, but that's its intent. Otherwise it would be  
15 the 4B price or the 4A price.

16 Q. And did you attend the first -- I think all of  
17 them, but let's start with the first -- hearing with respect  
18 to double pooling?

19 A. I did, in Order 30, in Minneapolis.

20 Q. And at that hearing, was the issue raised by any  
21 proponents or opponents of the issue of double pooling with  
22 respect to the California system and asking for special  
23 termination request for overbase milk?

24 A. One of the --

25 MR. RICCIARDI: Let me object, Your Honor. With

1 regard to another hearing, and other evidence that we're  
2 talking about, why is that relevant to any issue with regard  
3 to 124 and 131, that were at issue in this particular  
4 hearing right now. I mean, obviously they can -- they've  
5 already taken official notice of the conclusions reached;  
6 why is information regarding that particular proceeding  
7 relevant to anything here?

8 MR. ENGLISH: Your Honor, the issue's been raised  
9 here about overbase price versus Class III pricing and I'm  
10 asking this witness whether or not that precise issue has  
11 been raised in another proceeding, and, if so, what the  
12 resolution of that was, philosophically.

13 MR. RICCIARDI: So what, Judge? The fact is here  
14 a decision has to be made --

15 THE COURT: Well, the --

16 MR. RICCIARDI: Why is anything that happened  
17 there relevant to this issue?

18 THE COURT: Well, the "so what" might be  
19 something for the Secretary to decide. I mean, the  
20 Secretary might want to look at her reasoning -- was it  
21 "her"? -- at the time of the previous decision and compare  
22 it, I don't know --

23 MR. RICCIARDI: I mean, Judge, if we had two --

24 THE COURT: I know. I'm going to just let her --  
25 I think this is going to be pretty quick. I'm going to let

1 him answer --

2 MR. ENGLISH: It would have been over by now.

3 THE COURT: I recognize that.

4 UNIDENTIFIED MALE: Maybe.

5 MR. ENGLISH: No, it would have been.

6 THE COURT: You can answer that question, if you  
7 can recollect.

8 A. There was a proponent at the Order 30 hearing,  
9 Mr. Hawn [phonetic] from Land O'Lakes, who raised the issue  
10 that the dual pooling should not be a concern because the  
11 California pool was constructed not to be a market-wide  
12 pool, and he went through several pieces of analysis dealing  
13 with base and overbase and how those were put together, and  
14 then the decision written by the Department: they rejected  
15 that argument and came to the conclusion that it should be  
16 prohibited.

17 BY MR. ENGLISH:

18 O. I may have misunderstood. I think you heard  
19 differently than I did, but just in case: If Mr. Yale asked  
20 you a question regarding California plants that are federal  
21 order pool plants, do any such plants exist?

22 A. In the event he asked that question: I'm not  
23 aware of any plant in California that is a federal order  
24 pool plant. If there is one -- maybe there is, but I'm not  
25 aware that there is one, so I --



1 MR. ENGLISH: That's all the questions I have,  
2 Your Honor.

3 THE COURT: Any further -- Mr. Berde, you have  
4 some questions?

5 MR. BERDE: I have one. Sydney Berde, for United  
6 Dairymen of Arizona.

7 REDIRECT EXAMINATION

8 BY MR. BERDE:

9 Q. Mr. Yale asked you whether any producer-handler  
10 in this hearing has testified that the blend price was the  
11 price that the producer-handler relies on for his pricing of  
12 his Class I products. You recall that?

13 A. Yes.

14 Q. Do you recall the testimony of Mr. Beene, who was  
15 called by Mr. Yale as a witness in this hearing?

16 A. Yes, I do.

17 Q. And Mr. Beene was associated with a producer-  
18 handler in Texas, was he not?

19 A. That is correct.

20 Q. And do you recall Mr. Beene's testimony that in  
21 pricing their products, they use the blend price as the  
22 transfer price for raw milk from their farm to the plant?

23 A. Yes, Mr. Beene did.

24 MR. BERDE: Thank you.

25 THE COURT: Any further proponent questioning?

1 (No response.)

2 THE COURT: Any question from the federal side?

3 Mr. Tosi.

4 RECROSS-EXAMINATION

5 BY MR. TOSI:

6 Q. Good morning, Elvin.

7 A. Good morning, Mr. Tosi.

8 Q. Regarding the -- Proposal 4, on double-dipping,  
9 you're asking us -- I want to say it in a precise way.

10 A. Okay.

11 Q. You want us to rely on the findings of the  
12 previous decisions adopting prohibitions on the simultaneous  
13 pooling of the milk on the Arizona - Las Vegas order and a  
14 state order providing for the market-wide pooling of milk.

15 A. Yes.

16 Q. And with regard to the impact of pooling or the  
17 simultaneous pooling of milk on two orders, let's for the  
18 purposes of this question assume that I mean two federal  
19 milk-marketing orders.

20 A. Okay.

21 Q. Even if the two orders have different blend  
22 prices, how does the simultaneous pooling of the same milk  
23 on two orders distort -- would it distort how each market  
24 uses milk?

25 A. Well, the producers in that case would not be

1 uniformly equal in their ability to access that, to get --  
2 to be able to be dual-pooled, so there would be some  
3 difference in what producers return. Some producers,  
4 handlers, or cooperatives may be more adept and may have  
5 more opportunities to dual-pool than others, so that is not  
6 -- you know, that would be disorderly. And then the ability  
7 of those handlers to procure milk, using the dual resources  
8 of being able to dual-pool, or double-dip. That would be  
9 also a disorderly example, where they would have resources  
10 available to them that someone else in the pool would not  
11 have.

12 Q. Using the same scenario, example here, then, the  
13 simultaneous pooling of the same milk on two orders, then,  
14 would -- would you agree that it would distort the blend  
15 price paid to the producers?

16 A. Yes. There would be some values in there that  
17 may be earned that wasn't, you know, earned from the blend  
18 price and it could affect the competitive balance between,  
19 you know, two pools, that might not otherwise take place,  
20 just because of the ability to do that.

21 Q. And you would describe that as an example of a  
22 disorderly marketing condition?

23 A. I would.

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

25 THE COURT: Anything else, anyone? Mr. Rower.

1 MR. ROWER: Jack Rower.

2 RECROSS-EXAMINATION

3 BY MR. ROWER:

4 Q. Good morning, Mr. Hollon.

5 A. Good morning.

6 Q. In your handout this morning here, on Page 5 --

7 A. Yes, sir.

8 Q. -- Number 4, "The producer-handler is neither  
9 directly nor indirectly associated with the business control  
10 or management," et cetera, it's almost an administrative  
11 question, but how deeply or how -- in your opinion, how  
12 detailed should we consider ownership, for example if a  
13 producer-handler owns stock in Etree, Kraft is a handler --

14 A. Okay.

15 Q. -- is one share of Kraft -- or one share of  
16 Etree something that should be considered disqualifying?  
17 In other -- it seems to be a little trivial, in this -- that  
18 instance, but that's --

19 A. That's a fair question. I would say, in that  
20 example, no, that that probably should not disqualify. In  
21 all cases there's probably going to be some level of  
22 judgment that is going to have to be applied, and we've had  
23 quite a bit of discussion with some of the market  
24 administrator staffs over these particular issues, and, you  
25 know, in some cases things are fairly clear, there may be a

1 certain amount of -- there would be some legal filings, that  
2 would indicate some kind of common ownership, that would be  
3 a factor, some -- it gets to be harder.

4 Some cases, you can tell that there is, you know,  
5 management control in some form exercised over different  
6 operations. So -- if there's a -- for example, your example  
7 of company A and a share in another company, there's  
8 probably not much opportunity to influence the management of  
9 Kraft, in that example, by the producer-handler. If there  
10 is an opportunity -- an opportunity to influence and there  
11 could be some legal connection, I think that might be an  
12 indication of how deep the market administrator might dig to  
13 examine that.

14 Q. Following up just a little bit -- well, the  
15 ownership business, that's described in the next section --  
16 actually, I believe it's below, but -- where leasing would  
17 now be allowed, and I assume leasing in both directions, for  
18 example if a producer-handler owned property that was to be  
19 leased to -- for a shopping center, where an anchor store  
20 would be a Safeway, a Kroger, some other publics, whatever,  
21 again --

22 A. That would be, I think, too distant.

23 Q. Okay. I'm trying to get a handle on how a market  
24 administrator would administer, literally, this kind of a  
25 provision. We have a lot of land and property holders who

1 are also producer-handlers, so I'm just trying to get a  
2 handle on where the intent goes here and --

3 A. I think -- again, that's a difficult question to  
4 answer, and part of that's why you're asking.

5 Q. Right.

6 A. It seems like that where the two direct  
7 businesses, being a producer and being a procedure, have  
8 some common business link and where there can be some  
9 influence, you know, again, just using that as an example,  
10 back to -- that producer-handler would not have a -- exert a  
11 lot of influence over Safeway, you know, over what their --  
12 how they run their business. On the other hand, if it were  
13 a single convenience store, there might be some relationship  
14 there.

15 The percentage of ownership, leasing a piece of  
16 property would be small, but being involved in the ownership  
17 of the store might be somewhat larger.

18 MR. ROWER: I appreciate that. Thank you.

19 MS. DESKINS: Charlene Deskins, Office of General  
20 Counsel, USDA.

21 REXCROSS-EXAMINATION

22 BY MS. DESKINS:

23 Q. I had questions about (d) and (f), and I think,  
24 correct me if I'm wrong, the last time -- it's on Page 8.

25 A. Okay.

1       Q. The last time you testified, you said it would be  
2 up to the -- you know, up to the market administrator to  
3 determine if someone's a producer-handler, and it's not  
4 uncommon for that to be retroactive.

5       A. Yes.

6       Q. Okay. I'm just wondering, sometimes it can be  
7 the case the market administrator maybe needs another piece  
8 of paper in order to determine somebody's status, and if you  
9 need to get it from a third party, it can take a while, the  
10 producer-handler needs to get it. Is the way this would  
11 work is if -- let's say you needed a document to show you  
12 didn't own some land and you had to get it from a third  
13 party, if it took you a year to get it, during that time  
14 period, then -- and maybe we go back and determine which  
15 ones you were a producer-handler?

16       A. That's a pretty knotty question. I think we  
17 would have to rely on -- there'd have to be some level of  
18 discretion that would be applied there, and there's going to  
19 have to be some intent issues.

20       The nuts and bolts of that discussion, as I  
21 recall, I think was based on some questions from Mr. Yale,  
22 asking about: if an audit adjustment were to determine that  
23 we sold -- that one pound too much was sold for the limits,  
24 what would you do, and our -- at that time we didn't have a  
25 good answer, and so that's -- that's why we have done some

1 of the changes now and say that those types of errors would  
2 only disqualify you for the month and not for the entire  
3 post period.

4 On the other hand, if you were -- if you failed  
5 to disclose an ownership interest in another facility, that  
6 would not have -- you know, would have not allowed you to  
7 get the status to start with, that type of error seems to be  
8 more deliberate and not accidentally.

9 Q. Okay --

10 A. And so that type of error would disqualify you  
11 for the entire period.

12 Q. Okay, that's my next question, for loss of  
13 producer-handler status. If someone's supposed to get a  
14 document to show that they don't own something or they do  
15 and they don't get it --

16 A. Yes.

17 Q. -- is it reasonable then for the MA to say, "You  
18 didn't get it in three months; you're going to lose your  
19 producer-handler status"?

20 A. Yes. My experience is that most market  
21 administrators are reasonable --

22 Q. Okay.

23 A. -- and that sometimes I don't always agree with  
24 them, but I tend to find them reasonable, and that -- there  
25 seems to be some flexibility in doing that, and I think that



1 happens today, that there's some flexibility in  
2 interpretation, there's some flexibility in application, and  
3 I think we would intend them to have some flexibility,  
4 again, and you've described a good -- you've put up a good  
5 example: that sometimes you can't always get something that  
6 you need in the time frame, and so if both sides can show a  
7 reasonable attempt and the end result supports that, then I  
8 think that would be okay for the market administrator to  
9 grant some discretion in that.

10 Q. Okay. But once he determines that you've lost  
11 the producer-handler status, would it then be retroactive,  
12 to determine later on that you're a producer-handler, or if  
13 he determines you lose it, from that point on, from --  
14 retroactively you're not a producer-handler? Is that how  
15 it's supposed to work?

16 A. Again, in some of the cases where it's going to  
17 go back to an intense scenario, the best example again is a  
18 buy or a sell that, you know, maybe was right on the line  
19 and that, you know, somebody didn't take delivery of  
20 product, maybe, and that puts your percentages off by some  
21 amount. That would be a one-month thing, as opposed to some  
22 -- I had an ownership in something that I didn't disclose,  
23 then that should be -- it seems like there's some more  
24 deliberateness in that intent and that should carry a  
25 greater penalty.

1 MS. DESKINS: Okay, all right, thank you.

2 MR. TOSI: I'm Gino Tosi, T-o-s-i, with USDA in  
3 Washington, D.C.

4 FURTHER RECROSS-EXAMINATION

5 BY MR. TOSI:

6 Q. I asked a question that was -- I want to ask a  
7 question that was similar to one that I asked you in --

8 A. Okay.

9 Q. -- I believe it was in Seattle. If you could  
10 imagine a market situation where the Class price  
11 relationships for the month would result in what we commonly  
12 know in the industry as a price inversion, and to the extent  
13 that a producer-handler sees it to his advantage to  
14 disqualify himself as a producer-handler, in some way, like,  
15 for example, receiving the milk of other dairy farmers at  
16 his plant, that would cause him to lose his producer-handler  
17 status, causally become regulated and, because of a price  
18 relationship, would allow him to -- would allow the  
19 producer-handler to receive a draw from the federal order  
20 pool, and then in the next month, in the immediately-  
21 following subsequent month, return back to a producer-  
22 handler status.

23 I asked a question that was similar, or the  
24 question that I'd like to ask is -- I'd asked a question  
25 like that in Seattle. Do you recall?

1 A. I remember that.

2 Q. Is there something in here that would address a  
3 concern about that?

4 A. The intent there is somewhat picking and choosing  
5 regulation when it becomes advantageous or not, and  
6 currently, you know, we're in the process of addressing that  
7 issue for pooling and de-pooling and federal orders, you  
8 know, we are working on Order 30, for example, on some  
9 language and some intent, and the general intent there is  
10 that if you choose to get out of the -- if you choose to  
11 de-pool, if you get out of the pool, that there should be a  
12 multi-month consequence, you need to think about the  
13 economic advantage more than just for one month, and I --  
14 for example, in Order 1, there's some language that says if  
15 you get out of the pool for a period of time, you have to be  
16 out for a longer period of time.

17 I would think that that would be reasonable  
18 language to include here also, that if you -- except it  
19 would be the flip case, but if you get into the pool in a  
20 month where prices are advantageous and the next month you  
21 choose not to be a producer-handler again, well, maybe there  
22 should be some language that says if you trip [phonetic] in  
23 you ought to stay for a while, and I -- if that were -- that  
24 would be something that -- a concept that we would support  
25 and an idea that we would support.

1 Q. And I guess this question relates a little bit to  
2 what Ms. Deskins was saying too, or asking, that when your  
3 producer-handler status, if it for some reason is lost --

4 A. Yes.

5 Q. -- with regard to, you know, a reapplication or a  
6 resubmission of all known materials, that would reestablish  
7 a producer-handler status, and the issue of whether or not  
8 it can be retroactively applied.

9 A. I'm sorry, I missed -- try it again.

10 Q. Well, if a producer-handler intentionally  
11 disqualifies himself --

12 A. Okay.

13 Q. -- or violates the parameters of how we define  
14 "producer-handlers" --

15 A. Right.

16 Q. -- to the extent they become regulated and choose  
17 to become a producer-handler again in the future --

18 MS. DESKINS: You want me to try it?

19 MR. TOSI: Yes. I'm going to defer the question  
20 to Ms. Deskins, to ask it more precisely.

21 THE WITNESS: Okay.

22 FURTHER RECROSS-EXAMINATION

23 BY MS. DESKINS:

24 Q. I think the question is: If someone should be  
25 granted producer-handler status and, for whatever reason,

1 they don't produce all the documents they're supposed to --

2 A. Right.

3 Q. -- and the MA determines they lose it --

4 A. Yes.

5 Q. -- then later on they come up with information.

6 Should then their status be -- can you retroactively give  
7 them that status after the MA has determined they lost it,  
8 or do they have to come in with the information, from that  
9 point on the MA can consider it?

10 A. It seems like that if you -- if you want the --  
11 the benefits that come from a producer-handler, the burden  
12 should be on you to produce everything that there is, and if  
13 you can't produce it all on day one, you know, you're going  
14 to have to wait till the day comes when you can do that.

15 Q. Okay. And let's the MA determines you didn't  
16 produce it --

17 A. Yes.

18 Q. -- so you've lost it, so from -- so -- I'm just  
19 trying to figure out the retroactive. So once he determines  
20 you lose it, you can't then go back to the past and say,  
21 "Well, look" [indiscernible].

22 A. I don't see how you could do that.

23 Q. Okay.

24 A. For one thing, where would you get the funds to  
25 make those payments? Those pools have been --

1 Q. Well, that's what we're --

2 A. -- settled already, so I don't think you could do  
3 that.

4 Q. That's our concern, because if you can do it  
5 retroactively -- let's say someone couldn't get an insurance  
6 document for a year.

7 A. Yes. Yes.

8 Q. Can they then come back in and say, "For that  
9 past year, I should have had it; should I get the money back  
10 that I paid into the pool?", and you're saying no.

11 A. I would say no, that you should not be able to do  
12 that.

13 MS. DESKINS: Okay. I think that was your  
14 question; right, Mr. Tosi?

15 MR. TOSI: (Nods head.)

16 MS. DESKINS: Okay.

17 THE COURT: Are you done over there?

18 (No audible response.)

19 THE COURT: Okay. Any further questions?

20 Mr. Beshore.

21 MR. BESHORE: Marvin Beshore, for Dairy Farmers  
22 of America. Just a couple of questions on redirect, Elvin.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. BESHORE:

25 Q. Is it your testimony that with respect to

1 proposal 4, the double-dipping proposal, that the disorder  
2 that is addressed by that proposal is disorder at the  
3 producer -- the uniform pricing among producer level?

4 A. It is that, and it could then stay --

5 Q. Could be handler also.

6 A. -- to the handler level also, yes.

7 Q. Okay. But an element of it, at least, and maybe  
8 the primary element, is that it -- double-dipping threatens  
9 the uniform distribution of --

10 A. That's correct.

11 Q. -- proceedings among producers.

12 A. That's correct.

13 Q. And that's disorderly marketing.

14 A. That's disorderly marketing.

15 Q. It has been so interpreted and applied by the  
16 Secretary in numerous ways over the years.

17 A. That is true.

18 Q. So when you've been asked about whether -- you  
19 know, how you define "disorderly marketing," in terms of  
20 handlers paying -- where handlers are -- producer-handlers  
21 are creating marketing disorder, you need to view disorderly  
22 marketing not only at the handler level but at the producer  
23 level also.

24 A. Yes. Yes.

25 Q. And I think you were asked a question by Mr. Yale

1 or Mr. Ricciardi, whether -- If two handlers are paying the  
2 same minimum price, where's the market disorder? Do you  
3 recall that?

4 A. Yes, there was a question along there.

5 Q. Okay. Are you aware of situations where the  
6 Secretary has found market disorder even though handlers are  
7 paying the same minimum Class prices?

8 A. There have been instances in federal order  
9 history where there were individual handler pools, and those  
10 pools were slowly but surely eliminated, and the last one  
11 being the Upper Peninsula order in Michigan, it was an  
12 individual handler pool, and in the reformed decision, the  
13 decision was written to say that, you know, that was not  
14 good policy and that there was not uniform sharing of  
15 proceeds, and so that all federal order pools should be  
16 market-wide pools, and I think that perhaps goes, to some  
17 extent, to answer that question.

18 Q. There was no uniform sharing of proceedings among  
19 producers --

20 A. Correct.

21 Q. -- uniform minimum --

22 A. That's correct.

23 Q. -- minimum sharing.

24 A. That's correct.

25 Q. And that was disorderly marketing.



1       A. Yes.

2       Q. Okay. And just for the record, for  
3 clarification, individual handler pools, which have existed  
4 as recently as 1999 --

5       A. Correct.

6       Q. -- are pools in which all handlers pay the same  
7 minimum Class prices; correct?

8       A. That is true.

9       Q. However, all producers did not share in a market-  
10 wide blending of those utilizations; correct?

11       A. That is correct.

12       Q. One final question. With respect to the  
13 double-dipping provision, that language is currently in  
14 Order 124; correct?

15       A. Yes.

16       Q. And were you a participant in the hearing in  
17 which it was proposed and adopted for 124?

18       A. I was. Dairy Farmers of America was a proponent  
19 at that hearing, as was Northwest Dairymen, and several of  
20 the other cooperatives in Oregon and Washington.

21       Q. Now, did the clients whom Mr. Yale stated he was  
22 representing today -- that is, Smith Brothers, Edaleen, and  
23 Mallorie's -- did they propose the adoption of that  
24 double-dipping prohibition in that order?

25       A. Not to my knowledge. There were no witnesses

1 representing them, I don't think that Mr. Yale had any  
2 witnesses at that hearing, and I don't recall any of his  
3 three clients now even appearing or briefing on that issue.  
4 I don't recall that that was the case.

5 Q. So when you asked him who's he representing  
6 today, the history of adopting that provision and the order  
7 in which those clients participate was pertinent.

8 A. Yes.

9 MR. BESHORE: Thank you.

10 THE COURT: Any more Redirect?

11 (No response.)

12 THE COURT: Any Recross? Mr. Yale, go ahead.

13 FURTHER RECROSS-EXAMINATION

14 BY MR. YALE:

15 Q. Let's follow up on that. Since that announcement  
16 came out on that double-dipping --?

17 A. Yes, sir.

18 Q. -- California has announced the requirement that  
19 producers under its state order have to choose for  
20 12 months. Is that right?

21 A. Correct.

22 Q. Okay. Now, I want to go back, there was this  
23 question by the government participants on choosing going in  
24 and out as a regulated or pool producer-handler; right?

25 A. Correct.

1 Q. Is there any evidence in this record -- first of  
2 all, there's been some inversions in these orders in the  
3 last --

4 A. Yes.

5 Q. -- year or two; right?

6 A. Yes.

7 Q. Okay. Has any of the producer-handlers that  
8 participated in this hearing taken advantage of that  
9 provision?

10 A. Not to my knowledge.

11 Q. Now, take a situation -- first of all, any  
12 regulated handler can choose to be a producer-handler if  
13 they can acquire all the milk that they purchase, right now;  
14 right?

15 A. If they can meet the requirements, yes, they can.

16 Q. They can do that.

17 A. (Nods head.)

18 Q. So that a processor today, in Order -- in 2003,  
19 in Order 124, a fully 7(a) plan, and if they decide that  
20 they want to be a producer-handler for February, they just  
21 have to acquire so that they own all of the milk to do that;  
22 right?

23 A. Yes, if --

24 Q. And they can make that --

25 A. If they meet the requirements, they can do that.

1 Q. Right. And they can make that decision from  
2 month to month, right, right now?

3 A. Under the current scenario they can.

4 Q. Okay. So the ability to choose for a producer-  
5 handler to go regulated, from a regulatory standpoint, or a  
6 regulated handler to become a producer-handler, is about the  
7 same.

8 A. Yes. I think the point of the question was that  
9 under the current scenario there's some question about: is  
10 it reasonable to be able to come in and out of the federal  
11 order pool depending on price inversion or price advantage,  
12 and the prevailing thought, which I think DFA's in a  
13 position at the moment to support that, is that producers  
14 shouldn't be able to do that, there should be a longer-term  
15 commitment to supply the market.

16 And I think the question was: shouldn't that  
17 thought process extend to handlers also, shouldn't they be  
18 in the pool or out of the pool, you know, not at will,  
19 depending on prices. And I --

20 Q. But if you're going from a standpoint, first of  
21 all, for a producer-handler to purchase milk, okay, to  
22 disqualify as a producer-handler, he's got to do something -  
23 - I mean, I think that's kind of the indication here, right,  
24 that he's got to disqualify him?

25 A. In the example that was -- that was given, yes.

1       Q. You had producer from a producer, right, so he's  
2 going to need some additional sales; right?

3       A. There'd be a number of things that you -- there  
4 are a number of things that you'd have to do to meet that  
5 requirement, so not meeting any one of them would be room  
6 for -- reason for disqualification.

7       Q. And the -- let's talk about this retroactive. If  
8 a processor files a report -- or handler, 7(a) handler,  
9 files a report and either by a correction from the handler  
10 or an audit that requires correction by the handler --

11       A. (Chuckling.)

12       Q. -- there is an error that he's entitled -- or the  
13 plan is entitled to additional funds out of the pool, the  
14 federal order gives them that money; right?

15       A. Yes.

16       Q. And in fact that's part of the reserve that's  
17 in --

18       A. Yes.

19       Q. Right?

20       A. I agree.

21       Q. And there's also the ability, if it's  
22 substantial, they can even re-blend a pool blend, if  
23 necessary. I mean, I don't know that it's ever happened,  
24 but I guess theoretically it's possible.

25       A. I don't know the answer to that. I don't know

1 that it's ever happened either.

2 Q. Right.

3 A. So I don't know the answer to that.

4 Q. All right. So if a producer handler -- if it  
5 turns out that after he's been denied but he's otherwise  
6 qualified during that period, that they have to do a  
7 retroactive, how is that different than the processor, whose  
8 audit shows that things weren't decided correctly?

9 A. I'm not sure if I'm completely following your  
10 question, but I think our position was that if there's a  
11 retroactive adjustment -- in fact, I think this whole --  
12 this whole question was a result of some of your questions  
13 at the last hearing --

14 Q. I understand.

15 A. -- on this, and that was where we made the  
16 modifications that we're talking about today. But the -- I  
17 think where we -- what information we're trying to provide  
18 is that there maybe are two levels of penalty, if you will,  
19 or two levels of error, and, you know, one level, it's going  
20 to be something that's maybe a more common mistake, maybe  
21 somebody -- some customer didn't take delivery of a certain  
22 product, some calculation of -- you bought, you know, three  
23 loads of milk and it turned out to be 5,000 pounds more than  
24 150,000, that wasn't discovered till six months after the  
25 fact, that level of disqualification would apply only to the

1 month in which it occurred and not affect the pricing of the  
2 subsequent five or six months.

3           However, if there were status as a producer-  
4 handler from the standpoint of ownership in farms, ownership  
5 in processing facilities, as described, if those things  
6 weren't disclosed properly, then that penalty should be more  
7 severe.

8           Q. So if it's a situation where the producer submits  
9 what he believes is sufficient documents to establish  
10 producer-handler status, the market administrator denies it  
11 for the month --

12           A. Are we on day one here?

13           Q. Day one.

14           A. Okay.

15           Q. And he says, "I would like to have" -- I think  
16 one of the examples here was an insurance policy, and  
17 there's nothing to indicate in the record that the insurance  
18 policy is going to be anything different than what they know  
19 already, because they've got deeds and everything else, but,  
20 you know, six or seven weeks later, the producer-handler  
21 submits the insurance policy, I think under your  
22 interpretation, at least for the first month, if not the  
23 second month, he's not qualified to be a producer-handler.

24           A. That would be correct.

25           Q. All right.

1       A. On day one the burden of proof ought to be on the  
2 person applying, to provide all the proof that the market  
3 administrator requires.

4       Q. So then the producer-handler commences a 15A on  
5 the initial decision and prevails, probably through court,  
6 because I -- never known to win at the Department level, but  
7 is it going to be retroactive or are you suggesting that  
8 under this language, that even under those circumstances --

9       A. I don't have an --

10       Q. -- it doesn't apply?

11       A. I don't have an answer for that. Sorry.

12       MR. YALE: I don't have any other questions.

13       THE COURT: Before Mr. Ricciardi gets up there, I  
14 have Exhibit 64, it's been marked for identification. Did  
15 you want it in evidence? There's been a objection of  
16 questions on it, but I don't care.

17       MR. YALE: No, we're going to put this -- we got  
18 official notice of some of the numbers already and we're  
19 going to give you the numbers. I think we've got all of --  
20 that's already in there. It was a summary just to aid the  
21 witness.

22       THE COURT: That's fine. Okay, go ahead,  
23 Mr. Ricciardi, come on up.

24       MR. RICCIARDI: Al Ricciardi, for Sarah Farms.

25                   FURTHER RECROSS-EXAMINATION



1 BY MR. RICCIARDI:

2 Q. Mr. Hollon --

3 A. Yes, sir.

4 Q. -- hopefully a couple questions.

5 What is the minimum length of a contract between  
6 DFA and its members?

7 A. One year.

8 Q. So with regard --

9 A. Oh, I'm sorry: the minimum length?

10 Q. Yeah.

11 A. I think in some cases there may be some --

12 because DFA is coast to coast and because it's a merger of  
13 prior organizations, there are some membership contracts  
14 that are less than one year, but the majority are one year.

15 Q. So if we take the majority, if we take the  
16 average, then, this whole discussion about becoming  
17 regulated or being producer-handler and bouncing back and  
18 forth between months is going to be academic, at least with  
19 regard to people who are members of DFA, because not only do  
20 they have the issue of regulation to deal with, but they  
21 also have DFA in a legal impediment of being able to get out  
22 of a contract if it was within the year period; correct?

23 A. I'm sorry, I didn't understand your question.

24 Q. Sure. Here's the issue: if you've got a minimum  
25 length contract of one year --

1 A. Right.

2 Q. -- and somebody wants to become a producer-  
3 handler after one or two months, then not only are they  
4 going to have the issue of whether or not they can choose to  
5 be regulated or unregulated, but they also have the issue of  
6 DFA and the length of the contract to deal with. Correct?

7 A. I think if -- and there have been even recently  
8 some DFA members who have chosen to become producer-  
9 handlers, I can think of two, and while that's not my  
10 day-to-day responsibilities, I think that the scenario was  
11 that they had to wait until their contract expired and they  
12 had to -- to terminate their contract under the rules that  
13 it calls for, give adequate notice, and at that point, when  
14 their contract expired, if they wanted to be a producer-  
15 handler they could.

16 Q. So they'd have to wait -- in my example, if they  
17 wanted to start becoming a producer-handler, after they've  
18 signed the contract one month they have to wait at least the  
19 11 months and then some notice period had to be given;  
20 correct?

21 A. In general your description is right.

22 MR. RICCIARDI: Thanks.

23 THE COURT: Anything else?

24 (No response.)

25 THE COURT: You may step down.

1 MR. TOSI: Your Honor, may I -- we just need to  
2 -- we may need to ask Elvin one more question, but I just  
3 need to discuss something here --

4 THE COURT: You've got to learn how to move  
5 faster, Mr. Hollon.

6 (Laughter.)

7 THE COURT: Go ahead, take a minute. While  
8 they're talking: Who's the next witness going to be?

9 MR. BESHORE: Mr. Van Dam, for Northwest  
10 Dairymen.

11 MR. HOLLON: Better all the questions now than a  
12 denial later. I think.

13 MR. TOSI: I'm Gino Tosi, with USDA, Washington,  
14 D.C.

15 FURTHER RECROSS-EXAMINATION

16 BY MR. TOSI:

17 Q. Elvin, just to kind of summarize where I think we  
18 stand right now with proponents' testimony for regulating  
19 producer-handlers once they cross a 300-pound -- excuse me -  
20 - 3-million-pound distribution threshold.

21 A. Okay.

22 Q. And please correct me if I'm wrong on where we  
23 think we stand right now. With respect to the major points  
24 of justification for why that cap should be 3 million  
25 pounds, or that threshold, once we cross that, should cause

1 producer-handlers to become subject to the pooling and  
2 pricing provisions of the order.

3 A. Okay.

4 Q. One of the reasons is it's consistent when CCC  
5 charges for promotion, the assessment of promotion.

6 A. Yes, the promotion assessment. That's not done  
7 by CCC, but the promotion assessment.

8 Q. Excuse me --

9 A. Yes.

10 Q. -- that argument --

11 A. Yes.

12 Q. -- or that reason. The second reason is, is that  
13 at 3 million pounds -- and it relates I think strongly to  
14 Mr. Herbein's testimony, is that at 3 million pounds a  
15 producer-handler becomes sort of on an equal footing with  
16 respect to plant costs, that makes him competitive with  
17 other handlers who would be fully regulated.

18 A. That is our testimony, and that testimony was  
19 also supported by Dr. Cryan's additional academic, you know,  
20 research that supported Mr. Herbein's data, which was not  
21 purported to be academic research but based on his  
22 experience in his profession and his accounting details.

23 Q. And then this may relate perhaps more strongly to  
24 the testimony of Paul Crist [phonetic], that says that when  
25 the amount of milk that's exempt from pooling and pricing it

1 has an impact in that marketplace that would cause the blend  
2 to be changed by at least a penny. That's an indicator of  
3 disorder, that the order should correct, that would be a  
4 third reason?

5 A. Yes.

6 Q. Is there a fourth one that I'm not capturing here  
7 in asking you --

8 A. I need to refer to a couple of notes I have. Is  
9 that okay?

10 Q. Yeah.

11 (Pause.)

12 A. Additional rationale or reasons that we thought  
13 we -- that we put out was that we had data that showed that  
14 the balancing costs were not disproportionate and that they  
15 were not excessive, and we provided, you know, some detail  
16 in exhibit, to try to back up our -- back up our claim that  
17 there is significant market disruption as a result of the  
18 lack of uniformity of prices to handlers and there were, I  
19 would say, at least six or eight witnesses in quite a bit of  
20 detail that provided information, that there was data  
21 provided that a producer-handler of that size could service  
22 a sizeable number of retail stores based on actual milk  
23 sales in stores from IRI data, and that at 3 million pounds  
24 that would be a considerable number of small stores or, the  
25 other end of the curve, of larger stores. That data was

1 provided in detail.

2                   There's a point where there's significant  
3 advantages of the cost of producing milk, and that data was  
4 supported by the ERS cost-of-production studies for the  
5 industrial-size dairies and that those costs of production  
6 economies could be put into the marketplace in terms of  
7 price -- disorderly price differences, that --

8 (Pause.)

9                   That to the level of competitiveness, there was  
10 actually one producer-handler who testified directly that he  
11 considered his competition to be retail stores. The witness  
12 from Braum's said that they considered it retail competition  
13 that the housewife passed the dairy case and came to their  
14 store, as an idea of competitiveness in the marketplace.

15                   I think that those are -- that the points that  
16 we've summarized -- and we've summarized from time to time  
17 that should the reasons of support for the bright line to be  
18 drawn at 3 million pounds.

19           Q.    Okay. To the extent that federal orders, in  
20 providing the current exemption of the applicability of the  
21 pooling and pricing provisions on producer-handlers as they  
22 currently exist, we would have the same outcomes, to the  
23 extent that you're saying that these are -- the reasons that  
24 we've just --

25           A.    Okay.

1       Q. -- enumerated here, to the extent that they  
2 currently exist in the 3-million-pound number, are you  
3 giving explicit recognition to -- imprecise as it may be,  
4 and to the extent that producer-handlers' testimony here has  
5 commented on, that there's something in the mix of being a  
6 producer and a handler that -- that there's something in  
7 that mix that says -- there's something in the ownership,  
8 there's something involved in taking on the simultaneous  
9 risks of being a producer and a handler, doing everything on  
10 their -- on their own terms, without reliance on the federal  
11 order for giving them any sort of minimum price protection  
12 that would come from being regulated, that there's something  
13 -- that there's some recognition given in this 3-million-  
14 pound cushion that says: if you operate within that, we're  
15 giving you some sort of recognition for that unique mix of  
16 risks that comes with producing your own milk and processing  
17 your own milk and distributing that milk?

18       A. When we discussed the reasons and the rationale  
19 for the limit, and discussing, you know, our view of the  
20 population of producer-handlers, it seems to be clear that  
21 out of the hundred and -- I think our number was 117, based  
22 on, you know, market administrator publications, that our  
23 regulations -- or our proposals would only affect maybe six,  
24 eight, ten at the most, the majority would still be able to,  
25 you know, operate exactly as they are, without any --

1 without any change in their business.

2                   And so the ones that the -- our regulations would  
3 affect, or our proposals would affect, are those that we  
4 think have the ability to, you know, cause disorderly  
5 marketing conditions. So if -- but I think you're asking -  
6 - the proposals that we make affect a small number but that  
7 those small number haven't affected the marketplace, and  
8 there can be potential effect, you know, if that number  
9 grows.

10                   At the same time, there's the ability to do  
11 exactly, you know, what you have outlined in your question,  
12 up to that limit, and there are 110 or so business  
13 operations who, you know, choose to do that, including, you  
14 know, at least two that I know of in the last, you know,  
15 year, who have made the choice to -- to take on those  
16 challenges and form their business that way.

17                   So I think our proposals are affect -- are  
18 designed to affect those that disrupt the market to an  
19 extent that we think is damaging to our business interests  
20 and to federal orders and therefore to all producers'  
21 interest.

22           Q. I think I understand your answer. Thank you.

23           A. Also, I think that Mr. Van Dam has some comments  
24 relative to the risk question, that may provide some  
25 additional detail for you.



1 MR. TOSI: Thank you.

2 THE COURT: Was that a hand going up, Mr. Yale?

3 MR. YALE: Yes, I do, just a quick follow-up. I  
4 mean, this was -- you didn't get off the stand fast enough.

5 THE COURT: I told him that already.

6 (Laughter.)

7 THE WITNESS: I'm going to get my stuff ready  
8 now, so when you say "go"--.

9 (Laughter.)

10 FURTHER RECROSS-EXAMINATION

11 BY MR. YALE:

12 Q. I just want to address two of those points. You  
13 said significant market disruption.

14 A. Yes, sir.

15 Q. And the market disruption is in the switching of  
16 the accounts, the wholesale and retail accounts, from one  
17 handler to another.

18 A. That's just one of the signs.

19 Q. But that's the sign that the most testimony has  
20 been given, the Vitamilks, the testimony about the Costcos  
21 and the others, that's the primary testimony of market  
22 disruption; right?

23 A. Market disruption exists in that area. There's  
24 also concern expressed by many of the retailers that if this  
25 -- this problem, this disruption, isn't solved, that they

1 will in turn seek perhaps to end federal orders, and we  
2 think that's a bad thing for -- you know, DFA thinks that's  
3 a bad thing.

4 Q. -- retailers.

5 A. Not retailers. Processors, our processors.

6 Q. Okay.

7 A. Kroger was a retailer.

8 Q. But the general -- the retailers haven't been  
9 here to complain about this pricing.

10 A. Other than Kroger.

11 Q. But they're a bottler. I mean, they can complain  
12 because of their bottling facility.

13 A. Mr. Hitchel [phonetic] seems to complain  
14 uniformly.

15 (Laughter.)

16 Q. And then you talked about the balancing costs.

17 A. Yes.

18 Q. And that's because the classified blended -- the  
19 blended classification of a producer-handler is different  
20 with a higher Class I utilization than the pool?

21 A. That's a piece of it, we did put in an exhibit  
22 and testified to it and detailed it out. I could go back  
23 and revisit that, with a little bit of practice --

24 Q. Okay.

25 A. -- but that was -- that was part of the -- our

1 contention that the balancing costs were not excessive; we  
2 also presented some evidence through Dr. Smith about some  
3 alternative ways for balancing; and we also talked about  
4 just the cost of purchasing, you know, milk from producer  
5 distributors; and the exhibit of the market administrator  
6 that talked about the classification of surplus milk from  
7 producer-handlers being to a large part to Class I and Class  
8 II outlets.

9 Q. Okay. Now, you heard Mr. Allbright testify  
10 yesterday, you were here; right?

11 A. Yes.

12 Q. And he made the statement that the producer-  
13 handlers carry their full burden of their reserve. Did you  
14 hear anything --

15 A. He -- he -- I heard him make that statement.

16 Q. All right. You would agree, would you not, that  
17 the amount of milk necessary for Class I reserve is a  
18 different number than what is -- we traditionally put into  
19 Class III and IV in the order?

20 A. Yes.

21 Q. And it's -- in today's orders, primarily, the  
22 amount that's necessary for Class I is less than that;  
23 right?

24 A. Yes. Nationwide. It's not necessarily true  
25 place to place to place and market to market and market, but

1 as a general rule, yes.

2 Q. And in fact -- we won't go there right now.

3 Is there evidence in the record that identifies  
4 the fact that the amount of milk necessary to supply  
5 Class I, as opposed to other participants in the pool, what  
6 that amount is in Order 131 or 124?

7 A. There's Class I sales in the record.

8 Q. There's Class I sales.

9 A. Yes.

10 Q. And what about the reserve supply for that Class  
11 I sales?

12 A. I don't think there's been any testimony about  
13 the reserve supply.

14 Q. And it's less than what's going into III and IV,  
15 right, currently? The reserve supply necessary to meet  
16 Class I is less than what has --

17 A. Oh.

18 Q. -- been classified as III and IV in those two  
19 orders; right?

20 A. Yes.

21 Q. But there's no evidence of what that reserve  
22 needs to be; right?

23 A. No.

24 Q. In -- let's do Order 131, I think it might be the  
25 simplest one. I think it's approximately -- this is

1 rounding -- about a 20 percent Class I utilization?

2 A. Sounds -- okay.

3 Q. Okay, let's just say that it is, okay?

4 A. Yes.

5 Q. If 5 percent of that milk was removed, there  
6 would still be a sufficient reserve?

7 A. You mean 5 percent of the orders receipts --

8 Q. Yes.

9 A. -- were removed --

10 Q. Then still -- I mean, the Class I is getting its  
11 supply, I mean there's still enough for the Class I. Right?

12 A. Yes.

13 Q. Now, if 95 percent went, there wouldn't be;  
14 right?

15 A. Most days, no.

16 Q. So what we have is --

17 A. Somewhere between --

18 Q. -- somewhere in between.

19 A. -- 5 and 95.

20 Q. Somewhere in between. Right?

21 A. (Nods head.)

22 Q. And this blend price, this higher -- this blend  
23 price attracts milk that would otherwise not participate,  
24 that's going to cheese, to be pooled so it can obtain that  
25 blend price; right?

1 A. Try that again.

2 Q. The blend price attracts milk that's going into  
3 manufacturing because they get the additional money, I mean  
4 it attracts it to be pooled.

5 A. Okay.

6 Q. Right? I mean, isn't that one of the producers  
7 with your double-dipping thing is that it attracts milk that  
8 maybe doesn't belong here. Right?

9 A. I think the -- I think double-dipping is  
10 attractive no matter what the level, but --

11 Q. Well, I guess -- it could be, if it's truly  
12 double-dipping.

13 A. Okay.

14 Q. But the quantity -- when one says a plant is  
15 carrying its own reserve supply, it's not necessarily that  
16 they're carrying the order utilization; right?

17 A. "When one says a plant is carrying its own  
18 supply."

19 (Pause.)

20 I'm -- I'm not sure, I'd need some more detail to  
21 try to --

22 Q. Okay. Well, let me take another example, okay?

23 A. (Nods head.)

24 Q. And I'm not arguing the merits and I'm not trying  
25 to litigate this issue, and I have -- frankly, I'm not

1 wanting to, but I want to use it as an example:

2 The Western Order terminates the 1st of April;  
3 right?

4 A. Hope so.

5 Q. Yes. And -- but the milk -- the Class I needs in  
6 that -- what is now part of that order are going to still be  
7 met; right?

8 A. Yes.

9 Q. All right. But will all of the milk that's  
10 currently being pooled on Order -- what is that --

11 A. 135.

12 Q. -- 135 going to participate in those Class I  
13 sales?

14 A. No, they will not.

15 Q. Because you don't need all of that for the  
16 reserve supply --

17 A. That's correct.

18 Q. -- in Class I; right?

19 A. In that particular order, it was a pretty  
20 excessive calculation.

21 MR. YALE: I don't have any more questions.

22 THE COURT: Anyone else? Okay, Mr. Berde. Was  
23 that -- you want to question?

24 MR. BERDE: Yes.

25 THE COURT: Go ahead.

1 MR. BERDE: Sydney Berde, for United Dairymen.

2 FURTHER REDIRECT-EXAMINATION

3 BY MR. BERDE:

4 Q. Mr. Yale asked you whether Mr. Allbright's  
5 testimony yesterday was to the effect that producer-handlers  
6 carry the full burden of their operation. You recall that?

7 A. Yes.

8 Q. But Mr. Allbright did not attempt to quantify  
9 that burden, did he?

10 A. He did not answer Mr. Yale, but I did hear  
11 Mr. Allbright say that -- [indiscernible] agree with that,  
12 but I heard him say that, and you're right, Mr. Allbright  
13 did not attempt to quantify in any way the --

14 Q. Nor did he attempt to relate whether the  
15 advantage of not paying the full Class prices into the pool  
16 overweighed whatever burden there was in carrying that  
17 surplus.

18 A. That's correct, he made no assertions there  
19 either, or quantifications.

20 THE COURT: You may -- briskly -- step down,  
21 Mr. Hollon. Do you want to call your next witness now,  
22 Mr. Beshore?

23 MR. BESHORE: Actually, Mr. Van Dam is not my  
24 witness per se, but he is on -- we're aligned --

25 THE COURT: He was Mr. Marshall's, right, and



1 Mr. Marshall's not here.

2 MR. BESHORE: -- and he's prepared to testify.

3 THE COURT: Okay. Why don't you come on up,  
4 then.

5 (Pause.)

6 THE COURT: You are sworn in, Mr. Van Dam. Once  
7 you get situated I'll ask you to at least state and spell  
8 your name for the record too.

9 (Pause.)

10 THE COURT: Are you going to be reading a  
11 statement, Mr. Van Dam?

12 THE WITNESS: Yes, I am.

13 THE COURT: My thought, gentleman, after he reads  
14 the statement, would that be a good time to take our lunch  
15 break? It'll probably be just about noon when he's done,  
16 and we'll take a lunch break then. Okay. Unless people  
17 want it now. I don't really -- you know, those are the only  
18 -- those are the two --

19 UNIDENTIFIED MALE: I guess the other option,  
20 Judge, is just to keep going. He's going to be the last  
21 witness of the day.

22 THE COURT: Okay. I'm not sure of that yet so --  
23 why don't you -- let's see, I guess Mr. Beshore left, so  
24 I'll ask you, do you want to proceed with your testimony in  
25 the absence of Mr. Beshore, you're just going to read that

1 first, correct?

2 THE WITNESS: Yes, I'm just going to read my  
3 testimony.

4 THE COURT: Okay. When you start, even though  
5 it's on a piece of paper, if you would just state and spell  
6 your name, even though you are already sworn in.

7 THE WITNESS: Yeah.

8 WILLIAM C. VAN DAM, PROPONENT'S WITNESS, PREV. SWORN

9 DIRECT TESTIMONY

10 BY THE WITNESS:

11 My name is William C. Van Dam, the last name is  
12 spelled V-a-n, separate word, D-a-m. I'm preparing -- I'm  
13 here today testifying on behalf of Northwest Dairy  
14 Association. I've been previously sworn in and testified on  
15 November 18th in Seattle.

16 First correction of previous testimony, this is  
17 just a technical point but nonetheless needs to be  
18 corrected:

19 In my testimony of November 18th we presented, on  
20 Pages 2 through 6, the proposed language for Order 124.  
21 However, in Section 1124.10(a)(6), on the second line we  
22 referenced the incorrect pooling plan. It should be  
23 corrected as follows:

24 The reference of Section 1131.7(a), (b), or (e)  
25 should be replaced with: 1124.7(a) or (b).

1 Changes to the "similar package" proposal: NDA  
2 supports the same language for Order 124 that Mr. Hollon  
3 entered into the record on the last day of the Seattle phase  
4 of this hearing and just testified to this morning.

5 Producer-handler exemption history: The present  
6 exemption of the producer-handler traces its beginning to  
7 Kansas City in the early 1930s. USDA Marketing Research  
8 Report Number 14, dated May 1952, entitled "Early  
9 Development of Milk Marketing Plans in Kansas City,  
10 Missouri, Area" --

11 And unfortunately my underline extended too far  
12 there, it should have stopped right there, that's the end of  
13 the title.

14 -- gives a detailed history of the events of that  
15 time and is the source of the information included in this  
16 section. We ask that official notice be taken of this  
17 publication.

18 In July 1935, after years of efforts to  
19 compromise with producer-distributors, the Department gave  
20 up all efforts to regulate the operations of producer-  
21 distributors. Essentially that same exemption exists to  
22 this day. However, none of the conditions that existed at  
23 that time remain the same today, except perhaps the  
24 understandable desire of producer-distributors to "not be  
25 regulated."

1 A brief review of the critical factors of that  
2 time, and how they have changed, is in order. First: There  
3 were in the Kansas City area 335 producer-distributors, and  
4 they distributed about half of the milk in the area. At  
5 that time there was a clear distinction that producer-  
6 distributors sold raw ilk and that other handlers sold  
7 pasteurized milk. In fact, in the writings of the time, the  
8 regular handlers were known as pasteurized handlers.

9 This was a period in our country's history when  
10 the consumption -- when consumers were gradually  
11 understanding the merits of pasteurized milk.

12 Pasteurization was then what we would now label a "value  
13 added" process. The pasteurized handler had the new  
14 superior technology, and therefore the producer-handler was  
15 not viewed as a direct competitor.

16 The combined benefits of federal order audits and  
17 uniform pricing were judged to outweigh the need to include  
18 producer-distributors in the federal order. The raw milk  
19 distinction no longer applies, and obviously is not relevant  
20 to the issues before this hearing.

21 Number 2: There was no history of regulation at  
22 that time. It was a new concept, and there was a great deal  
23 of resistance to regulation, which grew as time went on.

24 For example, in April 1934, 298 producer-  
25 distributors filed reports with the Kansas City market

1 administrator. By December of that same year, the number of  
2 reporting producer-distributors had dropped to 154. During  
3 this time span the raw milk producers -- i.e., the producer-  
4 distributors -- became better organized for the sole purpose  
5 of getting the government out of their business.

6 By today, of course, regulation has been with us  
7 for nearly 70 years. Every contentious issue has been well-  
8 tested in court. Compliance will not be a problem.

9 Number 3: All of the producer-distributors of  
10 1935 were small operations, and none of them sold milk  
11 across state lines. There was a strong belief -- supported  
12 by the narrow interpretation of "interstate commerce" by the  
13 Supreme Court -- which made it unlikely the administration  
14 could enforce federal order regulations upon producer-  
15 distributors whose operations were not in "interstate  
16 commerce."

17 This was an issue that had a legitimate bearing  
18 on the Secretary's decisions made in 1935. However, that  
19 changed just a year later, in 1936, when the Supreme Court  
20 reversed its position and decided that interstate commerce  
21 included anyone who may affect interstate commerce, whether  
22 an actual participant or not. By that time, however, the  
23 preferential exemption for producer-handlers had been put  
24 into place. And I might add: other items had not changed  
25 at that point yet.

1 Today there is no question about the ability to  
2 regulate a handler who is not a producer, even if that  
3 handler is very small and does not ship milk across state  
4 lines. There are a number of such regulated handlers in the  
5 Pacific Northwest market. Several Oregon bottlers, for  
6 example, don't want to worry about standardizing to  
7 California standards and are too far from Washington or  
8 Idaho to distribute to distribute anywhere but in Oregon.  
9 Examples would include: Umpqua Dairy, Valley of the Rogue  
10 Dairy, and Eberhart Dairy.

11 None of the key issues that influenced the  
12 exemption of producer-distributors in 1935 exist today. The  
13 current producer-handler exemption is an artifact from  
14 another time and does not fit today's realities and  
15 circumstances.

16 Small business definition: My testimony  
17 presented on November 18th in Seattle contained, on Page 7,  
18 the following paragraph:

19 "Small Business. With the above background,  
20 then, I would like to point out that the public policy  
21 consideration to support small business overwhelmingly argue  
22 for ensuring that the producer-handler exemption does not  
23 injure the 933 pooled producers who are, as far as we know,  
24 mostly with the definition of 'small business.'"

25 Given the frequent and largely misapplied

1 reference to "small business" by Dr. Ron Knutson in his  
2 Seattle testimony, the record needs a clearer statement on  
3 this issue. While our statement is correct, it requires a  
4 more detailed discussion.

5 Upon our request the Market Administrator's  
6 office prepared and entered into the record Exhibit Number  
7 51, the first table, which is titled:

8 "Total Number, Number of Small and Small as a  
9 Percent of Total: Producers, Fully Regulated Pool Plants,  
10 Partially Regulated Plants, Producer Handler Plants, Exempt  
11 Plants, and Non-Pool Plants, June 2003."

12 Mr. Knutson, in his prepared testimony, on Page 4  
13 gives an accurate one-sentence summary of the intent of the  
14 Regulatory Flexibility Act, and it reads as follows:

15 "In 1980, Congress enacted the Regulatory  
16 Flexibility Act to require federal agencies to analyze the  
17 impact of federal laws on small businesses and consider  
18 meaningful alternatives that would achieve the agency's  
19 goals without unduly harming small business."

20 I question whether the intent of the RFA reaches  
21 to the, quote, "special obligations to foster and  
22 protection," unquote, small businesses, as suggested by  
23 Dr. Knutson, but clearly regulars are required to analyze  
24 the impact on small business, and they must consider  
25 alternatives consistent with regulatory goals, but the RFA

1 does not require the Secretary to take special steps to  
2 protect small business at the expense of regulatory goals.

3 The RFA contains a precise definition of who is  
4 and who is not a "small business," and Exhibit 51 applies  
5 these definitions to the PNW Order 124 and the Arizona/  
6 Las Vegas Order 131. This table identifies two key groups  
7 of small businesses that require analysis and consideration:

8 The largest by far is the group of pool producers  
9 in the PNW Order who produce less than 500,000 pounds of  
10 milk per month. In June 2003 there were 574 producers who  
11 were small businesses. In that month these producers  
12 represented 64 percent of all producers pooled.

13 It needs to be stressed that the smallest  
14 producer-handler that would be regulated under the proposals  
15 under consideration at this hearing is 6 times larger than  
16 the largest dairy farm that could meet the "small business"  
17 definition of a dairy producer.

18 The second group that meets the definition of  
19 "small business" is the 11 fully-regulated plants in the  
20 PNW. In June 2003 these plants represented 46 percent of  
21 all fully-regulated plants in the PNW. These 11 plants are,  
22 of course, the smaller plants located in the PNW and are  
23 those most directly negatively impacted by the exemption  
24 allowed the producer-handlers because they must compete for  
25 available sales.



1           If the provisions of the RFA -- now, I want to  
2 stress this: "if" the provisions of the RFA -- require the  
3 regulators to do -- again quoting Dr. Knutson, spelled wrong  
4 in that case, I'm sorry -- consider meaningful alternatives  
5 that would achieve the agency's goals without unduly harming  
6 small business, then the best way to achieve the uniform  
7 pricing mandate from Congress would be to adopt our  
8 proposals, as an alliterative to today's exemption, which  
9 places these 11 small business regulated handlers at a  
10 competitive disadvantage.

11           The term "small business" cannot, as defined by  
12 RFA, be applied to any of the producer-handlers who would be  
13 impacted by the proposed rules, because their farms exceed  
14 the small business threshold. Therefore the provisions of  
15 the RFA do not apply to the producer-handlers who will be  
16 impacted by the proposals being considered at this hearing.  
17 The provisions of RFA apply only to the extent the federal  
18 regulations impact the defined small business.

19           In this hearing, those are due consideration are  
20 the 574 "small business" dairy farmers in the PNW and the 11  
21 "small business" fully-regulated handlers. Both of these  
22 groups will benefit from the proposed limits on producer-  
23 handlers.

24           The paragraph following the one quoted above from  
25 my November 18th testimony reads as follows:

1 "It may be that the potentially regulated  
2 producer-handlers also are within the definition of 'small  
3 business.' However, we point out that many of the smaller  
4 regulated plants fit this definition also."

5 Since then, we have learned that this paragraph  
6 is wrong. It should read:

7 "None of the potentially regulated producer-  
8 handlers meet the definition of 'small business.' However,  
9 we point out that 11 of their fully-regulated-handler  
10 competitors do."

11 Women and minority interests: The issue of  
12 women's and other minority group ownership has been raised  
13 by the opponent producer-handlers. I have reviewed the  
14 membership list of NDA. This list cannot be electronically  
15 separated into sex or ethnic groups since it contains no  
16 field referencing such criteria.

17 However, all of our members are adversely  
18 affected by the current producer-handler regulations both  
19 directly through reduced Class I premium dollars in the  
20 federal order pool and indirectly by the unfair milk price  
21 advantage allowed NDA's direct competitors in the  
22 bottled-milk business.

23 Therefore, to illustrate a point, I have  
24 conducted the following count on our membership list:

25 First I crossed off all corporations because

1 their names do not give any clue as to gender of the member;  
2 but since Washington is a community property state, I would  
3 note that many of these corporations have significant  
4 ownership by women.

5 Second, I crossed off all the generic names for  
6 the same reason, but subject to the same qualification, of  
7 course.

8 And the fourth there should be third. This left  
9 a list of 445 membership names that could show that  
10 ownership included a female.

11 Of the 445 names left, 130, or 29 percent,  
12 contained a female name. Included in this list were  
13 9 dairies that contained only the name of a female.

14 Even with the conservative approach just  
15 outlined, there are far more women-owned businesses who  
16 would benefit from our proposals than there are those that  
17 are objecting to them.

18 In spite of the growing size of the modern dairy  
19 farm, the production side of this business remains a family  
20 business. Women and men are all deeply involved in the  
21 business and work and own the business as a family.

22 There can absolutely be no doubt that the numbers  
23 will correctly show, overwhelmingly, that if the interests  
24 of women and minorities are to be specifically considered,  
25 then the consideration must be concentrated on the interests

1 of the owners of the pool producers and their families.

2 The inference that the producer-handler exemption  
3 should continue because these businesses provide jobs for  
4 Hispanic workers is a misleading comment on several counts:

5 1.) Nearly all pooled dairy farms and dairy  
6 processing plants in the Pacific Northwest hire Hispanic  
7 workers. Producer-handlers are not doing anything unique  
8 or innovative in this respect.

9 2.) The producer part of the producer-handler's  
10 operations who would be subject to the regulation are in  
11 every case among the largest and most efficient dairy farms  
12 in the Federal Order 124 area.

13 While it may be, as the opponents suggest, that  
14 their bottling plants may have a difficult time competing if  
15 they had to pay the same price for milk as their  
16 competitors, there is no reason to believe that the producer  
17 portion of this is at any risk whatsoever. The Hispanics  
18 working on the dairy farms would continue to have their  
19 jobs.

20 3.) Producers and handlers do not regularly go  
21 -- I'm sorry.

22 Producer-handlers do regularly go out of  
23 business, it is a fact of economic life -- I'm going to have  
24 to start that one over again.

25 3.) Producers and handlers do regularly go out

1 of business, it is a fact of economic life, and although we  
2 all feel badly about the loss of jobs, it is not the  
3 function of the federal order system to keep some dairies in  
4 business, at the expense of others. The simple graph below,  
5 the last item in the risk section, shows that all sectors of  
6 this business do regularly go out of business.

7                   Risk. At the Seattle phase of this hearing, and  
8 again here yesterday, witnesses for the producer-handler  
9 opponents attempted to argue that the Secretary should  
10 recognize that by being vertically integrated they somehow  
11 have more at risk than other producers and other handlers.  
12 Exactly how they think the Secretary should evaluate that  
13 was not clear.

14                   The greatest difficulty of the "risk" argument  
15 advanced by the producer-handler witness is that there is no  
16 framework for that consideration in traditional federal  
17 order theory. Risk of losing an investment is simply not  
18 considered in federal order thinking.

19                   Producers regularly go out of business, because  
20 it is not the purpose of the federal orders to protect them  
21 from low prices or lack of a market. Handlers regularly go  
22 out of business because it is not the purpose of the federal  
23 orders to protect them from low margins or the loss of a  
24 customer.

25                   Different producers and different handlers all

1 have different amounts of risk, even on a per-hundredweight  
2 basis. No consideration is given in any federal order  
3 context to the additional risk that comes from investments  
4 in expansion. It makes no sense for producer-handlers to  
5 argue that their investments should be protected while the  
6 investments of other producers and handlers are not.

7 The record is disturbingly clear that neither  
8 producers nor handlers are guaranteed success with federal  
9 order regulation.

10 I have taken the following information -- and I'm  
11 sorry, I'm missing another paragraph in there, it indicates  
12 that the information I got came from other material that is  
13 -- has been inserted in this record, plus, except for the  
14 dairy producer numbers for 1998, which were -- have not been  
15 entered into this record before, but they came from the U.S.  
16 Dairy statistics numbers compiled each year and published in  
17 -- it used to be Dairymen's Magazine, now -- in 1998 it was  
18 from Dairymen's Magazine -- the actual numbers and counts of  
19 dairies compiled by the American Farm Bureau Federation.

20 The table is labeled: "Count of Dairy Producers,  
21 Producer-Handlers, and Regulated Handlers in the Pacific  
22 Northwest Order, 1998 to 2003."

23 Dairy producers in 1998 were 1,188, and by 2003  
24 they dropped to 943, a negative 245 producers, or a 20.6  
25 percent loss.

1 Regulated handlers, 20 of them in 1998, this is  
2 in Federal Order 124, dropped to 16 in 2003, a change of 4,  
3 for a 20 percent loss.

4 The data wasn't as readily for producer-handlers  
5 on this breakdown so I got a little different one from them,  
6 that came out of Table 51.

7 Producer-handlers are also not exempt, as is  
8 shown below. At our request, the Market Administrator's  
9 office prepared a new Exhibit 51, the second table, titled  
10 "Pacific Northwest Order - Federal Order Number 124, Class I  
11 Route Dispositions by Producer-Handler and 7(a) Pool Plants,  
12 Number of Plants and Average Pounds by Size Range, December  
13 of Selected Years."

14 There was a very important and relevant point --  
15 there is a very important and relevant point that needs to  
16 be made from this data. For illustration, I have reproduced  
17 part of the material, from the upper left-hand side of the  
18 data, from Exhibit 51, from that exhibit, which shows in  
19 regular print. I have then added a few calculations which  
20 appear in bold print.

21 A brief description of that exhibit, it's an  
22 excerpt from Exhibit 51, "Pacific Northwest Order Producer-  
23 Handlers," the number of producer-handlers broken down into  
24 those with less than a million pounds of Class I sales a  
25 month and those with more than a million pounds.

1 Those with more than a million pounds in 1990  
2 were 5, and there were 15 under a million pounds, for a  
3 total of 20.

4 By the year 2002, the number of plants with --  
5 again, just for the months of December -- number of plants  
6 with over a million pounds were 4, and they had dropped to 5  
7 in those that are under a million pounds, for a total of 9  
8 left in the marketplace at that time.

9 The loss between 1990 and 2002 for those greater  
10 than a million was just 1, for those that were less than a  
11 million was 10, a total loss of 11 of them. The percentage  
12 breakdowns is: 20 percent of those greater than a million,  
13 67 percent of those under a million, or a total loss of  
14 55 percent.

15 The overall loss of producer-handlers between  
16 1990 and 2002 was 11, or 55 percent, but the breakdown  
17 between the smaller producer-handlers and the larger ones  
18 goes to the heart of the matter under consideration at this  
19 hearing.

20 The table shows a loss of only one plant with  
21 monthly Class I sales of greater than a million pounds.  
22 Even the loss of that one plant is a bit suspect and may be  
23 a technicality related to school sales or some other  
24 marketing anomaly, but the point is well-made without  
25 adjusting the data, and that point is, that of the 11



1 producer-handlers that went out of business during this  
2 13-year period, a full 10 of them have sales of less than a  
3 million pounds per month.

4           This is real-life data that supports our  
5 contention that smaller producer-handlers, because of their  
6 cost structure, do not have in the final analysis any  
7 advantage over the regulated handler. It is not the large  
8 producer-handlers who are leaving the business.

9           Service fees. Several opponent producer-handler  
10 witnesses have stated that they face balancing costs that  
11 are not faced by their regulated competitors. We do not  
12 accept that argument as being true for us in our bottling  
13 operations nor for our bulk milk customers.

14           In Washington, where NDA markets to bottlers  
15 directly, and in the greater Portland market, where NDA  
16 markets through a multi-cooperative organization known as  
17 Oregon Milk Marketing Federation, the typical base service  
18 charge levels to bottlers range from the mid-30s to the  
19 mid-40s, that's mid-30 cents to the mid-40 cents.

20           However, the exact number depends on how milk is  
21 purchased and how a bottler cooperates in helping us  
22 minimize the cost of balancing his milk.

23           One key factor in the cost of balancing is  
24 "weekend milk." It helps us not to have surges on weekends,  
25 which can challenge our manufacturing plants, especially

1 during the spring and summer, when milk production peaks,  
2 and at times like the holidays, when some plants shut down,  
3 but we give a credit of up to 10 -- so we give a credit of  
4 up to 10 cents for evening out the purchases throughout each  
5 week.

6                   In addition, as a supplier to bottling plants, we  
7 have to bear, or pass on, the costs of balancing the  
8 seasonal fluctuations in consumer demand, which typically  
9 causes bottling plant demand to peak during the September to  
10 December time frame, when production is approaching its  
11 lowest levels in our climate.

12                   This counter-cyclical pattern presents a huge  
13 balancing problem. As an example of how that works, we have  
14 an agreement with DFA to supply milk to Wilcox Dairy plant  
15 at Roy, Washington. They have committed to a constant level  
16 amount of purchases, from season to season. DFA balances  
17 the plant's needs. But if they call on us for balancing,  
18 that "over contract" milk costs them \$1.45 per  
19 hundredweight.

20                   A drying plant is capital-intensive, and its  
21 operating costs are mostly fixed. One can see that the data  
22 used by USDA in establishing the current -- see that in the  
23 data used in establishing the current -- make allowances.  
24 Running a few more loads through that plant costs very  
25 little, because the equipment is already there, and the

1 labor is already scheduled, and at best, the only cost  
2 increase from processing an additional load of raw milk is a  
3 bit of energy and the cost of the powder bag. But at the  
4 same time, conversely, it is also true that taking a few  
5 loads out of the plant to supply a bottler saves the plant  
6 very little money, and at the margin, we forego most of the  
7 make allowance that would have been available if we could  
8 have run those additional truckloads of milk.

9                   The problem for manufacturing plant operators is  
10 that they can't make money under the current make-allowance  
11 structure unless, or maybe even if, the plant is full, so  
12 balancing the bottlers in the market is very costly when it  
13 requires taking milk out of a manufacturing plant.

14                   NDA did a lot of work in developing our service  
15 cost structure, and I can assure you that this cost-based -  
16 - that this is cost-based and easily explained to those who  
17 use us to balance their needs. That is why the customers  
18 accept it.

19                   Thank you for this opportunity to add this  
20 testimony. I shall be glad to take any questions after  
21 lunch.

22                   THE COURT: Mr. Beshore, did you want this  
23 document marked and admitted into evidence?

24                   MR. BESHORE: I think it should be marked because  
25 the chart in the document --

1 THE COURT: Right.

2 MR. BESHORE: -- will be helpful.

3 THE COURT: Okay, let's see, 65. We didn't admit  
4 64, but I'm marking this for identification as 65 and I'm  
5 admitting it into evidence.

6 (Exhibit No. 65 was marked and received.)

7 THE COURT: Is he going to be the last witness  
8 for the day, as far as you know?

9 MR. BESHORE: As far as I know.

10 THE COURT: Okay. And that's as far as you know  
11 too, Mr. Ricciardi and Mr. Yale, right?

12 MR. YALE: That's correct, Your Honor.

13 THE COURT: Okay. I still say we should break  
14 for lunch, because cross-examination tends to take a little  
15 while. Right now it's 5 after 12. Let's come back at 1:15.  
16 Off the record until 1:15.

17 (Off the record at 12:05 p.m. and reconvened at 1:20 p.m.)

18 THE COURT: We're back on the record after lunch  
19 break, for cross-examination of Mr. Van Dam, and Mr. Yale,  
20 you look like you're ready to proceed. Am I correct?

21 MR. YALE: I'm ready, if you would let me  
22 proceed.

23 THE COURT: Please go ahead.

24 MR. YALE: All right. Benjamin F. Yale, on  
25 behalf of Smith Farms Dairy, Edaleen Dairy, and Mallorie's

1 Dairy.

2 CROSS-EXAMINATION

3 BY MR. YALE:

4 Q. Good afternoon, Mr. Van Dam.

5 A. Good afternoon, Mr. Yale.

6 Q. I want to -- you have this history here of the  
7 producer-handler exemption, and I'm not going to beat that  
8 one, I think -- we've got a lot there, but I have some  
9 specific questions that I want to ask you.

10 You were pretty active in the federal -- the FAIR  
11 Act, the reform of the federal orders, do you remember that  
12 period, of 1996 through at least 2000?

13 A. Yes, I do remember that period, but to define my  
14 activities as "fairly active" is not --

15 Q. You weren't all that active?

16 A. No, I was not.

17 Q. You were aware, were you not, that the Secretary  
18 issued a decision in April of 1999 that, among other things,  
19 proposed this contentious Option 1(b), which we're not going  
20 to argue about, I don't want an objection, but remember  
21 that, it had the Option 1(b); right?

22 A. Sure do.

23 Q. And groups that you were a part of, and mine, we  
24 lobbied to get Congress to change that. Remember that?

25 A. Yes.

1       Q. All right. And in fact the end of 19 -- and part  
2 of that federal order reform, or that regulation, created  
3 the Pacific Northwest order as we now know it; right?

4       A. Well, I'm not sure that it created it as we now  
5 know it, because it's one -- it's the only order that did  
6 not change.

7       Q. The geographic order didn't change.

8       A. Right.

9       Q. Okay. But it did promulgate -- except for some  
10 amendments that have been made since 2000, but the  
11 regulations on producer-handler that we're talking about  
12 today were part of that -- that period; right?

13       A. Yes, they were.

14       Q. And for Order 131, it created 131, in terms of:  
15 enlarged the area and --

16       A. Correct.

17       Q. -- and -- and those regulations are also part of  
18 what's been proposed; right?

19       A. That's correct.

20       Q. Okay. And isn't it true, Mr. Van Dam, that  
21 Congress, in 1999, ordered the Secretary to implement those  
22 regulations but institute Option 1(a)?

23       A. Yes.

24       Q. You recall that?

25       A. Yes.

1 Q. All right. So we have a Congressional direction  
2 in 1999 that told the Secretary to implement the producer  
3 regulations that we're dealing with today; right?

4 A. I certainly know that the 1(a) direction came  
5 from Congress and -- having not read the legislation --

6 Q. Right.

7 A. -- I'm not positive that everything is involved,  
8 but I do know --

9 Q. Okay.

10 A. -- that that critical factor was decided --

11 Q. That --

12 A. -- by Congress.

13 Q. That's fair. Okay. I mean -- and I -- and  
14 that's something that would be in the statute, I mean --

15 A. Yes, it would be.

16 Q. -- right?

17 A. (Nods head.)

18 Q. So --

19 THE WITNESS: Judge, I'm getting tremendous  
20 feedback.

21 MS. DESKINS: Can we go off the record and maybe  
22 try to get the hotel to do something?

23 THE COURT: Off the record.

24 (Off the record and reconvened.)

25 THE COURT: On the record.

1 BY MR. YALE:

2 Q. Do you recall we were talking about that 1999 Act  
3 that ordered the Secretary to implement the regulations that  
4 we are now seeking to amend, do you recall that line of  
5 questioning?

6 A. Yes. Yes, I do.

7 Q. So -- and I think -- and I know you've been here  
8 these hearings, and there's been some testimony -- or you -  
9 - well, let me just ask you.

10 Are you aware that over the years, not in 1996  
11 but prior to 1996, that Congress would have language that  
12 said "the status of producer-handlers," you know, "shall not  
13 be changed," or something like that --

14 A. Something very close to that.

15 Q. Right. Okay. Now, the reason I ask that  
16 question is, shouldn't the Secretary be looking at -- rather  
17 than what happened in 1935 and what's changed since then or  
18 -- should she be looking at what's changed since 2000, when  
19 these regulations took effect?

20 A. Obviously the Secretary needs to pay attention to  
21 all of the things that have happened, and the things that  
22 have happened most currently probably have more bearing and  
23 should be given more weight in the decision-making process.

24 My revisit, going all the way that far back, was  
25 to counter some of the testimony given that -- that there



1 were decisions made back then that applied to now, and we  
2 feel that that's -- those changes are huge.

3 Q. Right. But isn't it a situation that that policy  
4 that was made in the mid '30s has just been repeatedly  
5 ratified by Congress and the Secretary over the years in  
6 light of those changing conditions and not necessarily  
7 saying that we still have 1935 conditions with producer-  
8 handlers?

9 A. I will admit they haven't been changed in that  
10 entire time period. I am not sure that -- what Congress has  
11 done those various times reaches to "ratification," but they  
12 did -- they did get their point, and it did get stated.

13 Q. And you weren't around in '35, marketing milk, so  
14 we really can't -- and we're not far behind each other, so  
15 we're not going to go there, but it is -- but I think one  
16 can truthfully say that even in the time that you and I have  
17 been through, there's been dramatic changes in all aspects  
18 of the dairy industry; right?

19 A. Rather remarkable.

20 Q. The sizes of cooperatives, the sizes of  
21 producers, the sizes of plants, the sizes of buyers; right?

22 A. All of those true, and remarkable changes.

23 Q. But coming back to my original question: Are you  
24 aware of any changes in the marketing area of 124 since  
25 January of 2000 in the condition of producer-handlers?

1           A. Well, other than some of them getting out of the  
2 business, hasn't been -- hasn't been much. There's been  
3 some growth among the bigger ones, as is true almost  
4 everywhere, I believe.

5           If I might add, one of the biggest changes that's  
6 occurred since the time I've been hanging around the Pacific  
7 Northwest Order has been the conditions between the Canadian  
8 market and the U.S. market, that's had a major impact on  
9 Edaleen and what they do, and what they've had to do in  
10 response to that.

11          Q. You state on Page 2 that every contentious issue  
12 has been well-tested in court. You see that?

13          A. I forget where it is, but I know --

14          Q. It's at the end of point 2 of your --

15          A. I know I said it.

16          Q. Yeah.

17          A. Yeah.

18          Q. Facetiously I was going to say "every contentious  
19 issue 'has' or 'will be' well-tested in court?" We don't  
20 need to go there.

21               I know you're not a lawyer, but evidently you've  
22 been prepped and you have some knowledge of the legal  
23 history of things that have tested the federal orders.  
24 Right?

25          A. That's correct.

1       Q.    Okay.  Are you aware of any case in which a  
2 producer -- let me back up a second.  Have you ever -- I  
3 think I asked you this question.  Have you very visited like  
4 Edaleen or Mallorie's or Smith Brothers Farms, have you ever  
5 been to their operations?

6       A.    Yes, yes, and yes.

7       Q.    Okay.

8       A.    Been to all of them.

9       Q.    And those are situations where the connection  
10 between the processing and the farm is -- it's easily  
11 established, right, it's a farm -- in Mallorie's case, the  
12 milk is bottled next-door to the milking parlor; right?

13       A.    Right.  And Smith Brothers, before they built  
14 their new dairy out in Royal City, was the same thing.

15       Q.    Same thing, right.

16       A.    And Edaleen also, until they built their new  
17 barn, basically had them all in the same place.

18       Q.    And you don't have any doubt in your mind that --  
19 or any reason to doubt that these are truly integrated  
20 operations, from the field -- or from the farm to the  
21 bottle; right?

22       A.    Well, that is certainly true, but it's true of  
23 almost every producer-handler whether these are the smaller  
24 ones --

25       Q.    Well, I understand that.

1 A. Okay.

2 Q. I'm not going on the size -- it isn't a size  
3 issue. So -- this is all -- I'm setting you up for a  
4 question here.

5 A. Really.

6 Q. Yeah.

7 A. Thank you for the warning.

8 (Laughter.)

9 Q. And the question is: under this contentious --  
10 are you aware of any court test where the federal orders  
11 have -- or a market administrator has told an operation such  
12 as Smith Farms, Mallorie's, or Edaleen, where it's all their  
13 milk, to pay into a producer pool?

14 A. A court case. No, I'm not aware of that.

15 Q. Now, you also make this statement, "Today there's  
16 no question about the ability to regulate a handler who is  
17 not a producer." Okay?

18 A. Correct.

19 Q. And -- but you would recognize that the strict  
20 language of the Act that says you can establish minimum  
21 prices for milk purchased from producers at least suggests  
22 that the Secretary's authority is limited to only purchases,  
23 not other circumstances.

24 A. We visited that earlier, and I don't agree with  
25 that, and it's been well -- that is one of the issues that

1 has been well-tested in court and that Section (c) has the  
2 paragraph in there, referring to both producers -- to  
3 include producers who also happen to be handlers.

4 Q. Okay, let's talk about that a second, okay?

5 A. All right.

6 Q. Let's say that -- let's take Edaleen, for  
7 example, they're in Lynden, Washington, and you've  
8 acknowledged that they have their own milk and it goes in,  
9 right, and they're a producer-handler; right?

10 A. That's correct.

11 Q. Okay. And it's clearly an operation operated by  
12 the -- you know, by the farmer and the plant, they're all  
13 integrated. If they were to purchase a load of milk from a  
14 farm across the road or nearby, then they would be a  
15 producer who handles milk at that point; right?

16 A. A producer who happens to be a handler.

17 Q. Yeah.

18 A. How do you get to that conclusion?

19 Q. Because they're -- the producer is operating this  
20 farm and this bottling facility, and now they're buying milk  
21 from some other farm.

22 A. And you're saying they still are a producer --

23 Q. On their own milk.

24 A. -- who is a handler. Yeah. This is correct.

25 Q. Your talk about the Regulatory Flexibility Act,

1 was this testimony drafted before or after John Mykrantz was  
2 on the stand yesterday?

3 A. Oh, before John was on the stand yesterday.

4 Q. And you're aware that he qualified that  
5 definition or that counting that he did on producer-handlers  
6 in that table; right?

7 A. You know, I was here for that testimony, and I'm  
8 not sure that he qualified it. He was asked if he could  
9 present the same table with a different assumptions, and the  
10 said he could do that, and certainly he could, and I could  
11 have too, I suspect.

12 Q. But he did agree that the heading in Exhibit --  
13 in that exhibit, where he says producer-handler it should  
14 have said producer-handler farms as opposed to producer-  
15 handler --

16 A. No, what he -- what he had on there was producer-  
17 handler plants --

18 Q. Right.

19 A. -- and he agreed that maybe it would have been  
20 less misleading or less confusing to people if he had left  
21 off the word "plants" and just put "producer-handler."

22 Q. Okay.

23 A. That is what I remember him saying.

24 Q. Now -- and I'll give you -- since you're here and  
25 you're remembering very well, I'll give you this

1 hypothetical: something to the effect that you have a  
2 regulated handler, 7(a) handler, that has 50 employees,  
3 okay, at the plant?

4 A. Yeah.

5 Q. And under the definition there, they would be a  
6 small business; right?

7 A. Correct.

8 Q. All right. And then you have a -- and let's say  
9 that they do -- what do you say, 5 million, let's say that  
10 they're a 5-million-pound-a-month plant, okay?

11 A. Okay.

12 Q. And then we have a producer-handler that's a  
13 5-million-pound-a-month plant --

14 A. Right.

15 Q. -- with 50 employees, and let's say they've got  
16 another 30 operating the farm, so they've got 80 employees.  
17 Okay?

18 A. (Nods head.)

19 Q. Now, from a plant standpoint, they still don't  
20 have 500 employees; right?

21 A. Oh, that's correct.

22 Q. So when you -- okay. But from the farm  
23 standpoint, they have more than 500,000 pounds of milk.

24 A. Correct.

25 Q. All right. Now, do you see this regulation,

1 where a producer-handler -- producer-handlers with more than  
2 3 million pounds having to pay -- contribute to the pool and  
3 draw back the blend, applying to them because they're  
4 handlers or because they're producers?

5 A. I thought I was with you, Ben, but --

6 Q. I mean what side -- I mean who's paying the money  
7 -- I mean who's going to be -- who's going to be filing the  
8 reports, is it going to be the plant or the farm that's  
9 doing these -- the contribution to the pool and taking back  
10 the blend?

11 A. I find that an interesting question from you,  
12 Ben, because --

13 MR. BERDE: Your Honor, I object to that question  
14 because it assumes in the question that the Secretary  
15 regulates producers, which he does not, he regulates  
16 handlers, and that's the only relevance that the question  
17 would have, except that he -- he must be talking about  
18 handlers, otherwise the question makes no sense.

19 THE COURT: I'll let you address that objection,  
20 Mr. Yale.

21 MR. YALE: Well, I'm asking him the question,  
22 because that's what -- I mean, I've got an objection, I  
23 don't know whether that's the answer and I need to -- you  
24 know. The question is to determine -- is just that: I want  
25 to know who -- what part of this producer-handler the



1 Secretary -- that he sees that's being regulated, and it  
2 goes to this definition of "small business."

3 THE COURT: I'll let him answer it. If you know  
4 the answer.

5 A. Well, the handler part is what gets regulated.  
6 Mr. Berde's right, correct, on that, and that's what's being  
7 regulated here. I think what you're probing is: trying to  
8 find out if it's correctly stated that just because the  
9 dairy is a large business, that the handler plant, which  
10 otherwise would be a small business, is now a large  
11 business; and the answer to that is: that is the way it's  
12 done and interpreted.

13 We used in our testimony the example: what if  
14 Microsoft bought one of the small handlers? -- if Microsoft  
15 owned it, it's clearly not a small handler anymore; the  
16 plant size hasn't changed one iota. It is the way it is  
17 defined.

18 BY MR. YALE:

19 Q. But if you look at the footnote and the  
20 definition that they have always looked at -- and I think  
21 Mr. Mykrantz's testimony was that they've looked at  
22 businesses beyond their -- just what's there at that plant,  
23 and sometimes going interstate and looking at other plants  
24 to determine whether they're small or not --

25 A. That's correct.

1       Q. -- and under that definition, Microsoft would not  
2 be a small business, under this definition.

3       A. I agree. Microsoft's not a small business.

4       Q. Well, even under their own interpretation, they  
5 look beyond just that plant and they would see that it's  
6 part of a larger corporation and they would not call that a  
7 small business.

8       A. Of course. That's my point.

9       Q. Okay. So coming back to this, is that we call  
10 them, under your definition, a small plant today, or a large  
11 business today, they don't fit --

12       A. Right.

13       Q. Okay. -- and at the end of the month the  
14 Secretary issues the decision you all want, and beginning  
15 February 1, they now become regulated because they have more  
16 than 3 million pounds. In February, although there's been  
17 no change in their production or the processing or anything  
18 else, they will now, because they are a regulated plant,  
19 would be treated as a small business; right?

20       A. Well, that would be true only if the ownership  
21 changes and they no longer met the definitions and things  
22 like that, but yeah, that's correct. It's one of the  
23 ironies of the way that bureaucracies, if you will, define  
24 things. And my point is not one of the emotional or moral  
25 issue, are they really big or are they small, it's a

1 definitional issue and it's what the Secretary has to  
2 consider. You meet the definition or you don't. The  
3 standard practice has it that they will not.

4 Q. I want to move ahead. You talk about risk.

5 (Pause.)

6 A. On Page 5.

7 Q. Now, I'm going to kind of state this as a -- as a  
8 statement, an explanation, and I want to ask a question  
9 dealing with that. Okay?

10 A. (Nods head.)

11 Q. Well, first of all, do you -- as I read this, you  
12 see risk as a situation whereby being a PD -- because they  
13 have higher risks they're entitled to the exemption? You  
14 see that as being the argument?

15 A. That's the way I'm understanding the argument I'm  
16 hearing.

17 Q. Okay. Isn't it that it's a -- it's a different  
18 argument, I want to suggest something to you and then I want  
19 to ask some questions, and that is, is that there's this  
20 enhanced risk, because you're owning both the farm and the  
21 other, okay, adds to the overall cost of the operation,  
22 indirectly, as opposed to a minimum price that you can  
23 identify as a plant, but it contributes to the mix of the  
24 cost of operating that PD, such that, when viewed in its  
25 total context, as compared to a regulated handler, the costs

1 are and have established themselves in the marketplace as  
2 being nearly equal.

3 Now, you didn't see that risk argument explained  
4 that way, right? You probably don't -- it looks like you  
5 don't even understand it. Do you understand what I'm trying  
6 to say?

7 A. I understand what you're trying to say. Whether  
8 your point is to try to get me to agree with it or not --

9 Q. I'm not.

10 A. -- is where I --

11 Q. Okay.

12 A. Because I don't.

13 Q. I wasn't asking you to --

14 A. Okay.

15 Q. -- sign on, I'm not that naive, I guess, but the  
16 point is, is that that -- but that's a different risk, in  
17 terms of its total mix, is that it -- you agree risk has a  
18 cost; right?

19 A. Risk has a cost.

20 Q. All right. But --

21 A. If I can counter --

22 THE WITNESS: Am I allowed to do this, Judge, or  
23 do I have to wait till he asks the question?

24 BY MR. YALE:

25 Q. How would you counter it? I'll ask the question.

1 How do you counter it?

2 (Laughter.)

3 MR. YALE: You owe me one, Bill.

4 A. The statement, the way you stated it, is that a  
5 combined producer-handler has greater risk than a regulated  
6 handler. Well, you're not comparing apples and apples. You  
7 have to compare a producer of the peer group with a -- plus  
8 a handler of the peer group and decide whether this two-  
9 faced entity has the same risk or not, and I believe the  
10 risk is the same.

11 BY MR. YALE:

12 Q. And that -- okay, and that's your argument.

13 A. Yes, okay.

14 Q. I mean, that's what we've --

15 A. We'll agree.

16 Q. -- we've argued. But let me go another way.

17 You've been involved in the dairy industry a  
18 number of years; right?

19 A. Born and raised on a dairy in southern  
20 California.

21 Q. Right. And you've been involved in farm -- I  
22 mean in terms of producer relationships between cooperatives  
23 and plants; right?

24 A. Yes, I have.

25 Q. And your experience in that as regards -- if

1 producers believe that there's some additional money to be  
2 made, they'll respond to that; right?

3 A. Yes, I agree with that.

4 Q. For example, quality incentives, if a plant or a  
5 cooperative installs some kind of quality incentive, there  
6 seems to be some response as the producers will do whatever  
7 they've got to do to win their points, get their back count  
8 down or something like that. Right?

9 A. Like everything else, there's a level at which  
10 you'll get a response, but if the incentive is strong  
11 enough, the response will be there.

12 Q. Right. And the greater the incentive, the  
13 greater the response; right?

14 A. That tends to be the way it works.

15 Q. Okay. And over the years, in the federal orders,  
16 we've changed -- in some orders, anyhow, not the Arizona one  
17 among them -- we've changed to multiple-component pricing;  
18 right?

19 A. That's correct.

20 Q. And one of the theories behind multiple-component  
21 pricing was to create added value for those producers that  
22 provide protein; right?

23 A. Exactly.

24 Q. And so that they would respond to that; right?

25 A. Well, it --

1       Q. It didn't work out that well in these formulas,  
2 but that was kind of the intent, wasn't it?

3       A. That's correct, and as I understood the arguments  
4 when they went at that time, not to put too fine a point on  
5 it, was that there were producers who were producing the  
6 higher-value product that were adamant --

7       Q. Right.

8       A. -- that they should be paid for it. Obviously  
9 there's -- it then creates an incentive for everybody to go  
10 there.

11       Q. Right.

12       A. But I'm not sure that the incentive was the  
13 driving force.

14       Q. Okay. One of the things that -- and maybe you  
15 can answer this question for me, this whole hearing, and I  
16 haven't heard the answer, is that if there's -- at the  
17 producer level there's an economic incentive to be a  
18 producer-handler, why isn't there the movement in response  
19 to that extra money that we saw in the quality incentives  
20 and the -- you know, the multiple-component pricing, and  
21 these other areas? Why is that?

22       A. Are you framing your question: in the Order 124?

23       Q. Let's just take --

24       A. Because it's a different answer than in 131.

1 Q. Well, I'll do both of them. Let's say 124, and  
2 then -- give it to me -- give me both of them.

3 A. If you don't mind, I'll give it to you the other  
4 way.

5 Q. 131 first, okay.

6 A. 131 first is easy: there has been a response,  
7 and it's been pretty remarkable, but it's been just one  
8 individual.

9 Q. One individual.

10 A. Yeah.

11 Q. Okay.

12 A. Now, in 124, I've been thinking about that a lot,  
13 and looking over the things, especially when we get over to  
14 this data: there are very few people who can start a  
15 producer-handler operation at the size required to be  
16 successful.

17 I am convinced, from looking at the data that we  
18 put together for this hearing -- some that we presented,  
19 other that I've heard -- that the smaller producer-handler  
20 has an extremely difficult road to hoe, and I think the  
21 biggest part is just plain a lot of work.

22 And there is market risk, although I won't give  
23 you the argument all the way, when you get to the bigger  
24 sizes. At a smaller size, it is a difficult task, very hard  
25 to do. I admire those people for trying it. But I do not



1 believe that they have any advantages. They're just working  
2 hard for no real gain.

3 Once you get big enough -- and our concern, quite  
4 frankly, is the future. When they get to the 3 million size  
5 and bigger than that, there are starting to be some  
6 opportunities for new ones to form up and take -- shave off  
7 segments of the market.

8 As a matter of fact, Dr. Ron Knutson pretty  
9 emphatically argued during his cross-examination that he  
10 thought that was a marvelous thing to have happen. It kind  
11 of worries us.

12 Q. All right. So what you're saying is the reason  
13 the change hasn't been made: the producers aren't big  
14 enough?

15 A. No, they're -- they're big -- there's plenty of  
16 them big enough now, and there's plenty of them looking at  
17 it now too.

18 Q. All right. But there have been some in that size  
19 range, of a couple, 3, 4, 5 million pounds a month, in the  
20 Pacific Northwest, for years; right?

21 A. There have been.

22 Q. Okay. And so they are of -- that's -- by the  
23 way, you said there's a -- they reach a certain size where  
24 it becomes worthwhile. Where's that size?

25 A. I think it's in the 3 million range, because

1 that's where the costs start making sense.

2 Q. Okay.

3 A. If you go to the bank with a proposal, you better  
4 have something that shows a sensible reason to do this.

5 Q. So what you're saying is that it's unrealistic to  
6 expect many producers to start up and succeed as a producer-  
7 handler less than 3 million pounds.

8 A. I would agree with that, and indeed my data that  
9 I prepared shows that 10 of the 11 that left were in that  
10 size category.

11 Q. So let's go back to -- and let's go back to  
12 Arizona, and I think we can include this in the answer on  
13 124. If there's a -- haven't there not been producers of  
14 significant size in Arizona and the Pacific Northwest, for  
15 at least four or five years, capable of establishing a  
16 producer-handler in the range that you just identified as  
17 being profitable?

18 A. There certainly are, in both those areas, more in  
19 Arizona than here.

20 Q. Now, let's go back again to this idea of your  
21 knowledge of producers. We talked about how producers  
22 respond to economic incentive; right?

23 A. Uh-huh.

24 Q. And have you noticed, when you get into these  
25 larger producer units, you know, the 2, 3 million pounds,

1 that they have an ability to respond to price incentives,  
2 seem to be a little faster and a little more complete than  
3 maybe sometimes the smaller ones do?

4 A. I think that's probably true. They --

5 Q. Or maybe a greater incentive to follow the  
6 incentives --

7 A. Yeah. Everything that happens multiplies by more  
8 cows and therefore there's more incentive to stay in tune  
9 with the market. I think you'll find that the -- those that  
10 participate in the futures markets tend to be the larger  
11 producers.

12 Q. Right. That's another incentive.

13 A. Same -- same kind --

14 Q. Right.

15 A. -- of reason.

16 Q. So it comes back to my question. With those  
17 units of that size, why have we only seen one new producer-  
18 handler in Arizona, no new ones in the Pacific Northwest  
19 during the last five, six years if there is at the producer  
20 level an economic incentive to do so?

21 A. And they haven't.

22 Q. And they haven't.

23 A. And they have not, and I -- I believe the reason  
24 they -- there's a couple of reasons why they have not. One  
25 of them is that it requires a management talent that these

1 people don't believe that they have, they aren't ready to  
2 hire another manager to take care of it. Secondly, they  
3 know very little about what the markets and what the markets  
4 might be out there, and that makes them a little nervous.

5 I have one person, that I know quite well, who  
6 used to be a producer-handler in California, moved up to  
7 Idaho, and desperately wanted to become a producer-handler,  
8 and my question that stopped him every time was: "Where you  
9 going to sell it?" These real big dairies tend not to be  
10 near the population centers into which they can sell it.

11 There's another factor that plays in the Pacific  
12 Northwest, that's kind of interesting, and that is the one  
13 that: there is too much stainless steel existing in the  
14 Pacific Northwest, that's shown in -- one of the tables  
15 shows that the average size of the plants in the Pacific  
16 Northwest is quite small, there's a lot of them, so there's  
17 a lot of people out there to compete with you for that  
18 market.

19 So I think the bottom line comes down to: these  
20 guys would do it if they had a market for it, and I think  
21 Ron Knutson kind of pointed out where that market is, and  
22 that's where our concern is.

23 Q. And -- but part of that -- when you talk about  
24 the market: in other words, they have evaluated the risks,  
25 the risk as -- being a PD but you're not going to have the

1 market, where if you go with the cooperative or something  
2 else, you've got a market, maybe not as much money as you  
3 think you want, but at least you've got a market. Right?

4 A. Correct. That's the one I'm giving you.

5 Q. Okay. So they've weighed the risk, and the risks  
6 outweigh the benefits, as they see it.

7 A. I would say they're weighing the risk --

8 Q. Right.

9 A. -- and so far have concluded that.

10 Q. All right. And therein lies that measurement of  
11 economic risk, such that there's not enough to move as a  
12 producer into a producer-handler provision.

13 A. Correct, not yet.

14 Q. Not under the current marketing conditions in the  
15 Pacific Northwest. Is that what you're saying?

16 A. That's correct. There is an additional risk that  
17 all of them talk about, and when I'm talking with them I  
18 point out to them, there's a regulatory risk, the risk that  
19 the regulation will be pulled, that's what this hearing is  
20 about, and they worry about that, they say, "Okay, I've  
21 invested all this money," and boom the rules get changed. I  
22 think there's plenty in this room who can identify with  
23 that.

24 Q. Okay. We have -- so whatever that -- but on the  
25 other hand, if that was a real large number, even that could

1 be -- even that risk could be overcome, right? You know, if  
2 you could get your bucks in a year and your investment back,  
3 then it's worth the risk, right? It's all about risk  
4 management, right?

5 A. That's a big part of it. It's: making your  
6 judgment.

7 Q. Now, kind of a -- I want to change things here.  
8 There was official notice regarding this rule-making  
9 proceedings to take care of the -- I think it was called  
10 double-dipping, with the state orders, right, for Order 124?

11 A. Yes. I'll help you refresh your memory: it is  
12 called double-dipping, and yes, it was in the notice.

13 Q. And it was also in Order 135, wasn't it? That  
14 is, there --

15 A. Yes.

16 Q. -- was proposed to be a change in 135.

17 A. Yes, it was.

18 Q. So in that recommended decision on 135, to  
19 eliminate double-dipping, the producers, there wasn't  
20 sufficient support for the producers for the amended order  
21 in total, that and other things?

22 A. Yeah. Good thing you added "that and other  
23 things." I think the double-dipping issue had nothing to do  
24 with it being voted out.

25 Q. I understand, I just -- but --

1 A. Okay.

2 Q. -- that order's been voted out; right?

3 A. That order has been voted out.

4 Q. And that's one of those in which official notice  
5 has been requested of the Secretary, the decision on that to  
6 be taken; right?

7 A. Yes.

8 Q. Now, I want to come down -- I think this is,  
9 hopefully, my final deal. I'm not promising that, but I'm  
10 certainly going to try. In the end page there you talk  
11 about service fees and balancing, and that's what I want to  
12 talk about.

13 A. Okay.

14 Q. Now, you heard my questions today of Mr. Hollon,  
15 I believe, about the amount of milk that's needed to supply  
16 Class I; right?

17 A. Correct, I heard that.

18 Q. And I think we all agree that Class I needs  
19 fluctuate differently than supply fluctuates; right?

20 A. That's correct.

21 Q. Both on a long-term seasonal basis through the  
22 years.

23 A. And on a weekly and holiday basis.

24 Q. On a weekly, daily, and sometimes hourly basis;  
25 right?

1 A. Well, "hourly" might be a little tight, but --

2 Q. Well, daily.

3 A. -- you know, I understand what you're getting at.

4 Q. Right. So you need to have a greater supply to  
5 deal with that Class I need because of that fluctuation;  
6 right?

7 A. Right. A hundred percent is a difficult number  
8 to achieve.

9 Q. That's right. So we have -- it used to be they  
10 used the term -- they used to reserve this term, "reserve  
11 supply" for Class I, you had to have milk in reserve, that  
12 you could meet the needs; right?

13 A. I remember those arguments well.

14 Q. And would you agree that in Order 124, that under  
15 its current Class I utilization, that we have more milk than  
16 is needed for simply a reserve for the Class I market?

17 A. The supply of milk in the PNW is certainly more  
18 than adequate to meet the needs of the Class I market.

19 Q. In fact, there's extensive cheese manufacturing;  
20 right?

21 A. Quite a bit of cheese manufacturing.

22 Q. And powder manufacturing?

23 A. And very large powder manufacturing.

24 Q. And I think you testified that those plants,  
25 really, to make it worthwhile, have to be running full-time.



1 A. Well, there's a framework of that statement, and  
2 the framework of that statement is that the make allowances  
3 within the federal order system are so narrow that you have  
4 no chance to make it if the plant's not running as near  
5 capacity --

6 Q. Right.

7 A. -- as possible.

8 Q. So we come back to this point, is that the amount  
9 of milk truly, truly needed for the Class I market,  
10 including its reserve and actually being supplied, is less  
11 than all of the milk that is currently pooled on Order 124;  
12 right?

13 A. That's correct.

14 Q. All right. Do you know what that number would  
15 be?

16 A. I over the years perhaps even participated in  
17 trying to define that number, and it's ranged from 15 to 40  
18 to 48 to 60 percent, number's kind of a slippery number, and  
19 it's becoming of less relevance as you get into marketing.  
20 My early history is in California, now California's --

21 Q. Right.

22 A. -- 20 percent Class I. The argument is of no  
23 merit anymore. Pretty much the same thing in the Pacific  
24 Northwest, we just don't talk in those terms anymore,  
25 because they're plenty --

1 Q. Plenty of milk, right.

2 A. -- and it can reach.

3 Q. So it comes back to this other issue, when we  
4 talk about the cost of balancing, is -- again, and I kind of  
5 want to bring back -- and we talked about all the risks and  
6 stuff. The cost of balancing -- and I think the argument of  
7 the producer-handler -- I want to make this a little -- as I  
8 understand it, what you're saying is, is that they're trying  
9 to say, "Well, if we added our cost of balancing into this  
10 equation, then we would be equivalent of paying a Class I  
11 price," or something like that. Is that your understanding  
12 of --

13 A. To an extent that's my understanding. My  
14 understanding is that you are not really expecting us to  
15 believe that the balancing costs are enough to cover the  
16 entire gap, but we've admitted in our testimony, DFA did in  
17 theirs, that there's a blend-down effect that needs to be  
18 considered in this thing.

19 Q. But to balance that plant -- in other words, for  
20 that producer-handler to have enough milk to meet its  
21 Class I needs, okay, that it has taken steps both at the  
22 plant level and at the producer level to absorb or remove as  
23 many of those irregularities as possible; right?

24 A. Well, certainly.

25 Q. All right. So in that way, they have borne the

1 risk of their own reserve supply in balancing their supply  
2 even though it may not be balancing or handling and covering  
3 the cost of other milk, more milk that's in the order, but  
4 at least within the milk that they have, they're handling  
5 that; right?

6 A. They obviously have the milk and they obviously  
7 need to deal with it and they need to move it. I think it's  
8 disingenuous for the producer-handlers to claim that they're  
9 bearing all the costs of disposing of it, because the  
10 marketplace has been pretty friendly in accepting their  
11 milk, and they've been very ingenious in finding places to  
12 put the milk, I've got to admire what they've been doing,  
13 but their costs are -- are not the same as building a cheese  
14 plant of their own --

15 Q. Right.

16 A. -- to get rid of the milk.

17 Q. But let's take -- I think your client, or your  
18 company, NDA, they own West Farm --

19 A. Yes.

20 Q. -- the bottler. Right?

21 A. Right. Four bottling plants?

22 Q. And -- huh?

23 A. Four bottling plants.

24 Q. Four bottling plants. And so you have some  
25 control in trying to level out that demand at the plant to

1 reduce the cost at the producers supply side; right?

2 A. Certainly do, and costs involved in doing that.

3 Q. And there's costs involved in doing that; right?

4 A. Yep.

5 Q. And you try to do that, but you can't necessarily  
6 force Safeway and Kroger and the others to do the same  
7 thing; right?

8 A. They respond to financial incentives just like  
9 everybody else --

10 Q. Right.

11 A. -- and you can get cooperation by cooperation.  
12 And in the case of our own plants, we can demand it.

13 Q. So, I guess coming back to the point, the  
14 measurement of them balancing and handling their balancing  
15 costs isn't as much how much they pay to have their milk  
16 hauled someplace or powdered or dumped, that's all part of  
17 it, but the point of it is, is that within the regula- --  
18 they have done what they have to do to have as much milk as  
19 they need, which may even require lowering their needs, by  
20 not taking customers, right? I think there was some  
21 testimony on that. Right?

22 A. Yeah.

23 Q. Okay. There's a cost --

24 A. I hate doing that, I don't --

25 Q. I know, but sometimes, if you -- to keep it down,

1 you might say, "That guy's just too irregular, I can't  
2 afford him," you know.

3 A. I even hate thinking that that might be  
4 happening, but it might be.

5 Q. Yeah. Okay. So you -- but you have that, and  
6 then, on -- the same time, changes at the farm and  
7 everything else, to try to -- to level that out. So that's  
8 how they handle their risk, and it may not be measured in  
9 terms of how many pounds they moved to a powder plant or  
10 sent to a non -- or a distributing plant that's non-pooled,  
11 or whatever; right?

12 A. Well, when you -- when you do it, when you've got  
13 a bigger operation -- in a producer-handler you've got a  
14 relatively -- compared to a multi-plant co-op, you've got a  
15 single supply of milk that you identify and you know what  
16 you have to move. In a bigger system, it becomes more  
17 theoretical, but nonetheless just as valid, that you verify:  
18 how much milk do I need at my plants, at their highest  
19 demand, that matches my lowest production? and then work  
20 your math against that to calculate back and charge back to  
21 your customers what the balancing costs are.

22 Q. And that cost, that you just talked about even at  
23 the co-op level, does not include any costs associated with  
24 balancing or handling the cheese or the powder plants as an  
25 independent demand for milk; right?

1       A. Well, it certainly does involve them. You have  
2 to build them bigger than -- if you really want to run your  
3 plants efficiently, we'd build them smaller and run them a  
4 hundred percent all the time. We have to have space for  
5 that day that we have the largest supply of milk compared to  
6 demand, so we've got extra capacity all the time, almost by  
7 definition, except for very short periods.

8               MR. YALE: I have nothing further. Thank you.

9               THE COURT: Thanks. Mr. Ricciardi, you have  
10 questions?

11               MR. RICCIARDI: I have some, Judge. Thanks. All  
12 Ricciardi, on behalf of Sarah Farms.

13                               CROSS-EXAMINATION

14 BY MR. RICCIARDI:

15       Q. Good afternoon, Mr. Van Dam.

16       A. Good afternoon, Mr. Ricciardi. So good to see  
17 you.

18       Q. Good to see you again. You're here on behalf of  
19 NDA, as I understand your supplemental testimony.

20       A. That's correct.

21       Q. Just so that we're clear on some points, and I  
22 think we may have covered them in Seattle, but let's make  
23 sure that we get them here:

24               NDA has no direct connection with Order 131;  
25 correct?

1 A. That's correct.

2 Q. And NDA does not market milk of any producers  
3 located in Order 131; correct?

4 A. It does not.

5 Q. And you have -- questions were asked, I think, by  
6 Mr. Yale with regard to his clients. You have not been to  
7 Sarah Farms; correct?

8 A. That is correct.

9 Q. And with regard to information concerning Sarah  
10 Farms, you're not here attempting to present any evidence or  
11 information specifically concerning Sarah Farms to this  
12 hearing; correct?

13 A. I do not have specific information on them and  
14 I'm not presenting any.

15 Q. Thank you. As I understand your testimony as to  
16 the size of a producer-handler at 3 million pounds per month  
17 -- are you familiar with Shamrock Dairy?

18 A. Only passingly and what I've learned from  
19 newspapers and what's been handed out here.

20 Q. And what you learned here was that they had  
21 recently built a 10,000-cow dairy near Stanfield, Arizona.

22 A. I have heard that here, yes.

23 Q. Given the information that you are aware of with  
24 regard to the claim that there is some type of a benefit for  
25 a producer-handler over a regulated handler, and given the

1 fact that Shamrock is in the 131 area and Shamrock has built  
2 a 10,000-cow dairy near Stanfield, Arizona, if it was such a  
3 major benefit, why isn't Shamrock a producer-handler?

4 A. I believe historically they were at one time, but  
5 the -- there is so little I know about that that I really  
6 can't give you an intelligent answer, because I don't know  
7 what their total sales are compared to their -- total  
8 production, what it is now or what it can be. But if those  
9 numbers get close enough, they will be a producer-handler.  
10 I doubt that they will, but I got the understanding that the  
11 plant is very large.

12 Q. They made a decision, for whatever reason, when  
13 they made the investment in the plant, that they were not  
14 going to be a producer-handler, and that was a business  
15 decision that they made; correct?

16 A. That is correct.

17 Q. And obviously Sarah Farms made its business  
18 decision and its investment to be a producer-handler and,  
19 again, decided to go down that road; correct?

20 A. Correct. It's a choice.

21 Q. All right. I'm going to direct you for probably  
22 the remainder of my questions to your supplemental  
23 statement, if you have it in front of you.

24 A. Got it here.

25 Q. Turn to Page 5, and I want to go through just a



1 few points on that page and then move on.

2 A. Okay.

3 Q. It's in the middle of the testimony that you have  
4 concerning women and minority interests, which began on 4,  
5 but I'm going to direct your attention on Page 5, your  
6 Paragraph 1, near the middle of the page, where you make the  
7 statement: "Producer-handlers are not doing anything unique  
8 or innovative in this respect and that is with regard to  
9 hiring Hispanic workers."

10 A. Correct.

11 Q. You see that.

12 A. Yes.

13 Q. Okay. Again, now, directing you to Order 131 and  
14 Sarah Farms, you're not here presenting any testimony as to  
15 why Sarah Farms is doing with regard to hiring Hispanic  
16 workers or whether they're doing anything innovative because  
17 you don't know that; correct?

18 A. I do not have firsthand knowledge. I know common  
19 dairy practice, but technically, you're correct, I don't  
20 have evidence and statements about Arizona.

21 Q. Correct. Now, Paragraph 2 on that particular  
22 page, 2, last sentence, you conclude: "The Hispanics  
23 working at the dairy farms would continue to have their  
24 jobs," and that is based upon the issue of whether or not  
25 producer-handlers would then be subject to regulation,

1 that's the -- your starting point for that paragraph;  
2 correct?

3 A. Yeah. The point -- well, maybe -- you didn't  
4 have it quite right, so I'll say it my way and then --

5 Q. All right, go ahead.

6 A. -- you probably will agree with it.

7 My point is that should they be regulated --

8 Q. Right.

9 A. -- and should the decision then be made by the  
10 producer-handler to shut down the handler part, I am  
11 absolutely convinced that the producer part would continue  
12 to exist and their employees would continue to be -- have  
13 jobs.

14 Q. That decision, just like the investment made by  
15 the producer-handlers, would be an individual decision based  
16 upon their investment in that particular enterprise;  
17 correct?

18 A. Right, and circumstances surrounding it, correct.

19 Q. And in fact if the regulation were changed, the  
20 possibility exists that they could no longer be in business  
21 on either side of the equation and therefore those folks  
22 would in fact lose their jobs; correct?

23 A. That is potentially correct, but those dairies  
24 would -- would be purchased by somebody else, they wouldn't  
25 just shut them down and walk away.

1 Q. They may, they may not, and those people may or  
2 may not hire those Hispanic workers, they made decide that  
3 they're going to limit the production and therefore some  
4 people would lose their jobs. Again, you're --

5 A. Oh.

6 Q. -- speculating as to what might occur.

7 A. Certainly.

8 Q. You don't know.

9 A. I am certainly speculating as to what I think is  
10 likely to occur.

11 Q. Now, Paragraph 3, same page --

12 A. Uh-huh.

13 Q. -- the second sentence, you indicate at the  
14 conclusion of it, after the comma: "It's not the function  
15 of the federal order system," or "FO system," "to keep some  
16 dairies in business, at the expense of others." That's your  
17 conclusion; correct?

18 A. Correct.

19 Q. It would also not be a function of the federal  
20 order system to keep one dairy, which is inefficient in  
21 business over a dairy that's efficient; correct?

22 A. Oh, that's correct.

23 Q. I mean --

24 A. Certainly.

25 Q. We're not here to try to help somebody who is not

1 doing the best to run their operation at an efficient level.

2 Correct?

3 A. Okay.

4 Q. Am I right?

5 A. Oh, you're right.

6 Q. Now, it is also not your position that the  
7 Secretary should make a change in this regulation based on  
8 what might happen in the future; it has to be based upon the  
9 facts and the evidence today; correct?

10 A. If regulations cannot be written with some view  
11 to the future, there's no point in doing it.

12 Q. But regulation shouldn't be based upon  
13 speculation, it needs to be based on fact; correct?

14 A. Fact and a reasonable look to the future.

15 Q. Turning over to Page 6, you have a chart here  
16 that has a couple of questions about -- and let's talk about  
17 the first portion of it. I realize that you have a sentence  
18 or so missing from the middle, but --

19 A. How embarrassing. We are -- what you have here  
20 is one version before a final. I don't know how that one  
21 got printed, but I did it.

22 Q. Having been through those myself, sir, I  
23 certainly sympathize with you, but I'm not going to -- I'm  
24 not making a point about that. I just want to direct your  
25 attention --

1 A. Okay.

2 Q. -- to where we are in terms of my question.

3 Now, you've got some statistics regarding dairy  
4 producers, producer-handlers, and regulated handlers, and as  
5 I understand the first portion of your chart, it's based on  
6 dairy producers and regulated handlers, and then the bottom  
7 deals with producer-handlers. Am I right?

8 A. That's correct, yes.

9 Q. Okay. Now, we see a reduction from '98 to 2003  
10 in dairy producers, from 1188 to 943. I read that  
11 correctly?

12 A. Correct.

13 Q. Now, what we don't know -- because statistics can  
14 of course be leading, and we can use them any way we want  
15 to, we don't know why those particular dairy producers went  
16 out of business.

17 A. We have no idea.

18 Q. Okay. There could be -- let's talk about what it  
19 could be. Consolidation; correct?

20 A. That's pretty rare, but yes, it could be.

21 Q. Could be that. Could be the fact that there was  
22 some kind of problem, a family problem, and they decided to  
23 go out of business.

24 A. Correct. That's common.

25 Q. Could be that they sold out. Could be that they

1 decided to put up some type of a real estate investment and  
2 sold the land. I mean, we don't know why there's been this  
3 reduction. Correct?

4 A. No, we don't.

5 Q. And the same thing would be true with regard to  
6 regulated handlers: we don't know whether or not Dean's or  
7 Kroger or Safeway or anybody bought some of those and  
8 therefore there was a consolidation; correct?

9 A. No, we don't, but that -- that is not what  
10 happened here, but that -- that's okay. We know quite a bit  
11 about 20 and 16, but if a plant was bought by somebody else  
12 and is still run, it's still on the list.

13 Q. Okay. Let's talk about, then, the producer-  
14 handlers.

15 A. Okay.

16 Q. The same thing would be true with regard to the  
17 issue of the reduction of producer-handlers, whether they be  
18 in excess of a million pounds or less, they may have gone  
19 out of business for a variety of reasons. We don't know  
20 that because the statistics, raw statistics, don't tell us  
21 that. Correct?

22 A. They do not, right.

23 Q. Page 7 of your supplemental testimony, if you  
24 would, next-to-the-last paragraph, you're talking about a  
25 supplier to bottling plants and you give as an example that

1 "NDA has an agreement with DFA to supply milk to Wilcox  
2 Dairy at Roy, Washington."

3 A. Uh-huh.

4 Q. Correct?

5 A. That's correct.

6 Q. Do you know whether or not that Wilcox Dairy is  
7 part of the dairy that supplies milk to Costco?

8 A. It is. Back one step.

9 Q. Yes.

10 A. I don't know if Roy does that, but I know Wilcox  
11 does.

12 Q. Okay. And Wilcox --

13 A. -- I assume what Roy does, but I do not know  
14 that.

15 Q. And Wilcox is regulated; correct?

16 A. It is.

17 Q. And Wilcox is able to compete for Costco's  
18 business, the big box business, in that area even though  
19 there are producer-handlers in the area too; correct?

20 A. They obviously do exactly that.

21 MR. RICCIARDI: All right. Thank you.

22 THE WITNESS: You're welcome.

23 THE COURT: Ms. Deskins, do you or your  
24 colleagues have any questions?

25 MR. TOSI: Thank you, Your Honor. My name is

1 Gino Tosi, with Dairy Programs, USDA.

2 CROSS-EXAMINATION

3 BY MR. TOSI:

4 Q. Several questions, Mr. Van Dam. I want to probe  
5 the -- with you the 3-million-pound threshold --

6 A. Okay.

7 Q. -- for what would cause a producer-handler to  
8 become regulated. And please feel free at any point to  
9 differentiate between your opinions about the Pacific  
10 Northwest Order and the Arizona/Las Vegas Order.

11 A. Okay.

12 Q. Were you here to listen to the testimony of  
13 Mr. Hollon when we summarized the rationale for the  
14 3-million-pound cap? if you will.

15 A. Yes, I was.

16 Q. If we take the -- and I want to speak to the  
17 precision of the 3-million-pound limit. It happens to be  
18 the exact number for when a promotion assessment would kick  
19 in on a regulated handler, or any other fluid milk  
20 distributor.

21 A. That is correct.

22 Q. And Mr. Herbein's testimony seems to be relied  
23 upon, that shows, for the proponents for regulating PDs  
24 under the pooling and pricing provisions of an order, that  
25 once you reach this 3-million-pound threshold you -- you



1 become more like entities that are regulated.

2 A. That's correct.

3 Q. Because of cost structure and being able to take  
4 advantage of certain efficiencies that they might not  
5 otherwise have up until that time.

6 A. That's correct.

7 Q. Now, with respect to the other list of things  
8 that we talked about, that Mr. Hollon summarized, if we look  
9 at anyone that's exempt from the pooling and pricing  
10 provisions of the order, aren't the other -- aren't the  
11 effects of that still present?

12 A. That is correct. You're referring to a regulated  
13 plant that's under 3 million.

14 Q. Right.

15 A. Yeah, those issues are there then also.

16 Q. So my question then becomes: To the extent that  
17 orders currently -- or the -- either the Pacific Northwest  
18 or the Arizona/Las Vegas Order, currently have a definition  
19 for an exempt plant at 150,000 pounds, why not set the cap  
20 in a way that's similar to entities that we currently exempt  
21 from pooling and pricing?

22 A. That's an interesting concept and not one that we  
23 have discussed internally. Nonetheless, there would be some  
24 justification for that. We do not have an official  
25 position, so you're just getting my view on this thing.

1       Q. Okay. Well, I'm trying to explore -- a number's  
2 been offered --

3       A. Yes. No, that number has been offered, and there  
4 would be merit in arguing that any plant under 3 million  
5 should be exempted.

6       Q. Yes, but to the extent that the Secretary can  
7 find that -- the negative aspects, the unequal sharing of  
8 the additional revenue that comes from Class I, it's not  
9 shared with all market producers, for entities that are  
10 currently exempted, they would exist even if producer-  
11 handlers become regulated in terms of the pooling price --

12       A. This is true, but to be true to our primary  
13 argument, which is that the cost of bottling milk in a plant  
14 that's less than 3 million pounds per month Class I sales  
15 are high enough that the person doing that has no regulatory  
16 advantage. I believe any plant that's smaller than 3  
17 million pounds has a tremendous reason why they can continue  
18 to exist, and that is: isolation, they are just a lot of  
19 miles from anybody else, and --

20       Q. To your knowledge, then, do either of the two  
21 orders under consideration here, or any other federal order  
22 that you know of, are exempt -- either are regulated or  
23 exempt from regulation on the basis of their plant costs?

24       A. No, I'm not aware of that. The 150,000 exemption  
25 level might be related to that, but it's not so stated.

1       Q. This question is kind of similar to what I'd  
2 asked of Mr. Hollon as well. Does the 3-million-pound  
3 exemption imply that up to that level, that there's a  
4 competitive disadvantage in being a producer-handler?

5       A. That, like the cost advantage, I'm sure is a  
6 sliding scale, and the smaller you are on that, there will  
7 be a point at which it becomes truly a disadvantage. Our  
8 argument is that at the 3 million it is about a push, and  
9 after that it's an advantage to have the exemption. Did I  
10 get to your question there?

11       Q. No, I --

12       A. Okay.

13       Q. I appreciate your answer. In your recounting of  
14 some of the history of producer-handlers in the context of  
15 the Federal Order Program, I want to ask a couple  
16 theoretical questions.

17       I want you to assume a market that has, say for  
18 example, 50 percent of the milk in that market, Class I --

19       A. Uh-huh.

20       Q. -- is -- was distributed by producer-handlers in  
21 the market. So 50 percent of the market's Class I sales,  
22 for example, are --

23       A. Okay.

24       Q. -- supplied by producer-handlers. And the  
25 Federal Order Program survived to this day, some 70 years

1 later?

2 A. If you're asking my opinion: I don't see how it  
3 possibly could survive that. The differences would be so  
4 great in the marketing ability that that 50 percent that's  
5 got the PD exemption would gradually take all the market,  
6 there's just no way to compete.

7 Q. Okay. I'm not -- I'm probably not -- let me ask  
8 it a little bit differently. Would you agree that in the  
9 early days of the Federal Order Program, that producer-  
10 handler milk represented a significant portion of the amount  
11 of Class I sales that were --

12 A. Yeah, I --

13 Q. -- made in federal milk marketing order --

14 A. I do agree, there -- that was clearly the case in  
15 Kansas City in 1935.

16 Q. Okay. And we'll just use Kansas City as the  
17 example.

18 A. Okay.

19 Q. Here we are, some 70 years later, and we still  
20 have the federal order, and it's survived, and people have  
21 created businesses and have lost businesses in the context  
22 of the milk order program.

23 A. Correct.

24 Q. To the extent that we could draw a similar  
25 correlation -- and let's use the Pacific Northwest as an

1 example: if there was a time when the Pacific Northwest  
2 Order had 50 percent of its milk that was supplied by  
3 producer-handlers and were down to about 10 percent, how has  
4 the order survived all these years when we have a reduction  
5 in the amount of milk that was supplied by producer-  
6 handlers?

7 A. In answer to your question, I'm going back --

8 Q. It would suggest that -- it would suggest that at  
9 a time when producer-handler milk was the majority of milk  
10 supplied to various markets, that the program would not have  
11 survived, yet it did; and that one of the points is -- I  
12 think I understand it so far, is, is that if we don't do  
13 something about producer-handlers, that there's this huge  
14 disruption and the existence of disorderly marketing  
15 conditions because we have differences in what handlers have  
16 to account for in terms of the minimum prices they pay, and  
17 at the same time an impact on the equitable distribution of  
18 Class I producers who supply that market.

19 (Pause.)

20 A. My turn now?

21 Q. Sure.

22 A. Going back to Kansas City, that very question  
23 troubled me with Kansas City, with 50 percent in the hands  
24 of producer-handlers. It wasn't until I discovered the  
25 write-up part about the raw milk that I understood what was

1 going on in that market, and in one hand you had the  
2 regulated handlers, who were pasteurized, who were the  
3 growing segment of the business, and they had the technology  
4 and they had the things that was growing their side. The  
5 other side of it was all raw milk.

6 Now, at some point, and I have no idea when that  
7 happened, at some point some of those producer-handlers  
8 undoubtedly started pasteurizing their milk. But what you  
9 had is a situation that as the market in the city and the  
10 transitions took place in the marketplace, the growth was in  
11 the hands of the regulated handlers and there wasn't a big  
12 supply of large producer-handlers who were causing problems  
13 and disrupting the flow in the market.

14 So that accounts for how from the early days it  
15 moved through there. I think in the -- up until current  
16 times we have not seen any producer-handler come into any  
17 market -- that I'm aware of; now, there might be some, but  
18 any that I'm aware of -- who came into a market and grew  
19 substantially within that market, taking away what's  
20 considered the traditional dairy market from the regulated  
21 handlers, which is where the disruption-in-the-market  
22 problems come in. So in the absence of rapid growth of  
23 producer-handlers and the potential rapid growth of  
24 producer-handlers, there's little reason to fear them.

25 And we went 70 years, with some attempts to

1 regulate it and get the money flow to all producers.  
2 Nothing much has happened. But it's the potential growth  
3 and -- the actual growth in Arizona and the potential growth  
4 here that is of concern now, and if those things happen,  
5 that I anticipate will happen, we will see substantial  
6 shifts of business away from regulated handlers to the  
7 unregulated handlers, and I feel that would be contrary to  
8 what Congress intended when they passed this law in the  
9 first place.

10 Q. If we have a market that has, hypothetically, 20  
11 producer-handlers supplying 10 percent of that market's  
12 Class I needs --

13 A. Uh-huh.

14 Q. -- do you see a difference between that -- that  
15 collectively, all 20 producer-handlers supply, for example,  
16 10 percent of the Class I sales in that market, do you see a  
17 difference between that and a single producer-handler  
18 supplying 10 percent of the market?

19 A. Remarkably interesting choice of examples. The  
20 -- if the one -- if you're talking about 20 that are  
21 constant, sitting there, not doing much in the way of  
22 changing and growing, that is not particularly a threat to a  
23 market.

24 \_\_\_\_\_ If you're talking about one that was at zero and  
25 moved its way up to -- up to 20 and was moving faster than

1 that and was disrupting the marketplace, yeah, that is a  
2 concern.

3                   And if you take the -- use the example of the  
4 10 percent market and say that the consolidation goes  
5 rapidly there and they end up with just one of those left  
6 and that one not only maintains the 10 but doubles it to 20,  
7 you start raising real interesting issues about market  
8 disruption and fairness of the orders and even the reason to  
9 have the orders.

10           Q.   If we have a market that's 10 percent represented  
11 by milk supply Class I sales, 10 percent of the market's  
12 producer-handlers, and we had a point in time where it was  
13 10 percent and there were 20 producer-handlers --

14           A.   Uh-huh.

15           Q.   -- let's move the clock forward a few years, and  
16 we're down to, say, four producer-handlers, supplying  
17 10 percent of the market.

18           A.   The same 10 percent. My answer would say:  
19 depending on where those sales came from, but if they stayed  
20 -- if it was a situation that wasn't rapid and wasn't  
21 disrupting the market by throwing lower prices out there to  
22 one segment of the business, that none of the others could  
23 get, it could be a reasonably stable market.

24                   You've got to understand in the whole thing that  
25 there's -- somebody used the term in this hearing:



1 "organized disorderly markets." It is very difficult to  
2 point to exactly places that -- where it's terribly  
3 disorderly, because everything looks so organized: the milk  
4 moves, the trucks are on the road, there's milk on the  
5 shelf.

6 "Disorderly" conveys a bigger -- bigger  
7 theoretical basis that we've got a fair distribution of  
8 money and a uniform application of prices. Otherwise  
9 there's hardly any point in having regulation. That is why  
10 it exists.

11 Q. Is there anything, in your understanding of the  
12 3-million-pound number that's being proposed, that implies  
13 that there is something in the mix when you combine someone  
14 who's a producer and create -- and operates in a way that  
15 meets the definition of what we've referred to as a  
16 producer-handler --

17 A. Yeah, that --

18 Q. -- that there is --

19 A. I --

20 Q. -- some sort of implicit recognition of the  
21 unique combination of risks in their capacity as a producer  
22 combined with that as a handler?

23 A. I heard you ask that question before, so I've had  
24 the advantage of having a little time to think about that,  
25 and it fits -- the answer to it fits in with what we have

1 proposed here, that you don't start regulating until  
2 3 million pounds, because prior to that there are no  
3 advantages and there are -- especially as you slide down the  
4 scale towards smaller, there are a number of disadvantages  
5 that cause that operation to have no advantage in the  
6 marketplace.

7           Whether I think that includes the -- what I would  
8 consider to be risks or not, it is all the business costs  
9 associated with it. A smaller producer-handler probably  
10 deals with smaller accounts, smaller accounts probably have  
11 a greater risk of collection.

12           Those kind of things are all encompassed in  
13 there, and that's why they -- they -- we aren't even  
14 thinking about extending this below the 3 million limit, we  
15 believe that there is adequate justification for them to  
16 have their entree, a chance to get into the market.

17           Q. To the extent that 3 million pounds is reflective  
18 of current conditions, where handlers have tailored the size  
19 of their operation to, on one hand, achieve certain desired  
20 efficiencies, and at the same time to be able to serve the  
21 market, the market's growing, population is increasing, it  
22 causes plants to become of a certain size.

23           A. Uh-huh.

24           Q. What guidance would you give the Secretary to  
25 weigh the validity of 3 million pounds with future

1 conditions, where, for example, the population of Arizona  
2 skyrockets for some reason, such that 3 million pounds is  
3 anchored at a time when we're looking at conditions that are  
4 applicable to what plant efficiencies are today?

5 A. There's a couple of answers to that. The first  
6 one is, and the one that I like the best, is the one that  
7 Wilcox Dairy exemplifies. They used to be a producer-  
8 handler. They saw that the market was exploding and  
9 growing, and they could participate in that growth and  
10 gather -- gather together a pretty vital and vigorous  
11 business without having to buy cows every time they had to  
12 increase their milk supply. They gave up their producer-  
13 handler exemption and are surviving, as has been indicated,  
14 by several quite nicely in this marketplace and have some  
15 very aggressive marketing philosophies and market to the big  
16 stores.

17 So they -- the bright line, as it's been called  
18 here, of the 3 million pounds, provides the opportunity to  
19 build a business, but once it goes blowing through that  
20 thing, there is no reason to be a producer-handler anymore  
21 and we believe that an effective competitor can exist quite  
22 nicely with that.

23 That being said, the 3 million pound limit, to be  
24 consistent with our theories, could be occasionally visited,  
25 and perhaps should be occasionally visited, but it is not

1 related to -- the answer would not be related to the growth  
2 of the area or things like that; it'd be related to the  
3 efficiencies of a plant. Once you get to the point where  
4 that plant can compete, then it should be allowed to  
5 compete.

6 That is a different number than you had  
7 contemplated and why I wanted to state it that way; it is -  
8 - it relates to the plant itself and its status relative to  
9 the competitors in the market.

10 That being said, I would assume that the  
11 3 million probably -- if it gets installed, probably  
12 wouldn't be revisited very often.

13 Q. Let me ask another question. Assume, for  
14 example, that 3 million pounds, an additional 3 million  
15 pounds of milk on a market, has no impact on the blend  
16 price, or has a de minimis impact on blend price --

17 A. That would be better, because you can't assume  
18 zero when it wouldn't be. Go ahead.

19 Q. Well, what would be the wisdom, then, behind  
20 regulating a producer-handler, if their imprint or footprint  
21 in the market, if you will, is such that it is so small as  
22 to have a de minimis impact on the blend price that will be  
23 paid to producers?

24 A. Well, you know, the de minimis -- you get a real  
25 big market, like Order 30, a fairly large producer-handler

1 could be created in that market and have a de minimis effect  
2 on the market, and the net effect of that would be -- and  
3 let's pick a really large size and, say, really put  
4 something big together, and you're going to move \$4 million  
5 -- that's an assumption I'm making -- \$4 million a year out  
6 of the pool to one person. I have a very difficult time  
7 understanding how that makes sense within the framework of  
8 the federal order system and its requirement that you have  
9 uniform prices and that you have uniform distribution of  
10 that money across all producers.

11                   So I -- I would go back to our argument, and we  
12 think it would be valid in any order, de minimis or not,  
13 that the -- once the plant is capable of competing in the  
14 real world, then it should be allowed to go to the real  
15 world. We might call "under 3 million" as "a schooling."

16           Q.    If the Secretary, in weighing all the evidence,  
17 hypothetically, comes up with a different number, other than  
18 3 million --

19           A.    Uh-huh.

20           Q.    -- a number higher than 3 million, how high of a  
21 number would you or who you represent support?

22           A.    The position we have taken on this is the  
23 3 million, but it is because that is the number that looks  
24 to us to be at the -- the point at which that transition  
25 occurs. When we looked at the data, we could have picked -

1 - because this is not an exact science. We could have  
2 picked 2 and a half million, we could have picked 4 million,  
3 and made every argument that we have made in this thing, but  
4 it's so clear beyond 4 million that they are competitive  
5 that I don't believe -- you know, the Secretary makes up its  
6 mind, but I don't believe that it's a valid argument beyond  
7 4 million, and we would probably complain if the limit were  
8 put less than the 2 and a half million because we feel it  
9 would be unfair to the people trying to get started in a  
10 producer-handler business. That's as close as I can answer  
11 it.

12 Q. Okay. To the extent that the Secretary may  
13 disagree with the precision that's behind -- we have one  
14 reason that says there's a promotion program level where it  
15 kicks in, and I understand that's one of the reasons of  
16 being offered, the other number that I hear, that speaks to  
17 the precision of 3 million, rests on Mr. Herbein's study,  
18 that's supported by testimony by other folks that say that  
19 that analysis is valid.

20 To the extent that it turns out that it's not  
21 does not carry the weight that you hope that it does. What  
22 else could we point to that would speak to why the number  
23 should be 3 million?

24 A. If there is valid other data, we certainly would  
25 be willing to include that in our reasoning. We have seen -

1 - we have seen we have done the best we can do with the data  
2 we have available to us, having only one plant that reaches  
3 down to that size. Nonetheless, we feel like we had some  
4 good slope data that indicated that we were in the right  
5 range. If there is other data, we certainly would listen to  
6 it very carefully.

7 MR. TOSI: All right. Thank you, appreciate it.

8 THE WITNESS: You're welcome.

9 THE COURT: Mr. Rower, Ms. Deskins, do you have  
10 any questions?

11 MS. DESKINS: No.

12 THE COURT: Any Redirect?

13 MR. BERDE: Yes.

14 THE COURT: Go ahead, Mr. Berde.

15 MR. BERDE: Sydney Berde, for United Dairymen.

16 REDIRECT EXAMINATION

17 BY MR. BERDE:

18 Q. Mr. Yale again brought up this business about the  
19 language that Congress incorporated in some of the statutory  
20 amendments to the Act. Do you recall that?

21 A. Yes, I do.

22 Q. The language was -- said in effect that "the  
23 legal status of producer-handlers shall not be affected by  
24 these amendments." Do you recall that?

25 A. That's correct.

1       Q. Do you recall also the fact that that same  
2 Congress rejected an amendment to the Act which would have  
3 precluded the Secretary from regulating producer-handlers?

4       A. I was not aware of that.

5       Q. If the records should so demonstrate, would that  
6 indicate an intent by the Congress to continue the same  
7 regulatory authority over producer-handlers as existed  
8 prior?

9       A. Certainly would conclude that.

10       Q. Now, are you aware -- and I believe there has  
11 been testimony in this record previously -- that in about  
12 1967, following, I think, about two years after the adoption  
13 of that original legal status language, there was a hearing  
14 in the Puget Sound Order in which representatives of the  
15 producer-handlers claimed that the proposed changes in that  
16 order, which would have affected producer-handlers, could  
17 not be made because of that legal status language that had  
18 been incorporated previously.

19       A. Uh-huh.

20       Q. And that the Secretary, in a decision in a  
21 hearing involving the Puget Sound Order, specifically stated  
22 that the legal status language did nothing but reaffirm the  
23 power of the Secretary to regulate producer-handlers.

24       A. Yes, I was aware of that and did read that  
25 finding and that is what that says.



1       Q. And further went on to state, in that same  
2 decision, that in the event the increase in producer-handler  
3 distribution could reach the point that it constituted a  
4 competitive impact in the marketplace with respect to the  
5 sales by other regulated competitors, that the Secretary  
6 should convene a hearing to consider the immediate  
7 regulation of producer-handlers.

8       A. That's correct.

9       Q. That appeared in that same decision, did it not?

10      A. It did.

11      MR. BERDE: Thank you.

12                                   REDIRECT EXAMINATION

13      BY MR. BESHORE:

14      Q. Mr. Van Dam, you talked about regulatory risk a  
15 bit.

16      A. Yes.

17      Q. You recall Mr. Hettinga's emotional appeal  
18 yesterday to keep it the same, don't change the rules in the  
19 middle of the game, or something to that effect?

20      A. Something to that effect, that isn't quite the  
21 way he said it, but yes, that was the intent.

22      Q. Now, regulatory risk is something that's in this  
23 -- in any regulatory -- any regulated business, is it not?

24      A. Oh, it sure is.

25      Q. And any participant that's worth their salt knows

1 it's there.

2 A. That's correct.

3 Q. Okay. And it's there for dairy farmers who  
4 aren't producer-handlers as much as for anybody else.

5 A. That's correct.

6 Q. Okay. And an example of it might be that prior  
7 to federal order reform, so-called, in 2000, some producers  
8 had 50 percent Class I utilizations for years and years,  
9 some areas, Utah for instance?

10 A. For instance.

11 Q. Yeah. And made capital investments on the basis  
12 of that, on their dairy farms?

13 A. They certainly did.

14 Q. Brought their families into the farms on that  
15 basis.

16 A. Many fourth-generation farms there.

17 Q. Right. And after federal order reform they had  
18 20 percent Class I utilization?

19 A. On the good months.

20 Q. On the good months.

21 A. Right.

22 Q. Regulatory risk?

23 A. Regulatory risk.

24 Q. Among the factors that have been presented in  
25 support of the 3-million-pound limit, in addition to

1 Mr. Herbein's analysis, you and Mr. McBride presented  
2 analysis on the West Farm Foods plants, did you not?

3 A. Yes, we did.

4 Q. And that was hard data from your own operations  
5 with respect to the efficiencies of operation of a  
6 distributing plant.

7 A. That's properly characterized, yes.

8 Q. And it supported the data of Mr. Herbein, among  
9 other data relating to that 3 million cap.

10 A. Yes, it did.

11 Q. And Dr. Cryan also presented analysis in support  
12 of that cap; you recall that?

13 A. He sure did.

14 Q. And Mr. Hollon presented data with respect to  
15 account sizes, that had been drawn from a national database,  
16 from the IRI data, the IRI group. You recall that?

17 A. Yes. That's correct, I remember that data.

18 Q. And that data also is supportive of the  
19 3-million-pound cap, in your view?

20 A. Yeah. It tended to indicate a very nice break  
21 point at which a person becomes eligible to really  
22 participate in the market.

23 Q. And of course on the producer side there's also  
24 been data, provided through Dr. Smith and other -- other  
25 sources, ERS data, that costs of production per unit, per

1 hundredweight, of milk go down at the higher levels of  
2 production, and certainly at the multi-million-pound-per-  
3 month level.

4 A. That is correct also. It's very impressive data  
5 from -- ERS was it?

6 Q. (Nods head.) Okay. Now, in all of those sets of  
7 data and all of that testimony and all that evidence, in  
8 your view, is supportive of a limit of 3 million pounds.

9 A. That is the number that fits all that data best.

10 Q. Let's talk about the -- just very briefly, the  
11 changes over the years in federal order markets, including  
12 the changes in the Kansas City market, which at one time,  
13 the record shows, in the '30s, I guess, had 50 percent  
14 producer-distributor volumes.

15 A. Right.

16 Q. By the way, that's the only market that's ever  
17 been anywhere near that, from any data -- do you know of any  
18 other markets that had anywhere -- have ever had anywhere  
19 near that market share of producer-handlers?

20 A. No. No, I'm not aware of any. The one that  
21 intrigues me, and I'd love to go back and look up the data,  
22 is that in -- there was a stretch in Southern California,  
23 just before pooling went in, where every new dairy built put  
24 a little bottling plant on it. It would just be a  
25 fascinating piece of history to go back and look at it. I

1 have no idea how far that reached.

2 Q. Okay. Producer sizes have changed over the years  
3 and that's had an effect on, you know, the structure of  
4 dairy markets, both handler and farm level.

5 A. It certainly has.

6 Q. Modes of transportation have changed, bulk tanks  
7 at the farm level and bulk trucks, as opposed to cans, have  
8 changed the structure of those markets, have they not?

9 A. They certainly have.

10 Q. They've certainly affected the structure both at  
11 the handler and the producer level.

12 A. They certainly have.

13 Q. Changes in packaging and equipment at the plant  
14 level, additional capital required to efficiently package  
15 product as required by consumers has had an impact on this  
16 marketplace.

17 A. Certainly has.

18 Q. And consumer buying habits, the growth of  
19 supermarkets and one-stop shopping and that sort of thing  
20 has affected the structure of those markets, and that would  
21 apply to Kansas City and all the rest of them, I suppose.

22 A. All of them, they're all impacted. Only the  
23 tiniest, tiniest little towns have not been impacted by  
24 that.

25 Q. And going forward, while we can't predict the

1 future, it's your testimony, I gather, Mr. Van Dam, that the  
2 Secretary must fashion this regulation on the basis of the  
3 fact known and the best judgment we can make about future,  
4 you know, marketing conditions?

5 A. That certainly is my testimony.

6 MR. BESHORE: Thank you.

7 THE COURT: Anyone else on Redirect?

8 DR. CRYAN: I have some questions. Is that  
9 all right?

10 THE COURT: Sure. Make sure you identify  
11 yourself.

12 DR. CRYAN: Yes. Thank you. My name is Roger  
13 Cryan, C-r-y-a-n, I'm with the National Milk Producers  
14 Federation. I'm not an attorney, but I understand that's  
15 not necessary.

16 REDIRECT EXAMINATION

17 BY DR. CRYAN:

18 O. This is in response to some of the discussion  
19 about risks, I want to ask you some questions about some of  
20 the discussions about risks.

21 Mr. Beshore asked you about regulatory risk.  
22 What's your understanding of the -- the general  
23 understanding in the industry about what the regulatory risk  
24 for large producer-handlers was?

25 A. The idea of a large producer-handler is not one

1 that has -- that is not new to the market, it's something  
2 that a lot of people have thought about a lot of times. Not  
3 many have been daring enough to do it because they are  
4 concerned that the instant they do it and have -- they do it  
5 on a large enough basis to have an impact on the market, the  
6 regulations will change, and so they face, in their  
7 decision-making process, the likelihood of a regulatory  
8 change, and I suspect almost all of them have decided they  
9 couldn't take that risk.

10 Q. And so do you think that's one of the main  
11 reasons why there has not been a proliferation of large  
12 producer-handlers?

13 A. Well, it certainly explains why the really big  
14 organizations haven't done it, like a Safeway or -- not to  
15 point fingers at anybody, but Safeway or Krogers, or any of  
16 those companies, coming back toward it, that has certainly  
17 stopped them. Dairymen, obviously, with a large enough  
18 dairy to look at this thing do worry about that. I'm not  
19 sure it would stop them if they thought the conditions were  
20 right.

21 Q. And based on your experience in the industry, how  
22 would the perception of regulatory risk for a large  
23 producer-handler change if there was no action in this  
24 proposal?

25 A. Well, this is -- this is what we call the red

1 light/green light hearing, there are people out there  
2 contemplating this, most of them have been advised to wait  
3 for the result of this hearing. If this hearing has a  
4 finding that allows producer-handlers, then they've got a  
5 green light and a good argument that they could continue.  
6 If it comes up with a red light, then they have avoided a  
7 regulatory risk they didn't need to actually experience.

8 Q. So in your opinion, this is likely to lead to  
9 more -- this is likely to increase the incentive for large  
10 producer-handlers to be --

11 A. Oh, it certainly will, because if the result of  
12 this hearing is to not change the producer-handler  
13 definition, then the regulatory risk quotient goes way down.  
14 It doesn't mean it won't happen, they still have some risk,  
15 but if this hearing has been gone all the way through and  
16 there's not finding, that's certainly going to change the  
17 attitude out there.

18 Q. And regarding some of the other elements of risk  
19 for producer-handlers, or for producers who are also  
20 handlers, are there some elements of the vertical  
21 integration between the farm and the plant that actually  
22 reduce risk?

23 A. Certainly. There are a number of things that  
24 reduce the risk of having an operation. One entity ends up  
25 with control over the quality of the milk all the way



1 through doesn't have -- shouldn't have any surprises in the  
2 milk quality they get delivered to them. Certainly we'll  
3 know how much milk is coming, have some control over that  
4 and can avoid a bunch of issues there. All in one place,  
5 you can see it all, things are not going to happen on the  
6 road because you're not going very far. There's probably a  
7 bunch more that I'm not thinking of.

8 Q. And you don't have to worry about whether you're  
9 going to get paid by a supplier or by a customer?

10 A. Well, yeah, you -- well, customer, you still have  
11 to worry about whether your customers are going to pay you,  
12 but you don't have to worry about whether your handler is  
13 going to pay you for your milk, if you're a dairyman.

14 Q. Okay.

15 A. At least I hope you don't have to worry about  
16 that. There's not much point in doing it if you have to  
17 continue to worry about that.

18 Q. One of the -- one of the things that's been  
19 brought up a number of times is the difficulties that a  
20 producer-handler faces in balancing farm and plant volumes.  
21 You could call it a risk or you could call it a cost, but if  
22 we call it a risk and we consider as a risk the issues  
23 associated with the farm and the plant having to match their  
24 volumes, is that a risk that would continue for a plant that  
25 became regulated?

1       A. The -- if they became regulated and participated  
2 in the market, they do not have the same level of concern  
3 about dealing with the issue. They'll certainly have the  
4 cost in some form, because everybody has to participate in  
5 the balancing costs of a market.

6       Q. But they'd be able to buy -- would they be able  
7 to buy milk supplies and dispose of their surpluses at  
8 market prices instead of at disadvantage prices, that are  
9 limited by --

10       A. Well, in this -- in the Pacific Northwest market  
11 in particular, they don't have very much disadvantageous  
12 prices they face, but that's true. If you become a  
13 participant in the market, the producer-handler would  
14 probably allow sales to grow substantially above his  
15 production so that his own production is always used and he  
16 uses the market to balance the rest of it by buying the  
17 required amount to fill his sales and will thus avoid the  
18 direct cost there.

19       Q. At generally the Class I price.

20       A. Generally the Class I price.

21       Q. Which is the price associated with the product  
22 that they're selling.

23       A. That's correct.

24       Q. There was a question earlier about whether or not  
25 you would be concerned about the impact of a plant -- a

1 large plant in a large market where the market was so large  
2 that the individual plant would not -- would have a  
3 de minimis impact on the blend price. Is there some concern  
4 about the aggregate impact if there's a large incentive to -  
5 - is the incentive is such that you could have a  
6 proliferation of plants?

7 A. Certainly, and at that point it is no longer  
8 de minimis. The question asked me was about the de minimis  
9 nature of one of them in a large market. But yeah, as they  
10 piled on, it becomes an issue of grave concern for the  
11 market.

12 Q. So that the issue as a policy issue doesn't  
13 become more a question of what is the impact on the market  
14 of the aggregation of producer-handlers rather than an  
15 individual plant, is that why you focus, then, on the plant  
16 costs rather than the market size or the impact of the  
17 individual plant?

18 A. I will try to answer that, but if I miss, come  
19 right back at me, because I might not have understood where  
20 you're going with the thing.

21 On the 3-million-pound limit and it being related  
22 to plant costs is the justification we have at the bottom  
23 line for the 3-million-pound limitation. Our concern for  
24 even having a producer-handler limitation is a grander  
25 scheme: that there is increasing amounts -- or the

1 potential for increasing amounts of Class I premium dollars  
2 moving out of the pool, to specific individuals.

3 Now, if that didn't answer it, try it again.

4 Q. Including multiple plants, including --

5 A. Yes.

6 DR. CRYAN: Okay, that's all. Thank you very  
7 much.

8 THE COURT: Mr. Yale, you have questions?

9 MR. YALE: Yes, I do. I can't stop myself.

10 (Laughter.)

11 RECROSS-EXAMINATION

12 BY MR. YALE:

13 Q. I want to follow up on that one question. How  
14 many producer-handlers or would-be producer-handlers have  
15 you advised in the last 12 months?

16 A. How many producer-handlers or --

17 Q. -- or would-be --

18 A. -- or would-be producer-handlers have I advised  
19 in the last --?

20 Q. -- 12 months. In a professional capacity.

21 A. I'll tell you, it's zero in a professional  
22 capacity, which means I got paid for it. It's four and  
23 perhaps five, because that year limit, on those that I'm  
24 speaking with informally about the prospect and the idea.

25 Q. And the names of those people are --?

1 A. I'm not going to give them to you. Proprietary  
2 information. That's the only time I had to use that, Ben.

3 Q. You say that this is a red light/green light.

4 A. That's what I said.

5 Q. If the Secretary says: we're not going to  
6 regulate this, all hell's going to break loose and the  
7 federal order is going to crash. That's kind of the sum of  
8 the testimony, excuse the French.

9 A. A little more dramatic than the way I stated it,  
10 but yes, that's the --

11 Q. All right. Are you aware that in the '60s and  
12 '70s, that Price's Dairy and the Rio Grande had 16 to 20  
13 percent of the market and they tried to regulate that PD and  
14 the Secretary said no and the world didn't come to an end?

15 A. No, I'm not aware of that.

16 Q. Are you aware --

17 A. I'm aware of another one, but not that one.

18 Q. Are you aware in 1988 that a 4- to 6-million  
19 pound plant in Waco, Texas, that the whole industry wanted  
20 to regulate, and they made the same argument, that "This is  
21 the end of the world if you don't do this, you've got to  
22 stop them," and they didn't stop them, and we -- how many  
23 PDs have created since then? Are you aware of that?

24 A. I'm aware of that case. In fact, wasn't that  
25 Mr. Beene's situation?

1 Q. Yeah.

2 A. Yeah.

3 Q. And not a whole lot of people came on, did they?

4 A. No.

5 Q. And in 1989, in El Paso, Texas, the Secretary  
6 held a hearing to limit the size and the scope of producer-  
7 handlers in the new New Mexico/West Texas Order, and the  
8 same arguments were made, and the Secretary said "we're not  
9 going to do that," and we still have a federal order system,  
10 15 years later; right?

11 A. That's correct.

12 Q. And we have a hearing in Arizona, and in the  
13 meantime -- I'm not sure of the exact timing, but I think  
14 that considered one of the biggest producer-handlers that's  
15 created, at least the ones -- the four here, that have  
16 started in the last 15 or 20 years, is Sarah Farms, right?

17 A. Uh-huh.

18 Q. In Arizona.

19 A. I believe that's true.

20 Q. And that was after those two hearings. Right?

21 A. That's correct.

22 Q. And he said that he did all kinds of inquiries,  
23 tracking to see what he had to do and the like, and do you  
24 have any doubt that Mr. Hettinga, as a risk manager, that he  
25 tries to analyze all the risks?

1 A. Oh, no doubt at all.

2 Q. All right. So he obviously had to know about the  
3 existence of these things and this, quote unquote,  
4 regulatory risk that if he's going to be a PD, that he could  
5 become regulated; right?

6 A. Oh, certainly. Certainly, certainly, I'd agree  
7 100 percent with that.

8 Q. So he still became a PD.

9 A. He still did it.

10 Q. And in 1983, in the very same order we're talking  
11 about here, the Arizona Order, there was a proposal to limit  
12 -- and in fact another PD started up, after those hearings  
13 nearby, Rio Grande and El Paso, in Texas, another PD started  
14 up in Arizona, a large PD; right? Do you recall that?  
15 Heartland.

16 A. Oh, yes.

17 Q. All right. And they started up, and evidently  
18 they should have taken that analysis of that risk; right?

19 A. And probably did.

20 Q. But they still did it, without waiting for this  
21 green light/red light; right?

22 A. That's correct.

23 Q. Okay. So how is it any different today, that  
24 this is a green light/red light, from those others?  
25 Evidently these proposals to regulate PDs has existed

1 forever.

2 A. Oh, they have, 70 years' worth of discussion.

3 Q. That's right.

4 A. We recognize that, and we recognize that that is  
5 one of the issues we must deal with in trying to respond in  
6 this hearing and put some reason back into it. But yes,  
7 Ben, all those are true.

8 Q. You mentioned, I think, in confirming part of  
9 Mr. Hollon's thing, is that one of the rationales is this  
10 3 million thing and the Fluid Promotion Act, as a basis and  
11 rationale for the 3 million?

12 A. You need to put that in perspective.

13 Q. The Fluid Promotion Act --

14 A. We've used that argument --

15 Q. Okay.

16 A. -- and we've said -- but let me tell you why we  
17 ended up using that. In response to Mr. Tosi, I told you  
18 that our numbers came out between 2 and a half million and 4  
19 million, and it was -- this is not a precise science so you  
20 end up with this big broad line and you're looking for it.  
21 It turns out that there was a political answer also, that  
22 happened to fit our numbers very nicely. There is merit in  
23 a political argument because this was fought out in a  
24 congressional thing, maybe two people, maybe fifty, maybe a  
25 hundred and fifty, we don't know how many people have input



1 in those things. Nonetheless, it was judged at that point,  
2 in a political environment, that the 3 million pounds  
3 happened to be a good number for dividing those who are --  
4 forgive me if I offend anybody -- that are really in the  
5 business and those that are trying to get into it, and so  
6 it's a political answer, it's very convenient, and it does  
7 have some bearing on this thing, some merit in our  
8 discussion.

9 Q. Isn't it true, Mr. Van Dam, that the 3 million  
10 was established because there was a fear of handlers -- that  
11 one of the promotional programs, that there were so many  
12 small ones that were petitioning to vote the order out, that  
13 by removing them at 3 million, they removed a large body of  
14 opponents to the promotion order, isn't that the reason that  
15 was done?

16 A. And isn't that the definition of a political  
17 settlement?

18 Q. It's a political settlement --

19 A. Yes.

20 Q. -- but it has nothing to do with economics.  
21 Right?

22 A. I agreed.

23 Q. All right.

24 A. I told you that.

25 Q. So we're right now in a situation that -- you've

1 talked about producers -- regulatory risk, Mr. Beshore  
2 talked about -- that in Utah, that had 10 percent -- or not  
3 10 percent, a much larger --

4 A. Right.

5 Q. -- Class I participation and they were making  
6 money and they were making business decisions and bringing  
7 family members on, and then the order got blended out with  
8 Idaho and it dropped to 10 or 15; right?

9 A. Uh-huh.

10 Q. And a political decision was made by those in  
11 power, to vote that order out, to bring that classification  
12 back to a higher number to those producers in Utah, didn't  
13 it?

14 A. That's very close to what really happened there.

15 Q. All right. So you talk about this issue over  
16 here, where Mr. Tosi says: if the 3 million is not high  
17 enough and you've got to raise it, we have to -- the  
18 producer-handlers would have to come to the order -- the  
19 Secretary and petition to change that cap, right, and have a  
20 hearing like this all over again; right?

21 A. Unless some other mechanism's put in place,  
22 that's the only way to change it.

23 Q. And who gets to vote for that, who gets to -- who  
24 has the majority votes, that could vote that in or out, that  
25 decision? Is it the producer-handlers or is it the

1 producers that are represented by NDA and DFA and UDA?

2 A. If the issue were of a size that it offended the  
3 majority of producers, they would throw out the order, and  
4 if they do that, then nobody has an advantage.

5 Q. And then -- the point comes down to: that the  
6 Secretary at this point has to make a decision in the public  
7 interest, of whether PDs have a value to the public  
8 interest, as opposed to the cooperative interest, don't  
9 they? Isn't that the whole purpose of that voting in and  
10 out and that provision?

11 A. You know, I'm not going to track down that with  
12 you. There is the standard of uniform pricing and uniform  
13 distribution of that money. That is the guiding light of  
14 the federal order system.

15 Q. All right. So let's --

16 A. And so --

17 Q. Okay.

18 A. But you're trying to make the life or death of a  
19 marketing order as going to exist on the decision on the  
20 producer-handlers. Unless that is really causing chaos, I  
21 mean huge chaos, to the point where producers aren't getting  
22 any benefit of being in the order, that is not going to be  
23 the reason orders get voted in or out.

24 Q. Well, NDA -- if the Secretary makes some  
25 amendments to this order but does not impose the cap, for

1 example the limitation to go to Alaska, for example, non-  
2 pool distributing plant, does not put in a cap, will NDA  
3 support and vote the order in or vote it out?

4 A. I am in one of those awkward positions where I am  
5 simply not knowledgeable of what the answer is on that and  
6 can't even hazard a guess.

7 Q. But let me suggest what the implication of an  
8 answer would be, because if they said that they would vote  
9 it in, it indicates that there isn't the chaos, as you just  
10 mentioned, in this marketing from these PDs to justify such  
11 a change; right?

12 A. A minute ago you were alluding to the potential  
13 lawsuit; I guess it's only fair the other side alludes to a  
14 potential voting out. It's not -- but I'm not sure I  
15 understood your question. I just wanted to make that point.

16 Q. Okay. Let's move on to something else. In  
17 answer to a question of Mr. Tosi, you indicated that -- in  
18 this consolidation of, I think, 10 or 20 producer-handlers,  
19 with a 10 or 15 percent market share -- right?

20 A. Uh-huh.

21 Q. -- and, you know, if they became two or three,  
22 you know, does that, you know, reach a point where all of a  
23 sudden they need to be -- you know, they're having an impact  
24 on the order and need [phonetic] to be regulated, and you  
25 made a comment that: as long as they're not lowering their

1 prices to gain market share. Do you recall something to  
2 that effect?

3 A. Something to that effect, right.

4 Q. All right. So let me ask you this question. If  
5 a producer-handler grew its market and maintained its market  
6 because it offered, for example, BST-free milk and it did  
7 home delivery, but it charged a higher price than what  
8 somebody might be able to buy it at the Costcos, because  
9 they want that value of the delivery and stuff.

10 Is that -- would that mean, then, that we  
11 shouldn't regulate them because they were not interfering  
12 with the market, because they weren't selling it at a lower  
13 price?

14 A. The situation you're getting into there, first of  
15 all, the first part of the answer is: all of those things  
16 could be done, and some of them have been done, by regulated  
17 handlers. So whether they're regulated or not does not  
18 permit somebody from finding and servicing very well a niche  
19 market. So that's the first part of the answer.

20 Q. We're not going -- the question is, on the lower  
21 prices -- if they don't lower their prices to expand their  
22 market but they do it by other -- service and quality, okay,  
23 is that disruptive of the marketplace, that justifies  
24 reconsideration of regulating them?

25 A. Perhaps not.

1       Q. So it comes down to -- whether or not they're  
2 lowering their price or not is a predominant factor in  
3 whether or not the PDs are having a negative impact on the  
4 order or not; right?

5       A. The -- except you're skipping one part of the  
6 thing --

7       Q. What's that?

8       A. -- and it was the aggressive growth and lowering  
9 of prices.

10       Q. Okay. And if the evidence shows there wasn't --  
11 the aggressive growth wasn't due to lower prices but the  
12 fact that there were customers out there that wanted  
13 multiple vendors, and suddenly there was a new vendor  
14 allowed, or, as was testified yesterday, that a vendor went  
15 out of business, unrelated to PDs, and they picked up the  
16 crumbs --

17       A. Uh-huh.

18       Q. -- and that may -- there's no evidence of that  
19 having anything to do with lower prices. Isn't that --  
20 would that be a justification, then, on your forming --

21       A. My answer is going to be along the lines --  
22 saying that -- like Mr. Hettinga, I was in a situation where  
23 we had the former Foremost Knutson [phonetic] Company go  
24 belly-up, leaving a lot of sales on the street, and we were  
25 regulated handlers in California and we loved it, just like

1 he loved it when they went out in [phonetic] his place. It  
2 has nothing to do with whether they're regulated or not.

3 Q. It has nothing --

4 A. A regulated handler can do exactly the same thing  
5 if he's in the right place.

6 Q. And it has nothing to do with lower prices.

7 A. At that point, no, you get the business fairly  
8 readily --

9 Q. Okay. Now, we talked about this Herbein study  
10 and this efficiency and at some point -- at three point they  
11 become efficient or not. So it's my understanding that it's  
12 the recommendation that the Secretary begin to look at the  
13 efficiencies of plants to determine the status of  
14 regulation. Is that right?

15 A. That is our testimony.

16 Q. All right.

17 A. And the reason for that is: at some point the  
18 producer-handler comes to a size where he can effectively  
19 compete. It is not an attempt to eliminate all producer-  
20 handlers.

21 Q. And at --

22 MR. YALE: Well, we'll leave that for a brief. I  
23 have no other questions, Your Honor. I do have the website.

24 THE COURT: Oh, this is that --

25 MR. YALE: On the questions of Mr. Hollon.

1 THE COURT: Okay. Why don't you just read it  
2 into the record.

3 MR. YALE: I'll do that. It's www.cdfa, for  
4 California Department of Food & Agriculture, -.cdfa.ca.gov\  
5 dairy, www.cdfa.ca.gov\dairy.

6 THE COURT: Thank you. Are there any more  
7 questions of this witness?

8 (No response.)

9 THE COURT: Hearing nothing, you may step down.

10 THE WITNESS: About time.

11 THE COURT: Okay, before we adjourn for the day,  
12 let's just talk -- we might as well talk on the record.

13 It's a little after 3. Both parties have said  
14 they have no more witnesses to present today, and in fact no  
15 one to present really early tomorrow morning, and in order  
16 to have a continuous day, rather than break up, we're  
17 looking at starting at 1 o'clock tomorrow afternoon, we're  
18 going to start off with Herbein, I believe, and then we're  
19 going to follow it with Murfield, is that the -- do I have  
20 that right?

21 MR. BERDE: It might be more efficient to start  
22 with Murfield, which will be short, because we don't know  
23 how long Herbein --

24 THE COURT: Okay, that's fine by me. We'll start  
25 off with Murfield, and then we'll follow with Herbein.



1 Mr. Ricciardi, do you have a sense about whether  
2 you're going to have a witness ready to go tomorrow  
3 afternoon, and when?

4 MR. RICCIARDI: Mr. Swanson, and I understand  
5 from the last information is going to be flying in I believe  
6 at 1:45, Judge, so he should be available latter portion of  
7 the afternoon.

8 THE COURT: Okay. And let me just say, I'm going  
9 to largely leave this up to you folks, especially the ones  
10 who are going to be doing a lot of traveling:

11 I am very -- I'm home and I'm happy to stay later  
12 on Thursday, if you want to get done earlier Friday, or  
13 maybe -- well, you're still going to have a witness to do on  
14 Friday, right, Mr. Ricciardi, or you're not sure about that?

15 MR. RICCIARDI: I'll know more about that, Judge,  
16 in the morning and I'll inform everybody.

17 THE COURT: Okay. So that way if people want to  
18 check out Friday morning, I guess you can do that, anyway, I  
19 don't think anybody's going to be staying Friday night,  
20 other than voluntarily. So let's plan on starting at 1,  
21 let's plan on probably going until 6:30-ish tomorrow, and if  
22 it behooves us that we're going to wrap things up or to help  
23 people get out of here earlier, we can stay even later, I'll  
24 wait and see, you know, who's falling asleep on their feet  
25 and ready to call it a day.

1                   So right now, at a little after ten after three,  
2 we're going to call it a day and come back here at 1 o'clock  
3 tomorrow afternoon. Off the record.  
4 (Whereupon, at 3:12 p.m., the hearing was recessed, to  
5 reconvene at 1:00 p.m. on Thursday, January 22, 2004, in the  
6 same place.)

7                   \* \* \* \* \*

1  
2  
3  
4  
5  
6  
7  
  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
  
19  
20  
  
21  
22  
23  
24  
  
25  
26  
  
27  
28  
29  
  
30  
31  
  
32  
33  
34

CERTIFICATE

In Re: PACIFIC NORTHWEST AND ARIZONA-LAS VEGAS  
MARKETING AREAS  
Docket Nos.: AO-368-832, AO-271-837, DA-03-04  
Place: ALEXANDRIA, VIRGINIA  
Date Held: JANUARY 21, 2004  
Time Held: 9:00 A.M.

We, the undersigneds, do hereby certify that the foregoing pages, number 2746 through 2963, inclusive, is the true, accurate and complete transcript prepared from the reporting by BOB ADDINGTON in attendance at the above-identified hearings, in accordance with applicable provisions of the current USDA contract, and the below-signed persons have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing.

2/9/04 TRANSCRIBER: Debbie Barnard  
R & S Typing Service

\_\_\_\_\_  
Signature

2/9/04 PROOFREADER: Sheila Orms  
R & S Typing Service

\_\_\_\_\_  
Signature

2/9/04 REPORTER: Bob Addington

\_\_\_\_\_  
Signature

