BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE

In the Matter of	:	
	:	**Docket Nos.:**
Milk In The Upper Midwest	:	**AO-361-A35 et al;**
	:	**DA-01-03**
Marketing Area	:	

BRIEF FOR DAIRY FARMERS OF AMERICA (DFA) AND THE NATIONAL FARMERS ORGANIZATION (NFO)

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I. INTRODUCTION AND BACKGROUND

This is the first hearing of what is expected to be several hearings to consider proposals to modify the pooling provisions of the post-reform federal orders which have been in effect since January 1, 2000. The reform process, which consolidated the then-existing thirty-one (31) federal orders to the present eleven (11) orders, also changed same rules for pooling milk under those orders. One result has been major shifts in the pooling under some orders, particularly those in the central and north central regions. These shifts in pooling are starkly revealed by a comparison of pooled volumes for January 2000 and June 2001 for Orders 30, 32, and 33:

Federal Order	January 2000	June 2001	Difference
Upper Midwest	2,432,632	1,513,844	(917,788)
Central	1,103,362	1,572,056	468,694
Mideast	1,123,688	1,585,679	461,991

Source: Exhibit 6 (February 2000); "Upper Midwest Market News," July 2001 (Official notice requested; Exhibit 1 attached). In spite of the fact that the single greatest change in pooling under federal order reform is that the Upper Midwest Order has had **reduced** volumes of milk pooled, this hearing was called because, by near-unanimous agreement of market participants, there is milk being pooled on the Upper Midwest Order which should not be pooled there and the provisions of the Order need to be revised to address this development.

The problem, identified by proponents of both proposal 1 and proposal 4, is that large volumes of milk from distant areas, California and Idaho, are being pooled on the Upper Midwest Order, thereby diminishing the producer price differential (PPD) and the payments made to producers in the marketing area states of the Upper Midwest Order. The question presented for the Secretary in addressing this problem is whether to amend Order 30 to require a performance

relationship with the fluid market for producer milk both within and outside of the procurement area of the Order or, alternatively, to adopt a proposal which would disqualify milk from California only while continuing the regulatory loophole which allows pooling without performance from other distant areas including Idaho. The Secretary must decide, on this hearing record, whether post-reform federal orders will require that all milk pooled, wherever located, service the market on a pro-rata basis equivalent to the service provided by milk within the established procurement area.

II. FACTUAL BACKGROUND

1. Dairy Farmers of America, (DFA), is a Capper-Volstead cooperative association of nearly 17,000 dairy farmers producing milk in forty-five (45) states. DFA regularly markets milk on 10 of the 11 federal milk orders, including Order 30, and in the state of California. (Tr. 360)

2. The National Farmers Organization (NFO) is a Capper-Volstead association of producers of milk and other commodities. NFO markets milk of its producer members in Order 30 and the state of California, as well as in other federal milk orders.

3. The Upper Midwest Order, effective January 1, 2001, is a product of the consolidation of the prior Upper Midwest, Chicago Regional and Michigan Upper Peninsula Orders. The marketing area was defined on the basis of the criteria discussed in detail in the final decision, with particular emphasis on the area of sales of handlers and the milk procurement area -- the location of farms by which those handlers were supplied. (Tr. 368; 64 Fed. Reg. at 16068-70)

4. The Upper Midwest Order and its predecessors has historically been supplied with milk from dairy farms in the states of Minnesota, Wisconsin, North Dakota, South Dakota, Iowa, Illinois and the Upper Peninsula of Michigan. (64 Fed. Reg. at 16070)

5. The terms for pooling and qualification of producer milk and supply plants under the Upper Midwest Order were established to accommodate in an efficient manner the pooling of milk of dairy farmers in the historical procurement area.

6. Federal order reform changed the economics with respect to pooling producers on federal orders by eliminating the "zone out" of milk diverted to and received at distant locations. This affected the producer price differential (PPD) that milk from farms, or plants, outside the traditional Upper Midwest procurement area could draw from the pool if qualified on the order. (Tr. 101, 522-23)

7. Supply plants which are not located in the Order 30 marketing area may be pooled by delivering the required percentage of their receipts to an Order 30 distributing plant (or other Class I plant as set forth in Section 1030.7(c)(1)). Out of area supply plants must qualify on their own each month and may not be grouped with in area plants for performance on a unit basis. (7 C.F.R. § 1030.7(c) and (f) (2001))

8. Producer milk may be qualified for pooling under Order 30, by delivery of one full day's production from a producer to an Order 30 pool plant. Thereafter, milk of that qualified producer may be diverted to non-pool plants without limitation. Diversions to distant non-pool plants are priced at the rate established in 7 C.F.R. §1000.52, irrespective of the distance from the marketing area of Order 30. (7 C.F.R. § 1030.13 (2001))

9. From January 2000 through June 2001, milk was pooled on Order 30 from producers

in the state of California in volumes beginning with 8.4 million pounds in January 2000, and increasing to more than 240 million pounds in March, April and May of 2001.

(Exhibit 7; Exhibit 8)

10. Milk in California has been pooled by at least three marketing organizations, including both DFA and NFO. (Tr. 482-83)

11. In April and May of 2001, milk from the state of Idaho was pooled on Order 30 in amounts in excess of 30 million pounds per month. (Exhibit 8)

12. The milk from California and Idaho has been delivered on the minimum basis of one day's production from each farm to an Order 30 pool plant. (Tr. 289, 513)

13. Milk from California and Idaho has, thereafter, been eligible for pooling on Order 30 by virtue of being "covered" by shipments of milk from farms in the marketing area to pool plants and pool distributing plants and/or by virtue of the pool supply plant to which the California or Idaho producers have been associated being qualified as part of a unit of supply plants under the order. In some cases the distant producers (or their handler) have paid fees to in-area handlers for the pooling of the milk. (Tr. 514)

14. The cost to deliver milk produced in the states of California and Idaho to markets in the Order 30 marketing area is at least $5.29 per cwt for milk from Idaho, perhaps as much as $6.25, and $7.59 per cwt or more for milk from California, costs which are considerably in excess of the benefit derived from pooling the milk. Every delivery of milk from California or Idaho to an order 30 pool plant consequently results in a loss to the handler delivering the milk because the cost of transportation so substantially exceeds the PPD. Consequently, there is no economic basis for milk in these states to actually supply, or be considered a reserve supply for, the Order 30 market. (Exhibit 37, Tables 4 and 5; Tr. 492-93)

15. The state of California operates a milk stabilization and marketing plan. (Exhibits 10-15)

16. California's milk regulations price producer milk on the basis of whether it is "quota" or "non-quota". Quota milk is paid $1.70 per hundredweight more than non-quota milk. The price of non-quota milk is based upon residual values in the California market after payment of the quota milk premium.

17. All or substantially all milk pooled on Order 30 originating from California farms is also subject to pricing under the California milk marketing stabilization program as quota milk or non-quota milk.

18. Proposal 1 would amend Order 30 to disqualify, or prohibit, the pooling of milk which is subject to a state "marketwide" milk pooling and pricing plan. (Proposal 1)

19. Under Proposal 1, milk from farms in the state of California which is subject to the California pricing plan would not qualify for pooling under federal Order 30, even if such milk was delivered to Order 30 pool distributing plants for Class I use. Federal orders have never similarly prohibited the pooling of milk from any specific region of the country. (Tr. 286-88)

20. Under Proposal 1, milk in the state of Idaho would continue to qualify for pooling under Order 30 without providing any supplies to Order 30 distributing plants.

21. Proposal 4 would require separate reporting of milk outside the states of Minnesota, Wisconsin, Iowa, Illinois, North Dakota, South Dakota, and the Upper Peninsula of Michigan. Milk in outlying states would be eligible for pooling under Order 30 on the same basis as milk within the procurement area states. If 10% of milk within the procurement area states was required to be delivered to pool distributing plants for pooling, the same requirement would

apply to milk from the state of Idaho and California and Utah, or any other state. (Proposal 4)

22. Proposal 4 embodies the principle that milk pooled under a federal order must be ready, willing and able to serve the market's Class 1 milk needs on a pro-rata basis.

23. Proposal 5 would change the rate of advance payment required to be made by handlers to producers or cooperative associations for milk delivered under Order 30.

24. Experience since January 1, 2000 has shown that the present formula for advance payment under Order 30 has had the effect of reducing the obligations of handlers to producers and thereby reducing the advance cash receipts and cash flow of producers. (Exhibit 37, Table 7)

25. To maintain essentially the cash flow envisioned by the order reform regulations effective January 1, 2000, the advance payment provisions of Order 30 should be amended as provided under Proposal 5 to require payment of 103% of the prior month's lowest class price. (Exhibit 37, Table 7; Tr. 565-73)

III. SUMMARY OF PROPOSAL 4

Proposal 4, as published in the hearing notice and modified by Mr. Hollon's testimony at the hearing, would provide as follows:

Proposal 4

1. Amend § 1030.13 by revising paragraph (d)(2); designating paragraph (d)(3) as (d)(4); adding a new paragraph (d)(3); and adding a new paragraph (e) to read as follows:

§ 1030.13 Producer Milk

* * * * *

(d) * * *

(2) Of the total quantity of producer milk reported by a handler described in 1000.9(c), except as provided in 1030.13(e), not less than 10 percent of such milk shall be delivered to plants as described in 1030.7(c)(1)(i) through (iv). These percentages are subject to any adjustments that may be made pursuant to

1030.7(g).

(3) The quantity of milk diverted by a handler operating in the capacity of a pool plant operator may not exceed 90 percent of the producer milk receipts reported by the handler pursuant to Section 1030.30(a) provided that not less than 10 percent of such receipts are delivered to plants described in Section 1030.7(c)(i) through (iv).

(4) The quantity of milk diverted to non pool plants by a pool plant operator as described in § 1030.7(a) or (b) may not exceed 90 percent of each reporting unit of the handler's receipts made pursuant to § 1030.30(a). This percentage is subject to adjustments that may be made pursuant to § 1030.7(g).

(e) Milk from producers physically located outside of the states of Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin and the Upper Peninsula portion of Michigan shall be grouped by individual state units and each state unit shall be:

(1) Reported on separate report(s) pursuant to § 1030.30; and

(2) At least 10 percent of each reporting unit of the handler shall be delivered to pool plants as described in § 1030.7(c)(1)(i) through (iv); and such deliveries shall not be used by the handler in meeting the minimum shipping percentages required pursuant to § 1030.7(c) or (f) or § 1030.13(d); and

(3) The percentages of § 1030.13 (e)(2) are subject to any adjustments that may be made pursuant to § 1030.7(g).

2. Amend Section 1030.7(g) to read as follows:

(g) The applicable shipping percentages in paragraphs (c) and(f) of Section 1030.7 and of paragraphs 1030.13 (d)(2) and (e)(2) may be increased or decreased [continue with present order language].

Proposal 4, as modified, has the following basic provisions:

(1) It would revise the producer milk definition of § 1030.13 to provide a new Section (e) requiring separate reporting and accountability for producers located outside the states of Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin and the Upper Peninsula portion of Michigan.

(2) § 1030.13 (d) would be amended to insert § d(3) and § d(4) to conform the limits for

diversions by handlers operating in the capacity of pool plant operators.

(3) The proposal will allow out of area producers to meet shipping requirements on the same basis as in area producers by shipments to other order distributing plants to the extent allowed under the existing order.

(4) § 1030.7 (g) would be revised to make the limitations of new paragraph 13(e) subject to reviion by action of the Market Administrator.

IV. THE TERMS OF POOLING IN FEDERAL ORDER 30 SHOULD BE ESTABLISHED ON THE BASIS OF MARKET PRINCIPLES REQUIRING PERFORMANCE IN SUPPLYING THE FLUID MARKETPLACE.

The Secretary should apply the same principles of market definition and performance to the issues in this hearing as were articulated and applied in consolidating and revising the orders as of January 1, 2000. Specifically, with respect to pooling, DFA and NFO urge the Secretary to require that all milk sharing in the marketwide proceeds of a federal order market be required to perform in serving the Class 1 needs of the order. Implementation of this principle requires that the language of subsection 13 of Order 30, 7 C.F.R. § 1030.13, be revised as requested in Proposal 4 and by Mr. Hollon's testimony at the hearing. This revision will make the pooling of producer milk diverted to non-pool plants subject to essentially the same standards of performance as pool supply plants under the order.

Federal orders are established by defining a marketing area which involves application of seven (7) criteria set out in the final decision of April 2, 1999. 64 Fed. Reg. at 16045. For Order 30, the final decision made clear that the marketing area was defined with a keen eye upon both the primary area of distribution of handlers serving the market and the areas of milk supply. As the final decision noted, "the pooling of milk produced within the same procurement area under

the same order facilitates the uniform pricing of producer milk." This criterion was particularly appropriate for Order 30 since the predecessor orders' (Order 68 and Order 30 (Chicago Regional)) marketing areas had been defined in substantial part on the basis of milk procurement area as well the handler sales areas. Thus, the current marketing area for Order 30 encompasses nearly the entire state of Minnesota; all but two (2) counties of the state of Wisconsin; a portion of the Michigan Upper Peninsula; and portions of the states of North Dakota, South Dakota, Iowa, and Illinois. As the final decision reported, major consolidation criteria include an overlapping procurement area between the Chicago Regional and Upper Midwest Orders and overlapping procurement and route disposition areas between the western end of the Michigan Upper Peninsula Order and the Chicago Regional Order. 64 Fed. Reg. at 16050. The final decision pointed out that 93% of the (anticipated) producer milk was produced within the consolidated marketing area and 91.4% of it was produced within the states of Wisconsin and Minnesota.[1] 64 Fed. Reg. at 16070.[2]

In establishing the terms and provisions of each order the final decision expressly adopted the principle of performance for pooling provisions stating:

> Fundamental to most pooling proposals and comments was the notion that the pooling of producer milk should be ***performance-oriented*** in meeting the needs of

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[1] In February 2001, the last month for which complete data are in the hearing record, only 83% of milk pooled on Order 30 was from Minnesota and Wisconsin while 12% was from California. (Exhibit 7, Table 8) In May, more than 17% of milk pooled on the order was from California and Idaho. (Exhibit 6; Exhibit 8) While the data for volumes from Minnesota and Wisconsin for May 2001 is not in the record, in all likelihood it was less than 80% of the pool.

[2] The final decision specifically rejected requests to extend the marketing area (and thus the procurement area) to the south or west. See 64 Fed. Reg. At 16070, 16073-74. This decision has been circumvented by the pooling practices which are at issue in this hearing which de facto extend the marketing and procurement area of Order 30.

the fluid market. This of course is logical since the purpose of the federal milk order program is to ensure an adequate supply of milk for fluid use.

. . .

The pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers within a common marketing area to establish an association with the fluid market. Obviously, matching these goals to the very disparate marketing conditions found in different parts of the country requires customized provisions to meet the needs of each market.

64 Fed. Reg. 16130 (emphasis in original) Implementing these principles, the now eleven (11) federal orders have varied pooling provisions related to the marketing conditions in each order. (Exhibit 37, Tables 1A and 2).

Notably, in the final decision the Secretary expressly refused to adopt "open pooling" and stated: "A suggestion for 'open pooling' where milk can be pooled anywhere has not been adopted, principally because open pooling provides no reasonable assurance that milk will be made available in satisfying the fluid needs of a market." 64 Fed Reg. 16130. While no participants in this hearing have advocated (explicitly) the adoption of open pooling provisions, the effect of allowing milk from Idaho and other distant areas to be pooled under current regulations is the same: The milk would be pooled without any assurance that it will be made available in satisfying the fluid needs of the market. Indeed, since such milk could only be supplied at a loss to the Order 30 fluid market, one can be sure that it will **not** be made available

to supply the market[3]. The Secretary should reiterate the explicit rejection of open pooling provisions; and also reject the ***de facto*** adoption of such provisions which is the underlying premise, ***sub silentio,*** of Proposal 1.

The pooling provisions in Order 30 (and all orders) have evolved over the years to meet the following standard: Milk which is so situated as to be ready, willing, and able to supply the fluid needs of the market, and which has demonstrated that ability, should be pooled so long as a proportionate amount of that volume is delivered to the fluid marketplace to meet the needs of the market. The necessary proportion of each marketing block (or "unit") of milk pooled is established in the supply plant and producer milk performance provisions of the order, 7 C.F.R. §1030.7 and 1030.13. Those provisions are subject to adjustment by the market administrator when additional milk is needed by fluid handlers. The intent, and effect, of the regulations has been to allow handlers to deliver the most efficient milk supplies to the market in quantities sufficient to meet the market's needs, all deliveries being from sources of milk in the marketing area which over the years have been shown to be available to serve the market.

Prior to federal order reform, the provisions of Order 30 and its predecessors provided that milk which was pooled under the order but delivered to locations outside the marketing area would be priced in a manner which reflected its diminished value to the pool because of its distance from Class 1 markets. Federal order reform eliminated this pricing system and

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[3] This was confirmed by the Kraft witness who testified: Q: So Kraft is paying the cooperative a fee to perform for its milk in Idaho . . . Correct? A. There's two ways to get pooling and one is to ship and one is to pay a fee for performance. Q. Okay. And you've gone the pay a fee route because it was less expensive than shipping. Correct? A. Yes. Q. Okay. Now what if you were to be required to ship 10 percent from Idaho instead of having milk in Illinois perform for you. Would you pool on Order 30? A. Well, I think we demonstrated in our testimony that there would be no economic incentive to do that . . ." (Tr. 514 l.17 – 515 l.7)

established a single national grid of location values. 7 C.F.R. §1000.52. This change,[4] which prices milk delivered to points distant from the federal order market at the same rate as milk delivered next door to a pool distributing plant, made it economical for handlers to associate large volumes of distant milk, not otherwise associated with the federal order pool, without any price concession to accurately discount the milk's lack of availability to marketing area distributing plants. The subject pooling of milk from California and Idaho is a result of this new pricing dynamic.

The solution to the issue should be the adoption of reasonable requirements of performance by milk from locations outside the established procurement area of the market. Proposal 4 would accomplish this by requiring milk produced on farms outside the states of Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula portion of the state of Michigan to be grouped by individual state units and perform on the basis of such individual state units. The purpose and effect is to merely require milk from distant states to perform on the same basis, in aggregate, as milk from the state of Wisconsin or Minnesota or Iowa. This solution does not discriminate; does not penalize; and does not establish any barriers to pooling of milk from any area in Order 30. It merely establishes a level playing field on which all participants have the same responsibility to serve the fluid market from which they are sharing the revenues.

V. PROPOSAL 4 IS CONSISTENT WITH HISTORICAL AND LEGAL PRECEDENT FOR IN AREA AND OUT OF AREA POOLING STANDARDS

Proposal 4's distinguishing between "in area" and "out of area" sources of milk, and the pooling standards applicable to each, is neither novel for Order 30 nor for the federal order

[4] See, e.g., Tr. 101, 522-23.

system more generally. Indeed, the proposed amendments with respect to producer milk merely mirror the present order terms for supply plants. Furthermore, both the predecessor Orders 30 and 68 distinguished pooling performance standards among in area and out of area plants, and numerous other orders, including present Order 1 (and Order 2, one of its predecessors, and other orders[5]) have had in area and out of area geographical pooling distinctions for many, many years. All of these distinctions are both justified and legal.

Order 30 presently has two (2) pooling mechanisms for supply plants: First, § 1030.7(c), the basic supply plant qualification provision, requires supply plants to deliver not less than 10% of the grade A milk received from dairy farmers each month to Class 1 plants. Notably, none of the distant out of area milk involved in this hearing is qualified through this provision which requires monthly shipments of 10%. Secondly, supply plants may also qualify as a unit of plants pursuant to §1030.7(f). However, the unit system of qualification, which does not require minimum monthly shipments from each plant, mandates that each plant be "located within the marketing area." It goes on to underscore the required linkage between the location of the plant and its means of qualification by stipulating that: "Cooperative associations may not use shipments pursuant to § 1000.9(c) to qualify plants located outside the marketing area."[6] This

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[5] See footnote 7, ***infra***.

[6] Section 1030.7(f) provides in pertinent part:

"(f) A system of 2 or more supply plants operated by one or more handlers may qualify for pooling by meeting the shipping requirements of paragraph (c) of this section in the same manner as a single plant subject to the following additional requirements:

(1) Each plant in the system is located within the marketing area or was a pool supply plant pursuant to § 1030.7(c) for each of the 3 months immediately preceding the applicability date of this paragraph so long as it continues to maintain pool status. Cooperative associations may not use shipments pursuant to § 1000.9(c) to qualify plants located outside the marketing area."

language makes it clear that the present order was intended to limit the ability of cooperatives or others to pool milk outside the marketing area without monthly deliveries to distributing plants.

The existing language in Order 30 with respect to in area and out of area supplies of milk was a continuation of longstanding distinctions in both predecessor orders 68 and 30. When Order 68 was first established as the Upper Midwest Order, a merger of four prior orders effective in 1976, new definitions for supply plant and reserve supply plants were established. Those definitions distinguished between performance required of plants located in the marketing area and plants located outside the marketing area. Plants located outside the marketing area were required to perform on a monthly basis; plants within the marketing area had the option to elect reserve supply plant status and be obligated to deliver milk only when called upon. When establishing the reserve supply plant system, the Secretary specifically refused to authorize reserve supply plant status for plants outside the marketing area, finding that there was no reason to believe that such plants would in actuality be the source of milk for the market's reserve needs. See 41 Fed Reg. 12436-12479 (March 25, 1976)(Final Decision)(Official notice of this decision is requested. It is Exhibit 2 attached). Likewise, in the predecessor Chicago Regional Order 30, the pool plant language distinguished between in area and out of area supply plants for many years. Similar to Order 68, Order 30 prohibited the association of out of area supply plants in a unit of plants which could perform (by making required deliveries to distributing plants) on an aggregate basis without shipments from each individual plant in the unit. Out of area supply plants were, nevertheless, always eligible for pooling on a monthly performance basis. These distinctions existed in Order 30 since at least 1977. See 42 Fed. Reg. 37388 (July 21, 1977)(Final Decision)(Official notice of this decision is requested; it is attached as Exhibit 3).

In other orders, distinctions between in area and out of area plants have been present for

even longer periods of time. In Order 2, the former New York- New Jersey marketing order, "regular pool plants" had to be "located in New York, New Jersey, or Pennsylvania."since prior to 1960. See 7 C.F.R. § 1002.24(a)(2)(1999) Plants not meeting the geographic criteria could nevertheless qualify as "temporary pool plants" under Order 2 provided they met other standards which involved monthly association with the fluid milk needs of the market. See 7 C.F.R. §1004.28(1999). In the post-reform Order 1, which now regulates the marketing of milk in Northeastern United States, the successor to Orders 1, 2 and 4, the requirement that out of area milk sources associate with the market on a monthly basis in order to be pooled was set out in 7 C.F.R. §1001.13(b). Those provisions simply require that producers outside the states in the marketing area (as well as the states of Maine and West Virginia which have been traditional procurement areas for the Northeastern markets) deliver the same monthly percentage of their production to pool distributing plants as is required of in area plants.[7]

The common denominator in all of these prior federal order provisions with respect to in area and out of area plants or producers is this: Distant plants or producers may qualify and be pooled in a federal order market if that plant, or the producers, on their own, perform in accordance with the minimum performance standards of the order. There is nothing in the application of any such standards which creates in any way, shape, or form a trade barrier to the movement of milk such as is prohibited by 7 U.S.C.§ 608c(5)(G).

Kraft has contended in its testimony that Proposal 4 is unlawful in three (3) respects: (1)

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[7] We have not made an exhaustive study of similar provisions in other pre and post reform orders, but are aware of these: 7 CFR § 1079.7 (1999) (performance varies by location of supply plant); 7 CFR § 1007.7(1999)(provisions applicable only to supply plants within the marketing area); 7 CFR § 1005.7(1999)(c)(cooperative balancing plant must be located in the states of North Carolina, South Carolina, or Virginia); 7 CFR § 1040.7(1999)(b)(3)(cooperative plant located in the State of Michigan).

that it is an unlawful nearby differential under Zuber v. Allen, 396 U.S. 168 (1968); (2) that it unlawfully conditions pooling upon utilization, in conflict with Blair v. Freeman, 370 F.2d 229 (D.C.Cir. 1966); and (3) that it creates an impermissible trade barrier invalid under Section 8c(5)(g) of the AMAA. None of these contentions is valid. First, the Zuber case found unlawful the payment of special bonuses known as "nearby differentials" to all farmers whose farms were located in specific areas near to the cities in the Boston Order. It is self evident that there are no such similar payments being proposed here. However, what Kraft overlooks is that after the nearby differentials were stripped from the Boston Order, what was left was exactly the system of plant point pricing which exists in Order 30 today and to which Kraft objects.[8] The contention that there is an impermissible price differential created on the basis of use classification because producers are required to deliver milk to distributing plants is likewise without a legal basis. The Blair v. Freeman case which Kraft cites was addressing the same type of nearby differential payment which the Supreme Court ruled invalid in Zuber. The prior Court noted that the payments appeared to premised upon higher fluid utilization, which may not be permissible in a marketwide pool. However, there is nothing in that decision, or anywhere else in the history of AMAA jurisprudence, which suggests that performance requirements for serving the fluid market are impermissible. Performance requirements are in fact all that is at issue here, not any type of payment differential, and without performance requirements, the marketwide pool would be dysfunctional. The final contention that a trade barrier which violates the Act is established is

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[8] Kraft's argument that in essence a nearby differential is created is based on the fact that the more distant producers have a lower net return after their deliveries to the pool plant than the producers whose farms are closer to the pool plant. (Tr. 491-496). Kraft points out that it is economically infeasible to supply the Order 30 fluid market from Rupert, Idaho. In a plant point pricing system the producer has the cost of moving his milk from farm to market; that is what Kraft is complaining about and that system certainly does not violate the act.

incorrect. Under the present terms of Order 30, the Rupert, Idaho, plant is eligible for pooling so long as it performs. Similarly, if Proposal 4 is adopted the producers who supply in Rupert plant will continue to be eligible to be pooled under the order, so long as they perform. There is no trade barrier of any sort. None of Kraft's legal theories is persuasive.

Proposal 4 requests that the Secretary amend the language of Order 30 to place diverted producer milk on the same pooling standard as applies to supply plants in the existing order and so-applied in the predecessor orders. The proposal simply requires the separate reporting on a state by state basis of milk from dairy farms located outside the historical Upper Midwest procurement area and then requires each such unit of production to perform on the minimum 10% per month basis applicable to in area milk supplies.

VI. PROPOSAL 1 WOULD NOT SOLVE THE PROBLEM WHICH EXISTS IN ORDER 30 AND IS AN ILL-ADVISED MEANS OF ATTEMPTING TO DEAL WITH STATE ORDER REGULATIONS.

Proposal 1, which would disqualify from pooling milk identified as participating in a state marketing order pool, will not solve the problems of pooling in Order 30 and will bring with it a set of additional administrative and legal challenges which should be avoided. Consequently, while DFA and NFO share concerns with the proponents of Proposal 1, there are numerous problems with proposal 1 which counsel against its adoption as the solution for the problems which underlie this hearing.

The most obvious deficiency in Proposal 1 is that it would not address the issue of pooling non-California distant milk, such as the milk in Idaho, which has no intention or practical ability to serve the fluid needs of the Order 30 market. As the handler for the Idaho milk testified, a

payment was being made to an Order 30 handler to pool the milk[9]; the milk was not being shipped to Order 30; and there was no anticipation that it would ever be shipped to serve the market. The Idaho milk is being pooled for the sole purpose of drawing money out of the pool thereby reducing the pool proceeds to those producers who were and are committed to supply the needs of the market. The local producers continue to bear the costs and burdens of supplying the market but receive less compensation for it. Consequently, because Proposal 1 does not address all of the objectionable pooling revealed in this hearing record, it is an inadequate and insufficient answer to those problems. There are a number of additional reasons why the Secretary should be cautious in adopting Proposal 1 and considering it a sufficient answer to the pooling-without-performing issues:

State regulations can and will change. While the proposal as stated may apply as intended with respect to the existing California state regulations, those regulations could change, as witnesses acknowledged. Any changes could require reconsideration or re-application of the proposal. Furthermore, there are proposals apparently pending in the state of North Dakota which could be impacted by this proposal if adopted. It's worth noting that North Dakota has a much more integral relationship with Order 30 than the state of California and unintended consequences with the respect of pooling North Dakota milk should not be lightly triggered. Furthermore, defining milk with qualification on the basis of state regulations fundamentally cedes to state authorities what should be a federal issue, defining the qualifications for federal order pooling.

An illegal trade barrier is erected. The operation of Proposal 1 quite likely violates Section 8c(5)(G) of the AMAA, 7 U.S.C. Section 608c(5)(G), which prohibits the erection of

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[9] Tr. 514.

trade barriers to any region or state in the federal order markets. Proposal 1 would create just such a barrier by operating to disqualify, regardless of performance, any milk from a state which regulated that milk in a certain fashion. In other words, if Proposal 1 was adopted, producers who supplied a fluid plant in the state of California, which plant became pooled in Order 30 by virtue of route disposition, would nevertheless be prohibited from sharing in the federal order pool of Class I revenues. It is very unlikely that this provision could survive legal scrutiny under the Act. If the imposition of compensatory payments upon milk moving from outside the marketing area, equal to a portion of the difference in class prices created an illegal trade barrier under Sani-Dairy v. Yeutter, 782 F.Supp.1060 (W.D.Pa.1991), and Lehigh Valley Cooperative Farmers v. United States, 370 U.S. 76 (1962), then a regulation which bars participation in the pool entirely from a region must be prohibited by the AMAA, 7 U.S.C. § 608c(5)(G).

In summary, Proposal 1 will not address the full extent of the problems which the record identifies exist with respect to the pooling of milk in Order 30. Moreover, it will bring with it a set of problems of its own which the Secretary will do well to avoid.

VII. DFA'S PROPOSAL 5 TO AMEND THE ADVANCE PRICE REQUIREMENTS OF THE ORDER SHOULD BE ADOPTED

Advanced payment provisions for Order 30 presently provide that partial payment be made to producers for their milk deliveries during the first fifteen (15) days of the month at a rate equal to the lowest class price for the prior month. Experience since January 1, 2000 under the class prices now prevailing demonstrates that that rate is lower than it has been historically and should be increased. The change in establishment of Class 3 and 4 prices under federal order reform has led to an increasing spread between the producer price differential (the proxy for the blend price previously) and the lowest class price. Consequently, the order should be changed to

increase the rate of payment required of handlers pursuant to 7 C.F.R. § 1030.73 .

Exhibit 37 demonstrates the erosion of producers' advance price payments under Order 30. For the period from January 1997 through May 2001, fifty-three (53) months, the monthly average spread between the Class 3 price and the blend price was $0.85. However, for the first thirty-six (36) months it was $0.73 and for the last seventeen (17) months it was a $1.08. Producers should not be required to absorb this reduction in cash flow which is simply a product of the class pricing changes implemented in federal order reform.

Therefore, DFA and NFO propose that the advance payment should be required at the rate of 103% of the lowest class price as a reasonable adjustment to approximate the spread that existed over the thirty-six (36) months prior to order reform. (Tr.571) The advance payment formula is similar to that present in other orders. (Exhibit 37, Table 6) This should present no difficulty to any handlers as it is merely a replication of the prior exisiting status quo. Furthermore, for cheese manufacturers, the funds made available for payment to producers are provided through the marketing order pool and it is essentially a passthrough item for them.

VIII. ORDER 30 SHOULD NOT BE AMENDED ON AN EMERGENCY BASIS PRIOR TO PROCEEDINGS TO CONSIDER AMENDING OTHER ORDERS.

The proponents of Proposal 1 have requested that the proceeding be handled on an emergency basis because of the impact which the out of area pooling is having upon the producer price differential in the Upper Midwest. DFA and NFO support the consideration of pooling issues on Order 30, and other adjacent orders which are being impacted in a similar fashion, on the same timeline. We oppose the amendment of Order 30 prior to hearings which could implement amendments to Orders 32 and/or 33 on a similar time schedule.

The distant pooling of milk of Order 30 has been ongoing since January 2000. While the volume of distant milk pooled has increased, the impact on Order 30 has been ameliorated by the

fact that Order 30 handlers have, in a not dissimilar fashion, pooled huge volumes of milk historically associated with Order 30 on Orders 32 and 33. The record also shows that milk from California is now being pooled on Order 32. There is a substantial possibility, perhaps the inevitability, that if Order 30 is amended prior to consideration of appropriate amendments to Orders 32 and 33 that the problem will just "migrate" as Mr. Hollon testified. That result is at least as disorderly, if not more disorderly, than the present situation. Consequently, DFA and NFO support the earliest consideration of amending all of these orders to conform them to the principles of performance enunciated in this brief.

IX. CONCLUSION

DFA and NFO respectfully request that Proposals 4 and 5 be adopted.

RESPECTFULLY SUBMITTED,

MILSPAW & BESHORE

By_____

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