UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
(Dairy Programs)

In Re: **Milk In the Western and Pacific Northwest Milk Marketing Areas**	Docket Nos. AO 380-A18, 368-A30 DA-01-08

Salt Lake City, Utah
April 16 – 18, 2002

TESTIMONY OF JOHN H. VETNE
On Behalf of Glanbia Foods and Jerome Cheese Co.
In Opposition to Pooling Proposals 3 through 7

I had not originally anticipated testifying at this hearing. However, hearing testimony over the last few days provides me with a strong sense of déjà vu, which compels me to say a few words from personal experience about the regulatory history of the Western Market. I hope that by doing so I can provide some important history for the hearing record.

In early 1980, USDA held a hearing in Boise, Idaho, to reconsider whether there should be a federal milk order in Southwestern Idaho and Eastern Oregon. At that time, there was opposition to regulation from Meadow Gold (Boise) and producers supplying Meadow Gold who were fortunate enough to have a Class I outlet for their production. The cooperative proponents argued that performance requirements should be relatively tight, because Class I utilization would be relatively high. I attended that hearing, representing Kraft, and argued that the proponents

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grossly understated the volume of milk that would be attracted to the market's pool; performance standards, therefore, should be relaxed. It was as a result of this effort that a Bulk Tank Unit handler option was first provided, permitting proprietary manufactures to pool milk efficiently in much the same way as supply plants in the Midwest, but without having to construct separate Grade A receiving silos. Due to the larger size of farms in Idaho, there was no practical need to receive and assemble milk at a supply plant.

Kraft was right about projected utilization. Shortly after the Order went into effect, Class I use was about 20% - half of that projected by proponents. A good portion of milk on the new Order 135 was reserve production of farmers located in Idaho that the proponents had previously pooled in the Great Basin or Oregon Orders. The creation of Order 135 immediately permitted the Great Basin pool to slough off Class III milk, and shift some of the burden of surplus milk to producers on the new Order 135 pool. Since the advent of Order 135, but ending on January 1, 2000, Great Basin's reserve has been carried on a separate pool.

During the two decades since creation of the Southwest Idaho market, pooling provisions in Orders 135 and 139 caused frequent problems because they could not accommodate the growing supply of Grade A milk in the Mountain States. As a result, diversion rules were routinely suspended at the request of cooperatives that associated milk with the markets. At a hearing in Salt Lake City in early 1986 (Docket No. AO-309-A27), from which the first protein pricing plan also resulted, I heard Judd Mason, the spokesman for IMPA (a DFA predecessor), describe the problem as follows in support of less restrictive performance requirements for the Great Basin Market:

> "[If] one group of farmers [receives] the benefits of the Order and their neighbors, equally qualified, [are] totally neglected, it would result in absolute market chaos.
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> A cooperative association like IMPA cannot determine that one member is entitled to participate in the Federal Order pool and that his neighbor, also a member, should be excluded if he meets the same requirements. The only result would be turmoil among farmers throughout the area, with one farmer being pitted against another for a place in the market.
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> The milk in some manner must be accommodated by the Federal Order."

This testimony was reported at pp. 654 and 700 of the 1986 hearing transcript. Judd Mason, incidentally, was for many years on the staff of NMPF, and regularly represented cooperative associations as one of the nation's leading dairy marketing and policy experts.

This experience is relevant, for reasons of fact and regulatory policy, to pooling DFA's pooling proposals in this hearing in 2002 which, as the record shows, has pitted one farmer against another.

Judd Mason's 1986 testimony reflects the *principal* objective of milk order pooling, that has driven government intervention since the 1930's, has been to equitably share the burden of lower-valued surplus milk not needed for Class I use. Based on DFA's testimony here, and in other parts of the country last year, many in today's industry appear unaware of or, perhaps, have forgotten this objective. The 'grandfather' of court decisions describing the need for government intervention is the U.S. Supreme Court case of *Nebbia v. New York*, 291 U.S. 502 (1934) which described the "milk problem" at pp. 517-518 as follows:

> Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor.

A similar explanation of the need for government intervention was made in the Rock Royal case four years later, the first federal milk order issue decided by the Supreme Court.

The provision of the AMAA that provides for marketwide pooling is 7 USC Sec. 608c(5)(b)(ii). This section says nothing about Class I use, and does not condition pool eligibility on use or performance of milk for the Class I market. Quite the contrary, it says that the market's producers must be paid a uniform price "*irrespective* of the uses made of such milk by the individual handler to whom it is delivered." This sharing of marketwide proceeds in a manner that does "not distinguish between producers on the basis of the use made of their milk" has been called "the core of the Congressional program" by the US Court of Appeals in Washington, D.C. (*Blair v. Freeman* (1966)), and "the foundation of the statutory scheme" by the Supreme Court (*Zuber v. Allen* (1969)). In both of these cases, courts overturned efforts to tilt the economic playing field created by regulation in favor of producers on account of closer association with the market's Class I outlets.

The 1962 "Nourse Report" (Report of the Federal Milk Order Study Committee to the Secretary of Agriculture) also addressed the need to accommodate all local milk supplies on policy and economic grounds. While noting that large surplus milk supplies could present problems, the report cautioned (at p. 67) that "the only alternative for such supplies may be the even more disruptive status of milk without a market or at least without a share of a Class I outlet." The Nourse Report was cited as authority by the US Supreme Court on at least one occasions, and has been relied upon by USDA's Judicial Officer on countless occasions as an authoritative source of federal milk order economic and regulatory policy.

Consistent with these court decisions, economic counsel, and with principals of efficiency and equity in milk marketing rules, USDA has consistently resisted overt efforts to use performance requirements to exclude or discourage local milk from participating in a market's pool due to its use in Class III where the market's Class I needs are being met. There are many examples of application of this policy. Some are as follows:

> "To share in the pool proceed of the order, supply plants must demonstrate the *ability* to furnish market fluid needs by shipping milk to pool distributing plants.... Shipments should not be encouraged to a greater degree than necessary to satisfy fluid milk needs.... To do so results in uneconomic movements of milk to distributing plants solely for pooling purposes rather than to meet fluid milk needs. 43 Fed. Reg. 12695, 12699 (March 27, 1978)(New England decision).

> "The existence of pool manufacturing plants should not be a basis for narrowly limiting the amount of milk which may be diverted to nonpool manufacturing plants, since it would continue to encourage inefficient milk handling by producer groups that use nonpool

> manufacturing plant outlets." 46 Fed. Reg. 55876, 55888 (Nov. 12, 1981)(New England decision).
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> One day's production of a producer delivered to a pool plant during fall months is "sufficient to demonstrate that a producer has *some association* with the fluid market" 44 Fed. Reg. 64087, 64091 (Nov. 6, 1979)(Inland Empire decision).

Suspension or reduction of diversion limits under federal orders has been very frequent, and justified by USDA as necessary to ensure that producer milk historically associated with the market can continue to be pooled. In the Western Order, federal milk order reform unintentionally caused disassociation of more than half of Idaho's Grade A milk that was pooled for many years; and DFA's proposals are unabashedly intended to disassociate much more of Idaho's historically pooled milk supply.

The policy reflected in decisions and suspension rules described above is also addressed in USDA's program brochure, THE FEDERAL MILK MARKETING ORDER PROGRAM, which explains (at pp. 5 and 10) that FMMO's facilitate orderly marketing by providing for "the sharing among producers of the returns from all milk uses." Further, "there has been a general lessening of pooling requirements to facilitate the efficient pooling of additional supplies of Grade A milk."

In short, the pool performance amendments proposed by DFA for the Western market are not objectionable merely as a large step backwards; they would represent a radical departure from past policy for which strict and demanding standards of explanation and justification is required by law.