

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:)
) Docket Numbers
) AO-368-A30 and
MILK ORDER AMENDMENT HEARING) AO-380-A18
FOR MILK IN THE PACIFIC) [DA-01-08]
NORTHWEST AND WESTERN)
MARKETING AREAS)
)

Hilton Airport Hotel
5151 Wiley Post Way
Salt Lake City, Utah

Friday,
April 19, 2002

The above-entitled matter came on for
hearing, pursuant to Adjournment, at 8:00 a.m.

BEFORE: HONORABLE JILL CLIFTON
Administrative Law Judge

APPEARANCES:

On behalf of the U.S. Department of
Agriculture:

GARRETT B. STEVENS, ESQ.
Office of General Counsel
Marketing Division
U.S. Department of Agriculture
Washington, D.C. 20250

On behalf of the Proponents:

CHARLES M. ENGLISH, JR., ESQ.
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APPEARANCES: (Continued)

On behalf of the Proponents:

MARVIN BESHORE, ESQ.
Milspaw and Beshore Law Offices
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JOHN VETNE, ESQ.
15 Powow
Amesbury, Massachusetts

Also Present:

GINO TOSI, Marketing Specialist
U.S. Department of Agriculture
Washington, DC 20250

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Carl Conover	1191	1211 1225 1228 1229	1230 1238	1234 1234 1241	--
Daniel S. McBride	1255	1278 1303 1305	1309	--	--

E X H I B I T S

<u>EXHIBIT:</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
Exhibit Number 54	1189	1190
Exhibit Number 55	1189	1190
Exhibit Number 56	1247	1249
Exhibit Number 57	1247	1249
Exhibit Number 58	1247	1249
Exhibit Number 59	1247	1249
Exhibit Number 60	1247	1249
Exhibit Number 61	1248	1249
Exhibit Number 62	1248	1249
Exhibit Number 63	1248	1249
Exhibit Number		
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P R O C E E D I N G S

8:08 a.m.

1
2
3 JUDGE CLIFTON: We're on record on April
4 19th, 2002. This is Friday, the fourth day of this
5 rulemaking hearing, and we have two witnesses scheduled
6 for today, and of course, if any other witnesses want
7 to testify, I will hear their requests as well.

8 Yes, Mr. Marshall?

9 MR. MARSHALL: Good morning, Your Honor.

10 By agreement with Mr. English, I believe Mr.
11 Carl Conover will go next, but I wanted to alert all
12 parties and yourself to some thoughts that we have
13 about ways -- things that need to be considered yet
14 today, and first is that Mr. McBride has a substantial
15 amount of -- substantial number of pages of prepared
16 testimony, and I will be suggesting that that be read
17 into the record as if read rather than read out loud.
18 Whether that's done by exhibit or not is something we
19 can discuss.

20 Copies of his testimony are now available in
21 the back of the room, and I think that in the interests
22 of time, that would be the most efficient way of
23 dealing with that, although we'll be more than happy to
24 stop and read out loud any parts that pertain to issues
25 that people may have with his testimony or some of the

1 issues that he's raised, and of course, he would be
2 available for cross examination. I think that might be
3 the most expeditious way to deal with his testimony.

4 Second, to alert any interested parties, we
5 have some concerns about the -- some -- there's some
6 legal questions and some evidentiary problems
7 associated with the fact that DFA's proposal for an
8 assembly credit has turned out at this hearing to be
9 also a proposal for a balancing credit, which we would
10 -- we will be making a motion and people can be
11 thinking about this, that's outside the scope of the
12 Hearing Notice and will have to be discussing some ways
13 that we can remedy that, if a ruling is made that it is
14 within the scope of the Hearing Notice.

15 So, I just wanted to alert the parties that
16 those are the two concerns that we have, that we can
17 take up after Mr. Conover's testimony.

18 JUDGE CLIFTON: All right. Thank you, Mr.
19 Marshall.

20 Mr. English?

21 MR. ENGLISH: Yes, Your Honor. Before Mr.
22 Conover, and I don't know where Mr. Vetne is at the
23 moment, but he and I've had some discussions off the
24 record. So, this will not be a complete surprise to
25 him.

1 First, let me say that my objection and
2 exception from yesterday stand, but I think that how we
3 deal with that and Mr. Vetne and I will discuss that
4 later as to whether I choose to file something on brief
5 or other pleading or not, and if so, I'll certainly
6 alert him and then we can decide how to handle that.

7 But I do not want to belabor this record any
8 more with that particular issue, except to say that --
9 that I do think that the proper place for counsel in
10 argument is here at the lectern and that was my point
11 from yesterday, and Mr. Vetne and I have also discussed
12 off the record and apologized to each other, but to the
13 extent I offended anyone last evening with my temper, I
14 apologize.

15 Finally, --

16 JUDGE CLIFTON: Mr. English, --

17 MR. ENGLISH: Yes?

18 JUDGE CLIFTON: -- you offend no one. You
19 are extremely courteous. You're very knowledgeable.
20 You fight hard on behalf of your clients in every
21 proceeding, and I personally want to thank you and Mr.
22 Beshore and Mr. Marshall and Mr. Vetne for the pool of
23 expertise that contributes to the success of these
24 hearings. So, in my opinion, you said nothing
25 offensive, you did not display any temper, and

1 certainly apology is of record, but it was not needed.

2 MR. ENGLISH: Thank you, Your Honor.

3 And finally, last evening, I may have
4 suggested, I did suggest the possibility that there
5 would be additional attorneys on the stand. I for my
6 part continue to believe that it's error and will not
7 compound the error by participating in that. So, I
8 will not be doing that.

9 Thank you, Your Honor.

10 JUDGE CLIFTON: Thank you, Mr. English.

11 MR. ENGLISH: At this time, I would have Mr.
12 Conover come to the stand, and while he's getting up to
13 the stand, I would say that I've had the court reporter
14 mark and I've provided to Your Honor two documents
15 which were also distributed yesterday to the Government
16 and all participants.

17 JUDGE CLIFTON: Mr. Conover, if you'd be
18 seated, please?

19 MR. CONOVER: Yes, ma'am. Thank you.

20 MR. ENGLISH: Two documents I've had marked,
21 Your Honor, were Exhibit Number 54, curriculum vitae of
22 Carl Conover, a two-page document, which essentially
23 the identical text appeared in -- in prior hearings in
24 the Upper Midwest and Central Order, and it is merely a
25 statement of Mr. Conover's credentials rather than

1 having him go through them, especially because he has
2 been acknowledged as an expert in so many -- on so many
3 occasions, and I know that he always gets unhappy when
4 I do this, but I would note that today is Mark's 51
5 years, 11 months and 19 days in the dairy industry and
6 that is to say the regular dairy industry.

7 (Applause)

8 MR. ENGLISH: And Exhibit 55 is his
9 testimony. As I stated yesterday but I'm not sure
10 everybody was in the room at the time, while we would
11 want the entire testimony to go in as Exhibit 55, Pages
12 6, 7, 8 and 9 are testimony that is almost identical
13 with some modifications for this Order as the testimony
14 that went in in the Central Order. It's a little
15 different from the Upper Midwest, but it has to do with
16 the double-pooling issue, which turns out not to be in
17 dispute at this hearing, and to save time for the
18 parties, I would suggest that we dispense with his
19 reading Pages 6, 7, 8 and 9, but, of course, he's
20 subject to cross examination on those.

21 JUDGE CLIFTON: Good. I appreciate that.

22 MR. ENGLISH: So, with that being said and
23 obviously, you know, I don't want to waive the
24 opportunity to -- to Voir Dire the witness, but I would
25 ask that for obvious reasons and for the fact that

1 everyone in this room has either on their own behalf
2 used Mr. Conover as an expert, either when he was at
3 the government or when in private practice and/or has
4 conceded the fact in the past, that if there's no
5 objection, I would ask that he be accepted as an expert
6 with respect to the regulation of milk, the
7 implementation of -- of regulations, their formulation
8 and their enforcement for milk marketing regulation
9 purposes.

10 JUDGE CLIFTON: All right. Is there any
11 objection?

12 (No response)

13 JUDGE CLIFTON: There being none, Mr.
14 Conover, I accept you as an expert in the regulation of
15 milk.

16 Help me with this, Mr. English. The
17 regulation of milk, including the implementation of
18 regulations, the formulation of regulations and the
19 enforcement of those regulations.

20 MR. ENGLISH: And their impact, Your Honor.

21 JUDGE CLIFTON: And their impact. Thank you.

22 All right. Mr. Conover, please state your
23 full name.

24 MR. CONOVER: My name is Carl Conover.

25 JUDGE CLIFTON: And would you spell both

1 names?

2 MR. CONOVER: C-A-R-L C-O-N-O-V-E-R.

3 JUDGE CLIFTON: All right. Would you raise
4 your right hand, please?

5 Whereupon,

6 CARL CONOVER

7 having been first duly sworn, was called as a witness
8 herein and was examined and testified as follows:

9 JUDGE CLIFTON: Thank you.

10 Mr. English?

11 MR. ENGLISH: Your Honor, --

12 JUDGE CLIFTON: Let's see. Let's -- let's --
13 let's deal with the exhibits first.

14 MR. ENGLISH: Yes.

15 JUDGE CLIFTON: I've marked Mr. Conover's
16 curriculum vitae as Exhibit Number 54. I've marked his
17 testimony as Exhibit Number 55.

18 (The documents referred to
19 were marked for identification
20 as Exhibit Numbers 54 and 55.)

21 JUDGE CLIFTON: Is there any objection to the
22 admission into evidence or any request to Voir Dire the
23 witness with regard to Exhibit 54?

24 (No response)

25 JUDGE CLIFTON: There is none. Exhibit 54 is

1 hereby admitted into evidence.

2 (The document referred to,
3 having been previously marked
4 for identification as
5 Exhibit Number 54, was
6 received in evidence.)

7 JUDGE CLIFTON: Is there any request to Voir
8 Dire the witness or any objection to Exhibit 55?

9 (No response)

10 JUDGE CLIFTON: There is none. Exhibit 55 is
11 hereby admitted into evidence.

12 (The document referred to,
13 having been previously marked
14 for identification as
15 Exhibit Number 55, was
16 received in evidence.)

17 JUDGE CLIFTON: You may proceed, Mr. English.

18 DIRECT EXAMINATION

19 BY MR. ENGLISH:

20 Q Mr. Conover, before I do additional direct
21 examination, if you please, read the first five pages
22 of your statement.

23 A Yes. The proprietary bulk tank handler
24 problem. The reason Proposals 11, 13 and 12 are
25 needed.

1 My testimony is on behalf of Dean Foods
2 Company doing business as Meadow Gold Dairies. The
3 intent of Meadow Gold's Proposal 11 and 13 or 12 is to
4 ensure that all pool handlers regulated by Federal Milk
5 Order 135 pay at least the minimum class prices
6 prescribed by the Order for milk received at their
7 plant and disposed of as fluid milk or fluid milk
8 products.

9 Thank you, Garrett.

10 Uniformity among handlers is required by
11 Section 608(c)(5)(a) of the Agricultural Marketing
12 Agreement Act (the AMA Act), which requires that prices
13 established under a milk order must be uniform to all
14 handlers, except for specific and limited exceptions
15 that are not applicable here.

16 It has long been recognized by the Department
17 that uniformity is meaningful only if it applies to all
18 the milk received at the plant. As the 65-year history
19 of milk regulation in this country shows, if there is a
20 crack in the system and the economic incentive for it
21 to do so, milk will soon find its way through that
22 crack. This proposal is aimed at repairing one such
23 crack.

24 A regulated handler operating a pool plant in
25 this market may receive milk from a proprietary bulk

1 tank handler and not be required to pay the minimum
2 Order prices for such milk. This creates an untenable
3 situation among competing handlers.

4 Certainly a major cornerstone of the Milk
5 Order Program, one that has allowed it to withstand
6 attacks from many quarters is a principle that the
7 minimum prices are uniform to all parties. Without
8 that requirement, the program would not have endured.

9 The provisions of Order 135 allow a person
10 who operates a plant that produces milk products, Class
11 2, 3 and 4, and operates a truck that picks up the milk
12 of producers to be a regulated handler and to
13 participate in the pool under certain circumstances,
14 such a person is a proprietary bulk tank handler and as
15 such is accountable to the pool for producer milk
16 delivered in his truck to a pool plant or to a non-pool
17 plant, including his own.

18 In order to qualify the milk going to the
19 non-pool plant for pool participation, a small portion
20 of the milk must be delivered to a pool distributing
21 plant. On this Order, the PBT handlers are Class 3
22 plants.

23 When Class 3 is eligible for a pool draw, it
24 is equivalent to the producer price differential.
25 Thus, on the milk delivered to the non-pool plant and

1 processed into milk products, the PBT handler will
2 generally receive a pool draw equal to the PBD. For
3 2000 and 2001, that value averaged a \$1.45 and 90 cents
4 per hundredweight, respectively. Exhibit -- I don't
5 have that number on mine.

6 Q Exhibit 6.

7 A Exhibit 6, Table 5, of the Market
8 Administrator's compilation of statistical material,
9 Federal Milk Marketing Order Number 135, Western
10 Marketing Area, April 2002.

11 This pool draw is the PBT handler's incentive
12 to ship to a pool distributing plant to qualify milk
13 for pooling. The pool draw is money available to the
14 PBT handler to procure a supply of milk in competition
15 with other handlers that must pay at least the blend
16 price.

17 In order to obtain this benefit, the PBT
18 handler needs a pool distributing plant to serve as an
19 outlet for a small portion of its milk. Since the pool
20 plant is providing a service of sorts to the PBT
21 handler by electing to take that milk, the pool
22 distributing plant has bargaining power in the
23 determination of the price. It is not uncommon for
24 pool distributing plants to charge for this service.
25 Indeed, this happens in other markets and even in

1 transactions involving cooperatives on this Order.

2 However, in other markets or transactions
3 involving cooperatives on this Order, there are
4 regulatory and economic -- or economic constraints on
5 the ability of the pool distributing plant to negotiate
6 a price that is lower than the classified price. For
7 example, when cooperatives sell raw milk to a handler
8 for their account, that milk is treated as producer
9 milk received at the plant and must be accounted for by
10 the plant as such.

11 Also, when a supply plant sells raw milk,
12 whether by diversion or transfer, even though the
13 supply plant is the receiving handler, the higher
14 shipping percentages associated with the supply plants
15 make it uneconomical for supply plants to agree to
16 lower their class prices.

17 Q Stop for a second, Mr. Conover.

18 A Yes.

19 MR. ENGLISH: Your Honor, it occurs to me
20 that because he didn't have the Exhibit 6 number
21 earlier, that he has a slightly earlier draft and a
22 couple modest changes are going to follow. So, if I
23 might approach the witness and give him my copy of the
24 Exhibit 55, so that we won't have the situation where
25 he will be having numbers missing and -- and one number

1 changed as a result of some testimony in the hearing.

2 So, if I could stop there and hand -- he does
3 not have what is in essence Exhibit 55.

4 JUDGE CLIFTON: All right. Yes, you may
5 approach the witness, and while we're stopped, I want
6 to ask you a question.

7 With regard to the paragraphs in the middle
8 of Page 2, Mr. Conover's reading of the paragraph was
9 slightly different from what is written, and I don't
10 know whether that's just because the wording was
11 changed in the exhibit you have or whether -- and the
12 -- and the question is whether -- no. I'm sorry. It
13 -- it's the -- it's the paragraph that begins with
14 "Indeed, this happens in other markets". I'm reading
15 from the exhibit, "and could even happen in other
16 transactions involving cooperatives on this Order.

17 That's what I have. Now, what Mr. Conover
18 testified is that it -- that it does happen and could
19 happen.

20 MR. ENGLISH: Why don't we start with the
21 paragraph -- again, Your Honor, --

22 JUDGE CLIFTON: All right.

23 MR. ENGLISH: -- the correct version.

24 MR. CONOVER: Starting with the paragraph,
25 "Indeed,"?

1 JUDGE CLIFTON: Yes, please.

2 MR. HOLLON: And I'm sorry for this, Your
3 Honor.

4 JUDGE CLIFTON: No, no problem at all.

5 MR. WILLIAMS: Indeed, this happens in other
6 markets and could even happen in other transactions
7 involving cooperatives on this Order. However, in
8 other markets or transactions involving cooperatives on
9 this Order, there are regulatory and/or economic
10 constraints on the ability of the pool distributing
11 plants to negotiate a price that is lower than the
12 classified price.

13 For example, when cooperatives sell raw milk
14 to the handler for their account, that milk is treated
15 as producer milk at the receiving plant and must be
16 accounted for by the plant as such. Also, when a
17 supply plant sells raw milk, whether by diversion or
18 transfer, even though the supply plant is the receiving
19 handler, the higher shipping percentages associated
20 with supply plants make it uneconomical for the supply
21 plant to agree to lower the class prices.

22 In this market, however, --

23 JUDGE CLIFTON: Let me make sure I have what
24 you just said on that last phrase. Would you read that
25 last line?

1 MR. CONOVER: Uneconomical for the supply
2 plant to agree to lower than class prices.

3 JUDGE CLIFTON: Thank you.

4 MR. ENGLISH: Thank you, Your Honor.

5 MR. CONOVER: That was my ineptitude in
6 reading. Nothing else.

7 In this market, however, where the truck
8 operator is defined as a handler and the shipping
9 percentage is very low, the situation is different.
10 Here is an illustrative sample -- example of the
11 economic incentive that entices PBT handlers to accept
12 milk -- to accept less than the class price on sales to
13 pool distributing plants.

14 BY MR. ENGLISH:

15 Q Do you mean the Class 1 price?

16 A To accept less than the Class 1 price on
17 sales to pool distributing plants.

18 If the pool draw is, say, \$1, PBT handlers
19 have a rational economic incentive to share up to 99
20 cents and to get the benefit of one cent because they
21 end up with one cent more per hundredweight than they
22 would have without the cooperation of the pool
23 distributing plant.

24 Thus, without the requirement of minimum
25 prices and agreement to share in the benefits of the

1 pool draw can result in prices that will be less than
2 Order minimums. Such transactions provide pool
3 distributing plants involved in such transactions with
4 a significant competitive advantage over other pool
5 distributing plants.

6 The benefit to the pool distributing plant
7 could be quite large. In fact, pool plants would have
8 the incentive to share in the benefits of the pool
9 draw. As discussed above, the average Order 135 pool
10 draw for cheese plants was a \$1.45 and 90 cents during
11 2000 and 2001, respectively.

12 Using the data for April 2001, from Exhibit
13 10, Table 1, of statistical material prepared at the
14 request of Charles M. English, Jr., April 2002, as an
15 example, and assuming hypothetically that the three PBT
16 handlers for that month each represented one-third of
17 the volume pool and that each shipped an equal volume
18 to Class 1 distributing plants, then each PBT pooled
19 28,000 -- 28,841,576 pounds and each Class 1
20 distributing plant received 1,523,200 pounds.

21 We conclude that only a minimum amount of
22 Class 1 milk is processed at the Class 1 distributing
23 plants that are known as juggers. The PPD for April
24 2001 was a \$1.35 on the non-Class 1 volume -- Class 3.
25 So that, the pool draw for each PBT in this

1 hypothetical would be \$368,798. That is, a \$1.35 times
2 273,318 hundredweight.

3 If the PBT handlers shared only 24,371 or 6.6
4 percent of the draw, of this PPT with the Class 1
5 distributing plant, the benefit to the Class 1
6 distributing plant would be equal to the \$1.60 Class 1
7 differential on this milk.

8 Q Stop for a second, Mr. Conover.

9 A Yes.

10 Q A little earlier in that paragraph, in the
11 parenthetical, I may have misheard, but did you mean to
12 say, we conclude that only a minimum amount of non-
13 Class 1 milk is processed at Class 1 distributing
14 plants?

15 A I surely meant that.

16 Q Thank you.

17 JUDGE CLIFTON: Let me also just clarify one
18 other point while we're stopped. All right. I think -
19 - I think it's clear right in the paragraph. I just
20 wanted to be sure I knew which statistical material you
21 were referring to, but that is what Mr. English asked
22 the Market Administrator to --

23 MR. ENGLISH: That was Exhibit 10. Yes, Your
24 Honor.

25 JUDGE CLIFTON: Okay. Very good. All right.

1 Thank you, Mr. Conover.

2 MR. CONOVER: Thank you.

3 Specific proposals to address the PBT handler
4 problem. Without specific language in the Order to
5 require minimum Order payments by specific handlers
6 receiving or handling producer milk from PBT handlers,
7 the Administrator has taken the position that it will
8 not enforce Order prices.

9 The purpose of Proposals Number 11 and 13 or
10 12 is to provide the Market Administrator with language
11 that will make clear his obligation to ensure that
12 minimum prices are being paid by pool distributing
13 plants participating in these transactions.

14 The language set forth in Proposal Number 11
15 provides that the milk delivered by a PBT handler to a
16 pool plant will be producer milk at the pool plant. As
17 such, the pool plant operator will be fully accountable
18 to the pool for the value of the milk and for paying
19 the producers whose milk was delivered to the pool
20 plant.

21 The pool plant operator would be responsible
22 for paying the producers the Order price but could for
23 the convenience of a single payment to each producer
24 hand the value over to the PBT handler for distribution
25 to the producers.

1 The order of the proposals in the Notice
2 needs explanation. Proposals 11 and 13 should be
3 viewed together. Together, they make clear that the
4 pool distributing plant operator is responsible for
5 paying the producers and accounting to the pool for the
6 minimum prices.

7 Under this language, the Market Administrator
8 has authority to verify the payments to the producer
9 settlement fund and to producers as he has on all other
10 transactions between handlers and producers.

11 Proposal 12 is offered as an alternative and
12 would not change the current flow of funds but would
13 specify that the pool plant is obligated to pay the PBT
14 handler at least the Order prices. Statutory authority
15 for such a provision in the Order to enforce minimum
16 prices for raw milk can be found in Section
17 608(c)(5)(c) and 608(c)(7)(d) of the Agricultural
18 Marketing Agreement Act.

19 Indeed, Section 608(c)(7)(d) permits the
20 Secretary to add terms in marketing orders that are
21 incidental to and not inconsistent with the terms and
22 conditions specified in Subsection 527 of this section.

23 JUDGE CLIFTON: Excuse me. Is that 5 to 7?

24 MR. CONOVER: 527 of this section and
25 necessary to effectuate the other provisions of such

1 Order.

2 With a gap in the uniform application of the
3 Order prices, as I have suggested, such a provision is
4 "necessary to effectuate the other terms of the Order,
5 incidental to" and certainly "not inconsistent with"
6 existing Order provisions or the intent of the
7 Agricultural Marketing Agreement Act.

8 Moreover, the AMA Act expressly authorizes
9 the Secretary to provide a method for making
10 adjustments in payments among handlers to ensure that
11 handlers are paying the full minimum price for their
12 milk purchases.

13 Section 608(c)(5) authorizes the Secretary to
14 provide a method for making adjustments in payments as
15 among handlers, including producers who are also
16 handlers, to the end that the total sums paid by each
17 handler shall equal the value of milk purchased by him
18 at the prices fixed in accordance with Paragraph A of
19 this subsection.

20 I think some comment on Proposal 5 would be
21 appropriate since adoption of it would eliminate any
22 purpose for our Proposals 11, 12 and 13. The provision
23 for a PBT handler was introduced into the predecessor
24 Southwestern Idaho/Eastern Oregon Order at its
25 inception over 20 years ago. The justification given

1 in the decision was the absence of traditional supply
2 plants in the marketing area and the desire to avoid
3 imposing the cost of upgrading to Grade A facilities on
4 existing manufacturing plants.

5 The rulemaking decision implementing the
6 provisions suggested that the PBT handler concept was
7 expected to facilitate the pooling of necessary market
8 reserves in the absence of supply plants. Since the
9 current Order has manufacturing plants that are now
10 capable of serving as supply plants, and since USDA has
11 implemented diversion provisions to accommodate the
12 handling of market reserves from supply plants, it is
13 not a big step to conclude that the PBT handler
14 provision is no longer necessary.

15 As a result of the 1981 decision, the
16 Department has effectively granted manufacturing plants
17 in the Western Order privileges and benefits similar to
18 and with respect to shipping percentages better than
19 that of a 9(c) handler without the corresponding
20 obligation to collect the minimum classified price.

21 It is not surprising, therefore, that
22 notwithstanding the existence now of a supply plant
23 provision that permits diversion as qualifying
24 shipments, that no manufacturing plant has chosen to
25 use that option.

1 Therefore, while we have advocated the remedy
2 proposed in Proposals 11 and 13 or 12, Meadow Gold
3 would not object to Proposal 5 if the Department in its
4 wisdom determines that the problem with Meadow Gold is
5 -- with which Meadow Gold is concerned can best be
6 remedied by removing the outdated and unnecessary PBT
7 handler provision all together.

8 BY MR. ENGLISH:

9 Q That would be where we stop, right?

10 A Yes.

11 MR. ENGLISH: And the rest of the testimony
12 will -- will come in as part of your exhibit, and again
13 we're just not trying to belabor the record on that
14 issue, especially since it appears that no one is
15 really contesting that issue.

16 On the other hand, that's -- this is the
17 position of Dean Foods Company.

18 JUDGE CLIFTON: Thank you, Mr. English.

19 BY MR. ENGLISH:

20 Q Mr. Conover, let me talk to that last point
21 for a moment with regard to Proposal Number 5.

22 It is not the intent of Meadow Gold to impact
23 the ability of Glanbia and Jerome to pool on this
24 market, is that correct?

25 A I think the intent of Meadow Gold is

1 expressed in our Proposal 11 and 13 and that doesn't
2 impinge in any way on the amount of milk they pool. It
3 only requires the payment of the minimum prices on that
4 -- that it received at the pool distributing plant.

5 Q And if the Secretary in her wisdom were to
6 adopt Proposals 11 and 13 with respect to treating the
7 milk as producer milk at the pool distributing plant,
8 if the Secretary needs some technical changes in order
9 to ensure that for responsible handler purposes for
10 pooling, it nonetheless is pooled for Jerome and
11 Glanbia, you would have no objections to those kinds of
12 technical changes?

13 A No, I would not.

14 Q In your testimony, you noted that without the
15 requirement of minimum prices, an agreement share of
16 the benefits of the pool draw can result in prices that
17 will be less than Order minimums and then you discussed
18 how that happens.

19 When you came to this hearing, other than
20 what your -- your client Meadow Gold had told you, this
21 was largely theoretical and hypothetical, correct?

22 A Yes, it was.

23 Q You've sat through this hearing?

24 A I have.

25 Q Have you now concluded that it's -- that --

1 that the testimony you've given and -- and this
2 hypothetical theoretical agreement is something more
3 than hypothetical and theoretical?

4 A Well, the testimony that I heard confirms
5 what I -- I thought was the case before I came here.

6 Q And that is to say?

7 A That's to say that those distributing --
8 distributing plants receiving milk from the PBT
9 handlers are not paying the minimum class prices.

10 Q If Proposals 11 and 13 or 12 are adopted,
11 what is your view as to the remedy that the Market
12 Administrator and/or the Secretary would have if in the
13 future the Market Administrator determined that
14 nonetheless a pool distributing plant purchasing from a
15 proprietary bulk tank handler receiving milk and
16 responsible for the payment to the producers was not
17 making minimum payments?

18 A Well, the remedy would be exactly the same as
19 it is to the Department or the Market Administrator on
20 all of the cases where handlers do not comply with the
21 Order, by failing to pay the -- the producer settlement
22 fund or pay -- failure to pay the producers the minimum
23 prices.

24 The Act sets forth the authority for the
25 Department to bring enforcement actions in the courts,

1 and they -- they have been down that road, as I have
2 personally, many times. So, there's plenty authority
3 to enforce payment of the minimum prices.

4 Q And if applicable charges for effectively
5 interest in the form of an underpayment charge?

6 A That also is applicable. If they fail to pay
7 it on time, there are additional charges imposed on the
8 amounts due.

9 Q And you are not suggesting in any way that
10 the Market Administrator should, if such discover that
11 there are minimum payments not being made by pool
12 distributing plants receiving milk from proprietary
13 bulk tank handlers, that the pool status of proprietary
14 bulk tank handlers would be adversely affected in any
15 way?

16 A I'm not suggesting that, and I think -- I
17 don't think ever in my experience that's ever happen
18 where they said you're no longer a pool plant because
19 you didn't meet the minimum payment requirements.

20 Q With respect to injury in the marketplace
21 presently, is the injury to Class 1 handlers like
22 Meadow Gold the loss of business or the requirement of
23 meeting prices or both?

24 A It's both. There's no question about that.

25 Q Are proprietary bulk tank handlers similar to

1 supply plants in Order 30 as was testified to two days
2 ago?

3 A Well, they serve a different function in
4 Order 30 than the plants out here, and as I heard late
5 last night in proposed testimony, I agreed with the
6 testimony, that the reason for the supply plants in the
7 Chicago area was and probably still is that they're
8 moving milk 200 miles rather than the 30 or 40 from the
9 production area to the plants, rather than the 30 to 40
10 that it's moved in the Idaho area.

11 In addition to that, the farmers in Wisconsin
12 are much smaller operations, and they use smaller
13 trucks to pick up the milk at the farm. Those trucks
14 are not efficient to make the long haul into Chicago.
15 So, they have to assemble it so it can be put into
16 larger trucks for that haul and that, as I understood
17 it -- understand the situation in Southern Idaho and
18 the testimony I heard here, the farmers are quite large
19 and they do use the trucks quite capable of picking up
20 the milk at the farm and moving it to the plants.

21 Q In your testimony, you referenced in the
22 hypothetical the idea that a distributing plant would
23 receive 1,523,200 pounds. When that term's -- when you
24 say receive, do you mean received and processed in
25 Class 1 pounds, correct?

1 A Yes.

2 Q Okay. Would Proposals 11 and 13 regulate
3 payments between handlers?

4 A They will not. There will be no payment
5 between handlers, the same as between the plant that
6 gets the milk directly from the farm and the producers.

7 Q Now, your testimony, though, you said as a
8 matter of convenience for single payment, it could be
9 set up that the pool distributing plant hands the money
10 over to the pool -- the proprietary bulk tank handler
11 and the proprietary bulk tank handler makes the payment
12 to the producer, correct?

13 A Correct. As far as I know, the Department
14 has never said to a handler you can't have an agent
15 distribute the money to producers. That doesn't
16 relieve the handler of any responsibility. If the
17 money doesn't get to the producers, I'm sure the
18 Department would be moving against the receiving
19 handler and not the PBT.

20 Q And that would be your intent?

21 A That's my intent.

22 Q And -- and you're saying therefore that the
23 proprietary bulk tank handler would no longer be
24 responsible for the payment on that volume of milk
25 received at the pool distributing plant, correct?

1 A That is right.

2 Q So, you're not speaking of a double
3 obligation?

4 A There's no -- no.

5 Q Okay.

6 A On the portion that's diverted to the non-
7 pool plant, the PBT would be responsible on paying that
8 -- paying for that.

9 Q You heard the dairy farmer witness -- I'm
10 trying to think now what day it was -- earlier in the
11 hearing testify that he benefitted with respect to the
12 pool from additional Falconhurst route disposition?

13 A Yes, I heard that.

14 Q Would that be because the more route
15 disposition Falconhurst has, the more the producer's
16 milk can then be pooled under the Order?

17 A Yes, that's what I took it to mean.

18 Q Does an increase in Falconhurst sales also
19 benefit the proprietary bulk tank handler in attracting
20 milk?

21 A Well, I think my testimony goes to that, that
22 the pool draw is -- is -- is the incentive and more
23 milk that the Falconhurst could distribute, then the
24 more milk he could qualify.

25 Q So, does it follow then that the --

1 A Before going to the non-pool plant.

2 Q I'm sorry. Does it follow then that the
3 proprietary bulk tank handler has an even greater
4 incentive to share more of the pool draw or the
5 economic benefit from the pool draw with Falconhurst?

6 A That's certainly possible.

7 Q On a slightly different issue, not addressed
8 by your testimony, would it be fair to say that Meadow
9 Gold Dairies supports the concept of transportation and
10 assembly credits but is not prepared to take a position
11 at this time on these particular proposals until we've
12 had an opportunity to -- to review them further?

13 A That's my understanding.

14 MR. ENGLISH: Thank you, Mr. Conover. I am -
15 - that concludes my direct examination. Obviously I
16 reserve redirect, but the witness is now available for
17 cross examination.

18 Thank you very much, Your Honor.

19 JUDGE CLIFTON: Thank you, Mr. English.

20 MR. ENGLISH: Thank you, Mr. Conover.

21 JUDGE CLIFTON: Who would like to begin cross
22 examination of Mr. Conover? Mr. Vetne?

23 CROSS EXAMINATION

24 BY MR. VETNE:

25 Q Mr. Conover, the policy issue concerning

1 which you expressed concern is that some handlers that
2 bottle Class 1 milk are able to have a raw milk price
3 that is different from other handlers that bottle Class
4 1 milk. Am I right?

5 A Raw milk price on producer milk that is
6 pooled under the Order, yes.

7 Q And that is because in the street, somebody
8 with a lower raw milk price can upset competitive
9 equity intended by uniform Class 1 price, is that
10 correct?

11 A I think so, yes.

12 Q And to that extent, it's no different from,
13 other than perhaps by degree, from producer handlers or
14 exempt plants not having to account for the Class 1
15 price, correct?

16 A I want to elaborate a little bit on that
17 other answer. Competitive equity meant by the uniform
18 price doesn't deal with the price on the street. It
19 deals with the price that the handler receiving the
20 milk must pay.

21 Q I understand. Your testimony was that the
22 price the handler must pay is translated on the street
23 in terms of loss of business and having to lower prices
24 for which bottled milk is offered. That -- that was
25 your testimony?

1 A Yes, if the handler has a lower product -- is
2 able to buy less than minimum price and that is
3 translated into the street price.

4 Q And -- and that's --

5 A The testimony I heard here indicates that is
6 happening.

7 Q Okay. And -- and that's what I was
8 addressing. For purposes of that impact, it's no --
9 it's no different whether the milk comes from a
10 producer handler, an exempt plant or somebody that buys
11 from another handler and gives a discount?

12 A There is a possibility that milk from those
13 exempt plants would be out there on the street in
14 competition, yes.

15 Q Having the same impact?

16 A I'm sorry. I didn't hear that.

17 Q And having the same impact that you've
18 described?

19 A If it were priced at lower prices, which I
20 heard no testimony in this hearing that that was
21 happening, --

22 Q Right.

23 A -- then it could have the same impact. But
24 there are constraints there. There are three or four
25 different kinds of exempt plants. There's a plant

1 operated by a college, and I doubt if they'd be out
2 there on the street selling at less than class prices.
3 There's plants operated for charitable institutions,
4 and I would say the same thing about those.

5 I believe the prisons are exempt, and I don't
6 think they're selling milk out on the streets --

7 Q Okay.

8 A -- at lower prices. There are the 150,000-
9 pound limits in this market. You're exempt if you're
10 below that and that plant could, if they weren't very
11 smart, be out there on the street under selling, but
12 there is a cap on that because the minute they break --
13 go over the 150, they've lost their exemption on
14 everything. So, that's the other kind and then
15 producer distributors and producer distributors have
16 been a problem, and I've testified many times in
17 hearings about producer distributors doing just what
18 you're talking about.

19 I didn't hear that mentioned here in this
20 market. I didn't hear anybody complaining that it was
21 happening. In looking at the -- the exhibits, I don't
22 -- I didn't see any listed -- producer handlers listed
23 for the Idaho area. Now, I did hear there was one up
24 there in certain periods, but that has not been a
25 problem, at least Meadow Gold has not indicated to me

1 that there was a problem in competing with producer
2 distributors.

3 Q Okay. Are you aware that there are some
4 large producer distributors in markets to the immediate
5 west and immediate south of the Western Order?

6 A Yes, I am.

7 Q Are you aware that there's a producer
8 distributor in the Arizona/Las Vegas Market that
9 markets in excess of 12 million pounds per month?

10 A I have no idea the volume. I know there's a
11 large producer distributor down there.

12 Q Okay. Are you aware that there's a large
13 distributor in the market to the immediate south of the
14 Arizona/Las Vegas Market, producer handler, -- producer
15 handler, producer distributor. Is that synonymous in
16 your head?

17 A Yes.

18 Q Okay. Are you aware that there's a producer
19 handler in the Arizona/Las Vegas Market, whatever its
20 size, that has caused considerable problem in the
21 street of the same kind that you've described?

22 A John, I -- I'm not surprised to hear that,
23 and I just haven't been involved in that market in the
24 last year or so to know that it's happened.

25 Q Okay.

1 A But that wouldn't surprise me. But it's not
2 happening, at least I haven't heard of it being a
3 problem in the Idaho area.

4 Q Would it be correct to say that distributing
5 plants by virtue of their ability to allow milk to
6 associate with the market have substantial negotiating
7 power when it comes to its suppliers?

8 A I think that was the indication in my
9 testimony. If they're providing a service to someone,
10 I'll put service in quotation marks, by pooling that
11 milk, then that gives them some negotiating power, I
12 think.

13 Q Correct. And you did refer to that as not
14 uncommon for pool distributing plants to charge for
15 that service?

16 A It happens in -- in other markets, I know.

17 Q It happens very frequently in the Order 30
18 area, doesn't it?

19 A I heard testimony at the hearing up there
20 that it was happening.

21 Q Okay. And are you aware that Dean Foods does
22 that fairly commonly in that market?

23 A I am not aware of that.

24 Q Okay.

25 A I don't deny it, I just am not aware of it.

1 Q Okay. The calculation that you've given us
2 on Page 3 near the bottom of the page, \$24,000, --

3 A Yes.

4 Q -- represents a little under a dime per
5 hundredweight. How -- how is that different than the
6 dime per hundredweight that the Valley Milk Producers
7 pay for the privilege of pooling that was described?
8 You heard that testimony --

9 A Yes.

10 Q -- by Rod Carlson, and the Valley Milk
11 Producers accepted a dime or less than what they would
12 otherwise get for the privilege of having the milk
13 pooled.

14 How conceptually is what you've described
15 here different from the dime that Valley Milk Producers
16 pays?

17 A Who are they paying the dime to?

18 Q They're paying the dime to the people that
19 pool their milk.

20 A Is that a cooperative?

21 Q And in that case, it's DFA, yes.

22 A If that cooperative is selling milk at less
23 than the Order prices, then there are sanctions
24 imposable at least under the Act.

25 Q Okay.

1 A If that 10 cents brings the sale price of
2 milk they sell below the class prices, then the remedy
3 is there.

4 Q You mean that because DFA as a cooperative is
5 treated as a single large producer when it delivers its
6 milk or any milk it handles to -- to Meadow Gold,
7 Meadow Gold at least has to pay DFA the Class 1 price?

8 A The minimum prices, yes.

9 Q Okay. So, it doesn't matter what happens
10 after that?

11 A That's a -- it's not a statutory mandate, but
12 there are sanctions imposed if they fail to meet that.

13 Q Okay. And your objective here in effect is
14 to treat it both -- the producer milk supply, the bulk
15 tank handler, in much the same way as a 9(c)
16 cooperative milk supply delivered to a distributing
17 plant, correct?

18 A That's what our proposal does, yes.

19 Q To treat that whole supply as a producer when
20 it hits the distributing plant?

21 A The supply that goes to the distributing
22 plant, yes.

23 Q Okay. But unlike the 9(c) handler that
24 accommodates such a supply, do you see any way in which
25 the producers delivering to -- to that plant might

1 agree to compensate anybody for the privilege of being
2 pooled in the same way that the River Valley Producers
3 compensate somebody for the privilege of being pooled?

4 A Are you asking me to come up with a way that
5 you could get around the Order? Is that what you're
6 saying?

7 Q No. I'm asking you if there is a way in
8 which the producers that are pooled through Glanbia or
9 Davisco or Falconhurst, if there is a way under the
10 system, and you're the expert, that those producers are
11 permitted to pay someone for the privilege of being
12 pooled in the same way that River Valley pays someone
13 for the privilege of being pooled?

14 A If -- if it resulted in payments by the pool
15 distributing plant at less than the Order minimums, I
16 think there'd be a remedy.

17 Q Okay. But the remedy is that enforcement
18 action would be taken so that it couldn't be done?

19 A I would think so.

20 Q Okay. So, River Valley or DFA after delivery
21 can reblend to individual farmers in effect to
22 compensate for the service but a bulk tank handler --
23 handler's producer supply, that milk cannot be
24 reblended in the same way?

25 A There's a distinction, and there are

1 privileges offered to cooperatives under the statute,
2 yes.

3 Q Okay. You've referred to in the middle of
4 Page 3 to \$1.45 and a \$1.90 as the --

5 A No, I don't think a \$1.90.

6 Q Pardon?

7 A Did I say a \$1.90?

8 Q No. A \$1.45 and -- and 90 cents.

9 A Okay.

10 Q As the pool draw for cheese plants. In fact,
11 the \$1.45 and the 90 cents is the producer price
12 differential that all producers get, subject to --

13 A Yes.

14 Q -- location adjustment?

15 A Yes.

16 Q It is not necessarily the draw because the
17 draw depends on your Class 1, Class 2, Class 3 and
18 Class 4 utilization, correct?

19 A Approximated. It isn't exactly.

20 Q It's a different -- the PPD is a different
21 animal than the draw, correct?

22 A The dollar amounts are very close.

23 Q They're close because of arithmetic --

24 A Yeah.

25 Q -- and utilization of the plants, but it's

1 not the same thing?

2 A I can see a slight difference.

3 Q And that's because any Class 1, the draw is
4 less?

5 A No, no, no. The draw is on. The net draw
6 might be because you pay in on a Class 1.

7 Q The handler's milk supply, the draw on the
8 milk supply is less than the PPD?

9 A But on the milk going to the non-pool plant,
10 it's all draw, I believe.

11 Q Okay. If you isolate that portion --

12 A Yeah. That's what I was directing my
13 testimony to.

14 Q You used the term "juggers". Isn't that a
15 term that's also used sometimes to refer to producer
16 handlers?

17 A In some markets, yes.

18 Q You're referring to juggers as a very small -
19 -

20 A I adopted that term from the Meadow Gold
21 testimony yesterday really.

22 Q Yesterday, Meadow Gold, I think, referred to
23 jobbers.

24 JUDGE CLIFTON: And also juggers, Mr. Vetne,
25 when he was talking about the plastic gallon milk being

1 sold largely in convenience stores.

2 MR. VETNE: Okay.

3 JUDGE CLIFTON: He talked about the people
4 who provide that jug as juggers.

5 MR. VETNE: All right.

6 BY MR. VETNE:

7 Q So, your -- you're using it only in that
8 sense, somebody that sells milk only in jugs?

9 A Yes.

10 Q Okay. You indicate that you don't intend to
11 impact the ability to pool. Under the current bulk
12 tank unit provision, a bulk tank handler may pool a
13 milk supply that is less than its entire milk supply,
14 correct?

15 A Yes.

16 Q Okay. And under the supply plant
17 alternatives, a supply plant must qualify on the basis
18 of all receipts, not just a designated unit of
19 producers?

20 A Yes.

21 Q Can you envision that there would be
22 difficulty pooling an entire milk supply to a company
23 like Davisco or Glanbia, based on the testimony you
24 heard yesterday that there just isn't pooling capacity
25 for their entire milk supply?

1 A If you used your entire non-pool plant --

2 Q Yes.

3 A -- as the supply plant, you would have that
4 limitation.

5 Q They couldn't qualify on the basis of their
6 existing market for Class 1 milk, correct?

7 A I'm not sure I heard that.

8 Q The question is, they could not qualify their
9 entire milk supply on the basis of their existing
10 market for Class 1 milk if all -- if all receipts at
11 those manufacturing plants --

12 A I believe that to be the case. I -- I -- I
13 don't know exactly how large their operation is there
14 but that, I believe, would be the case.

15 Q Okay. And finally, with respect to your
16 analogies to the -- the Order 30 area and the assembly
17 function of supply plants, you said farms there are
18 smaller and sometimes milk is assembled, that's
19 something that's happening less now than it did 10
20 years ago and less 10 years ago than it did 30 years
21 ago, correct?

22 A I think that supply plants in many markets
23 are dinosaurs.

24 Q Well, is -- is it not the case that even in
25 Order 30, most milk moves the same way as it does for

1 bulk tank handlers in this market that the pooling
2 handler moves it directly from the farm to the
3 distributing plants?

4 A There's a shift in that direction. Yes, it's
5 happening.

6 Q And in fact, it's the far, far majority of
7 the milk in Order 30 that moves that way?

8 A Yes.

9 MR. VETNE: Okay. That's all I have. Thank
10 you.

11 JUDGE CLIFTON: Thank you, Mr. Vetne.
12 Yes? Mr. Marshall?

13 MR. MARSHALL: Your Honor, to -- in order to
14 facilitate the hearing, I would simply ask that I be
15 allowed to call Mr. Conover back to the stand, if I
16 find out when we're off line that he can be helpful.

17 MR. STEVENS: Don't you want to take a chance
18 now?

19 MR. MARSHALL: I'll be glad to. I'd be glad
20 to. I'd be glad to.

21 MR. STEVENS: Just kidding.

22 JUDGE CLIFTON: So, you don't want to cross
23 examine him, you want to --

24 MR. MARSHALL: I may -- I may wish to do so.

25 JUDGE CLIFTON: Oh, but --

1 MR. MARSHALL: I was thinking we could
2 expedite the hearing if I could talk to him during a
3 break, and I'm mindful of the fact that Mr. McBride has
4 a substantial amount of testimony and that many people
5 would like to leave here this afternoon.

6 JUDGE CLIFTON: All right.

7 MR. BESHORE: I agree.

8 JUDGE CLIFTON: Everybody says that's fine.
9 Okay.

10 MR. MARSHALL: Thank you.

11 JUDGE CLIFTON: You're welcome.

12 Further cross examination? Mr. Beshore?

13 MR. BESHORE: Yes. Thank you.

14 CROSS EXAMINATION

15 BY MR. BESHORE:

16 Q I have just one question, Carl. Is there
17 anything in the Agricultural Marketing Agreement Act
18 which requires the Secretary in milk -- in promulgating
19 milk marketing orders to devise them in a way which
20 will accommodate and pool all Grade A milk produced
21 anywhere?

22 MR. VETNE: Your Honor, I object for two
23 reasons. One, it calls for a legal conclusion, and I
24 guess I shouldn't make that objection, but I do. But
25 secondly, -- but secondly, it goes well beyond -- well

1 beyond the scope of the direct testimony of this
2 witness and in fact seeks to adopt this witness for a
3 purpose -- for the purpose of being a witness on
4 proposals that this witness has not addressed and on
5 proposals which have, I think, closed. So, that's --

6 JUDGE CLIFTON: Nothing got closed here.

7 MR. VETNE: Okay. For -- on a subject -- on
8 a subject that was addressed at length, and I see that
9 the -- the -- there's about 80 percent of the people
10 that were here addressing those subjects have left.
11 So, that's -- that's my objection. It's -- it --

12 JUDGE CLIFTON: Thank you. Objection noted
13 and overruled.

14 Mr. Conover, do you remember the question?

15 MR. CONOVER: I believe so.

16 JUDGE CLIFTON: All right. You may answer.

17 MR. CONOVER: There's nothing in the Act --
18 no. Ask me the question again. I want -- I want to be
19 sure.

20 MR. BESHORE: Okay.

21 BY MR. BESHORE:

22 Q Is there anything drawing from your knowledge
23 and experience of more than a half century in Federal
24 Milk Marketing Order regulations, is there anything
25 that requires the Secretary to devise/promulgate orders

1 in a manner to necessarily accommodate all the Grade A
2 milk in the pool that anyone would want to pool
3 anywhere?

4 A There certainly is nothing in the statute
5 that requires that, and as Orders have evolved over the
6 65 years, an entirely different approach has been
7 followed. Now, there are -- the California system
8 requires that any milk pooled -- received at a plant in
9 California is pooled and the AMA Act doesn't even
10 authorize that as far as I know.

11 Q Okay. California system is a different
12 system.

13 A Different system --

14 Q If you're in the state --

15 A -- in that respect, yes.

16 Q In that respect. If you're in the state,
17 you're in the pool, correct?

18 A That's right.

19 Q But the Federal Order system's a different
20 system.

21 A No, no. Not if you're in the state. If your
22 milk is delivered to a plant in the state.

23 Q Okay.

24 A Then you're in the pool.

25 Q in the pool.

1 A But that is not in the AMA Act, to my
2 knowledge.

3 Q And the Marketing Orders, Milk Marketing
4 Orders that have been promulgated over the years,
5 pursuant to the AMA Act, have operated on a different
6 basis of performance pooling in essence?

7 A Absolutely, yes.

8 MR. BESHORE: Thank you.

9 JUDGE CLIFTON: Thank you, Mr. Beshore.
10 Cross examination? Mr. Vetne?

11 MR. VETNE: I've got to follow up.

12 CROSS EXAMINATION

13 BY MR. VETNE:

14 Q Nevertheless, Mr. Conover, as a matter of
15 application of the authority contained in the
16 Agricultural Marketing Agreement Act, has not the
17 Secretary over the years adjusted definitions for
18 plants, producers, performance diversions in a way to
19 accommodate additional Grade A milk supplies, such as,
20 for example, the conversion of Grade B milk to Grade A
21 in the Upper Midwest?

22 A No question but what he has accommodated the
23 increasing supply of Grade A milk and the pooling of
24 the increasing supply of Grade A milk in the markets.

25 MR. VETNE: Thank you. Thank you.

1 JUDGE CLIFTON: Any other cross examination
2 before I call for redirect? Mr. Tosi?

3 CROSS EXAMINATION

4 BY MR. TOSI:

5 Q Thank you, Mr. Conover. Thank you for
6 appearing.

7 A My pleasure.

8 Q Regarding your experience and what you just
9 called pooling philosophy, you know that in California,
10 all milk that arrives at a pool plant that's produced
11 in California is pooled?

12 A To the best of my knowledge, that is so.

13 Q And in the Federal Order system, it's
14 different in that the Act does not require us to pool
15 all milk on the Federal Order, if we have an Order?

16 A It does not require the pooling of all milk
17 received at the plants. There are plants that are
18 outside the pool.

19 Q And at the same time, the Act does not
20 prevent the pooling of all milk --

21 A Of course.

22 Q -- within -- within the context of the
23 Marketing Order?

24 A No. There's -- there's no limitation, no.

25 Q And is it within your experience that the

1 degree to which Grade A milk supplies are pooled in
2 Orders have often been predicated on the desire of
3 producers and their willingness to share Class 1
4 proceeds to the broadest extent possible or to the
5 limited degree necessary, depending on the prevailing
6 marketing conditions of the Marketing Order?

7 A That's a pretty long question, but I'd be
8 happy if you asked it again.

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

10 JUDGE CLIFTON: Thank you, Mr. Tosi.

11 Any other cross examination?

12 (No response)

13 JUDGE CLIFTON: Mr. English, redirect?

14 MR. ENGLISH: Yes, thank you. I had
15 forgotten a few things. I apologize.

16 REDIRECT EXAMINATION

17 BY MR. ENGLISH:

18 Q Mr. Conover, these proposals were originally
19 submitted or at least Proposal 12 was originally
20 submitted in late September. Do you have any comment
21 with respect to the emergency nature of this proceeding
22 as to Proposals 11 and 13 or 12?

23 A The problem those proposals address is an on-
24 going problem. It's here every day and Meadow Gold is
25 coping with that situation, and we've been underway now

1 for -- since November, that's what, eight months or
2 seven months or something like that, and the quicker
3 the Department could handle it, the better.

4 I think it warrants immediate attention. If
5 emergency's the word, then that's it.

6 Q Okay. And in fact, you know, a -- a
7 situation where there's a lack of uniformity and an
8 impact on regulated handlers in your years of
9 experience in the Market Order system is a very
10 critical situation for the Federal Order system to
11 endure, correct?

12 A I can't think of a more critical problem than
13 the lack of uniformity in the application of the prices
14 out there in the marketing area.

15 Q Mr. Vetne asked you some questions about
16 other operations, producer handlers, producer
17 distributors, and you discussed a few things about
18 exempt plants had a limit of a 150,000 pounds.

19 Do producer handlers/producer distributors
20 have any limits of that nature?

21 A Currently, in all -- I really am not going to
22 -- there have been times.

23 Q I don't mean --

24 A I know for a fact there have been times when
25 they've had limits.

1 Q I don't mean -- I don't mean size limits. I
2 mean, do they have any kinds of constraints?

3 A Oh, constraints. Well, they have the costs
4 of production as -- as their minimum costs anyway.

5 Q And they're also subject to regulatory
6 provisions in order to maintain the producer handler
7 status, correct?

8 A Sure. Yes.

9 Q There was some discussion through examination
10 or through cross examination or from the handlers
11 purchasing from proprietary bulk tank handlers
12 concerning the relative size of players in this
13 marketplace.

14 Have you reached any conclusion about Idaho
15 pool distributing plants and their sizes?

16 A I -- I don't think there are any large, what
17 I would call large distributing plants in Idaho. I
18 think the Class 1 use in Idaho is 20 million pounds a
19 month, and there are five or six plants up there. That
20 comes out to four or five million, something in that
21 range, and I'm familiar with a few plants in the
22 country that have twice that much milk in one plant of
23 the whole 20 million. That's a large plant. Those
24 plants are small plants.

25 Q Mr. -- I just want to clarify one thing

1 because Mr. Vetne referred to your analogy to Order 30.
2 Is it fair to say that was Mr. Vetne's analogy to Order
3 30 and you were contrasting a little bit? So, you're
4 not adopting that analogy?

5 A I thought I elaborated on -- on his analogy a
6 little bit.

7 Q Okay. And to the extent that Mr. Vetne asked
8 you questions about the implications for a supply plant
9 down the road, if I were to tell you that Order 135 has
10 a provision known as a split plant provision, would
11 that perhaps modify the answer to the hypothetical
12 question about how one might be able to pool milk or
13 not and leave milk off?

14 A Well, as -- as I was formulating my answer to
15 John's question, that was going through my mind. Was
16 he expecting me to tell him to -- to build a separate
17 facility for that, and I -- I avoided saying that, but
18 sure, that -- that eases the problem. That's one way
19 of coping with that situation is a split plant.

20 MR. ENGLISH: I have no further questions. I
21 thank you again.

22 JUDGE CLIFTON: Thank you, Mr. English.

23 Any recross? Mr. Vetne?

24

25

1 CROSS EXAMINATION

2 BY MR. VETNE:

3 Q Just on that last question, Carl. Are you
4 aware of an interpretative opinion by the Market
5 Administrator for the Northeast Area that does not
6 permit split plants to plants that do not receive Grade
7 B milk?

8 A No, I am not aware of it.

9 MR. VETNE: Thank you.

10 JUDGE CLIFTON: Any other recross? Mr. Tosi?

11 RECROSS EXAMINATION

12 BY MR. TOSI:

13 Q Thank you again, Mr. Conover. I need to ask
14 a few more questions about the regulatory impact on
15 small businesses.

16 A Sure.

17 Q To the extent that you've offered testimony
18 that would either -- that presented in Proposals 12 and
19 11 and 13 and that you would have no objection to the
20 elimination of bulk tank handler -- the bulk tank
21 handler provision, to the extent that those are --
22 these provisions have provided certain pooling
23 opportunities or pooling flexibilities to small
24 businesses and to the extent that these provisions have
25 allowed business to continue for a very long time now,

1 with other handlers, for example, the buyers of bulk
2 tank handler milk, and I know we had Mr. Stoker
3 yesterday testify why he thought it needed to continue.

4 The trade-off between the impact of perhaps
5 those entities going out of business or the lack of
6 ability for people to pool milk in a way that was to
7 their economic advantage that's now damaged in some way
8 or left -- certainly left an impact, what -- what
9 advice would you offer the Secretary in terms of
10 rationalizing the adoption of any of these proposals?

11 A Well, with regard to requiring minimum Order
12 prices, I don't believe you can say you're immune from
13 minimum Order prices because you fall under that small
14 business category. That's the one I -- I don't think
15 the Secretary could go draw that conclusion.

16 Now, on the other one, --

17 Q Size in this -- equity is more important than
18 --

19 A That and the statutory requirement.

20 Q Okay.

21 A Now, on the other one, elimination, if this
22 closed the door entirely to them pooling the milk, the
23 elimination of that provision, then you might have a
24 problem, but it doesn't close the door. It -- it -- it
25 may make it a little more inconvenient for them, but

1 surely it doesn't close the door.

2 Q And to the extent that it may result in the
3 buyers -- the Class 1 distributors who -- who end up
4 buying bulk tank milk, to the extent that it may -- the
5 change in that regulation alone could cause them to no
6 longer be able to function as a business, --

7 A I believe -- I believe --

8 Q -- there's an impact there?

9 A I believe Mr. Stoker -- I think that's who
10 testified. I've forgotten. Someone testified -- one
11 of them testified that they didn't mind paying the
12 class prices. They can live with that. That's what
13 they said.

14 Q And would you have any knowledge that if one
15 of these proposals that would in effect transfer the
16 payment responsibility from the bulk tank handler to
17 the Class 1 distributor, like Mr. Stoker and his
18 operation, whether or not they'd have the wherewithal
19 to submit the reports to the Market Administrator to
20 have all the infrastructure necessary to keep the
21 records and run producer payroll and all those other
22 functions that, for example, larger Class 1 handlers
23 that don't buy milk from the bulk tank handlers?

24 A I've been in a lot of plants, and I've never
25 been in one that didn't have the facility to receive

1 milk from a few producers and keep the records on them.
2 If he's in the milk business, that -- that -- I don't
3 see that's a problem.

4 MR. TOSI: Thank you. I appreciate it.

5 JUDGE CLIFTON: Mr. Tosi, were you wanting
6 Mr. Conover's advice also with regard to the other
7 proposals that would eliminate the status of bulk tank
8 handlers?

9 MR. TOSI: Well, Your Honor, I -- at least
10 from myself being the representative for the Secretary,
11 I -- I think -- I think the record is pretty long on
12 explaining that conceptually, these -- these proposals
13 all aim to address issues that may be causing disorder
14 in the market and inequity among standards in terms of
15 prices, and they're all offered as alternatives and
16 conceptually all deal with the same theme.

17 JUDGE CLIFTON: Yes, and I -- and I think
18 what I heard Mr. Conover's response to cover was only
19 the three proposals on behalf of the client that he's
20 here representing.

21 MR. TOSI: Correct. They also -- he also
22 testified that they have no objection to the support --
23 that if Proposal 5 were adopted, which calls for
24 elimination of the bulk tank handler provision, they
25 would not be opposed to it, and -- but they're -- but

1 they're offering, as far as I understand, alternatives.
2 You know, if you don't go that far, here's some other
3 things that maybe you could modify those provisions
4 with that would restore equity amongst handlers and --
5 and therefore enhance what we're marketing in the
6 marketing area.

7 JUDGE CLIFTON: And you obtained all the
8 information you want from this witness with regard to
9 that proposal?

10 MR. TOSI: With regard to that. The thing
11 is, is that these would be -- these are significant
12 changes to those provisions. They will have an impact.
13 That's something that we need -- that we have to
14 address, and I wanted to get as much information on the
15 record from expert people on what the probable
16 regulatory impact would be if such things were adopted.

17 JUDGE CLIFTON: And you don't need any more
18 information from Mr. Conover with regard to the
19 Proposal Number 5?

20 MR. TOSI: No, I do not.

21 JUDGE CLIFTON: All right. All right. Any
22 other cross examination? Recross? Redirect?

23 FURTHER REDIRECT EXAMINATION

24 BY MR. ENGLISH:

25 Q With respect to the -- any implications for

1 paperwork for the pool distributing plant receiving
2 milk from a proprietary bulk tank handler, is it
3 precisely for that reason that Proposals 11 and 13, as
4 you stated, could for the convenience of the parties
5 allow the party that's presently doing the paperwork to
6 still do it?

7 A Most of it, yes.

8 Q Okay. In which event, there wouldn't be any
9 increased -- any significant increase regulatory impact
10 on the pool distributing plants receiving milk from the
11 proprietary bulk tank handlers, correct?

12 A The increase would be minimal.

13 MR. ENGLISH: That's all I have. Thank you.

14 JUDGE CLIFTON: All right. Thank you.

15 Any other questions for Mr. Conover?

16 (No response)

17 JUDGE CLIFTON: All right. Thank you. You
18 may step down.

19 (Whereupon, the witness was excused.)

20 JUDGE CLIFTON: Let's -- let's take a 10-
21 minute break. Please be ready to -- Mr. English?

22 MR. ENGLISH: How about five? Can we do
23 five?

24 JUDGE CLIFTON: No. I think I need 10.

25 MR. ENGLISH: All right.

1 JUDGE CLIFTON: 9:35.

2 MR. ENGLISH: You win.

3 MR. STEVENS: Your Honor? Your Honor, could
4 I -- I'm sorry. I was asleep at the switch here. I
5 need to ask Mr. Conover some questions about the
6 testimony. I neglected to do so because I thought he
7 was going to testify on milk pooling, but if you're
8 finished, if you're finished -- if you're finished,
9 after you finish with that, I would like to ask him a
10 question or two.

11 JUDGE CLIFTON: All right. At 9:35, you may,
12 and Mr. Marshall may, if he has any at that point.

13 MR. STEVENS: That's fine. Thank you, Your
14 Honor.

15 JUDGE CLIFTON: Off record.

16 (Whereupon, a recess was taken.)

17 JUDGE CLIFTON: Let's go back on record. All
18 right. We're back on record at 9:36.

19 I just want to mention one thing before we
20 resume with Mr. Conover's testimony. I have given the
21 court reporter the lay-out for the transcript, and I
22 have utilized as a guide Exhibit 1, and Exhibit 1 has
23 the Pacific Northwest first and that's what I'm doing
24 with regard to the heading for this case.

25 Even though this case was more about the

1 Western area, I'm saying that the heading is In the
2 Matter of Milk in the Pacific Northwest and Western
3 Marketing Areas. So, just so you all know that.

4 All right. Mr. -- who wants to go first?
5 Did you, Mr. Stevens?

6 MR. STEVENS: Yes.

7 JUDGE CLIFTON: Mr. Stevens, you may cross
8 examine Mr. Conover.

9 Whereupon,

10 CARL CONOVER

11 having been previously duly sworn, was recalled as a
12 witness herein and was examined and testified as
13 follows:

14 MR. STEVENS: Thank you.

15 FURTHER RECROSS EXAMINATION

16 BY MR. STEVENS:

17 Q Mr. Conover, you're appearing here today on
18 behalf of Dean Foods Company?

19 A Yes.

20 Q And you gave testimony -- you just gave
21 testimony, you have given previous testimony, have you
22 not?

23 A I testified.

24 Q Have -- have you given testimony previous to
25 this time in the hearing?

1 A No.

2 JUDGE CLIFTON: No.

3 MR. STEVENS: All right. Fine.

4 BY MR. STEVENS:

5 Q So, this is -- this is the extent of your
6 testimony?

7 A Yes.

8 Q The statement you just put in the record. As
9 far as the testimony that you've given, this -- did you
10 create this testimony?

11 A Yes, I did.

12 Q Did you have any assistance in creating the
13 testimony?

14 A A degree of editing it, yes.

15 Q Yes, and who assisted you?

16 A Mr. English and Wendy.

17 Q And -- and -- and Wendy, employees of Dean
18 Foods or Meadow Gold Dairy? Let me -- let me -- let me
19 ask it a little different way.

20 Did -- did any of the employees of Dean Foods
21 or Meadow Gold assist you in any way in the preparation
22 of this testimony?

23 A They had a chance to review the testimony.

24 Q All right. Did they talk to you about the
25 testimony?

1 A Yes.

2 Q All right. And just briefly, your -- the
3 substance of those conversations, if you care to put on
4 the record the substance of the testimony, not
5 specifically what you talked about but you talked about
6 these proposals, I guess.

7 A Surely, yes.

8 Q And -- and -- and what was happening with
9 respect to Meadow Gold and other -- other parts of
10 these two Orders, I guess, I'm asking, with respect to
11 the proposals?

12 A I -- I talked to them, surely, to get a feel
13 for what their competitive situation was and what
14 problems they were having there.

15 Q And --

16 A That was -- all right. On that basis, I
17 drafted the testimony.

18 Q And it's a matter of record that you have
19 extensive experience in milk marketing orders and
20 implementation and enforcement?

21 A I have to modestly say yes, I have.

22 Q We all know you do, sir. And would -- and
23 applying that expertise to the information you received
24 and the assistance of counsel, you prepared this
25 testimony?

1 A Yes.

2 Q Now, just let me ask you this. You gave a
3 certain amount of testimony. All of the testimony was
4 written by you?

5 A It was all drafted by me.

6 Q Personally, by you?

7 A Yes. I'm a terrible typist. I sat there in
8 front of the computer and beat it out.

9 MR. STEVENS: That's all I have.

10 JUDGE CLIFTON: Did you want to talk about
11 milk pooling?

12 MR. STEVENS: Well, I know that was what I
13 was asking earlier and, of course, Mr. Conover told me
14 that he didn't give testimony about double dipping.

15 BY MR. STEVENS:

16 Q Did you?

17 A Yes. Yes, I believe I did.

18 JUDGE CLIFTON: Yes. He had an exhibit that
19 he put into evidence, and therefore it is fair cross
20 examination material.

21 MR. STEVENS: And that's -- my questions were
22 directed to the entire statement in that regard. So,
23 it is a matter of record, and with regard to the entire
24 testimony.

25 MR. CONOVER: Well, I -- I thought when I

1 answered your question that when I said I have
2 testified, I included my entire statement.

3 MR. STEVENS: And I agree, and I agree that
4 my questions were asked in that regard, and you
5 answered them in that regard.

6 MR. CONOVER: Okay.

7 JUDGE CLIFTON: All right. So, you -- you're
8 satisfied?

9 MR. STEVENS: I'm satisfied, and I'm finished
10 questioning. Yes, Your Honor.

11 JUDGE CLIFTON: Thank you.

12 Mr. Marshall, do you have any need to examine
13 this witness?

14 MR. MARSHALL: No, Your Honor.

15 JUDGE CLIFTON: All right. Thank you, Mr.
16 Marshall.

17 Any further questions of your witness, Mr.
18 English?

19 MR. ENGLISH: No, Your Honor.

20 JUDGE CLIFTON: All right.

21 MR. ENGLISH: Again, I thank you and the
22 witness and everyone else.

23 JUDGE CLIFTON: You're welcome.

24 You may step down again, Mr. Conover.

25 MR. CONOVER: Thank you.

1 (Whereupon, the witness was excused.)

2 JUDGE CLIFTON: All right. Mr. Marshall, you
3 would be calling the next witness?

4 MR. MARSHALL: Mr. McBride.

5 JUDGE CLIFTON: Mr. McBride, you may be
6 seated at the witness stand.

7 MR. McBRIDE: Thank you.

8 MR. MARSHALL: Thank you, Your Honor.

9 We have asked Mr. McBride to testify at this
10 point, and we would note that he's our only witness as
11 we presently see a need.

12 JUDGE CLIFTON: All right. Now, I have a
13 packet of his exhibits. Does the court reporter have
14 copies?

15 COURT REPORTER: Yes.

16 JUDGE CLIFTON: All right. Let's mark those
17 first, with your permission, Mr. Marshall.

18 MR. MARSHALL: Yes.

19 JUDGE CLIFTON: Mr. Marshall, I'm going to
20 indicate what numbers to put on them. Please interrupt
21 if you want it to be other than what I'm about to say.

22 I'm going to ask that the next number be
23 assigned, and the next number is 5-6, 56, to the
24 testimony regarding Proposals Number 3, 4, 6 and 7,
25 Preamble.

1 (The document referred to was
2 marked for identification as
3 Exhibit Number 56.)

4 JUDGE CLIFTON: Exhibit 57 will be Proposal
5 Number 3, Netting for Supply Plants.

6 (The document referred to was
7 marked for identification as
8 Exhibit Number 57.)

9 JUDGE CLIFTON: Proposal 58 will be -- excuse
10 me. Exhibit 58 will be Proposal Number 4, Cooperative
11 Pool Plant Changes.

12 (The document referred to was
13 marked for identification as
14 Exhibit Number 58.)

15 JUDGE CLIFTON: Exhibit 59 will be Proposal
16 Number 6, Diversion Limitations.

17 (The document referred to was
18 marked for identification as
19 Exhibit Number 59.)

20 JUDGE CLIFTON: Exhibit 60 will be Proposal
21 Number 7, Netting for Diversions.

22 (The document referred to was
23 marked for identification as
24 Exhibit Number 60.)

25 JUDGE CLIFTON: Exhibit 61 will be Proposal

1 Number 8, Transportation and Assembly Credits.

2 (The document referred to was
3 marked for identification as
4 Exhibit Number 61.)

5 JUDGE CLIFTON: Exhibit 62 will be Proposal
6 Numbers 5, 11, 12 and 13, Bulk Tank Handler Issues.

7 (The document referred to was
8 marked for identification as
9 Exhibit Number 62.)

10 JUDGE CLIFTON: Exhibit Number 63 will be
11 Proposals Number 14, 15 and 16, Market Administrator
12 Proposals.

13 (The document referred to was
14 marked for identification as
15 Exhibit Number 63.)

16 JUDGE CLIFTON: I'm going to ask the court
17 reporter if I've covered everything that you were
18 handed?

19 COURT REPORTER: Yes, you did.

20 JUDGE CLIFTON: All right. Thank you.

21 Now, because there are so many and because
22 people have not had an opportunity to read them yet, I
23 will be very liberal and generous in entertaining any
24 objections as we go along. In the interest of time, it
25 is my intention to take them all into evidence now.

1 Is there at this moment any request to Voir
2 Dire the witness or any objections to these exhibits?

3 (No response)

4 JUDGE CLIFTON: At this point, there is none.
5 I hereby admit into evidence Exhibits 56, that's 5-6,
6 through 63.

7 (The documents referred to,
8 having been previously marked
9 for identification as
10 Exhibit Numbers 56 - 63, were
11 received in evidence.)

12 MR. MARSHALL: Thank you, Your Honor.

13 JUDGE CLIFTON: You're welcome, Mr. Marshall.
14 I would ask Mr. McBride now to state his full
15 name and spell his names and then I'll swear him in.

16 MR. MARSHALL: Mr. McBride was sworn earlier
17 in the hearing, Your Honor.

18 JUDGE CLIFTON: Oh, of course. He testified
19 earlier. Thank you.

20 Just state your full name then again, please.

21 MR. McBRIDE: Daniel S. McBride.

22 JUDGE CLIFTON: And you remain sworn.

23 Whereupon,

24 DANIEL S. McBRIDE

25 having been previously duly sworn, was recalled as a

1 witness herein and was examined and testified as
2 follows:

3 JUDGE CLIFTON: Mr. Marshall?

4 MR. MARSHALL: Your Honor, as a preliminary
5 matter, may I request that Mr. McBride's testimony,
6 prepared testimony, which has now been entered as an
7 exhibit, also be read into the record as if read?

8 My reason for that request is simply this.
9 In the current era, the Department, and I think it
10 should be commended for this, puts on to the Internet
11 copies of the transcript. There are search vehicles,
12 search engines, if you will, within Acrobat Reader
13 which allow people like myself and others who
14 participate in these hearings to do quick searches for
15 subject matters. That will be very useful in doing
16 briefing.

17 I would offer that opportunity to have Mr.
18 McBride's testimony as part of the transcript for
19 search purposes which would not be as easily done if
20 they were merely exhibits.

21 JUDGE CLIFTON: Now, when you say "read into
22 the record", are you asking that I instruct the court
23 reporter to type into the transcript verbatim these
24 exhibits?

25 MR. MARSHALL: Yes, that is my request, to

1 have them appear as if read.

2 JUDGE CLIFTON: Why didn't we think of that
3 sooner? That's an excellent technique. I've never
4 done that before.

5 All right. Is there any objection to that
6 procedure? Mr. Beshore?

7 MR. BESHORE: Not -- not an objection per se.
8 The exhibits have tables and tabular materials in them
9 in part and I -- I don't know how --

10 JUDGE CLIFTON: You --

11 MR. BESHORE: -- that can be handled in the
12 same manner. I mean, --

13 JUDGE CLIFTON: I think that's up to the
14 court reporter, you know. He can scan it or he can
15 type it.

16 MR. BESHORE: Well, the tables haven't been
17 read by other witnesses and in that manner. I don't
18 know whether it makes any difference whether they're on
19 the transcript page or not, but it's a little different
20 situation than what the situations were when the
21 testimony's been read.

22 MR. MARSHALL: Your Honor, I would certainly
23 agree that it would not be appropriate to put in tables
24 attached to the prepared testimony. I -- such as, for
25 example, with Exhibit 56. I do note that there are

1 some data within -- in table form in connection with
2 Exhibit Number 61, I believe, and I believe those can
3 be put into the transcript as if read.

4 JUDGE CLIFTON: Okay. Let's go through them
5 one-by-one. With regard to Exhibit 56, is it the
6 agreement of counsel that I instruct the court reporter
7 to include in the transcript Pages 1 through 5 but to
8 exclude the following two pages, which is each
9 enumerated with a Page 5?

10 MR. VETNE: Yes.

11 MR. MARSHALL: That would be our suggestion
12 as well, Your Honor.

13 JUDGE CLIFTON: All right. Is there any
14 objection to that?

15 (No response)

16 JUDGE CLIFTON: All right. Then I'm asking
17 that the transcript include all of Exhibit 56, with the
18 exception of the last two pages, as I've indicated.

19 TESTIMONY OF DANIEL S. MCBRIDE:

20 MR. MCBRIDE: My name is Daniel S. McBride. I
21 am testifying on behalf of the Northwest Dairy
22 Association regarding the proposals which relate to
23 pooling standards (Proposals 3,4, 6 & 7). In earlier
24 testimony I have introduced myself, as well as NDA, and
25 WestFarm Foods.

1 Before beginning my prepared testimony, on
2 each of those proposals I would like to address several
3 items that have come up during the first two days of
4 this hearing.

5 Impact of "Reform". The so-called "Reform
6 process" brought many changes to the Federal Order
7 system. The people involved in this industry are an
8 inventive group and have found many loopholes in the
9 system that were quickly exploited. Part of the reason
10 for this hearing is to deal with such issues, the most
11 glaring of which are double dipping and pool loading
12 (or distant pooling).

13 However, Reform also brought some very good
14 things for producers. Among the most important of
15 these is the "higher of III or IV" price mover for
16 Class I. Consolidation of orders by definition put
17 various previous pools together that had different
18 Class I utilizations, thereby creating apparent
19 "winners" and "losers". A classic example of this is
20 the former Great Basin area that previous to Reform
21 enjoyed a very enviable Class I utilization which was
22 "watered down" by the combination of Utah and Idaho.
23 If one were looking at only the Class I utilization,
24 one can understand how Utah producers feel that they
25 would have been better off if the map had been drawn

1 differently.

2 However, the facts tell a different story.

3 The first thing that must be kept in mind is
4 that even if the marketing area map had been redrawn to
5 exclude the Magic and Treasure Valleys, there still
6 would have been some milk from that area pooled on the
7 Western order. The milk associated with the
8 distributing plants in those two orders may still have
9 qualified on the order, and in fact probably would have
10 expanded sales in the Salt Lake City area in order to
11 have become pooled. Therefore, much of the "Idaho
12 milk" would still be pooled. And in my judgement,
13 that is entirely appropriate as a necessary reserve
14 supply to the Salt Lake City plants. It is certainly
15 more appropriate than the pooling of Idaho milk in the
16 Midwest, or the pooling of Colorado milk in the Pacific
17 Northwest.

18 A more interesting point is that the
19 producers in Utah actually received more money relative
20 to the Class III price in the two year period after
21 Reform than they received in the two year period prior
22 to Reform. That is primarily because of the dollars
23 added to the system by "higher of" pricing. Another
24 positive change for producers was that the Class II
25 formula is now based on Class IV, rather than III.

1 Because Class IV was higher than III for most of the
2 past two years, it follows that the Class II price has
3 also been higher since 1/1/2000 than it would have been
4 under the old BFP-based system.

5 The average of the Weighted Average
6 Differential in the Great Basin order (Order 139) for
7 the years 1998 and 1999 was \$.88 per cwt. The average
8 Producer Price Differential in the Western Order (Order
9 135) for the years 2000 and 2001 was \$1.18. This is an
10 increase in the PPD of \$.30 per cwt since Reform. The
11 numbers for 2000 and 2001 are included in Table 6 of
12 Exhibit 4. The numbers for the Great Basin order come
13 from the annual summary (page 5 of the respective
14 reports) prepared by the Market Administrator's office
15 (copies attached).

16 Clearly the Western Order Producer Price
17 Differential, the amount paid to the producer above
18 Class III (which is sometimes called the "pool draw")
19 has been greater since 1/1/2000. There has been some
20 question about whether the Class III price itself has
21 been higher or lower. Some of the early projections
22 published during the 1999 suggested the Class III would
23 be lower. But when the final Class III formula was
24 applied to the 1999 NASS market survey data, it was
25 very close to the average Class III for 1999 under the

1 old BFP system.

2 The testimony given by, and on behalf of the
3 Utah dairy producers suggests that the changes in the
4 New Federal Order system that became effective 1/1/2000
5 have driven many Utah producers out of business. This
6 is counter-intuitive to the facts, which show two
7 things: First, the effect of the new pricing has been
8 to partially overcome the depressed Class III and IV
9 prices with a higher PPD than otherwise would have
10 occurred under the old system. Second, producer prices
11 were lower during 2000 because national Class III and
12 Class IV prices were lower than in 1998-1999. That was
13 because of depressed commodity markets that would have
14 existed regardless of whether or not the "reform"
15 changes had occurred in the Federal Order system.

16 When carefully analyzed, it is apparent that
17 the argument made on behalf of Utah dairy producers
18 amounts simply to a concern that the revised Federal
19 order should have helped them even more than was
20 actually the case.

21 We also note that although the numbers of
22 producers leaving the industry in Utah seems
23 significant on its own, the context of the entire
24 industry they are quite ordinary. The reported facts
25 over the five years from 1995-2000 are that Utah is

1 losing producers at a lower rate (19.8 %) than the
2 average of all western states (23.7%). This can be
3 seen by looking at the numbers provided annually by
4 USDA, NASS and reported widely in the dairy press.

5 The foregoing does not mean that Utah
6 producers are not sincere. I have put the foregoing
7 into evidence principally to demonstrate that the
8 causes of their plight do not track back to the
9 "reform" process. Sure, the utilization is lower than
10 under the old Great Basin order, but there are many
11 more important factors to consider.

12 Pooling Standards. There has been a great
13 deal of discussion about "performance" and what the
14 appropriate pooling standards should be in a Federal
15 order.

16 In the sections that follow, discussing each
17 of the proposals, I will try to review some of those
18 issues. But at this point I want to emphasize that
19 pooling standards, like many of the order provisions,
20 must follow from the key statutory mandates that govern
21 milk marketing orders. Specifically, orders must
22 prevent (and not create) "disorderly marketing
23 conditions". And of course the classic vehicle for
24 doing this is the creation of a "marketwide pool",
25 which results in a "uniform price" that shares the

1 Class I and II returns among all producers so that
2 there will not be an incentive for producers and
3 producer groups to engage in cutthroat competition to
4 elbow each other out of the way.

5 In Federal order theory, this "orderliness"
6 comes from including all producers in the pool so that
7 they all received roughly the same amount of money for
8 their milk. Knocking half the milk out of the pool, as
9 DFA proposes, does not make the milk go away. One must
10 assume that producers who are kicked out of the pool
11 will react. Certainly we at NDA will! And that is
12 because we will have to, for competitive reasons. If
13 the alternative is to lose our producers and die, we
14 will fight for survival.

15 The evidence already indicates that DFA's
16 proposals could kick half the milk out of the current
17 pool. Should that occur, the disorderly market
18 conditions that we would see from the dispossessed
19 producers will make the practices which are being
20 complained about in this seem tame by comparison.

21 For these reasons, an order must accommodate
22 producer milk that can serve each major population
23 center, and which seems to be realistically positioned
24 to do so. This was the Dairy Division's philosophy for
25 years, and it should not change. Pooling standards

1 must not be set "too tight". That is why the Federal
2 Register over the years has seen many, many suspensions
3 of diversion requirements and loosening of diversion
4 requirements. Typically in these decision USDA would
5 point out that milk supplies had grown relative to the
6 Class I needs of the market involved. The Department
7 would note that unless the diversion limit was
8 suspended or loosened, milk traditionally associated
9 with the market would be removed from the pool. It
10 would be noted that "unload/reload" techniques were
11 being used to ensure pooling. It would be further
12 noted that the milk, and the actual "unload and reload"
13 should not be required, because that process could
14 damage milk quality. That was the rationale for many
15 suspensions and changes in the diversion limits, which
16 were so common during the 1970s, 80s and 90s as milk
17 production in the country was growing.

18 Just as performance standards must not be
19 "too tight", they must not be "too loose" either. NDA
20 submits that USDA must find some "real" evidence of
21 willingness to serve the market or actual service to
22 the market. For example, if a distributing plant is
23 complaining to the Market Administrator that he has
24 called on pooled milk supplies for service and found
25 that milk will not be delivered, that Market

1 Administrator would do well to consider an
2 administrative reduction in the diversion percentage.

3 Some markets have "call provisions" for such
4 circumstances. For example, the Pacific Northwest has
5 such a provision for "cooperative reserve supply units"
6 which normally are not expected to serve the market.
7 However, they must do so if "called upon" by the market
8 administrator to perform. I do not think such a
9 concept would be objected to in this market, if it is
10 within the scope of the current hearing notice.

11 In judging all this, the institutional
12 factors in the market should be considered by the
13 Department (or market administrator) in determining
14 appropriate diversion limitations. In this case, as
15 the evidence has already shown, DFA has locked up the
16 Salt Lake City market with long term contracts to sell
17 milk at low service charges, with the result that there
18 is little room for someone to come into Salt Lake City
19 and try to elbow DFA out of the way - little room to do
20 so, except perhaps by selling milk below class prices.
21 In effect the proposals if accepted would create what
22 is almost a handler pool controlled by DFA.

23 That is one reason why "intent" has been
24 discussed in this hearing. There is no way to
25 demonstrate an "intent" or attachment, other than to

1 say "we would if we could".

2 If intent can be a factor to consider, surely
3 our intent is clear. The history of our cooperative
4 includes an emphasis on the Class I market. We are
5 among the few cooperatives in the U.S. which own and
6 operate bottling plants. Our Boise operation includes
7 one of the country's first major ultra-pasteurizing
8 facilities, which since 1989 has distributed fluid milk
9 all over the Western U.S. (for example, to all
10 McDonalds stores in Idaho, Oregon, Washington and
11 Alaska). This actually creates new Class I sales for
12 producers in this market, rather than just shift them
13 around.

14

15 We do not propose that intent be a formal
16 consideration in the order language, but it almost
17 certainly must be part of the judgement that the Dairy
18 Division and the Secretary must make. I want to be
19 sure there is no doubt that Northwest Dairy Association
20 is committed to serve market needs.

21 We at NDA submit that the current diversion
22 percentages of the order have done a reasonably good
23 job of balancing these considerations. This order is
24 neither "too tight" or "too loose". More importantly,
25 those rules are flexible, in that the percentages can

1 be adjusted administratively by the Market
2 Administrator if the need should arise.

3 I will be discussing these concepts in more
4 detail with respect to specific proposals, but wanted
5 to begin by providing this overview of our
6 recommendations.

7 JUDGE CLIFTON: Now, with regard to Exhibits
8 57, 58, 59, 60, if there's no objection, I will
9 instruct the court reporter to include those words
10 contained in this exhibits in the transcript as if they
11 had been read by this witness into the record.

12 Is there any objection to that?

13 (No response)

14 JUDGE CLIFTON: All right. No objection. I
15 so instruct the court reporter with regard to
16 preparation of the transcript.

17 TESTIMONY OF DANIEL S. MCBRIDE:

18 MR. MCBRIDE: My name is Daniel S. McBride. I
19 am testifying regarding Proposal No. 3, on behalf of
20 Northwest Dairy Association, which is usually referred
21 to as "NDA". In earlier testimony I have introduced
22 myself, as well as NDA and WestFarm Foods.

23 NDA Opposes Proposal No. 3. This proposal
24 amends the pool supply plant provisions in Section 7 of
25 the Western Order (Section 135.7(c)). A pool supply

1 plant is typically a manufacturing plant, which might
2 become a pool plant by transferring or diverting
3 sufficient quantities of milk to distributing plants.
4 For example, the WestFarm Foods drying plant at
5 Caldwell might someday qualify as a pool supply plant,
6 serving the Boise pool plants.

7 The qualifications for a supply plant (set
8 forth in Section 7(c)) specify that the quantity of
9 milk transferred to regular distributing plants
10 (defined under Section 7(a)) and/or to specialty
11 distributing plants making products that are ultra-
12 pasteurized or aseptically processed (defined under
13 Section 7(b)) must be at least 35 percent of the milk
14 "associated with" the supply plant (by which is meant:
15 milk that was received, or that could have been
16 received but was instead diverted directly to a
17 distributing plant).

18 Proposal No. 3 would amend the pool supply
19 plant provision to require that any quantity of milk
20 transferred to a distributing plant and back out, would
21 be reduced from the quantity of milk used in
22 determining the plant's qualification as a "pool supply
23 plant". To illustrate this, if the Caldwell plant were
24 to be qualified as a supply plant, and if the milk were
25 to move to the WestFarm Foods distributing plant at

1 Boise, then any transfers out of Boise to another plant
2 and back to Caldwell could not be counted in the 35%
3 qualification amount.

4 This proposed change is a concern to NDA,
5 because at some point it may very well be appropriate
6 to designate the Caldwell plant (or the WestFarm Foods
7 plant at Jerome) as a pool supply plant to the Class I
8 market.

9 Clearly, the impact of this proposal would be
10 to reduce the amount of milk that presently can be
11 pooled under this provision. Consistent with the
12 position taken with respect to other proposals in this
13 hearing, we simply think that is the wrong direction
14 for this Western Federal order.

15 Today, the Western order area has so much
16 milk relative to the amount of Class I sales, that each
17 distributing plant has become important as a base of
18 diversions in order to keep milk pooled. The goal of
19 this proposal is, effectively, to reduce the amount of
20 milk that can be pooled on the order. For reasons
21 explained in connection with later proposals, that
22 would not be wise policy because it would simply lead
23 to disorderly marketing conditions.

24 NDA submits that under Federal order
25 philosophy, the fundamental objective of the pooling

1 provisions of an order is to provide the incentive to
2 supply fluid milk needs of the market, while also
3 accommodating efficiently the reserve supplies of milk
4 that are available to serve or balance those fluid
5 needs. For that reason, the delivery percentages for
6 pool supply plants and other types of reserve supply
7 plants are set to ensure that they will perform when
8 needed and supply the fluid market. Shipping
9 requirements for such plants must be based on the
10 supply/demand relationship in the marketing area, and
11 should be adjusted if necessary to ensure that the
12 needs of pool distributing plants are met. Indeed,
13 the need to adjust to market needs is recognized by the
14 current order language, which allows the Market
15 Administrator to reconsider and adjust this percentage.

16 I will be very surprised if evidence is
17 offered at this hearing to show that any plant that
18 might someday qualify as a pool supply plant -- or
19 other type of reserve plant -- is failing to make
20 pooled milk available to the Class I market after being
21 requested by a plant to do so. I can testify that our
22 organization has never been advised that a distributing
23 plant's needs are not being met, much less asked to
24 supply any distributing plant that was short. We would
25 willingly supply such a plant if asked, and I am sure

1 others would as well. But we have never once been
2 asked to do so. I sincerely doubt there will be
3 evidence -- or could be evidence -- that any
4 distributing plant in this Western order market has
5 been unable to obtain sufficient quantity of milk if
6 its needs have been announced with sufficient time to
7 respond.

8 Without such evidence, this proposal should
9 be rejected. We are not aware of any effort to use
10 the existing language in the order which permits the
11 Market Administrator to make changes administratively
12 in the delivery percentage requirements. That language
13 was put into the order precisely to deal with such a
14 hypothetical failure to deliver to the Class I market.
15 There is no need to change this order to deal in
16 advance with a problem that does not exist, and for
17 which the order already provides an effective solution.

18 Given these traditional purposes of a pool
19 supply plant, one must wonder why there are no pool
20 supply plants designated in the Western order. We
21 submit that the 35% delivery requirement is too high to
22 be utilized under current conditions in this market.
23 The absurdity of the 35% requirement can be seen by
24 reference to our Caldwell, Idaho plant mentioned above.
25 If it were to be a pool supply plant, it would be

1 required to ship or divert approximately 700,000 of the
2 2,000,000 or so pounds that it receives each day.
3 There simply is no unmet need of that magnitude
4 anywhere in the Western order market today.

5 Indeed, if one thinks about it, if the goal
6 is to make more milk available to the distributing
7 plants, the solution should be to make it more
8 attractive to become a supply plant, rather than more
9 difficult. It simply makes no sense to require that a
10 cheese plant deliver 35% of its milk to others. It is
11 simply too expensive for the operator of a capital
12 intensive facility like a cheese plant to not utilize
13 it at 80% or 90% efficiency. But if the percentage
14 were lower -- say 10% or 20% -- then more cheese plants
15 may be willing to trade off the advantages of pooling
16 for the obligation to deliver milk to distributing
17 plants when needed. Lower delivery percentages would
18 seem to be the better solution. We note that the pool
19 supply plant provisions of the Upper Midwest order is
20 only 10% in a market with similar class utilization.

21 The historical purpose of the delivery
22 percentages in the Federal order pool supply plant
23 provisions has not been, and should not be, to limit or
24 reduce the amount of milk that can be pooled, if milk
25 associated with that supply plant is, in fact,

1 available to the Class I market and willing to serve
2 it. If the purpose of this proposal is instead to
3 limit the quantity of milk that can be pooled, it
4 should be rejected. When shipping requirements are
5 too restrictive, it simply causes handlers to move milk
6 inefficiently, uneconomically, and unnecessarily or to
7 find some other ways to achieve pooling (including ways
8 that can create disorderly markets). Of more concern
9 to us is the practice of "selling pooling rights" as a
10 way to achieve pooling. I will discuss that practice
11 in more detail in a few moments, after finishing my
12 comments regarding Proposal No. 3.

13 The last point I would like to make for the
14 record about Proposal No. 3 is that none of the other
15 Federal orders has such a "netting" provision and there
16 is nothing different about market conditions here to
17 justify such a provision. Throughout the Federal order
18 system, pool supply plants and other reserve plants
19 benefit the market because they are able to balance
20 milk supplies required by the fluid market and to pool
21 milk in an orderly fashion so that disorderly marketing
22 conditions do not occur. The obligation of such plants
23 to serve the need of the pool distributing plants can
24 be regulated through the percentage delivery
25 requirements, without a "netting" rule.

1 To summarize NDA's position on Proposal No.
2 3, if milk that is associated with pool supply plants
3 is not serving the Class I market when needed, then the
4 percentage requirements should be tightened
5 administratively by the Market Administrator. However,
6 we are not aware that such a situation has existed in
7 the Western order. Given that, the proposal seems
8 designed to increase sales of pooling rights, rather
9 than attract more milk to pool distributing plants.

10 While NDA strongly opposes this provision, we
11 would like to note one technical problem with it.
12 Should the Department determine to make a change, any
13 transfers to another pool plant should not be
14 subtracted out. That is because the plant of first
15 receipt did receive the milk, and it ultimately is
16 handled by a pool distributing plant - just a different
17 distributing plant. For example, if a distributing
18 plant that also makes ice cream should sell a load of
19 skim milk to a bottling plant that needs skim milk,
20 there is no reason to reduce that transfer from the
21 first plant's qualifying amounts, because the
22 deliveries have still occurred (indirectly rather than
23 directly). Indeed, it is entirely consistent with the
24 concept of a pool supply plant that its milk supply
25 more than one distributing plant.

1 General Concern About "Sale of Pooling
2 Rights". At this point, I would like to add some
3 general testimony about a subject that will come up in
4 connection with many of the proposals at this hearing,
5 including Proposal No. 3. These proposals seem more
6 like to increase the value of pooling rights, than to
7 increase the availability of milk needed by
8 distributing plants.

9 USDA should avoid creating "quotas" or other
10 artificial values without specific authority from
11 Congress to do so. It is useful to recall that some
12 twenty years ago, the statutory authority from Federal
13 Order Class I base plans was removed from the enabling
14 Act, in part because there was no longer political
15 support of a "quota system" by which shipping rights
16 (in that case, the rights of producers to returns from
17 the Class I market) had been created by USDA, granted
18 to producers, and then brought and sold by their
19 owners. Such a system exists today, under the
20 California state milk order system.

21 I fear that the Dairy Division's
22 institutional memory may not recall those days, nor the
23 controversies that surrounded the sale of Class I Base
24 in the old Puget Sound Federal order. At the time, I
25 worked for the Federal Order office which administered

1 the Puget Sound and Northwest orders. I strongly
2 suspect that if we could ask the late Herb Forrest, who
3 ran the Dairy Division in those days, he would agree
4 with our analogy to the old Class I base plane and he
5 would also be dismayed at the sale of pooling rights
6 that has arisen since the so-called "Reform" of Federal
7 orders.

8 I do not believe that the Department, nor the
9 Secretary at the time, intended to create conditions
10 for the sale of pooling rights. But I am concerned by
11 the failure of the Department to have addressed that
12 abuse during the recent Order 30 hearing process.
13 Today, milk from Idaho which can not be pooled in this
14 Western order continues to be pooled on Order 30, for a
15 fee, and the recent Order 30 decision will not impact
16 that practice.

17 Perhaps that issue was not addressed in Order
18 30 because one of the two fundamental causes of the now
19 widespread practice of "distant pooling for a fee" must
20 be addressed in a national order hearing. I refer to
21 the concept of a unified national price surface, which
22 was introduced during the "reform" process, and which
23 replaced the earlier concept that distant milk would be
24 priced relative to its ability to serve the population
25 centers in a specific order's marketing area. We are

1 not today criticizing the concept of a national Class I
2 pricing surface, but we strongly believe that it makes
3 no sense for the prices of milk at out-of-order
4 manufacturing plant locations to be set with respect to
5 that same price surface.

6 The relevance of all this to this hearing --
7 and a key point we want to make to the Department
8 during these proceedings -- is that the other aspect of
9 Federal orders that leads to the practice of selling
10 pooling rights is restrictive pooling requirements
11 which make it difficult or impossible for a dairy
12 farmer to become pooled on his local order.

13 In this hearing, Northwest Dairy Association
14 is asking the Secretary to recognize that one reason
15 Idaho milk is pooled other orders -- as was testified
16 to at other hearings, but which I can confirm in this
17 proceeding -- is that the pooling requirement of the
18 Western order are already too tight to permit the
19 region's milk to be pooled here. Given that, it makes
20 no sense to tighten the Western order pooling
21 requirements even further.

22 To summarize this discussion regarding the
23 sale of pooling rights, I will bring it back to
24 Proposal No. 3 by saying that, as near as we can see,
25 the only practice effect of this Proposal and the

1 companion proposals that tighten pooling requirements
2 would be to make pooling rights more valuable, and to
3 make the sale of pooling rights more lucrative. What
4 Proposal No. 3 and the other proposals will not do is
5 make more milk available to distributing plants.

6 I would be happy to answer any questions.

7 TESTIMONY OF DANIEL S. MCBRIDE:

8 MR. MCBRIDE: My name is Daniel S. McBride. I
9 am testifying today on behalf of Northwest Dairy
10 Association, which is usually referred to as "NDA". In
11 earlier testimony I have introduced myself, as well as
12 NDA and WestFarm Foods.

13 NDA Opposes Proposal No. 4. As we understand
14 this proposal, Section 7(d) of the Western Order (Order
15 135) would be amended to change the performance
16 standard for cooperative pool plants, to require that
17 50% of the milk associated with the cooperative is
18 delivered or diverted to pool plants.

19 Today, our cooperative has no plant
20 designated as a "cooperative pool plant", but it is
21 entirely possible that someday we may if market
22 conditions warrant and the language of Section 7(d) is
23 suitable.

24 The practical effect of this Proposal No. 4
25 would be to increase the portion of a cooperative's

1 milk that it would have to deliver to pool distributing
2 plants if it chose to designate a "cooperative pool
3 plant" under Section 7(d) of the order. In order to
4 meet these increased percentages, the cooperative that
5 operates such a plant would have to do one of two
6 things:

7 1. It could reduce the amount of milk it puts
8 through its reserve plant, and deliver more of its
9 existing milk to distributing plants. This would
10 be expensive, because of the high fixed costs
11 associated with a manufacturing plant, and
12 because of the tremendous "opportunity cost" of
13 not running the plant near its capacity.

14 2. Alternatively, the cooperative could increase
15 the total amount of milk it has, in order to both
16 keep its plant full and still deliver 50% of its
17 total milk to distributing plants. This seems to
18 be impossible to achieve, because we are not
19 aware of any distributing plants that need more
20 milk than they are presently receiving, or who
21 might be willing to get part of their supply
22 from a second source.

23 Note that one variation of that second point
24 would be for a cooperative like ours, which owns a
25 distributing plant, to attempt to expand the route

1 distribution of such a plant. However, that can be
2 done only by taking sales away from existing plants.
3 Based on our experience with the Boise plant, I can
4 testify that it is difficult to increase sales except
5 by price cutting.

6 Given that reality, then, it can be seen that
7 Proposal No. 4 could readily create disorderly
8 marketing conditions. I offer the following
9 hypothetical situation to illustrate this point:

10 Plant A, which is investor owned and has only one
11 goal -- to make money. Plant C, which is
12 cooperatively owned, certainly has the same
13 goal, but it also has an incentive to increase
14 its sales in order to ensure that its owners
15 are pooled -- two goals.

16 Being owned by the cooperative, Plant C can make
17 its producer owners happy by cutting wholesale
18 prices and taking sales away from Plant A.
19 Indeed, it may be rational for such a plant to
20 operate at a loss, in order to increase its sales.
21 Put a different way, Plant C has an incentive,
22 created by the Order, to return to its owner-
23 suppliers a price lower than the Class I price.
24 When Plant C attempts to do so, Plant A must meet
25 or beat Plant C's lowball prices or lose the

1 business. If Plant A lowers its price, it
2 probably can not recoup its Class I cost of raw
3 milk, unless it can sell its "pooling rights".
4 The result of both plants' activity would be that
5 the concept of uniform class pricing would be
6 threatened, and disorderly markets would clearly
7 have been created. Plant C and its cooperative
8 owner would be doing precisely what is done in the
9 classic textbook illustration of "disorderly
10 marketing conditions", which is to accept a lower
11 price in order to obtain access to the preferred
12 Class I market.

13 In this hypothetical situation, Plant A and
14 Plant C would come out losers, and so would all other
15 plants who would be impacted by the "cutthroat
16 competition" that would pervade the wholesale markets
17 for sales of Class I and II products. But we submit
18 that the real loser would be the reputation of the
19 Federal Milk Marketing Order system. There are at
20 least two reasons why this would be so. The foremost
21 is that government action should not encourage
22 uneconomic actions, and the Plant A's of the world
23 would have every right to object and to ask Congress to
24 fix the problem. I would argue that Congress has
25 already fixed this problem, by establishing as

1 statutory goals of Federal order system the creation of
2 uniform pricing to handlers and the prevention of
3 disorderly marketing conditions.

4 A second reaction would develop -- and I
5 think it already has developed -- regarding the sale of
6 pooling rights. As explained earlier in my testimony
7 regarding Proposal No. 3, USDA should be taking steps
8 to correct this practice.

9 Virtually all of my prepared testimony
10 regarding Proposal No. 3 also applies to Proposal No.
11 4. There is no need to repeat it, but I will summarize
12 the points that are relevant here:

13 1. The Department's traditional approach has been
14 to evaluate the supply and demand conditions of a
15 market, and to establish delivery percentages for
16 reserve supply plants -- including cooperative
17 pool plants -- at levels which ensure that milk
18 moves to pool distributing plants when needed,
19 and moves efficiently to reserve plants when not
20 needed by the Class I market.

21 2. We are aware of no situation in the Western
22 order in which that reserve milk has not been
23 made available to pool distributing plants. We at
24 NDA are prepared to supply such needs, if
25 requested to do so.

1 3. However, even assuming that someday there
2 were to be unmet needs, the order language already
3 provides a solution, by which such a plant may
4 request that the Market Administrator adjust the
5 delivery requirements.

6 4. We see no purpose behind these two proposals
7 other than to make the sale of pooling rights
8 more lucrative.

9 In connection with this Proposal No. 4, it is
10 appropriate to develop further the concept discussed in
11 connection with Proposal No. 3, that if the goal is to
12 make more milk available to the pool distributing
13 plants, these provisions should be made more workable
14 so that they can actually be utilized.

15 Specifically, we suggest that this proposal
16 be modified to reduce the current 35% percentage
17 delivery requirement to 10%, rather than increase it to
18 50%. Then a cooperative such as ours, with roughly one
19 quarter of the milk being pooled in the market, could
20 utilize this provision. As it stands, NDA would have
21 to deliver 35% of our milk to distributing plants to
22 utilize this provision. If we are 25% of the market in
23 a given month, then we would have to deliver 35% of our
24 35% which would be 8.75% of the entire market's milk.
25 But the combined Class I and II utilization of the

1 Western order market is only 25% of the market's milk.
2 In order to utilize this provision today, NDA would
3 therefore need to deliver roughly one-third of the
4 needs of the pool distributing plants.

5 NDA supplies one-third of the Class I and II
6 market in the Pacific Northwest marketing area, and we
7 would be very comfortable with a one-third share of the
8 Western order's Class I and II market. But the fact is
9 that to achieve that level, and to be able to use the
10 cooperative pool plant provision with even the present
11 35% requirement would necessarily require us to
12 displace others who presently supply those Class I and
13 II plants. There are two very real problems with that:

14 1. First, the major pool distributing plants in
15 this Western order market are today, all tied up
16 with long term single source supply contracts,
17 with DFA. I will discuss that in more detail,
18 in a minute.

19 2. Second, even if that were not the case, the
20 only way we could achieve a 25% market share
21 would be to cut price. Doing so would almost
22 certainly create disorderly market conditions.

23 Given that even the present 35% provision is
24 unrealistic for us to meet in the Western order, we
25 would supply reducing that percentage. We suggest 10%

1 be the new percentage, for two reasons. First, it is
2 the number used in the supply plant provision in the
3 Upper Midwest order, which is similar in class
4 utilization to the Western order. More importantly, it
5 matches the 90% diversion limitation in the Western
6 order, which should be retained as we will demonstrate
7 further in our discussion of Proposal No. 6.

8 General Concerns That Class I Market is
9 Foreclosed. As earlier noted, NDA is in the business
10 of selling milk to pool distributing plants. We are
11 ever alert to the potential to do so in the Western
12 order market, in particular at Salt Lake City where
13 none of the plants is competing directly with the
14 WestFarm Foods plant at Boise. There are three major
15 distributing plants there:

16 The Smith Food and Drug Centers plant in Layton,
17 Utah is owned by the Kroger Co, with whom we have
18 a supply relationship at Portland, Oregon. We
19 understand, and I believe this record already
20 shows, that they currently have a long term, full
21 supply contract with Dairy Farmers of America.
22 The Cream O'Weber plant at Salt Lake City is
23 owned by National Dairy Holdings, Inc., which is
24 in turn partially owned by Dairy Farmers of
25 America. DFA is also the supplier of that plant.

1 The Meadowgold Dairies plant in Salt Lake City
2 is owned by Dean Foods. As has already been
3 testified, they have a supply relationship with
4 Dairy Farmers of America. We do not know the
5 precise nature of that arrangement, but in the
6 March 29, 2002 edition of Cheese Market News, it
7 is reported that "DFA also has a milk supply
8 contract with the new Dean Foods". The CEO of
9 Dairy Farmers of America is quoted as saying, of
10 the recent transactions that spun off their
11 interest in what became Dean and created National
12 Dairy Holdings: "The transactions gave DFA members
13 the best of two worlds. We remain the milk
14 supplier of choice to the new Dean Food Co. and
15 gain an equity interest in National Dairy
16 Holdings that gives us even wider market
17 opportunities and a tremendous growth vehicle."

18 NDA submits that as long as Dairy Farmers of
19 America has effectively foreclosed access to the major
20 pool distributing plants in the Western Federal Order
21 Marketing Area, USDA can not fairly grant the DFA
22 proposals at this hearing which would require other
23 cooperatives and non-member producers to increase their
24 service to pool distributing plants.

25 In addition, it should be recognized by the

1 Department that the impact of these proposals to
2 restrict the pooling requirements will not increase the
3 supply of milk available to these distributing plants
4 unless the effect of the proposals is to make it easier
5 for DFA to take producers away from others in the
6 market. The Department has a legitimate interest in
7 ensuring that the distributing plants receive adequate
8 supplies of milk. But there will not be convincing
9 evidence at this hearing that those plants can not
10 receive adequate supplies today, under current order
11 provisions. I emphatically testify and assure the
12 Department, that Northwest Dairy Association is willing
13 and able to supply additional milk to them, if needed.

14 To bring this discussion back to Proposal No.
15 4, as long as the potential for cooperatives like NDA
16 to make additional deliveries to the pool distributing
17 plants at Salt Lake City is foreclosed by long term,
18 single source supply contracts, the Federal order
19 philosophy behind the cooperative pool plant provision
20 would indicate a need to reduce, rather than increase,
21 the percentage delivery requirement.

22 Proposal 4, which combined with the net
23 effect of the proposals 3, 5, 6 and 7, seem designed to
24 greatly reduce the amount of milk pooled in the Western
25 Order. It is proper to examine who is the beneficiary

1 of this group of proposals. It is of course the one
2 organization which controls the vast majority of the
3 Class I sales, and which has submitted these proposals.
4 Very few producers would have access to the pool except
5 through DFA.

6 In effect DFA seems to be asking USDA to
7 grant them greater control over access to the Western
8 Order. Doing so would also give them the opportunity
9 to leverage the provisions of the order into the
10 potential sale of pooling rights. That would make a
11 farce of this Federal order, and it would play into the
12 hands of those who would like Congress to end the order
13 system. We ask USDA not to take such actions, in these
14 or any other proceedings.

15 I would be happy to answer any questions.

16 TESTIMONY OF DANIEL S. MCBRIDE:

17 MR. MCBRIDE: My name is Daniel S. McBride. I
18 am testifying today on behalf of the Northwest Dairy
19 Association, which is usually referred to as "NDA". In
20 earlier testimony I have introduced myself, as well as
21 NDA and WestFarm Foods.

22 NDA Strongly Opposes Proposal No. 6. As we
23 understand this proposal, the Western Order (Order 135)
24 would be amended to reduce the amount of milk eligible
25 for diversion from the present 90% to 70%.

1 The impact of this is extremely significant.
2 Under today's 90% rule, for every 10 pounds that are
3 delivered to a pool plant, another 90 can be diverted.
4 If the diversion limitation were tightened to 70%, for
5 every 30 pounds that are delivered, only 70 can be
6 diverted. The ratio would shift from 9-1 to 7-3 (or
7 2.33 to 1). For every nine pounds that can be pooled
8 today, only 2.33 could be pooled in the future. The
9 intended effect is to force NDA and others to pool only
10 one-third of the milk we presently pool.

11 On top of that, it should be noted that the
12 Western order pools far less than the total milk
13 production within the marketing area. We ask that
14 Official Notice be taken of the publication entitled
15 "Milk Production", which is published monthly by the
16 National Agricultural Statistics Service.

17 That publication indicates that during
18 December of 2001, some 656 Million pounds were produced
19 in Idaho. The Market Administrator's Exhibit
20 indicates that only 277 Million pounds of Idaho milk
21 was pooled on the Western Order during that month. So
22 it is clear that more than half of Idaho's milk is
23 either pooled elsewhere, or not at all. That is a huge
24 pool of milk.

25 Proposal 6 would remove from the Western

1 order pool some 150,000,000 million pounds, which is
2 approximately 38% of the average volume of milk pooled
3 last year in the Western Order. This is shown in the
4 material which was prepared for John Vetne by the
5 Market Administrator's office (which we will introduce
6 into evidence if he does not).

7 The immediate effect of this would be to
8 tremendously shift the balance of economic power within
9 the Western order region. The secondary impact would
10 be for disorderly marketing conditions to break out in
11 many different ways. That may take on any number of
12 forms:

13 The classic use of "price incentives" to undercut
14 the raw milk price to Class I handlers. This may
15 provide an incentive for various types of
16 mechanisms which effectively undercut the
17 published Class I price.

18 The construction of new or expanded bottling
19 operations, to "raid" the retail milk market.
20 Milk now pooled on the Western order may find
21 other orders to pool milk, through artificial
22 mechanisms.

23 Some milk now pooled on the Western order may
24 pay a "pooling fee" to be pooled on this or some
25 other Federal order market.

1 The combination of these forces would have an
2 additional result, and that would be the political
3 reaction and Congressional review. An action which
4 kicks Idaho milk out of the very market in which it is
5 located, so that it moves to Order 30 and dilutes that
6 market, will make even the most supportive of public
7 officials question what is going on -- even before they
8 turn to the subject of creating an artificial market
9 value for pooling privileges. The proponents should
10 not be jeopardizing the Federal order system's
11 political support, by suggesting proposals which would
12 lead to such unsupportable conditions.

13 In analyzing the foregoing, NDA submits that
14 the more and more widespread practice of buying and
15 selling pooling rights is not only a reflection of
16 disorderly marketing conditions, it is also a cause of
17 disorderly market conditions. That is because the
18 seller can use the funds received to achieve
19 competitive advantages not available to others, and the
20 result would be even more disruption of the market.

21 There is simply no justification for reducing
22 the diversion percentage limitations of this order.
23 If anything, they should be increased rather than
24 reduced. While NDA is not formally proposing a change
25 in the diversion limitations from 90% to 95%, we

1 suspect that the evidence being introduced at this
2 hearing may well justify the change. However, it is
3 sufficient that the current provisions of the Western
4 Order permit any party to petition the Market
5 Administrator to change the diversion limitations of
6 the order. That is the appropriate mechanism for
7 change.

8 For all of the reasons set forth above, there
9 is no need to adopt Proposal No. 6.

10 I would be happy to answer any questions.

11 TESTIMONY OF DANIEL S. MCBRIDE:

12 MR. MCBRIDE: My name is Daniel S. McBride. I
13 am testifying today on behalf of Northwest Dairy
14 Association, which is usually referred to as "NDA". In
15 earlier testimony I have introduced myself, as well as
16 NDA and WestFarm Foods.

17 NDA Strongly Opposes Proposal No. 7. As we
18 understand this proposal, the Western Order (Order 135)
19 would be amended with a new paragraph that would reduce
20 the diversions from a pool distributing plant by the
21 amount of any transfers out of that plant. The concept
22 is to "net" the transfers out against the deliveries.

23 The practical effect of this is totally
24 consistent with the balance of proposals 3 through 7.
25 As with the others, Proposal No. 7 will greatly reduce

1 the ability of everybody in the market to pool milk --
2 with the exception of only one party in this market
3 that can hope to meet the combined standards be
4 proposed, and that is the proponent, DFA.

5 Proposal No. 7 is similar in wording and
6 intent to Proposal No. 3, which establishes a "netting"
7 provision in the pool supply plant. The objections I
8 raised in my earlier testimony regarding that provision
9 are equally applicable to Proposal No. 7.

10 None of the other Federal orders has such a
11 "netting" provision, and there is nothing different
12 about market conditions here to justify such a
13 provision. Throughout the Federal order system, pool
14 supply plants and other reserve plants benefit the
15 market because they are able to balance milk supplies
16 required by the fluid market and to pool milk in an
17 orderly fashion so that disorderly marketing conditions
18 do not occur. The obligation of such plants to serve
19 the needs of the pool distributing plants can be
20 regulated through the percentage delivery requirements,
21 with a "netting" rule.

22 This Proposal No. 7 must be analyzed in
23 conjunction with Proposals 3, 4 and 6. Proposal No. 6,
24 alone, would remove from the Western order pool
25 approximately 38% of the average volume of milk pooled

1 last year in the Western Order. When compounded by the
2 effects of Proposals 3, 4 and 7, there would be a
3 disruption in this market that would be unprecedented
4 in Federal order history. Yet there is no
5 justification for any of it!

6 What this package would NOT do and what
7 Proposal 7 would not do, is to make additional milk
8 available to distributing plants. There exists today
9 competition to supply those plants, not a need to
10 "mandate performance". As noted in earlier testimony,
11 DFA has the Class I market "locked up", making it
12 impossible for most parties other than DFA to perform
13 any greater degree. The milk of NDA and others is
14 already available and willing to perform. That is NOT
15 what these proposals are about.

16 Instead, this group of proposals would
17 increase the value of pooling rights, and enhance the
18 ability to extract other concessions from producers,
19 plants and cooperatives in the market -- leverage which
20 will come in handy when negotiating the sale of pooling
21 rights, or negotiating favorable terms of mergers or
22 joint marketing arrangements. That is certainly not
23 what Federal orders are about!

24 Coupled with the foreclosure of the Class I
25 market which I discussed in earlier testimony, this

1 package of proposals simply boots producers out of the
2 marketwide pool unless they make an arrangement with
3 DFA. USDA is being asked to set up DFA to control the
4 Western order market.

5 The sole impact of Proposal No. 7 will be to
6 make it more difficult for NDA and others to meet the
7 order's pooling standards. That is not a
8 justification for adopting it! Indeed, doing so would
9 violate earlier policies that were behind the current
10 order provision.

11 The policy set forth in the 1999 Final
12 Decision that established the current orders made it
13 clear that the desire was to permit milk to be pooled,
14 and to facilitate efficiency in balancing the remainder
15 of the milk. Some market were established with
16 unlimited diversion percentages, simply because over
17 the years as milk supplies have grown (with more demand
18 for cheese), the amount of milk produced relative to
19 Class I sales has declined in most markets. As that
20 occurred, one or more parties would eventually run up
21 against a diversion limitation, and petition the
22 Department to formally issue a rule suspend the
23 limitation entirely. The Department typically granted
24 such suspensions, in order to assure that all milk
25 traditionally associated with a pool could continue to

1 be pooled. Indeed, the Final Decision indicates that
2 the intention was to allow that to be done
3 administratively, order by order, rather than to be
4 burdened with a formal rulemaking requirement every
5 time some milk might not be able to meet diversion
6 limitations.

7 Furthermore, it was noted in the Final
8 Decision that the real limit to the amount of milk that
9 can be pooled through diversion lies in the combination
10 of a plant's pooling base (which fundamentally traces
11 back to what portion of a plant's milk is delivered on
12 route distribution within the marketing area) and the
13 required percentage of such milk that can be pooled off
14 of that base. The key was not the diversion
15 percentages themselves, nor whether the milk moving out
16 of a distributing plant should be "netted" against
17 receipts. Instead, the key concepts are the pooling
18 based and the diversion percentages. Especially the
19 diversion percentages, which are the "tool" used in the
20 orders (by the Department and the Market
21 Administrators) to adjust an individual order to the
22 changing needs of the market -- either the need for
23 more deliveries to the distributing plant, or the need
24 for more efficient handling of the market's surplus.

25 Proposal No. 7 would simply limit the ability

1 of a plant to maximize the utilization of its pooling
2 base, by throwing into the Western order calculation a
3 "netting" provision that does not exist in any of the
4 other milk orders. That was not the intent of the
5 current order program, as indicated in the Final
6 Decision:

7 "Even for orders without any diversion
8 limits, there is **a practical limit to how**
9 **much milk may be diverted from a pool plant**
10 **because of the pooling standards that must**
11 **be met.** For a pool supply plant, for
12 example, there is a standard computed by
13 dividing the amount of milk shipped to
14 distributing plants by a plant's total
15 receipts. As provided in the orders,
16 "receipts" include milk that is physically
17 received at the plant as well as diverted
18 to nonpool plants. This inclusion of
19 diverted milk in a plant's receipts
20 automatically limits the amount of milk that
21 may be diverted by those plants. Thus, the
22 maximum quantity of milk that such plants
23 would be able to divert and still maintain
24 their pool plant status would be 100 percent
25 less the pool plant shipping standards for

1 the month.

2 This treatment of diverted milk will

3 mitigate the need for suspending order

4 diversion limitations, an action that is

5 quite common in some of the current orders.

6 **Unlimited diversions for many of the new**

7 **orders will allow for maximum efficiency in**

8 **balancing the market's milk supply.** The

9 market administrator's ability to adjust

10 shipping percentages for pool supply plants,

11 pool reserve supply plants, and balancing

12 plants will ensure that an adequate supply

13 of milk is available for the fluid market

14 without the imposition of diversion limits."

15 (Quoted from Final Decision, pages 17 and

16 18 of "Acrobat" Internet version, in the

17 section entitled "Provisions applicable to

18 all orders". Emphasis in bold supplied.)

19 The proponents are asking USDA to reverse

20 direction and thereby limit the amount of milk that can

21 be pooled, and create more and more requests for

22 suspensions of the rule or administrative changes in

23 the requirements. No such change should be made

24 without clear and convincing evidence of a problem, and

25 a clear demonstration that there is no other solution

1 that is less radical and less disruptive of Federal
2 order concepts.

3 We are aware of no market conditions which
4 can justify such a radical change, and strongly urge
5 that this provision be rejected entirely.

6 I would be happy to answer any questions.

7 JUDGE CLIFTON: Now, with regard to
8 Exhibit 61, the only language that is not a complete
9 sentence is found on Page 5, and it appears to me that
10 would be easily included in the transcript.

11 Is there any objection to the entirety of
12 Exhibit 61 appearing in the transcript?

13 (No response)

14 JUDGE CLIFTON: All right. There appears to
15 be none.

16 TESTIMONY OF DANIEL S. MCBRIDE:

17 MR. MCBRIDE: My name is Daniel S. McBride. I
18 am testifying today on behalf of the Northwest Dairy
19 Association, which is usually referred to as NDA. In
20 earlier testimony I have introduced myself, as well as
21 NDA and WestFarm Foods.

22 NDA Has Serious Concerns About Proposal No.

23 8. As we understand this proposal, the Western Order
24 (Order 135) would be amended to provide both a
25 transportation credit and an assembly credit. We at

1 NDA presently see no justification for either.
2 However, before taking a "hard" position, we will use
3 this hearing as an opportunity to better understand the
4 concept.

5 We will convey our conclusions and final
6 position in the post-hearing brief. However, there are
7 some important concepts and evidence for the hearing
8 record.

9 Assembly Credits. The practical effect of
10 this is to provide producers and/or cooperatives with
11 supply distributing plants an additional \$.05/ctw on
12 the Class I portion of milk utilized at the plant, and
13 it would do so at the expense of the other producers
14 who share in the marketwide pool. NDA opposes this
15 concept for the following reasons:

16 Today, only on Federal order has anything
17 like this, the Upper Midwest order (Order 30). We note
18 that market conditions there are quite different than
19 in the Western order, where the "assembly plant"
20 concept does not apply. Farms tend to be smaller in
21 Order 30, but in the Western order it is not normally
22 difficult to assemble a full load in most parts of the
23 milkshed.

24 1. A fundamental problem with assembly credits is
25 illustrated by the Order 30 requirement that it

1 must be paid directly to handlers. In contrast,
2 Proposal No. 8 would provide direct payments to
3 the supplying producers and cooperatives. I
4 suspect that the Department took that approach in
5 Order 30 in order to maintain uniform pricing to
6 handlers under that order. Consider what would
7 happen in the Western order. As earlier
8 testified, the proponent (DFA) has long term
9 supply contracts with handlers, with stated
10 service charges. If the assembly credit is given
11 to DFA, there is no reason for them to pass the
12 credit on to their customer. In contrast, the
13 Gossner plant (or any other hypothetical pool
14 distributing plant that contracts for milk with
15 its own producers) will achieve a cost benefit
16 that it does not presently have. The effect will
17 be to alter the uniformity of competing handlers'
18 milk cost, in violation of statute.

19 2. However, if such a credit were paid to the
20 producer or cooperative that "assembles" the milk,
21
22 we note that it would provide an additional
23 incentive for a producer (or a cooperative) to
24 want to lock up Class I markets, thereby
25 potentially creating the very sort of "disorderly

1 marketing conditions" that orders are required
2 by statute to prevent. We see no way out of this
3 dilemma, except to reject the assembly credits
4 concepts.

5 3. The traditional concept of "assembly" is not
6 applicable in this region. That concept is the
7 gathering of milk from producers at an assembly
8 point, so that it can be more efficiently
9 transferred to the ultimate processing location.
10 I can testify that in connection with my day to
11 day activities, I have come to be aware of many
12 producers in Southern Idaho who ship full tanker
13 loads of milk at each pickup. Many ship over
14 70,000 pounds per day, which is our average load
15 size. It would be ironic that a market which has
16 so many large dairy farms which ship full tanker
17 loads would be given a credit to "assemble" such
18 milk!! More than ironic, it simply can not be
19 justified.

20 4. Furthermore, such a credit is not needed to
21 cover what assembly costs there are in this
22 market. We follow the pricing of other Southern
23 Idaho handlers very closely, and I can testify
24 that in that area all producers pay a hauling
25 rate that reflects at least some if not all of the

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cost of picking up their milk. Those hauling rates tend to be greater for smaller producers whose "assembly costs" must be combined with other producers on a tanker -- such producers are paying for the assembly of their milk onto efficient tanker loads.

5. As can be seen from the foregoing, there is no reason to distinguish between "assembly costs" of pooled milk that is bottled and the milk which is made into Class II or III or IV products. There is no "intermediate assembly point" in either scenario. Furthermore, the costs of "assembly" are identical, regardless of which type of plant the tanker goes to when it leaves the farm. The only effect of this proposal would be to give Class I handlers and suppliers a competitive advantage in recruiting producers.

6. DFA testified that one rationale for assembly credits is to somehow cover balancing costs of the market. We at NDA are directly aware of those costs, from our experience in both orders in which we operate. They are real. However, those costs are -- for the most part -- incurred by manufacturing plants, and not by the Class I

1 plants. Proposal No. 8 would pay producers who
2 ship to manufacturing plant which balances the
3 market. In fact, I can testify from our
4 experience that the producers who market only to
5 a distributing plant (whether directly or through
6 a bargaining cooperative) have a seasonal pattern
7 to their production which, in turn, must be
8 balanced by someone else's balancing plant. It
9 would be a travesty of justice for such producers
10 to be rewarded for providing a service, when in
11 fact they are the cause of the balancing problem.
12 The only way this dilemma can be rewarded is to
13 pay the balancing fee to the plant which actually
14 bears the "opportunity cost" of this balancing.

15 7. Each market has a seasonal pattern to Class I
16 and II sales, and a seasonal pattern to
17 production. When these two figures are graphed,
18 it is the difference between the two lines which
19 demonstrates the amount of seasonal balancing
20 that must occur during the month.

21 8. If we accept the notion that some seasonal
22 balancing cost exists, which producers should
23 bear its cost? If the balancing plant is
24 balancing milk from outside the order area, that
25 balancing cost should not be borne by producers

1 in the Western Order market but by someone (anyone)
2 in the other market. If a balancing plant within
3 this market is handling milk that is produced
4 within the Western order but pooled on another
5 Federal order, the cost of balancing that milk
6 should not be borne by Western order producers.

7 9. NDA believes that weekend balancing can best
8 be addressed through a system of "even daily
9 receipts credits". In such a system, distributing
10 plants which take the same amount of milk each day
11 of the week cause no "weekly balancing" costs and
12 pay no fee. Those plants which cause the problem,
13 pay for it according to some formula that
14 incentivizes a more regular pattern.

15 10. There is no justification for charging the
16 producers in the pool an assessment to reimburse
17 the costs related to field services or laboratory
18 services or processing producer payrolls. A
19 proprietary distributing plant which is its own
20 producer milk supply has always had to bear those
21 costs in the past and pay minimum prices. If the
22 producers which supply such a plant are given an
23 assembly credit which covers those costs, it will
24 be a pure windfall. That is because the order
25 will not permit the plant to assess producers

1 for those costs and pay less than the Federal
2 order class price. The plant will continue to
3 pay those costs but receive no credit, while the
4 producers who do not pay those costs would be
5 given a credit.

6 11. Following up on that last point, the
7 principle of uniform pricing requires that
8 distributing plants supplied by cooperatives
9 should not be put at a competitive disadvantage
10 from a credit system. Yet that is exactly what
11 would happen if the cooperative were to provide
12 those services, charge the pool for them, and
13 provide those services to the distributing
14 plant for free.

15 Given those thorny problems must mentioned,
16 we must closely examine whether there is any
17 justification for assembly credits. We submit that the
18 current order provisions are working well. We are
19 aware of no difficulty that distributing plants
20 presently have, in obtaining the milk they need. And
21 we are aware of no unusual cost situations which exist
22 today involving unique "assembly" challenges.

23 NDA believes that assembly and balancing
24 costs can be, and should be, paid by the distributing
25 plants, either directly (if they have their own

1 producer milk supply) or indirectly (if they buy from
2 cooperative or supply plants which perform those
3 services for them). Moreover, our understanding of the
4 current service charge level in this Western Order
5 market indicates that distributing plant are, already,
6 bearing those costs.

7 We understand from conversations a couple of
8 years ago with DFA that their service charges at Boise
9 are comparable to NDA's service charge, which is 25
10 cents/cwt on Class I and II milk. We understand from
11 (now-dated) conversations with DFA and its predecessor
12 (Western Dairymen Cooperative, Inc.) That the service
13 charge level in the Salt Lake City market is similar,
14 or perhaps a bit less. Perhaps DFA can provide more
15 current information, but all indications from the
16 marketplace are that those service charges were written
17 in to long term contracts that are still in place.

18 We can understand why the proponent would
19 like additional money from the pool for serving their
20 customers, but we can see no other rationale to support
21 this request.

22 Transportation Credits. As noted above, NDA
23 understands that there can be a rationale in certain
24 circumstances for a milk marketing order to provide
25 transportation credits. We are not clear whether there

1 is such a need in the Western order.

2 Three other Federal orders have
3 transportation credits, but they work in much different
4 ways than are proposed here.

5 In the Upper Midwest, the transportation
6 credits are available only to transfers between plants.
7 That market still has many small farms, and milk
8 apparently is still "assembled" at country plants for
9 shipment to distributing plants. As noted in our
10 discussion of assembly credits, that is typically not
11 the case in the Western order. This Proposal No. 8
12 applies to all milk, not just transfers between plants.

13 In two of the Southern markets,
14 transportation credits are provided to move milk from
15 outside the market area, to plants within the market.
16 This is so different from what happens in the Western
17 market, that is not a useful precedent. The Southern
18 United States is deficit, the Western order has a very
19 low Class I utilization. Indeed, Proposal No. 8 would
20 not provide a credit to bring in milk from any point
21 outside the marketing area.

22 NDA submits that Proposal No. 8 is so
23 different in concept from the three current situations
24 where a transportation credit is granted, this proposal
25 would be unprecedented. It must stand on its own

1 unique facts and justifications.

2 Proposal No. 8 is not only different in
3 concept, it is also different in detail. It proposes a
4 \$.0038/cwt credit per mile, whereas the figures is only
5 \$.0028 in the Upper Midwest and only \$.0035 in the
6 South.

7 Without taking a position on what an
8 appropriate credit is, I would like to provide the
9 following information about what NDA feels are fair
10 reflections of today's hauling costs:

	<u>Rate (total haul)</u>	<u>Road Miles</u>
12 Line haul rates to Salt Lake City from:		
13 Jerome	.75./cwt	225
14 Boise	1.10	340
15 Caldwell	1.18	365
16		

17 I should add that these bids are not all from
18 the same hauler, so they are not necessarily
19 comparable.

20 That said, it is important to stress that our
21 numbers reflect the full cost of the haul, including
22 farm pickup, road miles, and the cost of the 1-3 hours
23 that it typically takes at the receiving plant (to wait
24 in line, pump out, and cleanse the tank).

25 We are currently renegotiating our hauling
26 costs with our major hauler. We believe that it

1 typically takes over an hour on the farm to load a
2 producer who ships a full tanker load. A 10,000 pound
3 stop typically takes 30-45 minutes on the farm. There
4 is other driving time between stops.

5 All these costs of pickup and delivery are
6 included in the farm pickup costs we pay to haulers.
7 The hauler's charges are approximately equal to what we
8 charge back to our producer members, with variations
9 based on volume per pickup.

10 It might be useful to put into evidence that
11 this past winter had a competitive bid situation for
12 hauling milk from a farm 66 miles from our Jerome
13 plant. One hauler bid 30 cents per cwt for full 70,000
14 to 72,000 pound tanker loads each pickup, the
15 successful bidder was at 28.

16 As you can see, for a short haul, where the
17 producer milk is within a 30 mile radius, the
18 proportion of the total cost is primarily in the time
19 on the farm and at the receiving plant, not "over the
20 road" miles. The longer the haul, the more those over
21 the road miles become a factor, but there are still
22 anywhere from 2-8 hours of other costly activity
23 involved besides "loaded miles".

24 It is also worth noting for this hearing
25 record that the Upper Midwest market has location value

1 zones that, for the most part, differ by only \$.15/cwt,
2 whereas the Western market has a \$.30 disparity to
3 incent the movement of milk from Idaho into Utah.
4 Given that existing incentive, it is not clear what
5 would be accomplished by the proposed credits, nor it
6 is clear exactly how they would be used.

7 To illustrate that last point, I can testify
8 that NDA has members on farms in Baker County of
9 Eastern Oregon that are more than 80 miles from the
10 WestFarm Foods bottling plant in Boise. Normally, that
11 milk is delivered to the Caldwell, Idaho plant. But,
12 if a credit were available, there would be plenty of
13 incentive to move that milk right past Caldwell,
14 another 20 miles or so to the Boise plant, while other
15 milk near Boise is taken back to Caldwell. That would
16 be inefficient, but profitable! Similarly, one must be
17 concerned whether the effect of the proposal would not
18 be to move milk from Southern Idaho into Salt Lake
19 City, while milk from nearer Salt Lake City stays in
20 the area for use at the cheese plants at Smithfield and
21 Beaver, Utah. The propose should be to serve
22 distributing plants, but the result may be to fill up
23 one cheese plant at the expense of another.

24 On a related point it is important to note
25 for the record that there are currently movements of

1 milk from the Magic Valley (around Jerome and Twin
2 Falls) to the Treasure Valley (Boise and Caldwell and
3 Nampa). That means there is a backhaul potentially
4 available to help move milk from the Treasure Valley to
5 Jerome, and onto Salt Lake City. Yet the cost of that
6 additional haul would be reimbursed at the full
7 transportation credit.

8 A final point in our thinking is that we
9 presently see no unfair cost disadvantage to those of
10 us who supply the Class I market, which must be correct
11 through a transportation credit.

12 I will close this testimony by stating some
13 general concerns that should underlie any such
14 proposal:

- 15 1. It should benefit Class I only, and should
16 not indirectly benefit manufacturing activities.
- 17 2. It should not create an economic incentive
18 for artificial movements of milk.
- 19 3. It should not cover the full cost of hauling,
20 and
- 21 4. It should not provide a "windfall" to cover
22 other hauling expenses.

23 Summary. NDA suggests that these credits are
24 fraught with policy problems, and therefore would be
25 questionable public policy unless there is a clear

1 justification. At this point, we see no reason to
2 think they are needed, but we will analyze that further
3 in our post-hearing brief.

4 I think it is important to close this
5 discussion by testifying that, with respect to both
6 assembly credits and transportation credits, we
7 ourselves do not require these credits as an incentive
8 to serve the Salt Lake City market from our Idaho milk
9 supply(some of which is less than 200 miles from the
10 City). If the proponent and other supplies to the Salt
11 Lake City market are not willing to continue supplying
12 those markets under the current order provisions,
13 without assembly and transportation credits, NDA stands
14 ready and willing to do so.

15 I would be happy to answer any questions.

16 JUDGE CLIFTON: All right. With regard to 62
17 and 63, is there any objection to the court reporter
18 including those exhibits entirely in the transcript?

19 (No response)

20 JUDGE CLIFTON: There is none, and I so
21 instruct.

22 TESTIMONY OF DANIEL S. MCBRIDE:

23 MR. MCBRIDE: My names is Daniel S. McBride.
24 I am testifying today on behalf of the Northwest Dairy
25 Association, which is usually referred to as "NDA". In

1 earlier testimony I have introduced myself, as well as
2 NDA and WestFarm Foods.

3 NDA Opposes Proposal No. 5. As we understand
4 this proposal, the Western Order (Order 135) would be
5 amended to delete entirely the "bulk tank handler"
6 provision, which has been utilized by cheese plants in
7 Southern Idaho to pool their milk.

8 We note that the order provisions also would
9 permit handlers using this provision to qualify,
10 alternatively, as a pool supply plant. Our
11 understanding is that the bulk tanker handler provision
12 is a more efficient way of operations. If so, that
13 should be a justification for retaining it.

14 If there are problems associated with this
15 provision, they should be modified. But at this point
16 in the hearing, we see no reason for such a change.
17 The practical effect of this is to make it more
18 difficult for certain producers to be pooled, but that
19 should not be the goal of the Department in writing
20 Federal Orders.

21 Proposals 11-13. At this point in the
22 hearing process, NDA does not have a position on these
23 proposals. We understand the intent to be to ensure
24 that the proprietary bulk tank handler provision does
25 not result in agreements with distributing plants

1 which, when all aspects are considered, give the
2 distributing plants a lower cost of milk than the Class
3 prices under the order.

4 NDA could agree that plants should pay full
5 Class prices. The problem lies in how this can be
6 achieved. And the awkward fact is that today there
7 are many such devices which, when all is considered,
8 given some bottlers an economic advantage over
9 competitors who arguably are subject to the same Class
10 I price. One of those is the sale of pooling rights,
11 which has been discussed at length earlier in this
12 hearing. The fundamental problem is that the
13 transaction regulated by the Federal order need not be
14 the only business transaction between the parties.

15 Given that, we are certainly open to whatever
16 the Department feels makes sense.

17 I would be happy to answer any questions.

18 TESTIMONY OF DANIEL S. MCBRIDE:

19 MR. MCBRIDE: My name is Daniel S. McBride. I
20 am testifying today on behalf of Northwest Dairy
21 Association, which is usually referred to as "NDA". In
22 earlier testimony I have introduced myself, as well as
23 NDA and WestFarm Foods.

24 NDA Supports Proposals No. 14, 15 and 16.

25 These proposals were submitted by the Market

1 Administrator.

2 We believe they will assist in the
3 interpretation and administration of the order. To the
4 best of our knowledge, they are not controversial and
5 therefore require no further evidence in this hearing.

6 However, I would be happy to answer any
7 questions.

8 JUDGE CLIFTON: Mr. Marshall, do you happen
9 to have these documents on a disk that you can give the
10 court reporter?

11 MR. MARSHALL: Your Honor, we can certainly
12 make that available. At the present moment, they are
13 not -- not available entirely on a floppy diskette, I
14 don't believe, but we can surely do that before we
15 leave here today.

16 JUDGE CLIFTON: Excellent. Thank you. If
17 you'll make those arrangements directly with the court
18 reporter? All right. That's an excellent procedure.

19 You may proceed.

20 DIRECT EXAMINATION

21 BY MR. MARSHALL:

22 Q Mr. McBride, for the benefit of the audience
23 and other participants, let's review very briefly what
24 is contained in each of these exhibits.

25 Earlier in this hearing, there was a lot of

1 testimony about the alleged impact, economic impact on
2 Utah dairy producers from -- traced to the Reform
3 process. You've got a section on Exhibit 56 that runs
4 from Page 1 over on to Page 3. Is that attempted to --
5 an attempt to provide our economic analysis of that
6 issue?

7 A Yes.

8 Q And we've heard a number of questions asked
9 by Mr. Tosi during the hearing about what performance
10 and pooling standards should be applicable or should be
11 applied in a Federal Order. The materials on Pages 3
12 through 5, would that be our attempt to lay out in a
13 consistent way our theory regarding those matters?

14 A Yes.

15 Q Exhibit 57, which relates to Proposal 3,
16 begins with a section entitled "NDA Opposes Proposal 3"
17 and proceeds through the first three pages to discuss
18 and then on Page 4 to summarize NDA's position on
19 Proposal 3.

20 Beginning at the middle of Page 4 and through
21 the remainder of that exhibit, you testified about "our
22 general concern about the sale of pooling rights". At
23 this point, I'd like to ask some additional questions
24 regarding the subject of pooling rights.

25 We've heard testimony earlier in this hearing

1 from the representative of the River Valley Cooperative
2 that their members pay a 10-cent pooling fee to Dairy
3 Farmers of America, directly or indirectly. Do we have
4 information from the field, obtained from members of
5 the River Valley Cooperative, about the other related
6 arrangements?

7 A We have heard that -- that --

8 MR. BESHORE: Your Honor?

9 JUDGE CLIFTON: Mr. Beshore?

10 MR. BESHORE: The question has asked for
11 second- or third-level hearsay. We have very little
12 time to discuss, you know, 25 pages of prepared
13 testimony, analysis of data, arguments, etc., of Mr.
14 McBride.

15 To take additional time with hearsay, rumor,
16 reports from the field about a contract that has been
17 testified to by principals, one of the principals at
18 least, and other -- and other folks previously is not
19 going to help, and in fact, it's going to clutter and
20 impede our ability to get to the heart of the testimony
21 in the very limited time we've got.

22 MR. MARSHALL: Can I speak?

23 JUDGE CLIFTON: You may, Mr. Marshall.

24 MR. MARSHALL: Your Honor, first of all, this
25 is a hearing involving a matter of extremely important

1 economic and competitive importance to our cooperative.
2 We have been most considerate, I think, during this
3 hearing of the priority of witnesses with respect to
4 producers and expert witnesses, such as Mr. Hollon, who
5 had to leave.

6 This is our time to put into the hearing
7 record as much as we can and need to argue from in our
8 post-hearing briefs.

9 The second point made by Mr. Beshore was -- I
10 guess his primary point is that this was a hearsay
11 objection. His own witnesses testified as to reports
12 from their field staff. Now, his own witness had the
13 opportunity to clarify the contractual relationship
14 being discussed by Mr. McBride and chose not to do so.
15 That is their choice.

16 But the reality is that the word is on the
17 street of exactly what those arrangements are. We have
18 been told in fact by a principal of the River Valley
19 Cooperative that Mr. McBride would be presenting
20 technically hearsay evidence but of the kind that has
21 been introduced throughout this hearing.

22 JUDGE CLIFTON: All right. Thank you.

23 I have been very tolerant of rumor and word
24 on the street throughout this hearing. Normally that
25 would not be considered evidence in a hearing, but I

1 have allowed it in, and part of the reason I've allowed
2 it in is protections that are given to proprietary
3 information make it very difficult for the Secretary to
4 know what happened in the marketplace.

5 So, I don't know how reliable this
6 information is. I know we have limited time. I hope
7 you'll move right along, Mr. Marshall, but I will allow
8 your witness to answer the questions.

9 MR. MARSHALL: Thank you.

10

11 BY MR. MARSHALL:

12 Q Do you remember the question, Mr. McBride?

13 A Yes. We have heard from, you know, our field
14 staff that talk to other producers, you know, that, you
15 know, the producers -- basically River View is paying a
16 25-cent fee, which 10 cents is being paid by the -- by
17 the producers.

18 Q And the other 15 cents is paid from whom to
19 whom?

20 A Be paid by -- you know, from -- as we
21 understand it, from -- by the cooperative, River View
22 or River Valley, to -- to DFA.

23 Q It would be paid by the cooperative and/or
24 the Sorrento plant? Could it be either of those two
25 that are paying that?

1 A Yes.

2 Q And then, with respect to producers who ship
3 directly to Sorrento rather than through the River
4 Valley Cooperative, what have you heard as word on the
5 street about that arrangement from our field staff who
6 in turn have talked to Sorrento producers?

7 A They said that Sorrento producers are -- you
8 know, are also paying an additional 10 cents and that
9 the Sorrento is also paying an additional -- Sorrento
10 is paying an additional fee to DFA to have their milk
11 pooled on the Western Order.

12 Q Those are the only questions I have regarding
13 that. So, let's move on.

14 Proposal Number 4 relates in Exhibit --
15 discussed in Exhibit 58 relates to the Cooperative Pool
16 Plant provisions of the existing Order. I notice on
17 Page 3 of your prepared testimony, there is a suggested
18 modification to the proposal as outlined in the Hearing
19 Notice.

20 Would you please read the paragraph towards
21 the bottom lower half of Page 3 in which that is
22 discussed?

23 A Beginning with the paragraph that starts,
24 "Specifically, we suggest the proposal be modified to
25 reduce the current 35-percent delivery requirement to

1 10 percent rather than increase to 50 percent. Then a
2 cooperative such as ours with roughly a quarter of the
3 milk being pooled in the market could utilize this
4 provision. As it stands, NDA would have to deliver 35
5 percent of our milk to distributing plants to utilize
6 this provision. If we are 25 percent in the market in
7 a given month, then we'd have to deliver 35 percent of
8 our 25 percent which would be 8.75 percent of the
9 entire market to milk, but if a combined Class 1 to 2
10 utilization of the Western Order is only 25 percent in
11 the market, then in order to utilize this provision
12 today, NDA would therefore need to deliver roughly a
13 third of our needs to a pool distributing plant."

14 Q Because this may be a subject that would
15 involve cross examination, I'm going to ask you to read
16 the remainder of this section, the next several
17 paragraphs.

18 A All right. "NDA supplies one-third of the
19 Class 1 and 2 market in the Pacific Northwest Marketing
20 Area, and we would be very comfortable with the one-
21 third share of the Western Order's Class 1 and 2
22 market. But the fact is, is that to achieve that level
23 and to be able to use the cooperative pool plant
24 provision with even the 35-percent requirement would
25 necessarily require us to displace others who presently

1 supply those Class 1 and 2 plants.

2 There are two very real problems with that.
3 First, the major pool distributing plants in the
4 Western Order Market are today all tied up with long-
5 term single-source supply contracts with DFA. Second,
6 even if that were not the case, the only way we could
7 achieve the 25-percent market share would be to cut
8 price. Doing so would almost certainly create
9 disorderly marketing conditions.

10 Given that even the present 35-percent
11 provision is unrealistic for us to meet in the Western
12 Order, we are/would support reducing the percentage.
13 We suggest 10 percent to be the new percentage for two
14 reasons. The first, it is the number used in the
15 supply plant provision in the Upper Midwest Order which
16 has similar class utilization to the Western Order, and
17 more importantly, it matches the 90-percent diversion
18 limitations in the Western Order which should be
19 retained as we will demonstrate further in our
20 discussions of Proposal Number 6."

21 Q Thank you, Mr. McBride.

22 Your exhibit of prepared testimony then
23 proceeds to document our understandings of the nature
24 of existing contracts in the Salt Lake City and Boise
25 markets and how those contracts worked, to the best of

1 our knowledge. Is that your testimony --

2 A Yes.

3 Q -- regarding that?

4 Exhibit Number 59 relates, of course, to the
5 diversion limitations that are being proposed in this
6 Order.

7 A I would like to make one correction on Page 1
8 of this exhibit.

9 Q Please.

10 A Down on the last paragraph, I have the 150
11 million millions. So, it should just read a 150
12 million and cross out the six zeros.

13 Q Thank you, Mr. McBride.

14 I believe on Page 1, you have in italics a
15 request that official notice be taken of the
16 publication entitled "Milk Production" which is
17 published monthly by the National Agricultural
18 Statistics Service.

19 MR. MARSHALL: Your Honor, I believe that
20 official notice of that has already been taken.

21 JUDGE CLIFTON: Thank you.

22 BY MR. MARSHALL:

23 Q With respect to the general subject of
24 diversions, your testimony includes information about
25 disorderly marketing conditions. I'd like to ask you

1 one additional question to put into the record some
2 evidence.

3 You heard testimony earlier in this hearing
4 that some Sorrento direct shipping producers, some
5 producers who have been shipping directly to the
6 Sorrento cheese factory in Nampa, Idaho, had considered
7 building a bottling plant.

8 Have we heard those rumors as well?

9 A We heard the rumors that there is a group
10 trying to build a bottling plant so they'd have a way
11 for them to become pooled on to the Western Order.

12 Q If that were to occur, what would be the
13 impact on the West Farms Food Plant, bottling plant, at
14 Boise, Idaho?

15 A Well, you'd be very disruptive in whatever
16 area they built that bottling plant because that would
17 be additional sales that would have to be taken away
18 from existing customers.

19 Q Would that constitute, in your opinion,
20 disorderly marketing conditions?

21 A Yes.

22 Q With respect to diversion limitations, what
23 has been the philosophy of Northwest Dairy Association
24 in the Pacific Northwest Order as proposed to the
25 Department? In fact, let me break that down.

1 In the Pacific Northwest Order today, is it
2 true that effectively there are -- the diversion limits
3 permit all the milk within the Order area to be pooled?

4 A I believe so.

5 Q And do the cooperatives within the Order area
6 all work together to ensure that all of that milk has
7 been pooled?

8 A Yes. But we have to combine a letter to the
9 other cooperatives to make sure that all the milk in
10 the markets or at least members of the cooperative's
11 milk can be pooled.

12 Q There's a special provision of the Pacific
13 Northwest Order called a "cooperative reserve supply
14 unit". Could you describe that and why it was put into
15 the Order?

16 A That -- that's a provision that was put in to
17 where a manufacturing plant -- a co-op could deliver to
18 a manufacturing plant its -- its entire supply of milk
19 and still have the milk pooled on the -- on the Order.
20 There was a co-op that was supplying an Olympia cheese
21 plant in Washington that had no Class 1 sales, and, you
22 know, the provision was put in that they could have
23 their milk pooled without having any -- any performance
24 standards to the -- to the Class 1 market, except there
25 was also provision in there, a call provision which

1 required if milk was needed in Class 1 market, that
2 they would -- you know, they would have to deliver.

3 Q And that call provision would require the
4 Market Administrator to make a request to the
5 cooperative reserve supply unit if there was a
6 demonstrated need by any distributing plant for the
7 milk, is that correct?

8 A Correct.

9 Q You made a reference -- so the record is
10 clear, you made a reference to an Olympia cheese plant.
11 Is the name of that company that you're referring to --
12 was -- do I understand correctly you're referring to a
13 plant that once was known as the Olympia Cheese
14 Company?

15 A Yes.

16 MR. MARSHALL: Turning to Exhibit 61,
17 Proposal Number 8, Your Honor, we indicated earlier in
18 this hearing when we first reconvened this morning that
19 we had some -- we were going to be making an objection
20 as to some of the testimony yesterday regarding
21 Proposal Number 8.

22 MR. McBRIDE: Excuse me. Doug, did we cover
23 Number 60?

24 MR. MARSHALL: Thank you for that correction.

25 BY MR. MARSHALL:

1 Q Mr. McBride, Exhibit Number 60 relates to
2 Netting for Diversions and Proposal Number 7. Is there
3 anything you'd like to add to your prepared testimony
4 there?

5 A No.

6 Q Now, with respect to the proposals so far and
7 these subjects of pooling standards, are there any
8 corrections that you had wanted to note in the record
9 of your exhibit, any corrections of your exhibit that
10 we didn't discuss?

11 A I think back on Proposal -- Exhibit Number
12 56, the second line from the bottom, it says,
13 "Distributing plants in those two Orders". That should
14 read "in those two areas".

15 Q Again, what -- would you point that out again
16 for the record?

17 A That was Exhibit 56, Page 1, second line from
18 the bottom. It should read "Distributing plants in
19 those two areas".

20 Q Thank you.

21 Any other corrections on these exhibits --

22 A No.

23 Q -- regarding pooling standards?

24 A No.

25 Q All right. Turning to Exhibit 61.

1 MR. MARSHALL: Your Honor, so that we can
2 provide some background information with respect to the
3 objection that will be forthcoming, I would like to ask
4 Mr. McBride to actually read --

5 JUDGE CLIFTON: Mr. McBride, let me hear Mr.
6 Beshore's suggestion here.

7 MR. BESHORE: My suggestion is that the
8 testimony's in the record. The objection can be made
9 on brief, and the clock is winding down very fast, and
10 I -- I've got -- if we're going to all make the 1:00
11 plane we're on, I've now got, you know, less than an
12 hour to cross examine, assuming I can read all Mr.
13 McBride's testimony, you know. All this testimony and
14 objection to -- to proposals, and I want to move it
15 along. I don't think he has to read it. We can brief
16 these objections and go.

17 JUDGE CLIFTON: Is there anyone in the room
18 who does not have a copy of Exhibit 61?

19 (No response)

20 JUDGE CLIFTON: Mr. Marshall, everyone has
21 it. If you would merely call the witness's attention
22 to the portion that's important, it won't be necessary
23 for him to read it to us. But I do appreciate your
24 highlighting the crucial parts.

25 MR. MARSHALL: Thank you, Your Honor.

1 What I would like to do is make the motion
2 for the record then with respect to our objection to
3 testimony regarding the subjects, all subjects relating
4 to balancing costs as a factor in an assembly credit.
5 I would like to speak to that objection and discuss the
6 evidentiary problems that it presents.

7 JUDGE CLIFTON: So, -- so, you -- you want to
8 interrupt your client's testimony in order to make the
9 objection?

10 MR. MARSHALL: Right.

11 JUDGE CLIFTON: You may proceed.

12 MR. MARSHALL: I will simply cite to you our
13 prepared testimony on Page 2 of Mr. McBride's Exhibit
14 61 as to what the traditional concept of assembly is in
15 our opinion, and then I would like to speak further to
16 that.

17 JUDGE CLIFTON: Is it only Paragraph 3 that I
18 need to read?

19 MR. MARSHALL: All of it would be helpful,
20 Your Honor, but that's the key point.

21 JUDGE CLIFTON: All right. Let's go off
22 record just a moment.

23 (Pause to review document)

24 JUDGE CLIFTON: Back on record. All right.
25 We're back on record at 10:12.

1 You may proceed with your objection, Mr.
2 Marshall.

3 MR. MARSHALL: Your Honor, the objection is
4 to all testimony and evidence regarding balancing costs
5 as a factor in assembling credits. The reason for that
6 objection is that it's outside the scope of the Hearing
7 Notice, and I move to strike all such testimony and
8 evidence.

9 In speaking to that objection and motion, I
10 point out several things. First, that, as Mr. Beshore
11 indicated, the hour is late, and we spent a lot of time
12 during this hearing simply because -- in cross
13 examination of his witnesses simply because there was
14 no advance copy of DFA's testimony provided to NDA.

15 As a result, we were unaware until yesterday
16 afternoon that what is typically called in Federal
17 Orders a balancing fee was going to be introduced into
18 this hearing record as evidence in support of an
19 increased assembly credit.

20 The two are different concepts, in my
21 opinion, as an advocate, and to ensure that I was
22 correct last evening, I can represent to you that last
23 evening, I went to the final rule, which is the most
24 current statement that I can think of of Federal Order
25 philosophy, and learned the following.

1 First, that there was approved in the final
2 rule an assembly and procurement credit in the Upper
3 Midwest, which has been cited by DFA as some precedent
4 or parallel for their proposal. There was no mention,
5 I represent to you that there was no mention in the
6 final rule of any balancing costs as a justification
7 for that assembly credit.

8 In contrast, in the Northeast Market,
9 balancing credits were proposed but denied as it turned
10 out, but there was a lot of discussion in the final
11 rule regarding that proposal for a balancing credit.
12 Part of that discussion was an analogy -- was a -- was
13 with respect to the proponents in that proceeding
14 arguing by analogy to assembly credits, which were
15 described as, and I quote, "the cost of milk assembly
16 and the movement of milk". That comes from Page 22 of
17 the Internet version of the final rule under the
18 heading "Regional Issues".

19 Your Honor, as further background, let me
20 point out that the assembly credits in that Order and
21 indeed the proposed balance -- in the Upper Midwest
22 Order and indeed the proposed balancing credits in the
23 New England -- correction -- the Northeast Market were
24 then paid to plants for balancing services. That is
25 the way a balancing credit should work.

1 What I'm about to make would be argument, but
2 it also is supportive of the reason why this is outside
3 the Hearing Notice. The cost of balancing the market
4 incurred by balancing plants should be returned to the
5 plants which provide that service, not to the producers
6 who cause the balancing problem, as would be the case
7 if -- if the proposal is adopted and if the costs of
8 running a balancing plant are included within the
9 assembly credit.

10 Now, I have said what I wished to say. I'd
11 be happy to answer any questions, but I must say also
12 that the decision that you make will have a tremendous
13 impact on how we do the evidence for this proceeding.

14 I might note that there's been discussion of
15 a full hearing on balancing credits for the Northeast
16 Market. There's a study, I guess, I'm told, by Mr.
17 Ling of the Department of Agriculture, I believe it's
18 the Rural Cooperative Business Service, about supply --
19 the costs to a balancing plant, a study, which I've not
20 read but which would be evidence in this hearing if we
21 were to consider all of that.

22 There has been no opportunity for us even to
23 put into the record the kind of study --

24 MR. BESHORE: Your Honor?

25 MR. MARSHALL: -- that we do routinely within

1 Northwest Dairy Association with respect to our costs
2 of balancing simply because this was not noticed in the
3 hearing.

4 MR. BESHORE: Your Honor, the evidence is in
5 the record without objection from yesterday. Every
6 minute that I spend or anybody else spends on this
7 right now, I'm cutting my own throat from being able to
8 examine Mr. McBride on the -- on the testimony -- on
9 the proposals that are part of this hearing record
10 because we've got a finite amount of time.

11 Mr. Marshall's talking about the ability to
12 bring in and strike down evidence of studies that
13 aren't even in the record.

14 MR. STEVENS: Your Honor?

15 JUDGE CLIFTON: Mr. Vetne? I'm sorry. Mr.
16 Stevens?

17 MR. STEVENS: Your Honor, I -- I -- I don't
18 want to lengthen the time we discuss this. I think
19 that the matter that we're discussing now is a matter
20 that is, in my opinion, and I'll only offer it as that,
21 certainly not the Secretary's opinion, but in my
22 opinion, we're talking about a semantic difference.

23 If -- if it's a matter of semantics, if it's
24 a matter of argument, it's a matter of briefing, and in
25 terms of what evidence someone would have presented or

1 wouldn't have presented, I understand the point that's
2 made, but we are, it seems to me, not moving the record
3 forward by discussing this at this point, and I
4 appreciate Mr. Beshore's concern that we have adequate
5 time for cross examination.

6 It is a matter, I think, clearly for
7 briefing, not something that we should be involved with
8 in the hearing. So, I would also add, I hope, in
9 assistance to the parties.

10 JUDGE CLIFTON: Mr. Vetne?

11 MR. VETNE: Yes, Your Honor. At least in one
12 prior occasion in this hearing, the hearing officer has
13 ruled that evidence concerning a proposal was beyond
14 the scope of the Notice.

15 I just wanted to join Mr. Marshall in -- in
16 responding to the -- the concept of assembly and
17 balancing credits being different. As a matter of
18 fact, the history of those goes back to 1985. There
19 was a hearing in the Southeast for balancing credits in
20 1987, and there were subsequent hearings in the Upper
21 Midwest for assembly credits. Those are terms of art
22 which to me, and I believe to others, certainly Mr.
23 Marshall, mean very different things and generate the
24 need to bring very different evidence.

25 I do think that balancing is different than

1 assembly, and for that reason, you know, and there's
2 plenty -- there was good reason, as we found out, not
3 to object previously, to simply allow the evidence to
4 proceed. I don't think because we have to catch a 1:00
5 plane, that we ought to give Mr. Marshall less time to
6 present his case than DFA.

7 Thank you.

8 MR. BESHORE: We're not presenting his case.
9 That's the problem. Balancing is not a term of art in
10 the system, I will represent to you, in spite of any
11 statements by other learned counsel. It has never been
12 adopted as a provision, as a term of art in any Federal
13 Order by the Secretary, period. There is no definition
14 by the Secretary of balancing anywhere.

15 JUDGE CLIFTON: Well, I am going to rule.
16 First of all, I don't strike any of the evidence that's
17 been presented. The motion to strike the evidence of
18 Mr. Hollon is untimely.

19 Furthermore, even when I find that things are
20 beyond the scope of the hearing, that is not
21 necessarily good grounds to strike the information from
22 this record.

23 I do, however, find that the concept of
24 balancing is different from assembly and balancing has
25 more to do with the idea of the fluctuations in flow,

1 and there is not adequate notice in Proposal Number 8
2 that a balancing credit would be considered here.

3 I rule that the request for an assembly
4 credit does not include a credit based on balancing and
5 that therefore the concept of including in the assembly
6 credit a credit related to balancing is beyond the
7 scope of this hearing.

8 Mr. Beshore?

9 MR. BESHORE: Yes. Thank you.

10 Your Honor, we take extreme exception to that
11 ruling and note that, of course, according to the Rules
12 of Practice, the ruling is subject to review by the
13 Secretary in the -- in the decision-making process, and
14 that's all I'm going to say at this point. I'm not
15 going to argue it because, as I said, I'm -- I've been
16 -- I've been painted into the corner of shooting myself
17 in the foot or cutting off my own time by having to
18 deal with this dilatory and late objection.

19 JUDGE CLIFTON: Well, I know everyone would
20 like to get out of here, but, you know, this hearing
21 doesn't have to end at 11. I'd like for it to end as
22 quickly as we can, but, you know, we're here for as
23 long as this takes.

24 Mr. Marshall?

25 MR. MARSHALL: Thank you, Your Honor.

1 Just as a further matter, I hope that there
2 was not a ruling -- if there was a ruling there that
3 yesterday's testimony should have been objected to
4 then, I would simply ask that consideration be given by
5 the Secretary and by you to the expedited pace of these
6 proceedings and the attempts to let evidence in so that
7 objections could be raised at a later time rather than
8 taking time during yesterday's testimony, when, as it
9 will be recalled, Mr. Hollon was anxious to leave to
10 meet a prior commitment, and you've indicated earlier
11 in this portion of our testimony that you will allow
12 late objections, and I would hope you would do the same
13 in this case as well.

14 JUDGE CLIFTON: That's true, and I would deny
15 your motion to strike, even if it had been made
16 contemporaneously with the problem.

17 MR. MARSHALL: I can understand that, and I
18 do appreciate the ruling, and we shall now proceed.

19 BY MR. MARSHALL:

20 Q Mr. McBride, it's not necessary to cover the
21 material we had discussed we would cover regarding
22 balancing as a theory, in view of that most recent
23 ruling.

24 Your next two exhibits, Exhibits 62 and 63,
25 are fairly short. Is there anything about those that

1 you would like to point out or correct?

2 A No corrections. It just says that we're
3 going to oppose the elimination of Proposal Number 5,
4 proprietary bulk tank handlers, and that on 11 and 13,
5 we will take a look and decide if we will support those
6 on brief.

7 MR. MARSHALL: Your Honor, I have no further
8 questions at this time, and Mr. McBride is available
9 for cross examination.

10 JUDGE CLIFTON: I'd like Mr. McBride to
11 clarify what he meant when he said that "we oppose the
12 elimination of Number 5". I can read his statement and
13 it's clear, but what he just said was not clear to me.

14 What is your client's or your -- your
15 company's, your co-op's position with regard to
16 Proposal Number 5?

17 MR. McBRIDE: We will oppose the elimination
18 of -- of the provision.

19 JUDGE CLIFTON: All right. Thank you.

20 MR. MARSHALL: Your Honor, one more matter.

21 BY MR. MARSHALL:

22 Q Mr. McBride, you've heard a request earlier
23 in this hearing for adoption on an emergency basis of,
24 I think, all proposals. What is NDA's position with
25 regard to the need for emergency adoption of Proposals

1 3 through the end, other than -- other than 10?

2 A 1 and 10, we believe it needs to be done on
3 an emergency basis. The -- the other proposals, we
4 think, should be done on, you know, a regular basis
5 because of everything that's, you know, gone on at the
6 hearing. We're going to need to have time to see a
7 recommended decision and make our comments on that.

8 MR. MARSHALL: Thank you. No further
9 questions at this time, Your Honor.

10 JUDGE CLIFTON: All right. Thank you, Mr.
11 Marshall.

12 Who would like to begin cross examination?
13 Mr. Beshore?

14 MR. BESHORE: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. BESHORE:

17 Q Mr. McBride, in the -- in the earlier session
18 of this hearing with respect to Order 124, you were a
19 witness, and you were at that hearing, correct?

20 A Yes.

21 Q Pacific Northwest hearing of which this is --
22 this is a continuing part.

23 Dairy Gold has -- Northwest Dairy Association
24 has what, 60 percent or so of the milk pooled in that
25 Order or is it more than that?

1 A Approximately, yes.

2 Q Is it -- is that -- is that actually on the
3 low side?

4 A No.

5 Q Okay. And Pacific Northwest Order, Dairy
6 Gold's position is that there's too much milk being
7 pooled. DFA was pooling, paper pooling milk from Idaho
8 and you wanted to tighten it up, isn't that correct?

9 A We wanted to --

10 Q Tighten the Order up, lower the diversion
11 limitations, add the touch-base provision, keep more
12 milk off of that pool, isn't that correct?

13 A That was the proposal.

14 Q Yeah. That was -- that was Northwest Dairy's
15 position in that hearing, correct?

16 A Correct.

17 Q Right. There was -- you wanted to reduce the
18 diversion limitations from 90 -- 90+ percent to 80
19 percent, correct?

20 A Correct.

21 Q Keep Idaho milk off of that pool, so that
22 your utilization would be kept up, correct?

23 A Correct.

24 Q All right. Your utilization there is already
25 in the 30-percent area, it's been running, correct?

1 A Yes.

2 Q And you want it to be higher, so your 60-
3 percent share has a higher blend price up there,
4 correct?

5 A We want to maintain the 30 percent.

6 Q Yeah. Or increase it with additional touch
7 base. You want every producer up there to touch base
8 two times a month during designated months, isn't that
9 correct?

10 A Yes.

11 Q And that'll make it more difficult for people
12 to pool milk up there or at least more expensive for
13 anybody that wants to, isn't that correct?

14 A They just have to perform the standards to
15 pool the milk. If they perform, you know, --

16 Q Right. Performance standards. It would be
17 more difficult or at least more expensive if they've
18 got to go two times a month to the pool plants instead
19 of one, isn't that correct?

20 A That -- that'd be correct.

21 Q Right. So, by the way, DFA was a team player
22 in that -- in that Order and supported the -- the
23 proposals of the Federation, even though it was going
24 to in effect bump its own milk off of that pool, isn't
25 that correct?

1 A DFA was supportive of the issues.

2 Q Right. And it knew and you knew and
3 everybody knew that that meant that that was going to
4 adversely impact DFA's ability to pool milk up in that
5 Order, isn't that correct?

6 A Adversely pool milk from outside the Order on
7 the Order?

8 Q Yes.

9 A Yes.

10 Q Milk from Idaho, you felt -- that's outside
11 the Order as far -- the marketing area of the Order,
12 correct?

13 A Correct.

14 Q Okay. Now, of course, Northwest Dairymen, to
15 the extent that you don't pool Idaho milk on Order 135,
16 you pool it on 124, do you not?

17 A Say that again.

18 Q You have milk in Idaho, --

19 A Yes.

20 Q -- and if you don't pool it on 135, you pool
21 it on 124, isn't that correct? If your Idaho milk is
22 not pooled on 135, it would be pooled on 124, isn't
23 that correct?

24 A Not necessarily. Why --

25 Q Where? Would you just not pool it at all?

1 A If we had milk in --

2 Q Idaho, and you don't pool it on 135 for any
3 reason, you'd pool it on 124, would you not?

4 A I don't know. We've never -- you know, we
5 keep the milk in the Southwestern Idaho/Eastern Oregon
6 -- the Eastern Oregon pooled on the Western Order.

7 Q Okay.

8 A We have not pooled milk from Idaho on to the
9 --

10 Q On to --

11 A From -- from Southwest Idaho. We have
12 producers in Idaho, --

13 Q Right.

14 A -- up in the Panhandle, that are pooled on
15 the --

16 Q That are pooled --

17 A -- Pacific Northwest Order.

18 Q Okay.

19 A Now, if -- if --

20 Q Now, your position is, with respect to 135,
21 that the present pooling provisions, which have
22 generated 17-percent utilization, should be maintained
23 or reduced, correct, so that more milk could be pooled,
24 at least as much as being pooled now or in fact more
25 milk be pooled on Order 135, isn't that correct?

1 A We believe the performance standards that are
2 there now --

3 Q Right.

4 A -- should be -- you know, should be adequate
5 to keep the milk that's currently pooled, you know, on
6 -- on the -- on the market.

7 Q Well, you've gone beyond that, have you not,
8 Mr. McBride? You've proposed reducing them, so that
9 more milk can be pooled on Order 135 and the
10 utilization reduced from 17 percent, isn't that
11 correct?

12 A I'm not sure.

13 Q Doesn't your testimony, for instance, and
14 I've only had, you know, a few minutes to peruse
15 Exhibits 56 through, you know, 62, but you -- you
16 propose, for instance, reducing the supply plant
17 percentage from 35 percent to 10 percent, don't you?

18 A Not the supply plant.

19 Q The cooperative supply plant, cooperative
20 manufacturing plant provision?

21 A We are doing that, yes.

22 Q You're -- you're proposing --

23 A We are proposing that.

24 Q Yeah. You're proposing to -- to make it --
25 to reduce the performance standards of 135 in order to

1 make it easier for dairy -- Northwest Dairy Association
2 or anyone else to pool milk through a cooperative
3 supply plant, isn't that correct?

4 A We are making it more -- that is correct,
5 yes.

6 Q Yes. Okay. Even though there's no
7 cooperative supply plant presently on the Order 135,
8 isn't that correct?

9 A Correct.

10 Q But if you could make -- if you had a 10-
11 percent pooling provision for a cooperative supply
12 plant in -- in Order 135, as you've testified, you
13 might well consider making one of your plants in Idaho
14 a cooperative plant?

15 A It would be an option.

16 Q Right. And that would give you an option to
17 pool additional volumes of milk if they were under your
18 control or available to you through other organizations
19 on Order 135, isn't that correct?

20 A If we met the standards.

21 Q If you met the -- the -- the reduced standard
22 as you propose it to be reduced, correct?

23 A Yes.

24 Q Okay. Why is it, Mr. McBride, that what's
25 good for the goose on Order 124 is not good for the

1 gander in Order 135?

2 A In 124, we want to make sure that all the
3 milk that's in the marketing area is remaining pooled
4 and to keep the outside milk, distant milk, you know,
5 from being pooled, paper pooled into the market -- into
6 the -- into the Pacific Northwest Order, you know,
7 without having, you know, -- without actually coming
8 into the -- into the -- serving in the bottled plants.

9 Q Okay. So, it's your philosophy that the
10 definition -- that the geographic confines of the
11 marketing areas are what should define what milk is
12 going to be pooled in each Federal Order?

13 A No.

14 Q Isn't that what you just said with respect to
15 124, that you want the milk within the marketing area
16 of 124 pooled but milk that's located geographically
17 outside not to be pooled?

18 A We want the milk that's, you know, located
19 outside, if it's going to perform, you know, we are not
20 going to keep it out.

21 Q But the proposals you made to tighten the
22 pool in Order 124 are to make it harder for milk
23 outside the marketing area to be pooled on an Order,
24 milk that's being pooled there now, isn't that correct?

25 A It's just got to perform. We don't -- you

1 know, we don't -- we haven't -- we've gone to here, and
2 we haven't seen any decision.

3 Q But that's your proposal in that Order?
4 That's your philosophy?

5 A We have supported the proposals that, you
6 know, was presented by Northwest Milk Marketing
7 Federation.

8 Q Okay. Now, what -- what's Northwest Dairy
9 Association's -- approximately how much of the current
10 Order 135 pool do you -- do you represent?

11 A I believe I stated 25 percent.

12 Q Okay. Let me -- let me look at Exhibit 56
13 for a minute. You're not suggesting in your analysis,
14 in your critique, in your critique of the testimony of
15 the Utah Dairy Farmers, -- I'm sorry. 56.

16 In your critique of the testimony of the Utah
17 Dairy Farmers, you're not suggesting that their -- that
18 they would not be better off as they testified if the
19 utilization of the Utah -- of the Order 135 was closer
20 now to what it was pre-reform than it is, are you?

21 A Say that again.

22 Q Well, their testimony was that their -- that
23 they have a utilization -- Class 1 utilization of 30-
24 40, nearly 50 percent prior to the year 2000, correct?

25 A Correct.

1 Q And now, they have a utilization of 17
2 percent in most recent months, correct?

3 A Correct.

4 Q And that that reduction in Class 1
5 utilization has reduced the price that they would
6 otherwise receive, correct?

7 A If you look just at Class 1 utilization,
8 correct.

9 Q Okay. So that, as far as that's concerned,
10 they were correct in their analysis of -- of the effect
11 of -- of the changes in the Orders since January 1,
12 2000, correct?

13 A Looking at Class 1 utilization, yes.

14 Q Okay. Now, in -- in what -- are you
15 contending in your testimony that the Class 3 price is
16 the same -- the same level with the changes in formula
17 that were made in the reform decision as it was pre-
18 reform?

19 A I believe the statement says in 1999, the --
20 which is, you know, pre-reform, the DFP price and the
21 -- using the NASS commodity prices into the formula,
22 the prices were similar.

23 Q Okay. There's a whole -- without going into
24 it, there's a whole record of the Class 3 and 4
25 proceeding which analyzed -- I mean, Congress said in

1 essence in some legislation, we think these prices need
2 to be relooked at by the Secretary because it looks
3 like they're lower to us than they were before. You're
4 aware of that legislation that required a hearing
5 that's still on -- in process?

6 A Yes.

7 Q Okay. Exhibit 57 addresses Proposal 3,
8 Netting for Supply Plants, and again having not had a
9 chance to -- to read Exhibit 57, I gather your position
10 is that there should be no net shipments language
11 adopted in Order 135, correct?

12 A Correct.

13 Q Okay. And you believe that it's appropriate
14 to pool milk on the basis of performance that's
15 represented by taking milk from a supply plant or a --
16 would this apply to cooperative manufacturing plants as
17 well? Your -- your concept here of opposing net
18 shipments. Would you oppose net shipments being
19 applicable to cooperative plants as well?

20 A Net shipments is Proposal 3. So, it applies
21 to supply plants.

22 Q But let's talk about it in concept. Would
23 you oppose net shipments applying to cooperative supply
24 plants?

25 A We haven't -- you know, we haven't addressed

1 the issue.

2 Q Okay. Well, as far as supply plants are
3 concerned, you oppose it. So, that means that in your
4 philosophy of pooling, it would be adequate performance
5 for a supply plant to haul milk to a distributing
6 plant, pump it in, pump it back out on to the same
7 truck and take it back to the cheese plant, correct?

8 A If you're reading the other performance
9 standards, yeah. Yes, you're correct.

10 Q But -- but we're -- the -- the purpose of
11 this hearing and the proposal is to define what those
12 performance standards are, and your definition that
13 you're advocating is one which would define as
14 performance the -- the delivery of milk to a plant --
15 delivery of milk from a supply plant to a distributing
16 plant, pumping it in, pumping it back out on to the
17 same truck and taking it back to the supply plant. You
18 would define that as performance for the market, would
19 you not?

20 A Yes.

21 Q Has -- with respect to Proposal 4 and Exhibit
22 58, has Northwest -- Northwest Dairy Association ever
23 pooled -- used its plants as cooperative plants under
24 Order 135? Have you ever used -- used the provision?

25 A The provision is not there currently. That

1 was part of the hearing in December to include that
2 provision --

3 Q I'm sorry.

4 A Excuse me.

5 Q 135.

6 A We have not. Excuse me.

7 Q Okay. And may I ask why you have not? Maybe
8 you say -- maybe you say so in the testimony, which I
9 haven't had the chance to digest, but --

10 A We have not used -- you know, we -- just
11 putting -- not used that provision to this point.

12 Q So, assuming that -- let me just ask this.
13 Assuming -- in your proposal to reduce the language --
14 to reduce the -- the plant requirement to -- to 10
15 percent rather than 50 percent, there is no net
16 shipment language in the Order at the present time
17 relating to cooperatives -- cooperative pool plants,
18 correct?

19 A Correct.

20 Q Therefore, your proposal to reduce it to 10
21 percent, if it were adopted, would mean that a
22 cooperative pool plant with a 10-percent performance
23 requirement could meet the pooling standards of the
24 Order by delivering its 10 percent to a distributing
25 plant, pumping it in, pumping it out, and bringing it

1 back to the cooperative manufacturing plant, correct?

2 A Correct.

3 Q Does the Order language allow cooperative
4 manufacturing plants to pool their milk through direct
5 9(c) deliveries to distributing plants? Do you know?

6 A I'm not sure.

7 Q Okay. I've noted somewhere in one of your
8 exhibits, I don't know where, you'll remember it, that
9 you've made the -- made the point that there's no
10 evidence in the proceeding that distributing plants in
11 Order 135 are lacking supply Class 1 -- supply of milk
12 for Class 1 needs, correct?

13 A Yes.

14 Q Okay. Now, I think your -- I know. I know
15 that Northwest Dairy -- Mr. Marshall, the -- the
16 skilled advocate that he is and representative of your
17 association, I think, has engaged in the time-honored
18 tactic of advocacy that I call erecting a strawman and
19 striking it down as a way of bolstering a case here
20 with that point, and I wonder if you can tell me, isn't
21 it true that Mr. Hollon in the proposals for DFA never
22 made it a point as a part of advocating those proposals
23 in his testimony that there was a problem getting milk
24 to the Class 1 market in this Order, isn't that
25 correct?

1 A That he never asked -- that there was not a
2 problem?

3 Q No. That he did not -- he did not cite
4 difficulties in getting milk to the Class 1 market as
5 the reason why any of these changes need to be made.

6 A Okay.

7 Q Okay. The -- in fact, the premise of DFA's
8 position has been that the producers who are supplying
9 the Class 1 market are not being appropriately rewarded
10 with a -- with a share of those returns because the
11 utilization of the pool has been diluted by, you know,
12 loose pooling provisions. Isn't that what he testified
13 to?

14 A Yes.

15 Q Okay. So, all the testimony about -- and
16 Doug very skillfully at cross examination raised the
17 issue and then struck it down about whether or not
18 there was a problem in getting milk to Class 1 in this
19 Order really is not an issue as far as DFA's proposals
20 are concerned, if you look at -- at the testimony
21 presented in -- in principle in support.

22 A Okay.

23 MR. MARSHALL: Would you like a stipulation
24 to that effect, Mr. Beshore?

25 MR. BESHORE: I'd love one.

1 MR. MARSHALL: Stipulation that there is no
2 evidence --

3 JUDGE CLIFTON: Closer to the microphone,
4 please, Mr. Marshall.

5 MR. MARSHALL: Stipulation that there's no
6 evidence in the record --

7 JUDGE CLIFTON: You're not close enough to
8 it.

9 MR. MARSHALL: Be happy to offer a
10 stipulation that there's no evidence in the record
11 indicating that any supply plant in the Western Order
12 has had difficulty obtaining a supply. Distributing
13 plant.

14 MR. BESHORE: The -- yeah. The stipulation
15 that I would propose, that I assume Mr. Marshall would
16 join in, is that, you know, DFA is not citing the lack
17 of supply to distributing plants as a basis for its
18 proposals in these hearings.

19 MR. MARSHALL: We can so stipulate, Your
20 Honor.

21 MR. BESHORE: Thank you.

22 JUDGE CLIFTON: Thank you. Thank you,
23 gentlemen.

24 BY MR. BESHORE:

25 Q Let's turn to the Proposal 6, Exhibit 59, the

1 Diversion -- Diversion Limitation proposal.

2 A Which proposal?

3 Q Proposal 6. Your testimony's marked as
4 Exhibit 59.

5 A Okay.

6 Q Your -- you've supported, you've indicated, a
7 diversion percentage of 80 percent in the Pacific
8 Northwest Order, correct?

9 A Correct.

10 Q In -- but in this Order, you support
11 maintaining it at 90 or -- or increasing it to a -- to
12 a higher level, correct?

13 A We support maintaining the 90 percent.

14 Q And in -- in addition, retaining language in
15 the Order that allows that 90 percent to be pyramided
16 by qualification being obtained by pumping in and
17 pumping out. That has the effect of pyramiding the 90
18 percent or any applicable diversion percentage, does it
19 not?

20 A Right. Change in any of the current pooling
21 requirements.

22 Q So, -- but -- and the current -- just so we
23 understand, the current pool -- pooling requirements
24 which both allow transfers, I'll call them for
25 shorthand, allow -- as some people have -- allow

1 transfer shipments, shipments in and shipments out,
2 plus 90 percent, have the effect of establishing a
3 diversion percentage that is considerably in excess of
4 90 percent. Would you not agree?

5 A What are you getting as a receipt?

6 Q Well, let me -- let's look at it this way.
7 The -- the -- the Market Administrator's exhibits that
8 indicated the -- the utilization of proprietary bulk
9 tank handler unit milk showed that that milk could be
10 pooled with Class 1 utilization of less than five
11 percent, correct?

12 A Okay.

13 Q By -- by supplies to -- by supplies to the
14 distributors that we've heard from in this hearing that
15 don't process anything other than Class 1 products,
16 correct?

17 A Correct.

18 Q Okay. So, therefore, assuming that -- that
19 that demonstrates that when you don't have a net
20 shipments provision, and you've got a 90-percent
21 diversion provision, in essence, you can pool milk at a
22 ratio of 20:1 or perhaps more with respect to the Class
23 1 volume at distributing plants, correct?

24 A Okay.

25 Q Okay. And that's the status quo with respect

1 to pooling and performance that -- that you're
2 supporting for Order 135, correct?

3 A Correct.

4 Q In Exhibit 60, with respect to Proposal
5 Number 7, you are also opposing DFA's proposal to
6 attempt to establish a net provision in the Order with
7 respect to diversions, is that correct?

8 A Yes.

9 Q And again, if the failure of having any net
10 provision in the Order with respect to diversions
11 allows milk to be pooled at a ratio of 20:1 or greater
12 with respect to Class 1 versus manufacturing uses,
13 that's the system that you are supporting and
14 advocating for Order 135, correct?

15 A As part of the current system, yes.

16 Q Is it your view, Mr. McBride, that any person
17 who decides to produce Grade A milk in the -- in the
18 state of Idaho has an entitlement as soon as he gets
19 that Grade A permit to be pooled in Order 135?

20 A No.

21 Q Just have to have the ability to pump his
22 milk in and out of a distributing plant or be a part of
23 the 20 loads or diverted for the one load that's
24 delivered into the distributing plant. Is that your
25 position?

1 A There's performance standards in the Order,
2 and if you meet those, you're qualified.

3 Q Do you know what the -- have you done any
4 calculations with respect to what the utilization in
5 Order 135 would be if all the Grade A milk in Idaho was
6 pooled in the Order?

7 A If all the Grade A milk was pooled in this
8 Order?

9 Q Yes.

10 A No.

11 Q Okay. Is it your view that the utilization
12 of the Order ought to be in the four- to eight-percent
13 range that it was in prior to 2000, when it was just
14 the Southwestern Idaho/Eastern Oregon Order?

15 A Was in what range?

16 Q Four to eight percent. Four to eight
17 percent.

18 A Oh, four. Okay.

19 Q I'm sorry.

20 A At that -- prior to reform, those diversion
21 limitations were suspended and there was probably more
22 milk that was pooled that was, you know, -- it didn't
23 have the performance standards.

24 MR. BESHORE: Your Honor, if we have not
25 taken notice, and honestly I don't know whether we

1 have, of the -- taken official notice of the monthly
2 statistics for Orders 139 and 135 for the years 1997,
3 '98 and '99, I think the same time period as most of
4 the other datasets -- okay -- most of the other
5 datasets that have been -- that have been offered, I'd
6 like to request that official notice be taken of -- of
7 those -- this might be -- let me make it easier.

8 I'd like to request that official notice be
9 taken of the Annual Federal Milk Order Statistics
10 publications for -- for the system, for all Orders.
11 It's one -- one document published for those three
12 years by the USDA Dairy Programs.

13 JUDGE CLIFTON: All right. Is there any
14 objection?

15 (No response)

16 JUDGE CLIFTON: No? Official notice will be
17 so taken.

18 MR. TOSI: '97 through '99?

19 MR. BESHORE: Yes.

20 BY MR. BESHORE:

21 Q Okay. Let's talk about Proposal Number 8,
22 Transportation and Assembly Credits, for a minute or
23 two, Mr. McBride.

24 JUDGE CLIFTON: This is Exhibit 61?

25 MR. BESHORE: Exhibit 61, yes.

1 BY MR. BESHORE:

2 Q Now, you -- you agree, do you not, Mr.
3 McBride, that persons -- supply organizations which
4 supply the Class 1 market incur costs in supplying that
5 market by virtue of its -- its unique needs?

6 A Unique needs would be?

7 Q The unique needs of the fluid market.

8 A You mean delivery?

9 Q Delivery schedules, delivery times, seasonal
10 fluctuations in demand, daily fluctuations in demand
11 and things of that sort, correct?

12 A Okay.

13 Q There are costs involved in meeting those --
14 meeting those demands of the Class 1 market, are there
15 not?

16 A Okay. Yes.

17 Q Is that a yes? Okay. Thank you.

18 And those costs are not incurred by producers
19 who supply their milk or cooperatives who supply their
20 milk to cheese plants, isn't that correct, or other
21 manufacturing plants?

22 A Those costs -- if you're taking milk, putting
23 it into a bottling plant and not putting it into a
24 cheese plant, there's, you know, idle time at the
25 manufacturing plant.

1 Q Well, I wasn't talking about that. We can --
2 we can talk about that, but I wasn't specifically
3 talking about that. I'm talking about the costs of
4 having the milk delivered to the fluid plant, when it
5 wants it, when it needs it, seven days, four days, five
6 days, or whatever a week throughout the year.

7 A Okay.

8 Q Okay. The costs that are involved in that
9 are not necessarily involved in supplying milk to a
10 manufacturing plant, isn't that correct?

11 A If the manufacturing plant, you know, was --
12 was -- if -- if the manufacturing -- it's a balancing
13 plant, -- I'm not sure.

14 Q Do your fluid customers and Dairy Gold's own
15 fluid milk plants -- by the way, you operate your own
16 -- Northwest Dairymens Association owns and operates
17 fluid milk distributing plants, does it not?

18 A Yes, we do.

19 Q Okay. In both Order 134 and Order -- 135,
20 I'm sorry, and Order 124, correct?

21 A Yes.

22 Q Okay. And you supply those plants with milk
23 of your members, correct?

24 A Yes.

25 Q Okay. Now, do they take the same amount of

1 milk each day of the week year-round?

2 A No.

3 Q And your customers who also operate -- your
4 distributing plant customers, not your own plants but
5 third-party customers, have varying demands days of the
6 week and months of the year for fluid milk needs, do
7 they not?

8 A Yes.

9 Q Okay. Are your -- you saw the data which Mr.
10 Hollon presented with respect to the differences in
11 demand on days of the week in the Salt Lake City
12 market. Did that tend to be something similar to -- to
13 your experience in supplying Class 1 plants?

14 A You know, early to mid-week and then, you
15 know, lower demand on the weekends.

16 Q Okay. That's been your experience, also?

17 A Yes.

18 Q Okay. And seasonally, of course, the demand
19 for fluid milk -- I mean, the market aggregate
20 statistics show this, but the demand for fluid milk is,
21 you know, somewhat higher in the Fall than it is in
22 some of the Spring and Summer months?

23 A Yes.

24 Q Okay. And the Class 1 supplier has to have
25 the capability of balancing those -- meeting those --

1 those requirements of its Class 1 customer?

2 A Yes.

3 Q When you -- one of the concerns, and I think
4 it's expressed somewhere in your testimony with respect
5 to Proposal 8 and Exhibit 61, is that if you are
6 providing -- you, that is Northwest Dairymens
7 Association or whoever it might be, is providing the
8 marginal balancing for a fluid plant, by that, I mean,
9 the plant has other suppliers for regular Class 1
10 deliveries and you're the secondary supplier who
11 supplies some milk all the time but absorbs
12 fluctuations in demand, okay, but you wouldn't receive
13 all of the credits, all of the payments for deliveries
14 of assembling milk for Class 1. Is that a concern?

15 A That we would not --

16 Q Receive sufficient credits under DFA's
17 proposal for the -- in recognition of the balancing
18 element you play in that account.

19 MR. MARSHALL: Your Honor, I object to the
20 question as compound and confusing. Could it be
21 restated, please?

22 MR. BESHORE: No. I think I'll just drop it.
23 I won't -- I won't attempt to restate it.

24 I don't have any other questions at this
25 time, Your Honor. I will just -- just note, I have not

1 personally had the opportunity to read every part of
2 these exhibits. I have been able to glean the position
3 which has been advocated by the -- by the witness, and
4 I've had the opportunity to inquire into those
5 positions a bit, which I appreciate, and I don't have
6 any other -- any other questions at this time, although
7 in other -- in other circumstances with other --
8 different time -- time factors, I -- I might.

9 Thank you.

10 JUDGE CLIFTON: I understand. Thank you, Mr.
11 Beshore.

12 Mr. Vetne?

13 CROSS EXAMINATION

14 BY MR. VETNE:

15 Q Mr. McBride, early in your direct testimony,
16 you referred to fees associated with the River Valley
17 Cooperative and Sorrento-Lactalis.

18 Did your cooperative get that information
19 from an individual who was a member of River Valley
20 and, to your knowledge, either an officer, director or
21 official of that co-op?

22 A I understand it was from an individual from
23 River Valley.

24 Q Okay. Do you know whether that -- who that
25 person was?

1 A I don't recall, you know.

2 Q If I told you the name Greg Trost, would that
3 refresh your memory?

4 A I don't know --

5 Q Pardon me?

6 A -- who Greg Trost is. I -- you know, I'm not
7 sure who they got it from.

8 Q And the purpose of your testimony was to
9 provide a little bit additional background concerning
10 the details of -- of that fee transaction to which Mr.
11 Carlson, representing in this hearing as a party River
12 Valley Co-op, revealed in part but in your opinion not
13 in full?

14 A Correct.

15 Q With respect to -- if you go back for a
16 moment, do you recall the goose and the gander
17 questions by Mr. Beshore?

18 A Yes.

19 Q Yes. With respect to those questions as to
20 the Pacific Northwest, it's your objective, is it not,
21 that the milk produced in the Pacific Northwest Market
22 should be accommodated in the pool efficiently if that
23 milk is ready, willing and able to serve the Class 1
24 market, is that correct?

25 A Yes.

1 Q And consistently, it's your position and
2 opinion that the milk produced in the Western Market
3 Area should be accommodated in the pool if it's ready,
4 willing and able to serve the Class 1 market?

5 A Yes.

6 Q And concerning that net shipments, if that's
7 what it takes to accommodate that milk, that's what
8 should be left in place, correct?

9 A Correct.

10 Q Okay. Would you agree with me that for
11 purposes of -- of efficiency, if that is a regulatory
12 consideration, that it would be better if that milk
13 didn't have to be pumped in and out?

14 A It would be better.

15 Q Okay. But as it stands, at least if it's not
16 needed, at least a delivery to a distributing plant
17 demonstrates both readiness, willingness and ability to
18 serve Class 1 needs, even though on that day, it's not
19 needed?

20 A Yes.

21 MR. VETNE: Thank you. That's all I have.

22 JUDGE CLIFTON: Any other cross examination?

23 (No response)

24 JUDGE CLIFTON: Mr. Tosi?

25 MR. TOSI: I have none.

1 MR. RADMALL: I have a couple at this time.

2 JUDGE CLIFTON: All right. Mr. Radmall, of
3 course.

4 CROSS EXAMINATION

5 BY MR. RADMALL:

6 Q I appreciate your comments about the increase
7 in prices after Order Reform.

8 Has this Order -- increase applied to other
9 Orders, other than 135? Have other dairymen in other
10 Orders benefitted from the Order Reform?

11 A Well, I -- you know, Order Reform, you know,
12 basically is a moving target. There's good things.
13 There's some -- you know, and there's some things that,
14 you know, aren't so good.

15 Q Well, let me rephrase that. Specifically
16 from the higher of Class 3 or Class 4, have other
17 Orders benefitted from that?

18 A Yes.

19 Q Dairymen in Order 124, have they benefitted
20 from that?

21 A Yes.

22 Q Okay. So, it's not a unique thing, just that
23 the dairymen in 135 have seen an increase in their
24 prices, is that correct?

25 A Correct.

1 Q Okay. How many plants in Order 135 -- do you
2 know how many plants produce Class 4 milk products?

3 A Well, we have -- we have a powder plant in
4 Caldwell, --

5 Q Okay.

6 A -- and we have a condensing plant down in
7 Jerome and that condensing -- you know, its final
8 utilization determines what its -- what the plant's
9 utilization is.

10 Q Okay. That answered my question about who
11 owns those plants.

12 Has the total production from each plant been
13 pooled each month since Order Reform in Order 135?

14 A Yes.

15 Q Total -- total amount of production?

16 A Total NDA production has been pooled.

17 Q Okay. So, the producers in 135 have
18 benefitted a hundred percent from the higher of in
19 Class 3 or Class 4 --

20 A Producers --

21 Q -- since Order -- Order Reform? Yeah. In
22 Order Reform, we take the Class -- the higher of the
23 Class 3 or 4 and so every producer in 135's benefitted
24 if the Class 4 prices were higher than all the
25 producers in 135 have benefitted from that higher

1 price?

2 A Yes.

3 Q Okay. It's been my observation that -- and
4 maybe you can explain this or not, but in certain
5 months when Class 4 prices exceeded Class 3, there was
6 a diminished number of Class 4 pounds pooled, and when
7 the Class 3 prices were higher, it seems -- and I don't
8 have the -- the months to -- to substantiate that, but
9 in -- in Class 3 months -- okay. I have a Table 3 from
10 Exhibit 7.

11 Exhibit 6, Table 3. I haven't had a chance
12 to really to review this, but it just appears from a
13 bystander, from somebody that's not as knowledgeable as
14 others, that there seems to be some changes there that
15 might not benefit every producer in 135 when -- when
16 Class 4 is higher.

17 Do you have a comment on that?

18 A There are months -- I mean, yeah. If -- due
19 to price, we will determine whether we do pool the
20 milk.

21 Q I thought you just told me that you pooled
22 all the milk --

23 A Okay. Yeah.

24 Q -- from -- a hundred percent of the time.
25 So, is that different now?

1 A We have not always pooled all of the milk on
2 the -- on the Western Order, and when we don't pool,
3 it's due to price relationships.

4 Q Okay. So, then, the Utah producers have not
5 benefitted a hundred percent from the higher of 3 or 4,
6 have they?

7 A They still have a higher -- you know, the
8 higher of 3 or 4 are still there.

9 Q Well, if the milk's not on the pool, then how
10 can they benefit from that higher of?

11 A The milk that's on the pool is -- you know,
12 they get the higher of.

13 Q Sure. But how much -- what happens to the
14 milk that's not pooled? Does that contribute to
15 orderly marketing in the Order or does it contribute to
16 disorderly marketing in the Order?

17 A It's -- I don't know. It depends on when you
18 -- how you -- how you describe disorderly.

19 MR. RADMALL: Okay. Thank you very much.

20 JUDGE CLIFTON: Thank you, Mr. Radmall.

21 Any other cross examination?

22 (No response)

23 JUDGE CLIFTON: Any redirect, Mr. Marshall?

24 MR. MARSHALL: Your Honor, I would like to
25 ask the government witness -- the people if they would

1 like a break, so that they can finish their business
2 and return to the hearing.

3 JUDGE CLIFTON: No, we're not going to do
4 that. If you've got any redirect, you may ask it.

5 MR. MARSHALL: Thank you, Your Honor.

6 JUDGE CLIFTON: You're welcome.

7 REDIRECT EXAMINATION

8 BY MR. MARSHALL:

9 Q Just to clarify the last series of questions,
10 the higher of phraseology applies to the Class -- to
11 the price mover that sets the Class 1 formula. Is that
12 your meaning of the term as you used it?

13 A Yes.

14 Q There was a number of questions by Mr.
15 Beshore with respect to the Pacific Northwest Order
16 hearing, and just to clarify how that might apply here,
17 is it true that as proposed in that hearing, all plants
18 within the Pacific Northwest Order could be used to
19 meet pool qualification requirements by delivery to
20 those plants, whether they are distributing plants or
21 not?

22 A All pool plants.

23 Q As a practical matter, would all plants in
24 that Order be pool plants?

25 A No.

1 Q Could all deliveries to Linden all qualify as
2 touching base for purposes of the new provisions?

3 A If the plant was designated as a -- as a
4 supply plant or a co-op supply plant, reserve plant.

5 Q Isn't -- isn't the practical effect to allow
6 performance mandated by delivery to any manufacturing
7 plant that wishes to be so designated?

8 A Yes.

9 Q And if that same theory were to be applied to
10 Order 135, is it not true that the same opportunities
11 would exist, for example, for Sorrento to pool all of
12 its milk without perhaps having to pay pooling fees?

13 A Yes.

14 Q And is it also not true that if those
15 provisions were adopted, all of the milk of Jerome
16 Cheese could be pooled and all of the milk of Glanbia
17 Cheese could be pooled more easily without having to go
18 through some of the mechanisms required by the current
19 Order, Western Order provisions?

20 A State that again.

21 Q The practical effect if the Order 124
22 provisions were adopted and 135 would be to more easily
23 pool all of the milk from Jerome Cheese and Glanbia
24 Cheese without having to go through some of the
25 gyrations described earlier in this hearing?

1 A Yes.

2 Q Would we support such a liberalization of the
3 pooling requirements in this Order?

4 A Open pooling or of the --

5 Q Of the -- would we support the same kinds of
6 pooling requirements in Order 135 as have been proposed
7 for 124?

8 A No.

9 Q So, we're not proposing any looser
10 requirements for this Order unlike perhaps might have
11 been assumed from Mr. Beshore's questions, is that your
12 testimony?

13 A Yes.

14 Q Mr. Beshore asked a number of questions about
15 balancing which I think has been ruled outside the
16 scope of the hearing, but in the event he intends to
17 argue it on brief, I think it's important to get into
18 the hearing record some understanding about who bears
19 the balancing costs.

20 In the situation involving a proprietarily-
21 owned pool distributing plant which has its own
22 producers, as an example the KDK plant that's been
23 testified at this hearing, their producers would have a
24 seasonal fluctuation in their production, would it not?

25 A Yes.

1 Q And somehow, the market would have to
2 accommodate that balancing need, true?

3 A Yes.

4 Q I believe it was testified that that plant is
5 supplied by, among others, Magic Valley Quality Milk
6 Producers Cooperative. Is that your recollection and
7 understanding?

8 A Yes.

9 Q So, they would be the balancing entity for
10 that plant, would they not?

11 A Hm-hmm. Yes.

12 Q Magic Valley also supplies the West Farms
13 Food Supply Plant at Jerome, does it not?

14 A Yes.

15 Q And if it were necessary for the Magic Valley
16 plant to remove milk from the West Farm Foods Plant at
17 Jerome in order to supply the needs of the distributing
18 plant that we've been talking about, KDK's, the actual
19 balancer would be -- the actual balancing plant would
20 be the West Farms Food Plant at Jerome, would it not?

21 A Correct.

22 Q I'm reminded that -- scratch that.

23 Mr. Beshore asked the effect of the proposal
24 on the Pacific Northwest were to -- if our intent in
25 proposing the proposals in the Pacific Northwest was to

1 establish the geographic confines of the Marketing
2 Order as the test of pooling.

3 Does the provision of that Order also permit
4 any milk from outside the Order area that regularly
5 delivers to the market to be pooled?

6 A Yes.

7 Q Mr. Beshore asked -- asked about a
8 congressional intent behind the legislation that
9 mandated the current Class 3 or 4 hearings, and you
10 testified that you were aware of such hearings. His
11 question implied that there was a congressional intent
12 as to whether the Class 3 price or the Class 4 price
13 might be too high or too low.

14 Are you aware of any expression of Congress
15 that could be so interpreted?

16 A No.

17 Q Your answer could not be construed as
18 agreeing to that part of his compound question?

19 A Yes.

20 Q It could be construed as agreeing?

21 A No.

22 Q Could be or could not be?

23 A It should not be construed.

24 Q As agreeing?

25 A As agreeing.

1 MR. MARSHALL: Your Honor, I have no further
2 questions at this time.

3 JUDGE CLIFTON: Thank you, Mr. Marshall.
4 You may step down, Mr. McBride.

5 (Whereupon, the witness was excused.)

6 JUDGE CLIFTON: All right. I'd like to set
7 the briefing deadline. The court reporter is -- well,
8 I guess I better ask.

9 Is there any other evidence to come to the
10 hearing? Mr. Stevens?

11 MR. STEVENS: One thing, Your Honor. Your
12 Honor, Garrett Stevens.

13 This relates to Proposal 17, I believe.
14 Seventeen is proposed by the -- proposed by Dairy
15 Programs, Agricultural Marketing Service.

16 JUDGE CLIFTON: Yes.

17 MR. STEVENS: This -- this proposal is
18 contained in every Milk Order hearing that I've had
19 anything to do with. It's a proposal that allows the
20 Secretary to, under statutory authority, to make any
21 conforming changes -- well, it speaks for itself what
22 it provides, and it -- and it allows the Secretary to
23 evaluate the record and make such changes as may be
24 necessary to make the entire Order agreements and the
25 Orders conform with any amendments thereto that may

1 result from this hearing.

2 I'd just note that for the record. It's
3 authorized by the statute. It's part of every
4 rulemaking and that's included in the record.

5 Thank you.

6 JUDGE CLIFTON: Yes, you're welcome, and
7 there's been no objection to it.

8 All right. The hearing clerk contract for
9 the transcript here did not have any delivery time
10 deadline, but regardless of what delivery time deadline
11 is set, it appears to take about a month to get the
12 transcript. Do counsel agree? Has that been your
13 experience?

14 MR. TOSI: Well, at least three weeks.

15 JUDGE CLIFTON: About three weeks has been
16 the experience?

17 MR. TOSI: At least three weeks.

18 JUDGE CLIFTON: At least three.

19 MR. TOSI: At least three weeks and could be
20 longer.

21 JUDGE CLIFTON: All right. Assume for a
22 moment, I'm looking at 2002 calendar, assume for a
23 moment, today is April 19th, assume that you do not
24 have the transcript available on the Internet until May
25 17th. If that occurs, when do you want your transcript

1 corrections to be due, how many weeks thereafter, and
2 when do you want your briefs to be due? Proposals?

3 Mr. English?

4 MR. ENGLISH: I think two weeks for
5 corrections and either additional two or additional
6 three for the -- for the brief.

7 JUDGE CLIFTON: All right.

8 MR. ENGLISH: I can live with either, which
9 would -- so, I guess you'd be looking at May 31st for
10 the corrections. Is that Memorial Day?

11 JUDGE CLIFTON: No. Memorial Day is May
12 27th.

13 MR. ENGLISH: Okay. So, May 31st for the
14 corrections and June 21 for the brief.

15 JUDGE CLIFTON: Sounds great.

16 MR. ENGLISH: And then I assume we're doing
17 what we've been doing, which is if the transcript
18 misses, we'll automatically move. We've been doing
19 that the last several hearings which is that we've been
20 putting in the record that if the transcript is late,
21 that for every day the transcript is late, those two
22 dates, the corrections date and the brief date, move
23 the exact number of days that the transcript is late.
24 So, people will know in advance and not have to come to
25 Your Honor getting an extension because of the

1 transcript not being available.

2 JUDGE CLIFTON: Sounds excellent. Is there
3 any objection to that proposal?

4 MR. MARSHALL: Your Honor, --

5 JUDGE CLIFTON: Mr. Marshall?

6 MR. MARSHALL: -- I'd like to explain first
7 that as the senior vice president of our organization,
8 one of my duties is to spend about two weeks in June
9 each year on the road talking to the members of our
10 cooperative.

11 I would much prefer a later briefing date
12 simply to allow me to do that as well as to concentrate
13 fully on the voluminous record that was compiled for
14 this hearing.

15 JUDGE CLIFTON: What date do you propose?

16 MR. MARSHALL: I would propose the first
17 Monday in July.

18 JUDGE CLIFTON: For which?

19 MR. MARSHALL: I'm sorry. For the final
20 briefing date, not the -- I do not propose a change in
21 the corrections date. I do propose an extension of the
22 date for filing briefs.

23 JUDGE CLIFTON: From June 21 to July 1?

24 MR. MARSHALL: That would be fine.

25 JUDGE CLIFTON: All right. Is there any

1 objection to that? Mr. Vetne?

2 MR. VETNE: None.

3 JUDGE CLIFTON: Mr. Beshore?

4 MR. BESHORE: Fine.

5 JUDGE CLIFTON: Mr. English?

6 MR. ENGLISH: I can live with that.

7 JUDGE CLIFTON: Okay. Great.

8 MR. MARSHALL: Thank you.

9 JUDGE CLIFTON: You're welcome.

10 So, brief will be due July 1, which is a
11 Monday, July 1, 2002, unless the transcript goes on the
12 Internet later than May 17th, 2002. If it does, the
13 extension for briefs is the same number of days as the
14 transcript is delayed.

15 The proposed corrections to the transcript
16 will be due May 31, with the same possibility for
17 extension if the transcript is delayed beyond May 17th.
18 Please do not use the U.S. Post Office for delivery of
19 the briefs. I hate to do that, but the delay is very
20 lengthy because everything that comes through the post
21 office is diverted and irradiated and thereby damaged
22 as well as delayed. You may use a commercial carrier,
23 such as FedEx. It comes through just fine. If all
24 else fails, you can use the fax, although for
25 voluminous briefs, that's really not appropriate.

1 All right. Anything further? Mr. Vetne?

2 MR. VETNE: I would note that in the past,
3 the Dairy Division has accepted e-mail attachments of
4 the brief, and I think they'll do so here. They'll
5 provide, once they get the e-mail copy, they'll provide
6 a copy to the hearing clerk.

7 JUDGE CLIFTON: Mr. Tosi, is -- is -- are you
8 willing to accept that responsibility?

9 MR. TOSI: Yes, Your Honor. In the most
10 recent series of hearings that we've had, in light of
11 September 11th, the e-mail has worked out very, very
12 well.

13 Also, just for purposes of having it on the
14 record, if, in the unfortunate event that the hearing
15 transcript is delayed in such that by moving the date
16 by which briefs would be due would occur on a holiday
17 or a weekend, may we just then assume that it would be
18 the next business day --

19 JUDGE CLIFTON: Yes.

20 MR. TOSI: -- following that delay?

21 JUDGE CLIFTON: Yes, indeed.

22 MR. TOSI: Okay. Thank you very much, Your
23 Honor.

24 JUDGE CLIFTON: Thank you.

25 And please be aware, all of this has to be

1 filed with the hearing clerk, but if Mr. Tosi's office
2 is willing to accept the responsibility of making that
3 transfer, then e-mail is a wonderful way to provide
4 your briefs as well as your transcript corrections.

5 MR. TOSI: Yes, Your Honor, and also, to the
6 extent that people have sent me briefs, I usually then
7 send back a quick e-mail reply to them so they know in
8 fact that we received it, and it works well that way.

9 JUDGE CLIFTON: Excellent. All right. Mr.
10 Beshore?

11 MR. BESHORE: Do I understand that the -- the
12 means of serving briefs which have been stated by Your
13 Honor supersede any possible interpretations that may
14 be given to the -- the Rules of Practice in the -- in
15 the Code of Federal Regulations?

16 I only say that because they specifically
17 provide, and I've been in the circumstances of
18 litigating it, the only way you can file it is to have
19 it there or send it by the United States Postal
20 Service. That is all the Rules of Practice authorize.
21 FedEx does not qualify.

22 JUDGE CLIFTON: FedEx qualifies if it's
23 received by the hearing clerk by the deadline.

24 MR. BESHORE: Yes.

25 JUDGE CLIFTON: But not if that's the day you

1 deliver it to FedEx.

2 MR. BESHORE: Right. So, -- but when you say
3 don't mail it, although the Rules say that's how you do
4 it, you're saying FedEx it there the day before, and,
5 of course, e-mail is no where on the radar screen in
6 the Rules.

7 JUDGE CLIFTON: You're -- you're correct, Mr.
8 Beshore. I want it quite clear that I do not have the
9 authority to waive the Rules of Practice, and this does
10 create a problem. It needs an amendment in that
11 regard.

12 If you want to protect yourself and if by
13 putting it in the post office, you meet the filing
14 deadline, go ahead and do that but don't rely on it
15 getting to us.

16 All right. Anything further?

17 (No response)

18 JUDGE CLIFTON: I thank you all, and I know
19 you have to run for planes.

20 We'll -- we'll be in recess at 11:30.

21 (Whereupon, at 11:30 a.m., the hearing was
22 adjourned,)