Pursuant to Rule 39(f)(2) of the Arizona Rules of Civil Procedure, which states, "Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent," the "Prepared for" attorney has received a copy of this proceeding.

I, the officer, will provide a certified copy to each ordering party at the same copy rate, thus complying with Section 7-206, Appendix A Standard 3(a) of the Arizona Code of Judicial Administration (ACJA) Court Reporter Standard Certification (Effective January 1, 2003)

Each purchased copy of this transcript will be signed and certified by myself, thus complying with ACJA Section 7-206F(3).

A.R.S. 32-4003(B) provides, "Beginning July 1, 2000, a certified court reporter shall sign and certify each transcript that the certified court reporter prepares before the transcript may be used in court, except for transcripts that the court reporter prepares for proceedings that occurred before July 1, 2000." Thus, only an originally signed copy of my work product can be used in any proceeding before the Court.

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UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:	)
	) Docket Nos.
PROPOSED CHANGES TO	) AO-368-A32
WESTERN AND PACIFIC NORTHWEST MILK	) AO-271-A37
ORDERS	) DA-03-04
____________________________________	)

TRANSCRIPT OF PROCEEDINGS

BEFORE: MARC R. HILLSON
Administrative Law Judge

VOLUME I
(Pages 1-272)

Tempe, Arizona
September 23, 2003
9:54 a.m.

Prepared for:	Prepared By:
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TRANSCRIPT OF PROCEEDINGS,

taken on September 23, 2003, commencing at 9:54 a.m., at the Sheraton Airport Hotel, 1600 South 52nd Street, Tempe, Arizona, before Elaine M. Cropper, a Certified Court Reporter, Certificate No. 50491, in and for the State of Arizona.

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P R O C E E D I N G S

JUDGE HILLSON: Okay. We can go on the record now.

Good morning. My name is Marc Hillson. I'm an administrative law judge. I've been assigned to conduct this hearing. We're getting underway in Phoenix on the 23rd of September, 2003. We were supposed to start at 8:30, but we're starting at about 9:55 in the morning.

I want to thank our court reporter for getting here. We got her in about some 30-minute notice. We had some glitches out of our headquarters in D.C. arranging a court reporter.

I'm going to try to go over the preliminaries fairly quickly. I'll note that this hearing is generated from a Federal Register notice that was originally published on August 6, 2003, beginning on page 46505 and that there was a correction published on August 26 at page 51202, and that the docket numbers for this matter are AO368 -- AO, dash, 368, dash, A32; AO, dash, 271, dash, A37; and DA, dash, 03, dash, 04.

Just a few more preliminary matters.

Our court reporter -- a transcript will be available. A transcript will also be eventually posted on the Internet and accessed through the USDA Web site.

A transcript will also be available at the Hearing

Clerk's office in Washington, D.C. When you come up with exhibits, please submit four copies of the exhibits to the court reporter.

As a result of a few preliminary discussions and suggestions, I'm thinking that, especially given the length of this hearing, if people want to submit -- want to come up as witnesses and then submit a written statement and then just summarize the written statement, I will allow that as long as the written statement is made available on the table in the back of the room at least two hours prior to the testimony so that folks might still have an opportunity to cross-examine them.

In other words, you can submit a written statement and just come up here and summarize in a couple sentences, but you're still subject to cross-examination. People that have a chance to cross-examine you, they would at least have an opportunity to read the statement themselves.

I want to emphasize this is a public hearing. We're going to try to accommodate every single person that wants to speak. We have been tentatively scheduled to go through Friday.

While I do want to accommodate all testimony, I also want people to understand that Friday evening, the Jewish New Year starts and that there are some people here, myself included, who want to get out of here, if at all possible, by about noon on Friday.

Today was scheduled to go to about 6 o'clock, and depending on how things go, I will consider going a bit later on Wednesday and Thursday in order to get us out at a fairly early time on Friday, if not even finish on Thursday. That depends on how we're doing and how much more there is to do.

I'm also going to ask people -- if I hear, like, eight or nine people coming up and saying the exact same thing, I'm going to start to consider using the rules of procedure to limit repetitive, redundant testimony. I think that the Agency will get the idea of what you're trying to say and there's no need to say the same things over and over again.

I also want to emphasize that I, as the Administrative Law Judge, do not participate in any decision that is made as a result of these several days of hearings. My job here is, basically, to supervise and manage the testimony, to make sure that the procedure is followed, that witnesses are sworn in to handle any objections and make sure, basically, that all of the evidence comes in in an orderly fashion.

I also understand that I've talked -- I had a little preliminary discussion to try to get some schedules for testimony and I'm going to try to adhere to those. I also want people to know -- and I'll say this every day. People who are here for only one day or need to get back to work for whatever reason, I'm going the try to accommodate them even though it's out of the sequence that we talked about taking the testimony in.

At this time, I want to just get some of the participants here to identify themselves. I'll remind people that -- I'll probably have to do this a few times. When you do get up to ask a question or whatever, it's important that you state your name, who you are representing, and just so that we know who you are, especially the number of parties that are here. And with the fact that we may have different court reporters on different days, I think it's important that you always remember to please identify yourself.

What I'm going to do is first ask the people for the Agency identify themselves.

MS. DESKINS: Sharlene Deskins. I'm the attorney for the Office of General Counsel, U.S. Department of Agriculture. And I represent USDA Marketing Services in this proceeding.

MR. ROWER: I'm Jack Rower, R-O-W-E-R. I'm with AMS Dairy Programs. My colleague, Gino Tosi, will be joining us in just a few minutes, T-O-S-I.

MR. CHERRY: Good morning. My name is Richard

Cherry. I'm within USDA AMS Dairy Programs. Last name is C-H-E-R-R-Y, first name is R-I-C-H-A-R-D.

JUDGE HILLSON: I guess the best thing to do, I think we'll just go behind the AMS folks and people who are here in a representational capacity, we'll just go back and then come back around the front, just introduce ourselves for the record, please.

MR. YALE: Benjamin Yale of Yale Law Office, Waynesfield, Ohio, on behalf of Smith Brothers Farms, Inc., and Washington -- Edaleen Dairy out of Lynden, Washington, and Mallorie's Dairy out of Silverton, Oregon.

MR. MILTNER: Ryan Miltner of Yale Law Offices for the same three dairies: Smith Brothers Farms, Mallorie's Dairy and the Edaleen Dairy.

MS. REED: Kristine Reed also with Yale Law Service representing the same farms.

MR. RICCIARDI: Good morning. I'm Al Ricciardi, R-I-C-C-I-A-R-D-I, from the law firm of Hebert Schenk. I am representing Sarah Farms.

Here with me during this proceeding is Steven and Hein Hettinga as representatives.

MR. RITCHEY: I'm Alan Ritchey. I'm representing Alan Ritchey, Incorporated.

MR. ARBUTHNOT: Paul Arbuthnot, A-R-B-U-T-H-N-O-T, representing Northwest Dairy Association.

MR. VANDER POL: I'm Daryl Vander Pol, V-A-N-D-E-R-P-O-L, at the request of Dairy Farmers of America.

MR. BRANDSMA: I'm Ed Brandsma, B-R-A-N-D-S-M-A, and I'm from Edaleen Dairy.

MS. BRANDSMA: I'm Aileen Brandsma from Edaleen Dairy.

MR. BRANDSMA: Wayne Brandsma, Edaleen Dairy.

MR. HEERSPINK: Robert Heerspink, H-E-E-R-S-P-I-N-K, Edaleen Dairy.

MR. IMBORNONI: Brian Imbornoni, I-M-B-O-R-N-O-N-I, with Robbins & Green for Maverick Milk Producers Association.

With me are Hank Perkins, AMC, William Gladden, Jerome LaSalvin, and Dave Rawlins.

MR. VAN TREECK: Joe VanTreeck, V-A-N, T-R-E-E-C-K, Matanuska Maid, M-A-T-A-N-U-S-K-A, M-A-I-D, Dairy.

MR. HITCHELL: I'm John Hitchell, H-I-T-C-H-E-L-L, with Kroger Company, Cincinnati, Ohio.

JUDGE HILLSON: Anyone else on that side of the room in a representational capacity?

Let's go in the back on this side, then.

MR. MARSH: Michael Marsh, Western United Dairymen, Modesto, California. Joining me is the Director of Western United Dairymen, Tiffany LaMendola.

MR. DEPEE: Al Depee Representing Braum's Dairy, D-E-P-E-E.

MR. ENGLISH: Charles English with the law firm of Thelen, Reid & Priest in Washington, D.C., representing Shamrock Foods Company, Shamrock Farms, and Dean Foods Company.

Witnesses will be Mike Krueger for Shamrock Foods, Norm McLelland for Shamrock Farms, Ernest Yates for Dean Foods Company, and there may also be a consultant with us later.

MR. CHRIST: I'm Paul Christ, a retired marketing specialist, here as consultant to Mr. English.

MR. TILLISON: Jim Tillison, T-I-L-L-I-S-O-N, Alliance of Western Milk Producers, Sacramento, California.

MR. CRYAN: Roger Cryan, C-R-Y-A-N, National Milk Producers Federation.

MR. BESHORE: Marvin Beshore, B-E-S-H-O-R-E, attorney, office in Harrisburg, Pennsylvania.

I'm here representing Dairy Farmers of America.

With me testifying on behalf of DFA is Elvin Hollon, Director of Fluid Marketing and Economic Analysis for Dairy Farmers of America, and we will have one other witness in addition to Mr. Hollon.

MR. MARSHALL: My name is Douglas Marshall, M-A-R-S-H-A-L-L. I'm the Senior Vice President of Northwest Dairy Association in Seattle. With me is Bill Van Dam, a consultant to us; and Dan McBride, M-C-B-R-I-D-E. Both of them will be witnesses for Northwest Dairy Association.

MR. BERDE: My name is Sydney Berde, B-E-R-D-E. I'm an attorney for United Dairymen of Arizona, proponents of Proposal Number 3. And with me is Jim Boyle, who is the President of United Dairymen of Arizona; and Keith Murfield, CEO of United Dairymen of Arizona.

Also testifying on behalf of our Proposal Number 3 will be Elvin Hollon later in the proceeding.

Thank you.

JUDGE HILLSON: Okay. That's everybody. Just one or two other preliminary matters before we get the first couple of exhibits in.

One is that since we started late, the normal progress is that you have a break in the morning. I think we already had our break. I plan to go right until lunchtime. We'll have an hour for lunch and 15 minutes this afternoon.

I would also let you know that there's going to be a buffet served right outside here for the Federal Milk Market hearing. It says 11:30 to 1. My plan is to go until noon. If people want to sneak out and get their food early, that's okay. My plan is to go until noon, take a lunch break, reconvene at 1 o'clock, take a 15-minute break in the 3 to 4 range, and then go to about 6 o'clock tonight, give or take, depending on how we're doing, where we're at.

MR. YALE: Your Honor, Ben Yale on behalf of Smith Dairy, Edaleen Dairy and Mallorie's Dairy.

I want to talk about hearsay. You mentioned about the written statements. I'm not objecting to the written statements, but I think the process that has been submitted is really going to put a burden that's going to impair our ability to defend this case. To have it two hours ahead during the hearing means that we've got to do two things at once, pay attention to the cross-examination of the proceedings here and read -- and some of this stuff, I'm not saying it's turgid but it's pretty technical stuff. You just can't quickly read through it. Some of them you can.

But this is an extremely important hearing to my clients. We're asking -- the proponents are asking to assess my clients millions of dollars a year and their business is at risk, and I don't want to accede to a process that I don't have an opportunity to both participate in the hearing as it's going and prepare testimony that's going to be instantly put upon us.

JUDGE HILLSON: Okay. Let me just -- for the witnesses that we had scheduled for today, they are all going to testify at some length. Is that a fair statement?

I guess that's --

MR. BERDE: Not at great length, Your Honor.

JUDGE HILLSON: Are the witnesses who are planning to testify today, do any of them plan to hand their written statements in and then summarize them or are they going to testify?

MR. BERDE: I don't think so. The witnesses that I'm presenting today and the other witnesses from California who I understand want to testify today, I understand they have short statements and it will not greatly lengthen the proceedings to let them read their statements.

JUDGE HILLSON: Okay. Since it's not going to affect anyone today, how about if I say that you have to have it on the table before we adjourn the evening before?

MR. YALE: Thank you. That was going to be my suggestion.

JUDGE HILLSON: Okay. Does anyone have a problem with that? I hope not.

MR. YALE: Now, following up on that, you know, obviously, we want -- I mean, it may be obvious but it's not. We want this hearing done quickly simply from the standpoint of costs. These are small people.

But I do have a concern, and we may approach it as those specific witnesses come and how it falls to go late in the day. I mean, beyond 6 o'clock may create some physical problems and some ability to just properly perform.

I mean, this is not an emergency hearing. The Secretary has not announced this as an emergency hearing. There's no Congressional obligation to complete the rule-making within a specific period of time as we've dealt with in the past when we've had to speed things up. And everybody here, whether you're for it or against it, this is an extremely important hearing.

Just to rush it to rush it bothers me. If we can get it done in truly an extra hour or two and can get out of here Friday, that's great. But to rush it and still not get it done, I think we need to have that analysis. We're going to have a situation where we go to 9 o'clock and then we've got all of the witnesses to prepare the next day. That just makes for a very, very long day and I don't know that it's necessary.

We would recommend that if we're going to have the witness statements, that six to me seems like a pretty long day as it is; we're going to get a lot done. And to be prepared so that it moves quickly, we need rest and preparation.

JUDGE HILLSON: I'm not planning to go much later than six tonight. I think I just would prefer to wait to see on the rest of it. If we are sitting here on Thursday night and we can go two more hours and get the whole thing done or that will get us out -- my plan right now is to go to six tonight.

MR. YALE: And then we deal with it. That's fair. I just wanted to raise the concerns. Thank you very much, Your Honor.

JUDGE HILLSON: We need to get the official exhibits in on the Federal Register notice in the record and also the notification to the Governor.

MS. DESKINS: Yes, Your Honor. I have here a copy of the Federal Register notice. I'll give one to the court reporter. Please note, Your Honor, one is a copy of the notice and was also a correction.

JUDGE HILLSON: So I guess I'll have them marked as Exhibits 1 and 1A, with 1A being the correction.

MS. DESKINS: Correct. That's -- the first page should be the correction.

JUDGE HILLSON: The top page is 1A and underneath it is Exhibit 1, which is the Federal Register notice.

(Exhibit Nos. 1 and 1A marked for identification.)

MS. DESKINS: Judge Hillson, the next thing I have is a certificate saying that the governors of the states of Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, and Washington and Wyoming were notified.

JUDGE HILLSON: I'll let the reporter mark that as Exhibit No. 2 and enter that into evidence.

(Exhibit No. 2 marked for identification.)

JUDGE HILLSON: Anything else?

MS. DESKINS: Yes. I also have a certificate that a news release was made announcing the hearing. Let me hand this to the court reporter.

JUDGE HILLSON: And I'll ask her to mark that as Exhibit 3.

(Exhibit No. 3 marked for identification.)

JUDGE HILLSON: And I'll admit that into evidence.

MS. DESKINS: And the other thing I have, Your Honor, is a note called a Determination Regarding Mailing of Notice of Hearing to -- that interested persons were notified. I'll hand a copy to the court reporter.

JUDGE HILLSON: And I'll ask her to mark that as Exhibit No. 4.

(Exhibit No. 4 marked for identification.)

JUDGE HILLSON: And I'll admit it into evidence as Exhibit No. 4.

JUDGE HILLSON: Okay. Are you ready to call your first witness?

MS. DESKINS: Yes, your Honor. We would like to call John Mykrantz to testify.

Mr. Mykrantz?

JOHN L. MYKRANTZ,

a witness herein, having been first duly sworn by the judge to speak the truth and nothing but the truth, was examined and testified as follow:

JUDGE HILLSON: State and spell your name for the record, please.

THE WITNESS: My name is John Mykrantz, spelled J-O-H-N, M-Y-C-R-A-N-T-Z.

EXAMINATION

BY MS. DESKINS:

Q. Mr. Mykrantz, could you please tell us what your current position is?

A. I'm employed by USDA, AMS dairy programs, as a marketing specialist for the Pacific Northwest, Arizona-Las Vegas, and Western Federal Milk Marketing Orders.

Q. And how long have you held that position?

A. Since 1994.

Q. And could you tell us just briefly what your educational background is since high school?

A. I received a B.A. from Washington University in history and also a Master's of Science in agricultural economics from Michigan State University.

Q. Mr. Mykrantz, as part of your job duty, did you prepare any statistical information for this hearing?

A. I did.
Q. Can you tell us what you prepared?
A. I prepared -- they were prepared under my supervision, two documents that I'll refer to as the MA hearing statistics. One is gray and one is red.
Q. One covers Federal Milk Marketing Order Number 124?
A. Correct. That is the gray one.
Q. Why don't we start with that one? You have several copies up there. I'm going to hand one to the court reporter and have it marked before we proceed.
JUDGE HILLSON: The reporter can mark it as Exhibit No. 5.
(Exhibit No. 5 marked for identification.)
BY MS. DESKINS:
Q. Mr. Mykrantz, copies of these are available on the back table?
A. Yes, they are.
Q. Could you please tell us what Exhibit 5 is?
A. Exhibit 5 is a compilation of statistical material for the Pacific Northwest Order. All of the data in these compilations is based on records obtained from the Market Administrator's office and relate to Federal Order 124 of the Pacific Northwest Order.
Most of the data were derived from the monthly

handling of the reports, the receipts and utilization and producer payrolls that handlers submit to the Market Administrator on a monthly basis. Some of the data on the tables were compiled using whole numbers and then rounded for inclusion in the tables in abbreviated form. Therefore, in some instances, data may not add due to rounding.

The compilation of statistical material prepared for this hearing for 124 consists of 38 pages, plus the front and back cover pages and the table of contents.

The compilation of statistical material -- excuse me. I guess there are 11 tables and one map in the gray document.

Q. Let's just go through each table, and just briefly tell us what it is.

A. Table 1 on pages 1 through 5 shows a list of fully regulated handlers, partially regulated handlers, producer-handlers, exempt plants, and co-operative associations.

The names and addresses of each organization are given in addition to the city, state, and county where each plant is located, or handler.

The Class I differential for the county is identified, as is the type of plant, as defined in the Order.

There are footnotes at the bottom of this table that indicate significant changes that have occurred in 2003.

Q. Okay. Now, tell us about Table 2.

A. Table 2 on pages 6 through 9 is similar to Table 1 but represents a list of pool plants, nonpool plants with Class I sales in the marketing area and co-operative associations and representative months in which these plants were associated with the Order for the years 2000 to the present.

For the columns headed 2000 through 2002, January was chosen as a representative month for that year. The plant had sales into the marketing area in January. A J is shown in that column.

If the handler did not have sales into the marketing area except in February through December or not at all, no J would still be shown.

For 2003, all months through June 2003 are shown, and, again, there are footnotes at the bottom of this table to indicate significant changes that have occurred in 2003.

Q. Can you tell us about Table 3?

A. Table 3 on pages 10 and 11 shows the pounds and percentage of producer milk by class and in total for the four classes of utilization in the Pacific Northwest Order for the months of January 2000 through June 2003, I think actually July 2003 -- nope. June 2003. Annual totals are shown for each year.

The pounds of producer milk in Table 3 are based on pounds reported on handler reports and do not represent totals that have been audited.

These pounds of milk and their associate components are used to compute the monthly price differential which is announced on or before the 14th of each month for the preceding month.

Q. Let's move on to -- I believe on Table 4.

A. Table 4 on pages 12 through 15 contains the class prices for the Pacific Northwest Order for each month of January 2000 through June 2003. The prices are given for components in the class, the skim milk equivalent value of the component and at 3.5 percent butterfat as announced by the Market Administrator. Component prices are on a per-pound basis. Skim and 3.5 percent butterfat prices are on a hundredweight basis.

The Class I price is the price announced for King County, Washington, and includes a Class I differential of $1.90 per 100 weight. Annual averages are given for each column.

Q. Let's move on to the next table.

A. Table 5 on pages 16 and 17 provides producer prices for each month of January 2000 through June 2003 and annual averages. Minimum prices to producers under the

Order consist of four items: Butterfat, protein, other solids, which are on a per-pound basis, and the producer price differential, which is on a per-hundredweight basis. The statistical uniform price also on a per-hundredweight basis is provided for informational purposes only.

Q. Let's move on to Table 6.

A. Table 6 on pages 18 through 21 shows the pounds and percentage of producer milk by state for January 2000 through June 2003. These pounds are based on producer payrolls submitted by handlers and subjected to a preliminary audit. The total pounds in this table may be somewhat different from the pounds shown in Table 3 on page 10 and 11, which are based on pounds from handler reports of receipts and utilizations.

Information for certain states and selected months are combined with other states when the data represents fewer than three handlers. Footnotes at the bottom of Table 6 detail what states are included with other states and the month of the inclusion.

Q. Can you explain to us why you had to do that if there were three handlers or less?

A. It is the policy of the Market Administrator to restrict data when it represents three -- fewer than three handlers or fewer than three producers. Otherwise, confidential data is revealed, can be revealed.

Q. Let's move on to the next table.
A. Tables 7, 8, 9, and 10 on pages 22 through 35 provide the number of producers and the pounds of producer milk by state and county for January 2000 through June 2003.
Tables, 7, 8, and 9 show the information -- same information as Table 6 but broken down to the county level and, in addition, show the number of producers.
The state totals in 7, 8, 9, and 10 correspond to the state totals in Table 6 on pages 18 and 19.
Tables 7, 8, 9, and 10 reflect data for 2000, 2001, 2002 and 2003 respectively.
Q. Let's move on to Table No. 11.
A. Table 11 on pages 36 and 37 shows Class I in area routes by pool plants, producers, handlers and other plants for January 2000 through June 2003. There's a footnote defining the type of plants included with other plants. Other plants include plants fully regulated under other federal orders, partially regulated plants, and exempt plants.
Q. Then the last page is a map. What does that show?
A. The last page of the document is a map of the marketing area. The heavy black line marks the poundage of the marketing area. The counties that are shaded are counties from which milk originated and was pooled on the Pacific Northwest Order in June 2003.

The location of pool distributing plants, co-operative pool manufacturing plants, and producer-handlers are shown as indicated by the key for plant type in the upper right-hand corner.

For example, in King County, Washington, we can see that there are three symbols of black dots within circles. Each black dot within a circle indicates the approximate location of one pool distributing plant. None of the eight partially regulated distributing plants are shown on the map. Information on handlers not shown on the map can be found in Tables 1 and 2 on pages 1 through 9.

Q. Now, you also said you prepared a similar document in regards to Order Number 131?

A. I did.

Q. Okay. I'm going to hand a copy of that to the court reporter.

JUDGE HILLSON: Did you want to get this admitted into evidence, Exhibit 5?

MS. DESKINS: I was going to move for both.

JUDGE HILLSON: Okay. That's fine.

(Exhibit No. 6 marked for identification.)

JUDGE HILLSON: This will be marked as Exhibit 6.

BY MS. DESKINS:

Q. Could you please tell us what Exhibit 6 is?

A. Exhibit 6 is a similar document to Exhibit No. 5

except that the data in this crimson document deals with the Arizona-Las Vegas milk marketing order, Federal Order Number 131.

Q. Okay. And copies of this are available on the back table?

A. Yes, they are.

Q. Let's open it up and let's go through each of the tables in this one. Let's start with Table 1.

A. Table 1 on pages 1 through 4 shows a list of fully regulated handlers, partially regulated handlers, producer-handlers, exempt plants, and co-operative associations.

The names and addresses of each organization are given in addition to the city, state, and county where each plan is located.

Class I differential for the county is identified as is the type of plant as defined in the Order.

Q. Look through Table 2.

A. Table 2 on pages 5 through 7 is similar to Table 1 but represents a list of pool plants, nonpool plants with Class I sales in the marketing area, and co-operative associations. The representative months in which these plants were associated with the Order for 2000 to the present.

Q. Okay. Let's move on to the next table.

A. Table 3 on pages 8 and 9 shows the pounds of percentages of milk by class and in total for the four classes of utilization in the Arizona-Las Vegas order for the months of January 2000 through June 2003. Annual totals are shown for each year. The pounds of producer milk in Table 3 are based on pounds reported on handlers' reports and do not represent totals that have been audited. These pounds of milk and their associated components are used to compute the monthly producer, butterfat, monthly uniform producer butterfat and skim prices announced on or before the 11th of each month for the preceding month.

Q. Okay. Let's move on to the next table, which would be Table 4.

A. Table 4 on pages 10 through 13 contains the class prices for the Arizona-Las Vegas order for each month of January 2000 through June 2003.

The prices are given for butterfat and skim for each class and that 3.5 percent butterfat as announced by the Market Administrator. The butterfat prices are on a per-pound basis with skim, and 3.5 percent butterfat prices are announced on a hundredweight basis.

The Class I pricing is -- in this table is the price announced for Maricopa County, Arizona, and includes a Class I differential of $2.35 per hundredweight. Annual averages are given for each column.

Q. Okay. Let's move on to Table 5.

A. Table 5 on pages 14 and 15 provides the uniform -- provides uniform prices for each month of January 2000 through June 2003, annual averages. Minimum prices to producers under the Order consists of the uniform butterfat price which is on a per-pound basis and the uniform skim price which is on a per-hundredweight basis. The uniform price at 3.5 percent butterfat on a per-hundredweight basis is also provided.

Q. And the next one I have would be Table 6.

A. Table 6 on pages 16 and 19 -- through 19 shows the pounds and percentage of producer milk by state for January 2000 through June 2003. These pounds are based on producer payroll submitted by handlers and subjected to a preliminary audit.

The total pounds in this table may be different -- some difference from the pounds shown in Table 3 on page 8 and 9, which are based on pounds from handler reports of receipts and utilizations.

Information for certain states and selected months are combined with other states. And when the data represents fewer than three handlers, footnotes at the bottom of Table 6 detail what states are included with other states and the month of that inclusion.

Q. Okay. Let's move on to Table 7.

A. Tables 7, 8, 9, and 10 on pages 20 through 25 provide the number of producers and the pounds of producer milk by state and county for January 2000 through June 2003. Tables 7, 8, and 9 showed the same information as Table 6 but broke down to the county level and, in addition, showed the number of producers.

The state totals in Tables 7, 8, 9, and 10 correspond to the state totals in Table 6 on pages 16 and 17.

Tables 7, 8, 9, and 10 reflect data for 2000, 2001, and 2002 and 2003 respectively.

Q. Okay. Let's move on, then, to Table 11.

A. Table 11 on pages 26 and 27 shows Class I in area routes by pool plants, producer-handlers and other plants for January 2000 through June 2003. There is a footnote defining the type of plants included with other plants. Other plants include plants fully regulated under other federal orders, partially regulated plants and exempt plants.

Q. Okay. Let's move on to the last page, which is a map.

A. The last page of the document is a map of the marketing area. Heavy black line marks the dairies in the marketing area. The counties that are shaded are the counties from which milk originated and was pooled on the

Arizona-Las Vegas order in June 2003.

The location of pool manufacturing plants, co-operative pool manufacturing plants, and producer-handlers are shown as indicated by the key for the plant type in the upper right-hand corner. For example, in Maricopa County, Arizona, we can see that there are three symbols of black dots within circles. Each black dot within a circle indicates the approximate location of one pool distributing plant. No partially regulated distributing plants are shown on the map. Information on handlers not shown on the map can be found in Tables 1 and 2 on page 137.

Q. Okay. Now, for both 5 and 6, were these prepared under your supervision?

A. Yes, they were.

Q. Have you had a chance to look through both of them? Are they accurate to the best of your knowledge?

A. They are accurate to the best of my knowledge.

Q. And also the information, both of them, what was the source for the information?

A. The source of the information were the records available at the Market Administrator's office, including handlers' reports and producer payrolls.

MS. DESKINS: Your Honor, at this time I move for the admission of Exhibits 5 and 6.

JUDGE HILLSON: In the absence of hearing any

objection, I'll admit both Exhibits 5 and 6 into evidence.
Thank you.
BY MS. DESKINS:
Q. Sir, you also prepared some other documents for this hearing?
A. I did.
Q. Can you tell us what those are?
A. There's two documents. One is entitled Statistical Material Prepared at the Request of Douglas Marshall, Senior Vice President, Northwest Dairy Association, September 2003.
Q. Okay. Can I get a copy of that and I'll have the court reporter mark it?
JUDGE HILLSON: That will be Exhibit 7.
(Exhibit No. 7 marked for identification.)
Q. As this document says, you prepared it at the request of Douglas Marshall?
A. Correct.
Q. And if you could just briefly tell us what is in this document.
A. The information in the packet was put together by the MA's office and it was not prepared in support of or in opposition to any proposals.
The first table, entitled Table 1 in area route disposition by handlers, Pacific Northwest Order, 1998

through 2002, annual. This data is drawn from information published in the MA report, a monthly publication of the Market Administrator's office.

Q. Just for the record, say what MA stands for.

A. MA is an abbreviation for Market Administrator.

Q. Let's move on to the next page of that document.

A. The next item in the packet, entitled Table 2 in Area Route Disposition by Handlers, contains data similar to Table 1 but on a monthly basis from January 2000 to 2003 to date.

Q. Okay. Let's look at Table No. 3.

A. The next table, Table 3, is entitled Producer-Handlers, Number, Production, and Routes, Oregon, Washington and Total, 2000 through 2003 to date.

Q. Okay. Let's move on to table No. 4.

A. The next table, Table 4, entitled Producer-Handler Production and Routes, is similar to data in Table 3 but over a longer period of time, 1975 through 2000, and for the month of December only.

The number of producer-handlers by state is noted in footnotes for the 1975 through 1985 period. When two orders existed in the region now roughly encompassed by the current Pacific Northwest Order as is indicated in footnote 4, routes were estimated using Class I use as published in the Market Administrator's report in 1975, 1980 and 1985.

Q. Let's look at Table No. 5.
A. The next table, Table 5, entitled Producer-Handler and Routes and Pool Information, contains data similar to Tables 3 and 4 for December of 1990, 1995, and 2000 with the addition of producer milk pools on the Order, total in area routes and producer-handlers as a percent of both pool and producer-handler totals.
Q. Okay. Let's look at Table 6.
A. The last table, Table 6, entitled Utilization of Surplus Milk by Producer-Handlers, January 2000 through July 2003, contains data representing uses of milk by producer-handlers for other than Class I purposes at the procedure-handlers' plant and sales of milk and cream to other handlers.
Class I is comprised of sales of milk to nonpool plants and pool plants which are known to have bottling operations. The sales to nonpool plants represents over 90 percent of the sales over the 43-month period. Class II uses represent own plant manufacturing and sales to other nonpool plants that are known to be Class II manufacturing plants. Classes III and IV uses represent own plant manufacturing and sales to other nonpool plants that are both to be Class III, IV manufacturing plants. Bulk inventories, animal feed, dumped milk, max dental loss are not included in this table.

Q. Now, is this document correct to the best of your knowledge?

A. Yes, it is.

Q. And this was prepared under your supervision and control?

A. Yes, it was.

MS. DESKINS: Your Honor, I move for the admission of Exhibit No. 7.

JUDGE HILLSON: I see a question.

MR. YALE: Ben Yale. We would like to have a chance -- we can do it later with all of the exhibits -- to cross-examine before we would waive any objections.

JUDGE HILLSON: I'm going to admit the document into evidence. You can cross-examine him.

MR. YALE: Even if there are errors?

JUDGE HILLSON: That can be modified. He said it was prepared under his supervision. I'm going to allow this admitted into evidence.

BY MS. DESKINS:

Q. Sir, did you prepare any other statistical information for people?

A. Our office also prepared a document entitled Statistical Material Prepared at the request of Elvin Hollon, Director of Milk Marketing, Economic Analysis, Dairy Farmers of America, Inc., September 2003.

Q. Okay. I'm going to get that and hand a copy to the court reporter and we'll have it marked as Exhibit 8.

(Exhibit No. 8 marked for identification.)

Q. Sir, in regards to Exhibit 8, you said who you prepared it for. Can you look at the table and tell us what it is?

A. The information in the packet entitled Statistical Material Prepared at the Request of Elvin Hollon, it was put together by our office and not proposed in support or opposition of any proposals. Mr. Hollon requested that the MA office put together two tables of information that we have titled Miscellaneous Information on Producer-Handlers, May 2003, and Miscellaneous Information on 7(a) plants, also from May 2003. The information in Table 1 pertains to producer-handlers and includes the percentages -- percentage of the market's Class I held by producer-handlers, the average monthly volume of Class I held by producer-handlers, the median size producer-handler, the average monthly volume of the smallest, middle, and largest grouping of producer-handlers, and the percentage that these represent of the market.

Table 2 represents the same configuration of data as Table 1 but, as the title indicates, for 7(a) plants.

There are a number of details regarding the tables that should be noted. Number one, all data for producer-handlers associated with the Arizona-Las Vegas order, Federal Order 131, is restricted and -- as indicated in the tables.

Two, since there are only six producer-handlers associated -- strike that.

The median-size producer-handler and pool plants Class I marketing would reveal a particular plant's specific pounds, so that number is restricted. The average size and the average size handler and handler by size grouping, however, represents similar information.

The handlers whose information is represented in this table can be found on Table 2 of the hearing statistics that I described earlier, the MA hearing statistics.

Lastly, note that the data provided for all types of plants for all orders is Class I usage. Class I usage includes route dispositions, inventory of packaged milk, transfers or diversions of Class I milk and any applicable Class I shrinkage. For the calculation of the percentage of the market's Class I utilization, we considered the market's Class I utilization to be a combination of the producer-handler Class I usage with the Federal Order Class I usage as published in our monthly bulletin.

The Federal Order Class I usage, as published in the monthly bulletin, includes the Class I usage of 7(a) plants as well as 7(b) plants and miscellaneous Class I movements by co-operative associations.

MS. DESKINS: Your Honor, I would move for the admission of Exhibit No. 8.

JUDGE HILLSON: Okay. Did you want to say something?

MS. DESKINS: I have it as Exhibit No. 8.

JUDGE HILLSON: Right. I will allow -- Exhibit No. 8 is admitted into evidence.

BY MS. DESKINS:

Q. Have you received any other requests to prepare any statistical information?

A. We have received one request that we have not completed as yet. We are working on it at this time and it should be available by, I would say, Thursday.

Q. So on Thursday, we'll recall you to talk about that exhibit once it's ready?

A. Correct.

MR. BERDE: Your Honor, may we inquire as to the nature of the additional information that was --

JUDGE HILLSON: I need you to identify yourself for the reporter.

MR. BERDE: My name is Sydney Berde representing the UDA.

Could we inquire as to the nature of the information requested, just in general terms?

JUDGE HILLSON: Sure.

Why don't you answer the question.

THE WITNESS: The data was requested by Elvin Hollon and represents the -- a different kind of perspective on the minimum order values, minimum order prices announced for Federal Order 124. Elvin requested that we convert our uniform price valuations to a uniform skim and a uniform butterfat basis.

Federal Order 124 of the Pacific Northwest Order is a component order and we do not, typically, announce or calculate equivalent skim -- uniform producer skim and uniform producer butterfat prices, though statistically that's possible from the data that we have.

JUDGE HILLSON: Anything else?

MS. DESKINS: I have no further questions for this witness.

MR. BERDE: Is the witness ready for cross-examination?

JUDGE HILLSON: Yes. It might be easier for the reporter if you use the microphone. Once again, anyone that is going to cross-examine, you need to identify yourself once again.

MR. BERDE: Sydney Berde for UDA.

EXAMINATION

BY MR. BERDE:

Q. Mr. Mykrantz, several times during the course of your testimony you referred to partially regulated handlers. Do you recall that?

A. Correct.

Q. Would you indicate and describe for the record just what is meant by a partially regulated handler and what impact the distribution of milk from that handler has on the Order?

A. Okay. A partially regulated plant is a plant that may have sales into the marketing area but does not meet the definition of another type of plant as defined in the Order. That would mean, as an example, for the Pacific Northwest Order, less than 25 percent of their physical receipts are not put into the bottle and less than 25 percent of their route dispositions are not marketed in the marketing area.

Q. Then you also had a reference in your material to an exempt plant. I think Sunrise Dairy in the Arizona-Las Vegas marketing area is described in some of our tables as an exempt plant during some months, and in other months, it is described as a producer-handler plant. Do you recall that?

A. I do.

Q. Would you indicate what the differentiation is between a plant that is an exempt plant and why, in some months, it is described as a producer-handler plant?

A. An exempt plant, under the Orders, is a plant which has less than 150,000 pounds of routes in a particular month. A producer-handler, as designated by the Market Administrator, has Class I sales in the marketing area and has qualified to be exempted from the pricing and pool provisions of the Order by the MA.

There is -- if a plant has less than 150,000 pounds of routes but also has -- is supplied by milk from its own farm, it is not clear in the Order that it is one or the other. And I believe you can probably remind me when it happened, but we came to the decision that Sunrise was more appropriate to be classified as a producer-handler than as an exempt plant based on the fact that it has its own farm production.

Q. Well, is it fair to conclude, then, that this, quote, exempt plant was simply redesignated by the decision of the MA to be more appropriately described as a producer-handler plant?

A. Correct.

Q. Okay. I want to direct your attention to Table 11 of the Arizona-Las Vegas tables, Class I in area routes by pool plants, producer-handlers, and other order plants, January 2000 through June 23. And more particularly, first directing your attention to the months under 2000 which appears to show that Class I in area by other plants into the Arizona-Las Vegas marketing area ranged from about 9 to 10 million up to 15.5 million during that year; is that correct?

A. That looks roughly correct, yes.

Q. And then looking down to 2001, in the month of February, Class I in area by other plants was approximately 13.7 million; is that right?

A. That is correct.

Q. And in the following months, for the first time, you combine -- under the column Class I in area by other plants, you combine the producer-handler distribution into the March figure, do you not?

A. Yes, we do.

Q. And then there's a jump, then, from 13.7 million to 28.5 million; isn't that correct?

A. That is correct.

Q. So that it's fair to conclude that if you subtract the February 13.7 million from the 28.5 million, one can arrive at an approximation of the producer-handler distribution?

A. That would be up to you.

Q. Is there any other explanation for the jump from 13.7 to 28.5 million from February to March?

A. As the footnotes indicate, between February to March, we began including producer-handlers in the Class I in area by other plants number.

Q. And that is the explanation for the jump in numbers from February to March?

A. We started including them. That may not be the entire explanation of why the numbers changed so drastically.

MR. MARSHALL: Doug Marshall with Northwest Dairy Association.

EXAMINATION

BY MR. MARSHALL:

Q. First, Mr. Mykrantz, I want to thank you for putting together what has now been marked as Exhibit 7.

One clarifying question. You used the term "route disposition" or "routes" in Tables 2 and 4. I'm aware that there are some producer-handlers who market some of their own products through retail stores that they own. Would those be considered route dispositions for purposes of this exhibit?

A. They would be considered route dispositions.

Q. And, secondly, with respect to Exhibit 5, turn your attention to page 35. I note that this exhibit seems to have production numbers for December of 2003 and I ask whether those months across the top of that page might be mislabeled. It should be January through June rather than July through December?

A. It appears that they are mislabeled. I can verify that these are the actual numbers for January through June 2003.

MR. MARSHALL: Thank you, Mr. Mykrantz. No further questions.

MR. BERDE: Your Honor, I have a question. Sydney Berde. Will Mr. Wise be available for examination with respect to documents that he prepared?

MS. DESKINS: Yes. He's going to be called next.

MR. BERDE: Thank you.

JUDGE HILLSON: Any further cross of Mr. Mykrantz?

Go ahead.

MR. BESHORE: Marvin Beshore for Dairy Farmers of America.

EXAMINATION

BY MR. BESHORE:

Q. I, too, would like to thank you for the materials and for your ongoing efforts with respect to the request for additional information that Mr. Hollon has made.

Going to Exhibit 8 for a moment, if I understand Table 1 correctly, the column labeled Average Monthly

Class I volume, the largest one-third grouping of producer-handlers in the market indicates that in May 2003, the three largest producer-handlers in Order 124 had average Class I volume of 4,714,702 pounds; is that correct?
A. I believe so.
Q. Okay. That's the three largest producer-handlers.
Now, if you look at Table 2, which contains miscellaneous information or is titled Miscellaneous Information on 7(a) plants, 7(a) plants are fully regulated pool distributing plants; is that correct?
A. Correct.
Q. So in the Pacific Northwest line on Table 2 of Exhibit 8, you've indicated that there are 18 fully regulated distributing plants in the market; correct?
A. In May 2003.
Q. In May 2003, yes.
And the smallest one-third grouping of those fully regulated 7(a) plants would be the sixth smallest, I assume, of the 18?
A. Not necessarily. There could be three handlers in the smallest grouping and a balance of 15 in the other two groupings.
Q. Okay. Can you explain that for me, then? I assume -- how did you do the groupings, the one-third groupings on Table 2 of Exhibit 8?

A. I think I have to verify what count of plants was included in each of the groupings.

Q. Okay. Would you be able to do that?

A. Yes.

Q. If they were not grouped six, six, and six, what other possible configuration might there have been there?

A. I could think of possible reasons. There was a natural extremely small group, larger grouping, and stay in the middle where they are all similar size and then I guess at least three in the largest grouping.

Q. Okay. But you'll determine exactly what those numbers are and they will be made available at a later time; is that correct?

A. Correct.

Q. Okay. Thank you.

So setting aside how many 7(a) plants are in that column labeled smallest one-third on Table 2 of Exhibit 8, we could conclude from the data you have depicted here that the three largest producer-handlers are larger than the smallest one-third grouping of fully regulated plants; correct?

A. Could you repeat the question?

Q. Does the information on Table 1 and Table 2 not indicate that the average monthly Class I volume for the largest one-third of producer-handlers, 4.7 million pounds in May 2003, is greater than the average monthly Class I volume for the smallest one-third grouping of fully regulated 7(a) plants and 3.961 million?

A. I guess that's true --

Q. Okay. Thank you.

A. -- by these measures.

Q. Now, I'd like to direct your attention to Table 6 of Exhibit 7 of the material prepared at the request of Douglas Marshall. Do you have that?

A. Table 6?

Q. Table 6 of Exhibit 7.

A. I do.

Q. Thank you.

Now, do I understand correctly that the data reflected on Table 6 is strictly the utilization by -- in aggregate by the producer-handlers in Order 124 over and above their packaged fluid milk route disposition?

A. Correct.

Q. Now, if I wanted to determine the average Class I utilization of the producer-handlers, their full volume in Order 124, would I add the aggregate route disposition for a given month to the -- and show it as Class I to the utilizations on Table 6 to find the total utilization for that group of handlers?

A. I guess that would be one way to combine the data, but it would not take into consideration the elements that I described: Bulk inventories, packaged inventories, milk that was utilized in animal feed, dumped milk, accidental loss.

Q.   Okay. Other than the inventories which, presumably, are utilized the next month -- I mean, that's a rolling number more or less, I assume?

A.   I guess the beginning inventory -- or the ending inventory for one month is the beginning inventory of the next month.

Q.   Can you direct me to which table would show the aggregate monthly route disposition for all producer-handlers in Order 124? Is that figure on one of them, one of your tables?

A.   I guess it exists on Table 1 on an annual basis.

Q.   Table 1 of Exhibit 7?

A.   Yes.

Q.   Okay. So if we took the annual volumes from Table 6 of Exhibit 7 and added them to the annual volumes for producer-handlers in Table 1 of Exhibit 7, we could come close to having the aggregate utilization for producer-handlers short of the animal feed and other usages that you mentioned before?

A.   I guess that would be one measure of their total size but, again, the inventories and other uses that are not included may be large in some months, small in other months. I would have to do an analysis to determine that.

Q. Well, if you're working with annual totals, the inventory at the end of the year would be the only number that you would adjust the annual number for as far as inventory is concerned; correct?

A. I believe so.

Q. And that's not likely to be a material number. The ending inventory of December 31 is not likely to be a material number with respect to the aggregate annual volumes, wouldn't that be fair?

A. I would say inventories are pretty much a wash, probably.

Q. With respect to the utilization of surplus by producer-handlers, Table 6 of Exhibit 7, when, in a year like 2002, the producer-handlers have 25 million pounds of Class I usage of their, quote, surplus milk, does that provide any value to the pool in Order 124?

A. Could you repeat that question?

Q. Well, does the producer-handlers' Class I usage of surplus milk shown on Table 6 in any month or any year provide any value to the pool in Order 124?

A. We do not pool milk of producer-handlers. They do not pass money and we don't -- and we do not pay them money.

Q. They don't pay you any money and you don't pay

them any money. They run their own --
A. As long as they are producer-handlers.
Q. Now, if a producer-handler had Class I on Table 6, is any of this Class I utilization at pool plants?
A. Yes, it is.
Q. But that Class I utilization of pool plants, the producer-handler does not pay to the pool any funds for -- any money for that Class I?
A. Right.
Q. Is the same thing true with respect to Class II? Would that reflect Class II utilization at pool plants in some cases?
A. This table was defined as Class I being all sales to nonpool plants with Class I utilization and pool plants with Class I utilization. There are no pool plants in any other column other than Class I --
Q. Okay. What if a producer-handler sold bulk milk to a pool distributor?
A. -- unless that pool plant did not have any bottling operations.
Q. Does that mean that all producer-handler bulk sales to pool plants are classified as Class I?
A. Pool distributing plants?
Q. Pool distributing plants, I'm sorry.
A. Correct. There may be some milk in Class III-IV

that's going to a pool plant that does not have bottling and is not a pool distributing plant.

Q. On several of the exhibits -- or of the tables in Exhibit 7, such as Table 3, the terminology "routes" is used. Maybe you clarified this with Mr. Marshall but I'm not sure. On Table 3, take January of 2000, when you show 4,500,751 in results under Oregon, what does that represent?

A. That represents packaged milk sales that are moving out of the producer-handler's operation into the food marketing channels.

Q. And on this table, when it says the number -- in the Oregon set of data, the number 3, what does the number 3 mean there?

A. It means that there's three producer-handlers represented in these numbers.

Q. Okay. And Washington, there are 9 producer-handlers in that year, 2000?

A. In January 2000, there were 9.

Q. Okay. And then -- I see. By 2003 there were 6 in Washington and 3 in Oregon and routes are just -- is that just another word for route, disposition?

A. Correct.

Q. Did I understand your testimony that in Order 124, there are no -- are there plants that are classified as exempt plants which would otherwise be qualified as producer-handlers if they had additional volume?

A. I don't understand the question.

Q. Okay. If you've got an operation that would qualify as a producer-handler but the volume is less than 150,000 pounds, do you have that listed with exempt plants or with producer-handlers in your data?

A. All of the exempt plants listed in our data do not have home farm production.

MR. BESHORE: Thank you, Mr. Mykrantz.

JUDGE HILLSON: Any further cross?

MR. ENGLISH: Charles English.

EXAMINATION

BY MR. ENGLISH:

Q. Mr. Mykrantz, just one follow-up question on Exhibit 8, Table 2.

The column or percentage of Class I held by 7(a) plants for Arizona-Las Vegas is restricted. Is that because if you gave that information -- let me back up.

Was that, to your knowledge, to be the percentage of Class I versus the total with producer-handlers or including other work plants?

A. Could you repeat that?

Q. What is the column 2, Percentage of Markets Class I Held by 7(a) Plants, what does that mean to you?

A. That would be the Class I 7(a) plants divided by the total market.
Q. "Total market" meaning what?
A. Meaning all plants with sales in the marketing area.
Q. So does that column for the Pacific Northwest include sales from plants outside the marketing area that are fully regulated by another Federal Order?
A. I guess the divisor would include those other order -- PRDP plants is partially regulated distributing plants.
Q. Okay. Well, then, why is it impossible to know, for Arizona-Las Vegas, the percentage of markets Class I held by all 7(a)? We know the numerator; correct?
A. Correct.
Q. And the denominator would not be restricted because it includes partially regulated plants; correct?
A. I believe that's correct.
Q. So if you're going to come back Thursday, could you at least look at whether or not that data will remain restricted?
A. Yes. I can verify that.
Q. Now, for clarity purposes, there's going to be another Marketing Administrator witness; correct? Mr. Wise is going to testify?

A. That's what I understand.

Q. And some of his testimony will go to statistical data for years 1999 and before; correct?

A. Correct.

Q. But beginning in 2000, it was your responsibility for the entire office, including the Arizona-Las Vegas market, to provide the data; correct?

A. Correct.

Q. There's some questions right around the end of '99 and 2000 I'm going to ask you about, and if you can't answer, just please tell me and I will ask Mr. Wise. If you can answer, I'm perfectly happy to have you answer.

A. Okay. I'll try.

Q. All right. Turning to Exhibit 6 and Table 11, for January 2000 you list a volume for Class I in area other plants that does not include producer-handlers for January of 2000 of 8,908,342 pounds; correct?

A. That is correct.

Q. Do you know whether, from the time that you first published the information regarding January of 2000 for this line to a later month, whether that number was revised?

A. At times we received information after the date that we published the bulletin. So on some occasions we do make revisions.

MR. ENGLISH: Your Honor, a future witness is going to put into the record the physical market bulletin or monthly issues for 1999 for a number of these markets. I believe the reason for that physical documentation is that that documentation was not uploaded to the Internet.

BY MR. ENGLISH:

Q. Information since then, beginning in January of 2000, would it be true, Mr. Mykrantz, each of those information are available on the Internet; is that true?

A. I believe that's correct.

MR. ENGLISH: I would ask for official notice, which is basically one bulletin that is published for all three of these market orders, the two that are at issue here and one that is not open, which is Western, for January 2000 through the time of briefing. That is, those documents are available at www.fmmaseattle.gov --

THE WITNESS: Dot com.

BY MR. ENGLISH:

Q. I'm sorry, dot com. I apologize. They are usually dot gov.

So that information is of the technical nature that would only be accepted?

A. It is information put together with the Market Administrator.

Q. Am I correct, Mr. Mykrantz, in the normal course of business?

A. Yes, it is.

Q. And it is published on a regular basis and is available on the Internet?

JUDGE HILLSON: Any objection to that?

MS. DESKINS: No objection.

JUDGE HILLSON: Notice is granted.

BY MR. ENGLISH:

Q. Mr. Mykrantz, if we go back and look at March of 2001, and that discloses that in January of 2000 class I in area by other plant sales were listed as 1,073,715, that's a substantial deviation from the line that actually appears today in Exhibit 6, Table 11; correct?

A. Could you repeat that?

Q. January -- the data for January 2000, in the published, now officially noticed, March 2000, not 2001, market bulletin, for January 2000, if you'll accept for me that it's 1,073,715 pounds, you would agree that that is a substantial deviation from the number that is now revised as 8,983,342 for January 2002; correct?

MR. RICCIARDI: I'm Al Ricciardi. There has been no testimony that there's a revision.

JUDGE HILLSON: I'm going to allow the questions.

MR. ENGLISH: It is now in the official documents that it was revised. The witness has already testified that they do make those revisions.

MR. RICCIARDI: And he has no knowledge for those revisions because he doesn't have the background at this point.

MR. ENGLISH: That's what I'm asking about, Counsel, if you would give me the proper chance.

MR. RICCIARDI: If you would ask the proper question, I won't have an objection.

BY MR. ENGLISH:

Q. Mr. Mykrantz, do you recall whether in January of 2000 there was significant change made to the market plant as opposed to September '99?

A. I guess January 2000 was when Federal Order Reform was implemented.

Q. And Federal Order Reform included changes to the Arizona -- in 1999 was the Central Arizona marketing area, correct? The marketing area that existed in December '99 changed between December and January of 2000?

A. Correct.

Q. And that change was the addition to the Central Arizona area of additional counties in Arizona, correct, as part of it?

A. I'll accept that.

Q. As well as the addition of Clark County, Nevada; correct?

A. I guess that's true also.

Q. And prior to January of 2000, Clark County, Nevada, would have been part of the Old Great Basin Order 139; correct?

A. I believe that's true.

Q. And distribution into Las Vegas from California, prior to January of 2000 would have shown up as partially regulated distribution in the Great Basin Order; correct?

A. I believe that's true, but Bill Wise could confirm that.

Q. Do you know whether, in January of 2000 when the Federal Order change was made and you first calculated the data that was published in the March 2000 bulletin, whether your office for that first month initially picked up that California volume that was moving into Las Vegas but now picked it up for the expanded Las Vegas -- Arizona-Las Vegas order?

A. I would have to confirm that.

Q. Since you're coming back Thursday, could you please confirm that?

A. Yes, I could.

Q. Thank you.

Turning, again, to Table 11 and the third column, Class I area by other plants column, whether that was an issue in January of 2000 or not, certainly by, say, April of 2000, if there was route disposition by plants located in

California but with sales in Las Vegas, that volume would be included in that third column; correct?
A. I believe it would be.
Q. Now, there was another change that occurred about the time of Federal Order Reform but slightly preceding that. There was a statutory change implemented by administrative regulation that as of October 1, 1999, plants located in Clark County would not be subject to the minimum price rules of any order; correct?
A. Yes, I believe that's correct.
Q. And as of the end of 2000 and through today, there is one fluid bill processing plant located -- that is operating in Clark County; correct?
A. There's one that I'm aware of.
Q. And it's your job to know; right?
A. We don't regulate handlers in that county.
Q. Can you tell me whether for 2000, 2001, 2002, 2003, the volume process in that plant or any plants operating in Clark County would appear anywhere on Table 11?
A. I do not believe that their production is included in these tables.
Q. Now, just by way of example for later discussion and then, ultimately, to the question Mr. Berde asked you, if from one month to another, a plant is in one month listed as an other order plant with route disposition but the next

month is not, it's correct that its volume should be in for the month that it is listed but not in for the following month; correct?
A. I believe that's correct.
Q. If volume shifted from one month to the other from a plant that is an other order plant to a plant that is a 7(a) plant under this order, then the volume would shift for those months from column 3 to column 1; correct?
A. I guess we would account for the sales into the area.
Q. But if, say, in the month of May of 2000, that volume was held by a plant, say, a Safeway plant in Colorado, the statistics would show, from the official documents, that it didn't have volume in June. And if there's testimony that that volume switched to a 7(a) plant, that would mean that the volume moved from column 3 to column 1 between those two months; correct?
A. Yes, I believe that's correct.
Q. However, if volume shifted between, one, a partially regulated plant, and, two, an other order plant such as a plant in Utah from a plant in California, that shift would not be reflected because it would still show up in column 3 from month to month; correct?
A. Correct.
Q. Let me go to the question Mr. Berde asked and

maybe ask it a slightly different way, which is to compare March of 2000 when the volume Class I in the area by other plants was 13,259,144 --

A. What was that?

Q. I'm sorry. The third column of Table 11 and the column of -- the line for March 2000 where the Class I in area by other plants did not include producer-handler data was 13,259,144.

A. Okay.

Q. And for comparison purposes for a 31-day month, March of 2001, the number which includes producer-handlers is now 28,505,706?

A. Okay.

Q. And in answer to a question from Mr. Berde, you said there might be other things.

What else could account for the difference or at least the most significant portion of the difference, between 13,259,144 to 28,505,706, in that upward direction from March 2000 to March 2001 other than producer-handler volume?

A. Fluctuations in sales.

Q. What else?

A. Perhaps changes in where a handler produces certain products, whether they produce it in a Federal Order 131 pool plant versus a plant that they might have in the outside marketing area that is not a Federal Order pool plant.

Q. And that kind of data would be reflected in the now officially noticed monthly bulletins if plants were coming into the Order that were not associated with the Order before; correct?

A. I don't know if you would be able to determine that from what the plant lists, if they shifted volume from one plant to another.

Q. What else would explain the difference of over 15 million pounds from March 2000 to March 2001?

A. I guess producer -- the volume of producer-handler route sales in the area was included in March 2001 and not in March 2000.

MR. ENGLISH: Thank you, sir. I'll look forward to talking to you again on Thursday.

MR. MILTNER: Ryan Miltner for Edaleen Dairy.

EXAMINATION

BY MR. MILTNER:

Q. Mr. Mykrantz, you talked a little bit about the Market Order Reform, and that took place in January of 2000; is that correct?

A. That's when it was implemented.

Q. Am I correct if I state that the AMAA provides the

Secretary with the power to suspend provisions of the marketing order from time to time?

A. I guess -- I'm not an expert on the powers of the Secretary.

Q. Okay. Since the implementation of the Federal Order Reform, are you aware of the provisions of the Pacific Northwest Order being suspended for any reason since, say, January of 2000?

A. I believe diversion limits were adjusted by the Market Administrator since January 2000.

Q. Okay. What circumstances led to the change in those diversion limits?

A. I believe the Market Administrator, based on information supplied to him by handlers and interested persons, determined that the diversion limits were excessive based on the amount of milk that handlers said was available for the Class I market.

Q. Okay. And is that the only suspension or modification that you've been aware of since Market Order Reform was implemented?

A. That's the only one I can recall at this time.

Q. Okay. Are you at all familiar with Edaleen Dairy and their operation?

A. I have never visited Edaleen Dairy. I know Edaleen Dairy by their handler's report. We deal with a lot of handlers' reports. I don't know I could recall exactly what your volumes are and allocations between Class I, II, III, and IV uses.

Q. Are you aware that Edaleen Dairy would dispose of some of its surplus milk by sales to plants located outside of the Order?

A. I cannot reveal the operations of a particular handler.

Q. If the proposed change to the Order as it's in the notice, I believe it's Proposal 1 at 124.10(a)51 with regards sales to the plants outside of the Order, if a plant were to sell milk to a plant located in, say, Alaska, how would the change to the Order affect a producer-handler's ability to make that sale?

A. I guess I am not sure at this time.

Q. I want to talk about, if I could, Exhibit 6, Table 2, page 6. And this table is entitled Partially Regulated Distributing Plants. There's a plant list. The third one there is Anderson Dairy in Clark County, Nevada. This table indicates that there were -- this plant was associated with the Order, Order 131, in January of 2001. Is that correct, that Anderson Dairy was associated with the Order at that time?

A. I believe it is correct, but I'd like to verify.

Q. Okay. One other question. This is on Exhibit 8.

The material prepared for Elvin Hollon -- and if you could look at, first, Table 1. I want to make sure I'm reading this correctly. In the Pacific Northwest Order, this table shows the average monthly Class I volume for a PD was about 2.2 million pounds per month. I'm reading that correct? Is that accurate?

A. We refer to them as producer-handlers, but yes.

Q. Sure.

And then on Table 2, the same spot in the chart, the average monthly Class I volume for all 7(a) plants is 10.8 million pounds?

A. That's roughly correct.

Q. So would I be accurate in saying that the average 7(a) plant is approximately five times larger than the average producer-handler in the Order?

A. I guess if you multiplied five times the average monthly Class I volume for all producer-handlers, you would come up with a number that's roughly similar to that same number on Table 2.

Q. Okay.

MR. MILTNER: I don't think I have anything further.

MS. REED: Kristine Reed representing Edaleen Dairy and Smith Brothers Farms and also Mallorie Dairy.

EXAMINATION

BY MS. REED:

Q. In addition to the records, the compilations that you prepared for this hearing which were marked earlier as Exhibit 5 and Exhibit 6, does your office routinely accumulate and report other statistics that would not be included in those summary compilations?

A. Yes, we would.

Q. Wouldn't that include some annual reports that you would have done for 2000, 2001, and 2002?

A. We also compile currently on a monthly basis -- if I can remember correctly it's called a compilation of statistical material that's published on our Web site. It may have additional or different information than what's published in the MA hearing statistics that are Exhibits 5 and 6.

Q. And those documents, as well as the hearing documents, are gathered in the ordinary course of business and under your supervision; is that correct?

A. Yes, they are.

Q. And those are available to the public as well?

A. Correct. We publish them on our Web site.

MS. REED: Your Honor, to the extent that this request is broader than the request for official notice made by Mr. English, we would like to ask for official notice of the Market Administrator's documents.

JUDGE HILLSON: No objection to that?

That's fine.

MS. REED: Okay.

BY MS. REED:

Q. Mr. Mykrantz, do the dairy programs at AMS also publish statistical information concerning the industry, to your knowledge?

A. Yes, they do, on the dairy program's Web site.

Q. And so if -- by saying it's on the Web site, it's publicly available then; right?

A. Yes, it is.

Q. And do they also do annual summaries, to your knowledge?

A. They do.

MS. REED: Okay. Your Honor, we would like to request that official notice be taken of the dairy programs at AMS, their statistical information for the years 2000 through the briefing period.

THE WITNESS: Do you have a Web page site for that?

MS. REED: I don't have that handy.

MS. DESKINS: There's federal milk order statistics --

MS. REED: As well as the Dairy News Publication,

the weekly publications.
MS. DESKINS: Since it's been identified, we don't have an objection to it.
JUDGE HILLSON: Then we'll notice it. I'll officially notice it.
Do you have something to add to that?
MR. BESHORE: I just wanted to know what publication.
JUDGE HILLSON: You have to identify yourself each time you talk.
MR. BESHORE: Marvin Beshore.
For these official notifications, we have to note which publications are being noticed. The prior one was not so specified and I'm not sure what was noticed.
JUDGE HILLSON: Do you have an exact title for these? Does anyone have an exact title for these?
MS. REED: For this past one, Dairy Market News.
MR. BESHORE: The reference for Market Administrators?
MS. REED: I think what we're talking about is they publish a compilation of statistical material that is broader than what was noticed or what was prepared specifically for this hearing.
MS. DESKINS: Maybe if you can give us the Web page site where it's located.

JUDGE HILLSON: If you want to figure that out and give it to us later on, I don't want to spend too much time on this.

MS. REED: I think it's the same Web site that Mr. English referenced earlier.

MS. DESKINS: Also, if you could specify the years.

MS. REED: It would be located at fmmaseattle@fmmaseattle.com.

THE WITNESS: That's an e-mail page?

MS. REED: Web page www.fmma.net.

THE WITNESS: That's for that? I could give you the Web address. Http://www.fmmaseattle.com.

MS. DESKINS: Can you give us the statistical information that's published on an annual basis?

THE WITNESS: And monthly, annual and monthly.

JUDGE HILLSON: Is there an identifier or a name so we can take official notice of it? What exactly is it called?

THE WITNESS: It is the Web site of the Federal Milk Market Administrator.

JUDGE HILLSON: I mean the documents that --

MS. DESKINS: Is it called statistical compilation?

THE WITNESS: I would have to verify that.

JUDGE HILLSON: When you come back on Thursday, maybe you can give us the exact title of the portion of it, the exact documents that we're trying to notice. You could just notice the whole Web site.

MS. DESKINS: I can't remember if it's done by year. I think it has a name like statistical information. I would have to check it.

JUDGE HILLSON: You can continue with your questioning.

MS. REED: Okay. Thank you.

BY MS. REED:

Q. Mr. Mykrantz, does your office keep track of the number of independent producers in each of the Orders, specifically 124 and 131?

A. What do you mean by "independent producers"?

Q. Producers that are not members of co-operatives.

A. We identify them in our data although I don't believe we typically publish the breakdown between members and nonmembers.

Q. So it would be fair to say that information would not be included in the hearing documents that were marked as Exhibit 5 and 6?

A. That is correct.

Q. And do you know -- are you able to tell me what those numbers are?

A. We could put together a table if the data request was defined.

Q. Okay. Could we have made available the number, then, of independent producers in Order 124 for the years 2000, 2001, 2002, and current information for 2003?

A. Is that by month?

Q. Yes. That's fine.

A. I believe we could put that together.

MS. REED: Okay. I have nothing further. Thank you.

MR. YALE: Ben Yale for Smith Dairy, Edaleen and Mallorie.

I have a follow-up on some of these other questions that dealt with some of the technical aspects of some of the documents you've provided.

EXAMINATION

BY MR. YALE:

Q. I would like you to, if you would, look at that Table 6 of the utilization of surplus milk producer-handlers that you prepared. I believe it was for Doug Marshall.

Now, as I understand your testimony, when it came to the issue of Class I, if you saw that the milk went to a nonpool handler that had route distribution in another market not within 124, you treated all of that as a Class I

sale; is that right?
A. That's true.
Q. You made no inquiries to see what class was agreed or anything of that nature, is that right, that they agreed to a lower class or anything else?
A. We do not price milk as it is utilized by producer-handlers. So there's no -- I don't think there's a frame of reference.
Q. I take it by that you don't even go and audit those nonpool plants to see if they received it and what class they put it into?
A. I believe we audit nonpool plants where producer milk is sold.
Q. Now, you also, as I understand it, on that Class III and IV, you're only looking at things that were actually sold to another plant or distributed or sold, just sold to another plant; is that right? It has to be sold to another plant for it to show up on this report. Is that a fair statement?
A. It would need to be sold to another plant or it would have to be used at the producer-handler's operation in a Class III or IV product.
Q. And if a producer-handler farm, they took some of their skim or some of their whole milk and fed it to calves, this wouldn't show up on your report; is that right?

A. I'm pretty sure that would not show up.

Q. Now, if you were to look at a handler that is fully regulated and you did the utilization of all -- as you have indicated here, the indication of all of the plants in the Order, you would include milk used for animal feed and the like in those classifications; right?

A. I guess within our normal published statistics, we would include those uses.

Q. I guess in short, it's not quite an apples-to-apples comparison?

A. No, it is not.

Q. Now, you also had a table where you put together, I believe it's 2, Table 2, again, this is that special exhibit. I just want to make sure we're kind of continuing these things. The producer-handler Class I in route distribution does not include any of the Class I that's shipped out, right, to any other plants? I'm sorry, to a nonpool plant and you classified as Class I, it's not in there?

A. If it is not a route-disposition-packaged fluid or Class I fluid milk products, it is not in this table.

Q. I want to go back. One of the other questions, you were talking about some other things to include in Class I sales. If a PD sells Class I milk to a regulated hauler under 124, that's treated as Class I disposition

under your scenario? Let me follow up. The other part of it is the producer-handler does not get a Class I price for that from a regulated handler; is that correct?
A. I'm not aware of the price that the producer-handler gets.
Q. What about the accounting that the regulated plant does to the pool?
A. If a -- for example, a 7(a) plant receives milk from a producer-handler, that milk is -- we would say it's down-allocated. It gets allocated IV, III, II, I in the allocation scheme.
Q. So in a sense, if some milk went from a producer-handler to a regulated handler and it was Class I, that would show up in Table 6 as surplus Class I sales?
A. Yes, it would.
Q. But the handler for that milk, in terms of a credit to offset whatever he pays -- whatever he pays, whatever that price is to -- the producer-handler would only get -- would start with the lowest class in the Order until that milk has been fully accounted for; is that right?
A. Could you repeat that?
Q. It's confusing but I want to go back.
That down-allocation, assuming that, you know, he sells it -- the plant has to report it as Class I, whatever the Class I is, 7(a) plant was; right? But its

contribution, it has to contribute to the pool at that Class I price, right, or all of it is Class I and has to report -- whatever its source was?

A. Correct.

Q. But in terms of its recovery from the pool to pay to the producers, because it's a producer-handler, he does not get the balloon price on that; right?

A. The procedure-handlers do not share in the federal pool.

Q. That's right. So the plant would only receive Class IV or Class III, depending on the volume of milk that was acquired; right?

A. I'm not aware of what price.

Q. I mean -- I'm sorry, receive credit from the pool only at the IV or III price?

A. The pool handler would not receive a credit from the pool on producer-handler milk allocated to Class IV.

Q. Then that would be part of the down-allocation?

A. In effect, a receipt of producer-handler milk at a pool distributing plant allocated to Class IV pushes producer milk into higher classes.

Q. Which means that there's more money that's available to the pool -- to the producers participating in the pool; right?

A. I would say the value of the producer milk would be slightly higher than if the handler had not received the producer-handler milk.

Q. Thank you.

Looking at the miscellaneous tables, these were prepared, I believe, for Mr. Hollon. This is Table 1 and Table 2. This is for May of 2003.

Was the decision to use May 2003 yours or was that the request that was made?

A. Mr. Hollon requested May 2003.

Q. We can ask him why that was.

I apologize for this but I was a little confused. As I understand it, this grouping of the one-third, one-third, and one-third isn't by number but it's by some kind of statistical weight or --

A. I'm going to verify what the groupings are.

Q. And I think there was a request to make a modification of that grouping, as I understand it, by Mr. Beshore, to make it so that it was six, six, six. Did I understand it correctly? Or was that just part of the verification?

MR. BESHORE: My question was what it was. I can verify what the plant count is in each category.

MR. YALE: Okay. You're not asking for a change? Okay.

BY MR. YALE:

Q. If a request is made to change that, there has been a change in the composition of who are pool handlers under the Order as of this month; is that right? There's been a reduction in the number of pool distributing plants?

A. The recent past, some pool distributing plants have gone out of business in 124.

Q. So if there's a request made, it would be nice to see something in September or October that would maybe reflect the loss of those plants. If you're not going to do it, otherwise, I'm not going to burden you. Otherwise, if you did it for me, we would decipher those plants, and I'm not asking for that confidential information.

Notice in the list of plants, Matanuska out of Anchorage, Alaska, it's not a part of the regulated plant, out of the Order?

A. It is not.

Q. And that means it doesn't have any distribution within the Order, to your knowledge?

A. That is correct, that we're aware of.

Q. Now, if you look at Table 1, I think it's Exhibit 5, this is the --

JUDGE HILLSON: Counsel, I'm going to interrupt you for a second. It's noon and I don't know how much longer you are going to be. I'm waiting for a logical place to break. They are only going to be serving that buffet until 1 o'clock. I do want to give people an hour to eat. Why don't we just come back at 1 o'clock?

MR. YALE: That will be fine. And I might find something that I don't have to ask any more questions.

(Recess at 12:00; resumed at 12:57 p.m.)

JUDGE HILLSON: Okay. Let's go back on the record.

MR. YALE: Ben Yale for Smith Brothers Dairy, Edaleen and Mallorie Dairy. I guess it's Smith Brothers Farms.

EXAMINATION (CONTINUED)

BY MR. YALE:

Q. Okay. I'd like to look at Exhibit 1, the Pacific Northwest documents that you've filed. Are any of the handlers' operating pool plants listed on their own by Dean Foods?

A. I'm not aware that any of those plants are listed on their own by Dean Foods.

Q. Are you aware of some maybe partially regulated handlers or any fully regulated handlers under either 131 or 124?

A. I don't believe Dean Foods owns any plants under 124 pool, plants under 131 either.

Q. Now, do you know the thing called National Dairy Holdings?

A. I'm aware of that organization.

Q. Do you know if any of these handlers are owned by DFA or National Dairy Holdings?

A. I'm not aware that they are owned by National Dairy Holdings.

Q. Now, in terms of partially regulated handlers, are there any that are owned by Dean Foods that you know of?

A. I wouldn't say my knowledge in this area is particularly keen, but I'm not aware of any plants in our list of partially regulated distributing plants that are owned by Dean Foods.

Q. Now, looking over on Table 2, at the end you have a list of co-operative associations. Is Dairy Marketing Services -- you don't have them listed as a co-operative in any kind of market or 124.

A. Dairy Marketing Services is not a handler under the Pacific Northwest or Arizona-Las Vegas orders.

Q. Do you know whether any of the independent -- the numbers which we've asked for, but if any independent producer in Order 124 uses the services of Dairy Market Services?

A. I'm not aware that they use DMS or Dairy Marketing Services.

Q. The total, if you would look at Table 6, again, of Exhibit 5 and Table 3, I think you explained that there were differences. I didn't quite catch the explanation of why the pounds may differ in numbers.

A. Typically, between the time that the handlers filed their reports and we get the actual data that the handler uses to back up its reported producer milk, we will find situations where a handler has pooled a producer when, in actuality, that producer was not qualified.

A handler may also make transcription errors in reporting producer milk on their handlers' report.

Q. I'm not trying to create testimony but if I may paraphrase it, is it the numbers that show up in Table 6, the difference is that it's not that there's any real difference in the milk; it's more a difference of whether the producer is -- there may be some producers pooled or not within the marketing area?

A. Correct, and transcription errors.

Q. Which of the two is the most accurate? That's a terrible question to ask.

A. I guess the handler's report is one piece of information. This data represents producer payroll data. It has not been fully audited. So this would be, theoretically, slightly more accurate than the producer milk totals.

Q. Over at the end of Table 6 you have percentages, and you mentioned California. I guess I -- really, all of Table 6 is California. Are those producers located in California that are delivering into the market or is that --

I mean, that's what that is. That's not producers. Let me just get, really, the question I want.

These are not producers that are delivering to California plants that are partially regulated; is that right?

A. The pounds in the column titled California represent producers who are qualified on the Order whose dairy farms are located in California. They may go to any type of plant.

Q. In Table 7, I guess it's 7, 8, 9, you've got those different years. You also have on your Web site the numbers of producers by county and state, total annual production back to 1990, do you not?

A. I believe we do.

Q. And that's available at the Web site that's been identified?

A. Yes.

Q. And it's identified as historical data?

A. Correct.

MR. YALE: Your Honor, we would ask that judicial notice be taken as to the work related showing the number of producers by state and county on the Order 124's Web site for the years 1990 through 1999.

JUDGE HILLSON: Any objection to that?

MS. DESKINS: Are those available on the Web site?

MR. YALE: Yes, they are. That's where we got ours.

JUDGE HILLSON: Okay. That will be noticed.

MS. DESKINS: One point of clarification. Is it listed under historical data?

MR. YALE: It's listed under historical data.

Your Honor, I have no other questions. Thank you.

JUDGE HILLSON: Does anyone else have any cross-examination at this time?

If you do, go ahead. Don't forget to identify yourself.

MR. BESHORE: Thank you. Marvin Beshore for Dairy Farmers of America.

FURTHER EXAMINATION

BY MR. BESHORE:

Q. You indicated in response to earlier questions of mine that there are some utilizations of surplus milk by producer-handlers which are not shown in the totals of Table 6 of Exhibit 7, uses such as milk-fed calves and the like. Do you recall that?

A. I do.
Q. Would I be correct that we could reach an approximation of those uses not specifically shown on any exhibit here by taking, for instance, for 2003 year-to-date, taking the information on Table 3 of Exhibit 7, total pounds produced by all producer-handlers, which, for 2003 in the first 7 months, is 169,409,889 pounds?
Taking that total production and subtracting the route sales shown in the next column on Table 3 and the total dispositions of surplus milk shown on Table 6, you have 169 million less 122.9 million of direct route sales and 45,697,000 pounds of surplus shown on Table 6. You're close to 169. There's some residual there which would be the milk fed to calves and other uses that you identified. Is that accurate?
A. I guess what would not be taken into consideration is any milk, milk products perceived by the producer-handler, and the pounds produced on Table 6 is just the form production.
Q. So that if -- you're saying that in that universe of receipts, there could be some additional purchase of limited quantities of milk from the pool as there often are purchases of limited quantities from the pool; correct?
A. They could purchase up to 150,000 pounds from pool handlers in any given month. If they purchased more than

150,000 pounds of milk in one month, they would lose their producer-handler status in the following month.

Q. Okay. But to the extent that the pounds produced does not include pounds acquired from other sources and the subtraction out from the pounds produced of route sales and surplus usage on Table 6, if you've got any amounts left over there and they have bought any from the pool, they would have created their own additional usage as opposed to being burdened with milk of their own production to feed to their calves; correct?

A. I believe that's correct, but shrinkage is not considered.

Q. Is not considered in what respect?

A. In Table -- shrinkage is not considered in Table 6.

Q. There are a few usages. Shrinkage is one that's not shown in Table 6. Milk fed to calves is another usage that's not shown in Table 6; correct?

A. Correct.

Q. Now, the producer-handlers report all of those usages to you on their monthly reports, do they not?

A. They do.

Q. So that if we wanted to know precisely in any given month, for instance, what volume of usages for all producer-handlers were not accounted for on Table 3 and

Table 6, if we picked a couple of months, you've just got nine reports to add it from, you could come up with those numbers without being burdened too greatly, I would believe. Is that possible?

A. To calculate the residuals of --

Q. Yeah, the aggregate usages that you haven't shown here, that you've identified but haven't shown, milk fed to calves, shrinkage and whatever else?

A. I believe we could calculate that.

MR. BESHORE: Okay. Thank you. That's all I have.

EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Mykrantz, good afternoon. My name is Al Ricciardi. I represent Sarah Farms in this proceeding.

A. Good afternoon.

Q. I'm going to ask you some questions based upon the documents that have been admitted. Let's start, first of all, with Exhibit 6, which is the information concerning Order 131, page 4, Table 1. Hopefully, these questions won't be self-evident. I'll get to the points I want to and, hopefully, quickly sit down and let somebody else ask you.

Under producer-handlers, Sarah Farms is listed in this exhibit; correct?

A. Correct.
Q. And what that means, I assume, is that a determination has been made that under the current regulations, that Sarah Farms is exempt from the pricing and pooling requirements by the Market Administrator's office; correct?
A. The Market Administrator has determined that Sarah Farms is a producer-handler.
Q. And the Market Administrator does that pursuant to the current regulations; correct?
A. Yes, that's correct.
Q. And that is done how often?
A. I believe Sarah Farms is subject to audit. I don't know the frequency of the audit. I believe it's less than or more than once a year.
Q. Have you ever participated in any audit of Sarah Farms?
A. I have not.
Q. Have you ever visited Sarah Farms?
A. I have not.
Q. Other than the information that is provided in any report, do you have any information about Sarah Farms' operation, production, anything like that?
A. No, I do not.
Q. Sticking with the same exhibit, which is

Exhibit No. 6, and flipping over to Table 11, sir, page 26. Page 26, there seems to be a lot of interest on this side of the room in this particular table, so I want to ask you some basic questions about it.

When it says "R" in the column under Class I in the area about producer-handlers, what does that R signify?

A. R signifies restricted, meaning that the number of producer-handlers is less than three.

Q. And if there are less than three producer-handlers in any given order area, then the Department does not provide that type of information to the public; correct?

A. No, we do not publish numbers which represent less than three handlers or three producers. It's not a function of what type of handler that is.

Q. Okay. I see.

So if it's less than three, it's simply restricted information. It's not going to be provided or published; correct?

A. Correct.

Q. Now, turning to Exhibit No. 8, Table 1 -- do you have it in front of you?

A. I do.

Q. -- I believe you testified in your initial direct examination that you are a marketing specialist and your responsibility includes Federal Milk Orders 124, 131, and

135?
A. That is correct.
Q. In that capacity, are you provided, on a monthly basis, with any information concerning any other federal orders?
A. I routinely but not consistently look at that order information from other orders as published by those offices.
Q. Are you familiar with the number of producer-handlers that exist currently under all of the federal orders?
A. I believe that piece of information is published. I guess one could find out that number.
Q. Would it be true that that number is in the range of 50 or 52 in the entire country?
A. I guess I wouldn't disagree with that number, but I don't have that information in front of me.
Q. Let's take some information you do have in front of you, which is Table No. 1. As I understand in looking at the number of producer-handlers in the market for the Pacific Northwest, the miscellaneous information that was provided as part of Exhibit 8, there's an indication that the number of producer-handlers in the Pacific Northwest market is nine. Am I correct?
A. The table says nine.

Q. Am I right that that number is the right number?
A. Yes, it is.
Q. And the table for the Arizona-Las Vegas market indicates that there are two producer-handlers in that market?
A. Correct.
Q. And that is the correct number?
A. That is the correct number according to our handler list.
Q. I understand. Would it also be true that the Arizona-Las Vegas market has the lowest number of producer-handlers in the entire country?
A. I would have to look at the data to verify that. It's one of the lowest, I'm sure.
Q. And if you look at the data, you could confirm whether it is, in fact, the lowest; correct?
A. True.
Q. What would you look at?
A. I would probably look at handler lists as published by the other orders.
Q. Is it possible -- and I understand from hearing information this morning that you're going to be available to testify again on Thursday. Am I correct about that?
A. That's correct.
Q. Is it possible for you to compile for us the

number -- and I don't care about names -- the number of producer-handlers in the country by Federal Order number?

MS. DESKINS: Your Honor, I'm going to object. This witness is familiar with what happens within the market order that he covers. To ask him to do something that deals with other market orders would be without his knowledge.

JUDGE HILLSON: He's just asking if it was possible, first of all. I haven't seen any indication --

THE WITNESS: I can --

MR. YALE: Mr. Hollon will be submitting that information as put forth, to be requested by all of the Market Administrators in the country.

MR. RICCIARDI: That may resolve it at this point, Your Honor.

BY MR. RICCIARDI:

Q. If you would now, Mr. Mykrantz, take a look at Exhibit No. 7, which is the information that was prepared at the request of Mr. Marshall. I'm interested in Table 5. Do you have that in front of you?

A. I do.

Q. I want to direct your attention to the information that's provided under the heading Pool and the particular producer milk where there's a footnote under footnote number 1. Do you see that?

A. I do.

Q. The footnote 1 indicates that this statistical information for '95 and 2000 doesn't include eligible milk not pooled in that period of time because the data is restricted. Did I interpret that correctly?

A. In December of those years, yes.

Q. So, if for whatever reason, milk available wasn't pooled in that period of time, it's not reflected in the December figures for '95 and 2000; correct?

A. I guess handlers chose to not pool milk for one reason or another in those months.

Q. So if, in fact, a handler chose not to pool their milk, that would mean that these figures in '95 and 2000 would be understated for purposes of producer milk; correct?

A. No. The producer milk is correct.

Q. Okay. Then what -- in terms of the pool, then, milk pooled in that period of time, would this be an understated figure?

A. I guess if all eligible milk was pooled in September of those years, the numbers would be -- for producer milk would be higher.

Q. And, therefore, the percentage of producer-handler as a percent of the pool and producer-handlers would decrease in '95 and 2000; correct?

A. I believe they would be smaller.

MR. RICCIARDI: Okay. I don't have any further questions.

MR. MILTNER: Your Honor, can I follow up with one thing?

FURTHER EXAMINATION

BY MR. MILTNER:

Q. I want to clarify. Mr. Beshore had asked and you had stated that a producer-handler can purchase 150,000 pounds of milk each month and retain their exempt status. Is that accurate?

A. 150,000 pounds from pool sources.

Q. Okay. Can a producer-handler make any other purchases beyond that and retain their exempt status?

A. I believe they can buy powder, nonfat dry milk.

Q. Other than powder, nonfat dry milk, can they make any other purchases and retain their status?

A. Could you repeat the question?

Q. Sure.

Beyond the 150,000 pounds a month and the nonfat milk, the dry milk that you had talked about, can a producer-handler make any other purchases of milk and retain their exempt status?

A. No, they cannot.

Q. Thank you.

Do producer-handlers report to the Market Administrator in any way their expenses or cost of producing their own milk supply?

A. On a monthly basis, producer-handlers do not report to us their cost of production. However, those records are subject to audit.

Q. But they are not required to provide those on a regular basis to you?

A. Not in the same manner as the handler's report.

MR. MILTNER: Okay. Thank you. I have nothing else.

JUDGE HILLSON: Any other questions?

You may step down. See you on Thursday.

(Witness excused.)

JUDGE HILLSON: Call your next witness.

MS. DESKINS: Our next witness is William Wise.

WILLIAM A. WISE,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: Please state and spell your name for the record.

THE WITNESS: William A. Wise, W-I-S-E.

EXAMINATION

BY MS. DESKINS:

Q. Mr. Wise, for the record, would you please tell us

what your business address is?
A. 10050 North 25th Avenue, Suite 302, Phoenix, Arizona 85021.
Q. And where are you employed?
A. Milk Market Administrator's Office.
Q. And how long have you been employed by that office?
A. I've been with the Market Administrator's program for 22 years.
Q. Can you tell us about your educational background since high school?
A. I have a bachelor's degree in business administration from the University of Phoenix and a master's degree in business administration from Arizona State University.
Q. Mr. Wise, for these proceedings, were you asked to prepare any documents?
A. Yes, I was.
Q. Can you tell us -- let's start with the first document. What were you asked to prepare and prepare by whom?
A. I was asked by Mr. Sydney Berde, on behalf of United Dairymen, to prepare an estimated blend price calculation of the possible effect of an additional 18,000 pounds of producer milk in Class I.

MS. DESKINS: Your Honor, I'd like to hand that to the court reporter and have it marked as an exhibit.

JUDGE HILLSON: That will be No. 9.

(Exhibit No. 9 marked for identification.)

BY MS. DESKINS:

Q. Mr. Wise, did you mean to say 18 million pounds per month?

A. 18 million pounds each month. For every month, January 2000 through July 2003.

Q. Mr. Wise, are there copies of this exhibit in the back of the room?

A. Yes, there are.

Q. Now, did you prepare this or was it prepared under your supervision?

A. I prepared it.

Q. And where did you get the data to prepare this particular --

A. Public information.

Q. And by "public information," you mean what?

A. I used each month's announced blend price computation, which is available publicly, and then added -- as the heading of the document says, added 18 million pounds of producer milk at that month's Class I butterfat test for Class I and added a location adjustment of 210. The base location adjustment is 235.

Q. When you say available publicly, do you mean it's available from information gathered by the Milk Administrators in your office?

A. Yes, I do.

MS. DESKINS: Your Honor, I'd like to move for the admission of this exhibit.

JUDGE HILLSON: Okay. It's admitted, Exhibit No. 9.

BY MS. DESKINS:

Q. Mr. Wise, were you asked to prepare any other documents?

A. Yes, I was.

I prepared, at the request of Al Ricciardi on behalf of Sarah Farms, for December of each year 1980 through 2002 the number of producer-handlers under Federal Order 131 and their Class I route dispositions and also for those same months and years the number of Order 131 pool plants and the amount of producer milk in Class I.

Q. Mr. Wise, I'm going to get a copy of that and give it to the court reporter to mark it as an exhibit.

JUDGE HILLSON: That will be No. 10.

(Exhibit No. 10 marked for identification.)

BY MS. DESKINS:

Q. Mr. Wise, this document is also available in the back of the room?

A. Yes, that's correct.

Q. Now, where did you get the information to prepare this exhibit from?

A. Information compiled by the Market Administrator's office.

Q. You did, in fact, prepare this exhibit?

A. Yes, I did.

Q. And to the best of your knowledge, is it accurate?

A. Yes, it is, to the best of my knowledge.

MS. DESKINS: Your Honor, I would move for the admission of Exhibit 10.

JUDGE HILLSON: Okay. Exhibit No. 10 is admitted.

BY MS. DESKINS:

Q. Mr. Wise, were you asked to prepare any other documents?

A. Yes, I was.

Q. What's the next document you were asked to prepare and who asked you?

A. Charles M. English, Jr., on behalf of Shamrock Foods, I was asked to prepare for December of each year, 1988 through 2002, the names of the producer-handlers under Federal Order 131 for those months and years.

Q. Okay. Let's just clarify something. What years did you say you were asked to prepare it for?

A. 1988 through 2002.

Q. What happened to that order in 2000?
A. The Order was -- order reformation took effect January 1, 2000. Order 131 marketing area expanded from its old area. Previously, the marketing area was, essentially, the southern half of Arizona.
Beginning January 1, 2000, the marketing area encompasses the entire state of Arizona and Clark County, Nevada.
Q. Even though it has the same marketing order number on there, there was a change, so it's covering different geographical areas pre-2000 and post-2000; correct?
A. That's correct.
Q. Now, you said you prepared this document yourself?
A. Yes, I did.
Q. I'm going to come and get a copy of it and I'd like to have the court reporter mark it as an exhibit.
(Exhibit No. 11 marked for identification.)
JUDGE HILLSON: Exhibit 11.
BY MS. DESKINS:
Q. Mr. Wise, to the best of your knowledge is this exhibit accurate?
A. To the best of my knowledge, it is.
MS. DESKINS: Your Honor, I would move for the admission of Exhibit 11.
JUDGE HILLSON: Okay. Exhibit 11 is admitted into

evidence.

BY MS. DESKINS:

Q. Mr. Wise, were you asked to prepare any other exhibits for this hearing?

A. I was asked to compile some previously published information.

Q. And is that in regards to the milk market bulletins?

A. Yes, it is.

Q. I'm going to hand you a document and have you identify if that's what you're referring to.

A. Yes, it is.

JUDGE HILLSON: Would you like that marked?

MS. DESKINS: Yes, I would.

JUDGE HILLSON: Exhibit 12.

(Exhibit No. 12 marked for identification.)

BY MS. DESKINS:

Q. Just for the record, can you tell us what this is?

A. This is every month for the year December '99, a monthly bulletin published by the Market Administrator's office, what was then Federal Order 131, 134, 137, and 139. 131 was -- the then-existing Central Arizona order.

Q. Now, these are not available on the Web site?

A. That's correct. These were not on the Web site. These were mailed out at the time during the months --

during the time period involved.

Q. And these were -- the milk market information was comprised as part of the ordinary course of business in the Market Administrator's office?

A. That's correct.

Q. You did not personally prepare this information?

A. No, I did not. It was prepared under my supervision. During this time I was the acting Market Administrator, in '99.

Q. All right.

MS. DESKINS: Your Honor, I believe this has been marked as Exhibit 12; is that correct?

JUDGE HILLSON: That's correct.

MS. DESKINS: I would move for its admission.

JUDGE HILLSON: Exhibit No. 12 is admitted into evidence.

BY MS. DESKINS:

Q. Just to clarify for the record, Mr. Wise, on the Web page for Federal Order 131 and 124 there's an electronic version of this milk market information since 2000?

A. Since 2000, that's correct.

Q. Okay. So since 2000, you can get a copy of that from the Web page?

A. That's correct.

Q. Okay. Mr. Wise, were you asked to prepare any

other information for this hearing?
A. Not that -- No. I provided additional information but I wasn't preparing it.
MS. DESKINS: Okay. I have no further questions for this witness.
JUDGE HILLSON: Okay. Cross-examination?
Mr. Berde?
MR. BERDE: A couple of questions. Sydney Berde for United Dairymen.

EXAMINATION

BY MR. BERDE:
Q. Several years ago do you recall preparing for me a document entitled Assume Additional 12 million pounds of Class I Milk With No Location Adjustment?
A. Yes, I do.
Q. And that document covered the period September 1997 through January of 1999?
A. I remember comparing it. I don't specifically remember it.
Q. Let me show you a copy and have it marked for identification as 13.
A. That's the route sales, not the blend price.
Q. Strike that. Route sales instead of blend prices.
(Exhibit No. 13 marked for identification.)

Q. Do you recall that that document described for '95-'96 and '97-'98 the route sales for pool plants, partially regulated, and other order plants, producer-handlers, and total? Do you recall?

A. Yes. This is -- these are pages taken directly from our -- I'm sorry, the annual statistical publication for these years.

Q. Right. And if you look under the column headed Producer-Handlers --

A. For what year?

Q. For the year 1995.

A. Okay.

Q. At that time, do you recall how many producer-handlers there were in the market?

A. There had to be three or more or we wouldn't have published it. I could tell you in December of '95 from the document I prepared for another interested party the number is three for December '95.

Q. And did one of those three go out of production in January '97, Ethington?

A. I would have to go back and look. Ethington at one time was a producer-handler.

Q. And Golden West was another producer-handler, no longer a producer-handler?

A. That's correct.

Q. And the existing producer-handlers which sometimes indicate one and sometimes two, one of those two, is that Sunrise Dairy that has been described this morning as an exempt plant but sometimes is listed as a producer-handler; is that correct?

A. We currently have two producer-handlers under the Federal Order 131, Sarah Farms and --

MR. RICCIARDI: Your Honor, is this a private discussion or are we going to have an opportunity to be able to see what the witness is being asked about and testifying to?

MR. BERDE: I have a file.

JUDGE HILLSON: Do you want to see a copy of the marked exhibit?

MR. RICCIARDI: It would be helpful since we're, obviously, getting into substantive information and having this witness rely upon that information in his testimony.

MR. YALE: May I inquire, Your Honor. We have two exhibits. What is the label of it?

MR. BERDE: Table 6, Orders 131, 134, 137, Class I Packaged Milk Disposed of On Routes.

JUDGE HILLSON: I have a three-page document that I have marked.

MS. DESKINS: Perhaps we should mark it with a number so that it's easier to tell what it is, mark it with an exhibit number.

JUDGE HILLSON: It's Exhibit 13. It's not in evidence yet but it's marked as Exhibit 13.

MR. RICCIARDI: And, Your Honor, to clarify, then, Exhibit 13 is a four-page document?

JUDGE HILLSON: I have a three-page document. I don't know what to tell you.

Mr. Berde, how big is the document supposed to be?

MR. RICCIARDI: And I've got a one-page document and a three-page document that was handed to me, Judge.

JUDGE HILLSON: Well, that could be a collating issue. How big is the document?

MR. BERDE: You are looking at a three-page document.

THE WITNESS: The heading is Orders 131, 134, 137, Class I Packaged Milk Disposed of on Routes and diverted Class II and III product. Order 131 is what is listed on this document.

BY MR. BERDE:

Q. Directing your attention to 1995, the producer-handler monthly disposition, which shows, as an average, of 1.8 million, approximately, of monthly average distribution of those three producer-handlers; is that correct?

A. Well, again, I don't know how many there were each month. I know only from a document I also prepared that in December there were three. I don't know how many there were in other months.

Q. Then continuing down on that same page, the average for 1996 was 4.6 million; is that correct?

A. That's what the document shows.

Q. And then, when we get to 1997, the information with respect to producer-handlers is restricted, is it not?

A. We did not publish it.

Q. And that is included in the column labeled Partially Regulated Producer-Handler and Other Order Plants?

A. That's an aggregate. That's correct.

Q. And then when we get down to 1998, that average monthly distribution is 9.2 million, is it not?

A. That's what the document shows. 9.267. 9.3.

Q. 1999 we're up to 11.6 million; correct?

A. That's what the document shows.

Q. Now, what is included in the partially regulated plant portion of those averages with respect to each of those years?

A. Well, it would be sales during the month from handlers not fully regulated yet subject to partial regulation, sales in the marketing area.

Q. From what sources?

A. From nonfederal sources. So it would be -- it's partially regulated, which is plants that are not subject to full regulation yet, have sales in the marketing area, producer-handler and other order plants. Other order plants would be plants regulated under other federal orders.

Q. Do you recall when Sarah Farms came into the market?

A. Not off the top of my head.

Q. Would 1994 refresh your recollection?

A. Well, I can tell you that they were on in December of '94. Whether they were on earlier in '94 I don't know, based on this document I prepared for someone else.

Q. Now, did you also prepare another document which is labeled Assume Additional 12 Million Pounds of Class I Milk With No Location Adjustment?

A. That's --

Q. Let me show you that one.

A. I recall doing this. It's been a while. January '99 is the last month on it.

Q. Would you describe what that discloses?

A. This is entitled Assume Additional 12 Million Pounds of Class I Milk With No Location Adjustment.

JUDGE HILLSON: Do you want to have this document marked?

MR. BERDE: I think it was previously marked.

JUDGE HILLSON: This one was already marked.

MS. DESKINS: That one has not been marked.

JUDGE HILLSON: Give a copy to the reporter and mark it as Exhibit 14.

(Exhibit No. 14 marked for identification.)

Q. Would you describe what that one discloses?

A. Again, this is entitled Assume Additional 12 Million Pounds of Class I Milk With No Location Adjustment. It has beginning with September 1997 through, it looks like, January '99 and it has original blend, new blend difference, UDA pounds pooled and dollars.

Q. And what is the total shown as the cost to UDA?

A. Well, I believe the dollars is calculated by multiplying the difference between an assumed -- under these conditions, recalculated assumed price versus the announced price, taking that hundredweight value times the hundredweight of pounds under the column, the UDA pounds pooled. That equals the number under the dollars column. It totals -- on the bottom it says: Total for period 9-97 through 1-99, 2002.9 million.

MR. BERDE: We offer those two exhibits, 13 and 14, Your Honor.

MR. RICCIARDI: Your Honor, I would object. I would like an opportunity to voir dire the witness.

MS. DESKINS: Your Honor, before he voir dires him, has the court reporter gotten a copy of that exhibit?

MR. BERDE: I'll get a copy.

VOIR DIRE EXAMINATION

BY MR. RICCIARDI:

Q. I just want to ask some basic information to the substance of these documents. Exhibit 14, is this a document that was prepared in the ordinary course of your work?

A. No.

Q. Is this based upon information that you would keep on a regular basis?

A. Again, it's prepared the same way that Exhibit 9 is in that the announced blend price is public information, and then just adding these additional pounds and respective dollars and recalculating it.

Q. So this is based upon a set of assumptions that you were asked to make?

A. That's correct.

Q. And was this prepared for purposes of litigation?

A. I have to recall Mr. Berde why he requested it.

JUDGE HILLSON: Mr. Berde is not testifying.

THE WITNESS: I don't recall why. It was back in '99. I honestly don't recall why I did it.

BY MR. RICCIARDI:

Q. Okay. Same question initially with regard to

Exhibit 13. Is this a document that is kept in the ordinary course of your work?

A. This is. This is copies, these years are, and these tables are in our annual summary statistics.

Q. Do you know why you prepared this particular document, Exhibit 13?

A. 13, I didn't really prepare it. I just copied it and supplied it to Mr. Berde.

Q. Okay.

MR. RICCIARDI: Your Honor, I would object, then, to Exhibit 14. It's not prepared in the ordinary course of his business. I don't think it's any document that would be relevant or important to any issue in this case at least for this witness.

JUDGE HILLSON: Well, I'm going to admit both exhibits. The Administrator can give the exhibits the weight that they deserve based on what they know about them. I am going to allow both of them to be admitted.

MR. ENGLISH: Your Honor, Mr. English. I agree with your ruling. I just want to point out for the record in terms of what the Administrator should consider that under the standard just enunciated, Exhibits 9, 10, 11, and 12 -- or 9, 10, and 11 could not be admitted and there would be no admission of all of these documents. This is the normal kind of document that appears in these proceedings, for the Administrator's note.

MR. RICCIARDI: I would rather ask for professional opinions on this, Judge, but I made the objection. It stands.

JUDGE HILLSON: It's noted.

Okay. Is there any further --

I'm sorry. Were you all done?

MR. BERDE: That's all I have.

JUDGE HILLSON: Further cross-examination of Mr. Wise?

Mr. English? Go right ahead, sir.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Mr. Wise, I'm going to start with a really easy question.

A. Thank you.

Q. Is the Sarah Farms plant north or south of 33 degrees latitude?

A. I don't know.

Q. Do you know whether the Sarah Farms plant was located within the Central Arizona marketing area as that was defined prior to Federal Order Reform?

A. I don't know. I would have to look at it.

Q. Sunrise Dairy is located, according to the statistics, in Navajo County?

A. I'm not sure of the county. I think it's in Taylor, Arizona.

Q. If you look at Exhibit 6, Table 61, page 4, this has Sunrise Dairy as being in Taylor, Arizona, in the County of Navajo, with a 190 differential.

A. Okay.

Q. Would you agree with me that Navajo was not within the marketing area prior to Federal Order Reform?

A. I don't recall that it was.

Q. Would an operation qualify as a producer-handler under present order provisions if it had less than 25 percent of its routes and position in the market area?

A. That's not a qualification for a producer.

Q. So it's just simply if they have routes to position in the marketing area, then you make a determination as to whether or not they are a producer-handler?

A. A producer-handler is a person as defined by the Act that owns and operates at the sole risk and enterprise of that person the farm, and the plant has route disposition in the marketing area.

Q. I want to return to a question that was asked of Mr. Mykrantz and ask if you know the answer. For the statistics on Exhibit 2 of Table 6 of page 6, Anderson Dairy

is listed in January of 2001 as a partially regulated distributing plant.
To your knowledge, since October 1 of 1999, has Anderson Dairy been anything other than a nonpool plant?
A. I believe Mr. Mykrantz was going to testify to that on Thursday on why that January was there. But effective October 1, 1999, any plant located in Clark County was not subject to any provision of any federal milk order.
Q. Anderson Dairy is in Clark County; correct?
A. To the best of my knowledge, yes.
Q. Looking for a moment at Exhibit 12, Exhibit 12 is the Market Administrator statistics issued February of '99 through January of 2000, which effectively covers the months of January '99 through December 1999; correct?
A. That's correct.
Q. Are you aware of, in late 1999, of a change in a plant status other than Anderson Dairy?
A. Under what order?
Q. Under the Great Basin Order 139.
A. You're jogging my memory. I would have to go back and look. Each month contains on the back a listing of plants under the four orders that we were administering at the time and their status under those particular orders. I could peruse those from one month to the next.
Q. Let me help you out a little bit.

For the Market Administrator bulletin issued in September of '99 for the date of August of 1999, if you look on page 5, which is what I think you meant by the back, if you look under Fred Meyer or Smith's Food and Drug Centers in Utah, you would agree with me that under 139, Smith Food and Drug was a pool plant under Order 139 for the month of August; correct?

A. They were listed as a code 6, which is pool plant, and you look over there, that's 139.

Q. And if you turn to the data issued in October for the month of September under Fred Meyer, Smith Food and Drug Centers, Inc., for Layton, Utah, there is a 5 which means partially regulated plant; correct?

A. That's correct.

Q. So even though the plant is located in the marketing area, they did not qualify as a pool plant for the month of September; correct?

A. They are not -- they were partially regulated for September and fully regulated for August.

Q. And the impact of that would be reflected in the data if you compare the first page of September to the first page of October. I note an increase of 9.5 million pounds. I'm not saying that's all of it. The 9.5 million pounds on sales from outside the marketing area in the Great Basin Order 139 reflects an increase from 9 million 9 to 19.4

million.

And, again, I'm not saying that's the exact volume but the volume that is represented by Smith's would have, in August, been under Class I producer milk, but for September, be in the line from outside the marketing area; correct?

A. You know, I would have to go back and look because they weren't outside the marketing area. I don't know whether we had it in there or not.

Q. Isn't it correct that the reason you have them outside the marketing area is for confidentiality reasons and you just merged it in there?

A. I would have to go back and look at our source documents for this. The Smith's plant was in the then Great Basin marketing area. Now, whether we include it from outside the marketing area, meaning nonpool Class I, I don't know. I would have to take a look.

Q. Let me try it in a different way for a moment.

It certainly would have been in the Class I producer milk for September -- for the August 1999 and issued September 1999, it would be in the 77,440,580; correct?

A. If they were in this pool plant, that's correct.

Q. And they would not be in the item for 67,092,093 under Class I producer milk for September 1999?

A. If the milk going to that plant was not pooled, that's correct, it would not be an item.

Q. And as we move through, we would note that that carries forward until one gets to December. If you look at the December, page 5 --

A. The delivery period or issued December?

Q. I'm sorry. Issued in January, the December statistics, Smith's Food and Drug is, again, listed as a fully regulated handler so that on page 1, they are --

A. For Fred Meyer?

Q. For Fred Meyer, correct. Correct?

A. Fred Meyer-Layton is listed as a pool plant for the month of December '99. So any milk being pooled received at that plant would be included in any pool stats.

Q. And I would note for you that the number from outside the marketing area drops by a volume consistent with what increased in Class I producer milk.

A. I see it was 18.9 million in November and 10.8 million in December, according to these publications.

Q. Now, the other thing I wanted to look at here, and it ties in to Exhibit 10, is if you would look at the months of October and November any other month for the year, for Order 131, milk from outside the marketing area, would you agree that, for instance, for the November data issued in December that number is 3,548,475?

A. That's the number I see on here.

Q. And if you turn to the January -- issued in January for December of '99, there is a significant increase from November to December, an increase of 15.9 million; correct?

A. That's correct.

Q. And there is a consequent decrease of the Class I milk from 82 million 8 to 69 million 1; correct?

A. That's correct.

Q. That 69 million 1 is what turns it in Exhibit 10 for the information requested by Mr. Ricciardi; correct?

A. Yeah. Exhibit 10 is producer milk, which is what the 69.126 is.

Q. But the month of November was 82 million. I guess the question I want to ask there is: Was there an anomalous situation in November '99 which accounts for looking at Exhibit 10, a rather significant difference for December of 1999 than December of any of the months before or after it?

A. I can just tell you that in November there was 82.8. In December there was 69.1. I couldn't speak to the marketing decisions that were made to result in that. That is the amount of milk that was pooled and priced under the Order as Class I producer milk.

Q. Do you know of any reason why there was less milk consumed in Class I in Arizona in December of 1999 than in November of 1999 or in January of 2000?

A. We don't have any stats here for consumed.
Q. Do you, for your part, have any explanation for the change from '98 to '99 and back to 2000 for December?
A. Clearly, handlers made marketing decisions that resulted in less Class I producer milk being pooled and priced under the Order.
Q. In addition to the information that's already been officially noticed, does the Web site that we've discussed at length today, www.fmmaseattle.com, also include annual statistical data from prior to 2000 for Orders 131, 134, 137 and 139?
A. Yes, it does.
Q. And for the data in 1999, issued, I believe, on June 13 of 2000, was it your job to compile that data?
A. No, it was not. Well, it was compiled under my supervision, that's correct.
Q. Okay. So it was your information?
A. It was compiled during the course of 1999 when the Federal Order was still mainly administered from the Phoenix office.
Q. And this is the similar kind of information that we've already brought in for future years? It's similar, for instance, to the information in Exhibit 6; correct?
A. The tables resemble other tables that had been already put in Exhibit 6.

MR. ENGLISH: Your Honor, I think copies of this document have been made as exhibits. I would ask for official notice of the 1999 annual statistical data for Federal Milk Orders 131, 134, 137, and 139.

JUDGE HILLSON: Does anyone object to that?

I'll consider it noticed.

MR. ENGLISH: Thank you, Your Honor.

For convenience, I would like to hand a copy to the witness. It's not going to be made an exhibit but the copies are here.

BY MR. ENGLISH:

Q. If you could turn to page 17 of this document, could you describe page 17, which looks like it's Table 6 for Order 139?

A. It says Order 139, Class I Routes to Position and Class II and III Bulk Diversions, and it shows for each month, January through November of '99, with an average and a total. Pool plants, column one. Second column is partially regulated and other order plants. Column three is producer-handlers. Column four is total. Column five is diverted with a footnote 1 indicating bulk milk and cream classified Class II or III transferred or diverted to nonplant.

Q. And then the second set of lines at the bottom?

A. Again, for the same months, January through

December '99, with an average and a total. Package Class I sales by California plants, column one. Column two, percent of total Class I sales in marketing area. Both these columns footnoted with a footnote 2, which reads, "Packaged Class I sales in the marketing area by partially regulated and exempt plants located in the State of California and percent of total possible sales in the marketing area."

Q. Now, for 1999, and each of these months, dispositions from California plants into Clark County, Nevada, would show up here; correct?

A. Clark County was in the then Great Basin marketing area, Federal Order 139.

Q. And this -- for instance, in December of 1999, the 7,362,257 would be included in Exhibit 12, the very first page, the line from outside marketing area under the column Great Basin Order 139; correct?

A. That's correct.

Q. And for each of the preceding months for the first page, the numbers appearing on page 17 of the officially noticed document for the 1999 statistical data would also appear within the same line item from outside the marketing area under the line item Great Basin Order 139; correct?

A. That's correct.

Q. Do you have the Order language with you?

A. Yes, I do.

Q. Could you turn to provision 131?

A. I have the Order language codified as of January 1, 2003.

Q. That's correct. That's the current language, page 207, for Section 131.10 for producer-handler.

A. Okay.

Q. And I would like to turn to paragraph E.

A. Okay.

Q. It does not distribute fluid milk products to any wholesale customer that is also serviced by a plant described in 7(a), (b), (c), et cetera.

I would like to ask one or two interpretation questions.

Has your office had occasion to interpret the phrase "wholesale customer"?

A. The Market Administrator's office has, from time to time, been required to interpret that.

Q. And what is your interpretation about what the phrase "wholesale customer" means?

A. The Department's interpretation has meant that to mean that each store stands alone as a separate store.

Q. So, for instance, if there is a Company A that owns 30 stores, you don't consider the wholesale customer to be the company with 30 stores in Central Arizona; correct?

A. That's correct.

Q. You consider each of those 30 stores to be a separate wholesale customer; correct?
A. That has been the Department's interpretation.
Q. So if in a given month, a producer-handler serves eight stores, for instance, of 30, and then the next month it serves 12 stores of the 30 --
A. I'm sorry?
Q. Let's say from month to month.
A. A pool plant or producer-handler?
Q. A producer-handler is serving 8 stores one month, say in July, and then in September it sells 12 but somebody else is servicing those others, you do not consider that in terms of whether or not a producer-handler is qualified because you consider each store individually; correct?
A. Each store is considered one customer.
MR. ENGLISH: That's all the questions I have. Thank you.
MR. BERDE: I have a couple more questions, Your Honor. Sydney Berde.

FURTHER EXAMINATION

BY MR. BERDE:
Q. Under 1131.10, paragraph F, that language that appears --
A. The current order?
Q. In the current order, correct. That language

essentially says that to qualify as producer-handler, the person who operates the plant must be the same person who owns and operates the dairy facility that supplies the milk that is received at the plant. Is that the interpretation that you would put on that provision?

A. It reads that -- the preliminary language reads, "The producer-handler...provides proof satisfactory to the market administrator that the care and management of the dairy animals and other resources necessary to produce all Class I milk handled (excluding receipts from handlers fully regulated under any Federal order) and the operation of the distributing plant are the personal enterprise of, and at the personal risk of, such person in his/her capacity as a producer-handler."

Q. Now, a producer-handler operating a plant may receive milk at that plant from more than one dairy facility, maybe, maybe not?

A. If that person owns the farm, the same person owns the farm.

Q. How do you determine or do you determine in whose name the permit for that facility is issued?

A. As part of our audit of whether it be any type of plant, and a producer-handler plant in particular, we would provide, through the audit, proof satisfactory for the Market Administrator to determine that the same person as defined by the Act, person, partnership, individual, or other business unit, is the same person that owns both the farm and the plant at which milk is received from any given farm.

Q. Is that determination at all related to determining in whose name the permit for the dairy facility is issued?

A. Well, we would look at ownership -- I don't know why the permit would be issued to anybody that doesn't own the farm. But during the course of our audit, we're going to look at any and all information to determine if, in fact, a person qualifies under Section 10 of the Order.

Q. You're aware that a producer-handler in Yuma may be receiving milk from a dairy located in California, may he not? Theoretical question, but may he not receive milk from a plant from Southern California?

A. To be a producer-handler, a producer-handler must receive milk from a farm that's owned by the same person that owns the plant, regardless of where that farm is located.

Q. My question is directed to the procedure that you go through in ascertaining ownership and whether or not it involves looking at the permit --

A. Yes, that's something we're going to look at.

Q. And you see in whose name the permit is issued?

A. That's correct. We would look at that.
Q. And is that part of your audit.
A. It's certainly part of our audit and it would be part of the information provided to the Market Administrator.
Q. Now, under the provisions of 1131.10(f), may a producer-handler shift from month to month the source from which you receive the milk at his producer-handler plant?
A. If you mean move from the -- move from a farm that that same person owns to any other farm that that same person owns, yes.
Q. And in that case, do you then investigate to determine that the new source of raw milk is a facility in which the permit has been issued to that same person?
A. On audit we're going to look at all receipts at that plant and the source of those receipts.
Q. And you consider that a critical part of the audit to determine whether the producer-handler qualifies as a producer-handler?
A. The producer-handler can only receive milk from the same farm owned by that same person or up to 150,000 pounds of federally ordered priced milk.
Q. Is there anything that prevents the producer-handler shifting from month to month the farm as to which it receives milk?

A. I'm not sure what you mean by "shifting."
Q. Well, changes -- terminates the source of milk from one facility in one month and moves to another facility.
A. As long as the same person that owns both the farm and the plant.
Q. And you make that determination when, at the time of the shift or sometime in the following audit?
A. Well, until we actually view actual records, we cannot determine. But based on the audit of records, we would determine if someone qualifies under Section 131.
Q. And does your audit include also investigating the California permit situation to determine whether the farm has a California permit in the name of the same person who owns the plant?
A. If a producer-handler had a farm located in California or Texas or Montana or New Mexico, we would certainly look to make sure that that person that owns that farm is the same person as defined by the Act that owns the plant.
Q. And the person can include either a partnership or corporation or any other form of legal entity?
A. The Act defines a person as an individual, partnership, corporation or other business unit.
Q. And does the language, as you interpret it,

require that the same form of legal entity that owns the plant also constitutes the ownership of the dairy facility that supplies the milk to that plant?

A. The same person must own both the farm and the plant.

Q. My question is: Does the same person mean the same legal structure, the same legal form of entity? For example, if a plant is owned by a partnership and the dairy facility that supplies the plant may be owned by a different partnership, would that make a difference?

A. Yes.

MR. BERDE: Thank you.

EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Wise, Al Ricciardi. I don't have hypotheticals; I have a reality question for you.

Were you involved in conducting an audit of Sarah Farms?

A. Since Sarah Farms has been a producer-handler it's been subject to authority by the Federal Milk Order Office, Federal Order 131.

Q. And based upon those audits, the Market Administrator's office has decided that Sarah Farms fits within the criteria for a producer-handler?

A. That's correct. The Market Administrator has determined that Sarah Farms is a producer-handler.

Q. I have some questions based upon some of the exhibits that were produced by your office under your auspices at the request of some of the individuals here.

Let's take a look at Exhibit No. 9 for a moment. Do you have that in front of you?

A. Yes, I do.

Q. Okay. Thank you.

This is a document that Mr. Berde, on behalf of United Dairymen, asked you to prepare; correct?

A. That's correct.

Q. And in that he asked you to make certain assumptions regarding a blend price; is that correct?

A. That's correct.

Q. And can you tell me, then, based upon the assumptions that he asked you to make, what the column entitled DIF means?

A. Difference.

Q. The difference between --

A. The difference between the announced -- what's under the column labeled Pooled Blend that was the announced blend price for the month, the actual blend price. The column Assumed Blend is the calculated blend price based on assuming an additional 18 million pounds of producer milk in

Class I at that month's average Class I butterfat test and location adjustment 210. The Difference column, then, is a difference between those two.

Q. So he asked you to assume that there was 18 million more pounds of milk and that the producer decided to pool that milk; correct?

A. Well, that would be -- he asked me to include 18 more million pounds in the pool of Class I.

Q. So, obviously, part of that assumption is that it was 18 million pounds and it got pooled?

A. A handler decided to pool, that would be the assumption.

Q. Now, in the 2003 differential, in looking at that column, I noticed that it has decreased since January to the point where in July it was the difference of 5 cents; correct?

A. That's correct.

Q. Do you know if, in August or September of that year, that continued to go down?

A. I didn't calculate anything past July.

Q. I understand. Appreciate that.

Let me ask you to direct your attention, then, for a moment to Exhibit No. 11, please.

A. I have that.

Q. Now, this is a document that Mr. English, on

behalf of Shamrock Foods, asked you to prepare; is that correct?
A. That's correct.
Q. I noticed in 1995 that Ethington Dairy and Golden West Dairy were producer-handlers.
A. In December of that year.
Q. In December of that year. And, again, in '96 that would be true; correct?
A. That's correct.
Q. When we get over to '97, however, Ethington Dairy, at least as of December of 1997, was not a producer-handler?
A. That's correct.
Q. Do you know if Ethington Dairy went out of business?
A. They did.
Q. Golden West Dairy, again, for '95, '96, and '97, appears to be a producer-handler for December but in 1998 disappears. Do you know if Golden West went out of business?
A. It's my understanding they did.
Q. And when we get to December of 2001 and December of 2002, we have the addition of Sunrise Dairy. And my understanding, from your previous testimony I believe, is that the reason that Sunrise Dairy is included as a producer-handler is because of the change in the Order in

2000?
A. They were now located within the marketing area.
Q. So currently as we sit here today, there are two producer-handlers in the 131 marketing area. That would be Sarah Farms and Sunrise Dairy?
A. For last month, that's correct.
Q. And going over to Exhibit No. 10, which is the document I asked you to prepare --
A. I have that.
Q. -- the Order 131 producer-handlers for 2001 and 2002 show two, which would corroborate the information as set forth on Exhibit No. 11; right?
A. I checked it and double-checked it. I hope so.
Q. Again, you were asked a number of hypothetical questions and interpretive questions regarding the current regulations for producer-handlers in Order 131. Are you satisfied that producer-handlers that are set forth on Exhibits 10 and 11 met the requirements as determined by the Market Administrator to be a producer-handler?
A. The Market Administrator has determined that they are producer-handlers for the months indicated.
Q. I don't have any further questions for you. Thank you.
MR. ENGLISH: Just to follow up directly on that --

JUDGE HILLSON: I still need you to identify yourself.

MR. ENGLISH: I'm sorry. Charles English.

EXAMINATION

BY MR. ENGLISH:

Q. 1131.10(e), it's, again, page 207 of the 2003 edition of the CFR, the language about a wholesale customer refers to milk serviced by plants described in 7(a), 7(b) or (e) or handler described in 8(c) that supplied the same product and the same size package with a similar label for the wholesale customer during the month.

Sir, do you remember in June of this year that a wholesale customer, after the first of the month, on June 10, switched vendors from a 7(a) plant to a producer-handler plant under this order using the same label from the wholesale customer? Do you recall that?

A. I'm with you so far.

Q. Do you agree that that happened?

A. I agree that we didn't -- I guess I want to be sure that I don't reveal any type of confidential information.

I could say that the Order permits a retail customer to shift supplies from a fully regulated plant to some other entity.

Q. Absolutely. There's no question about that. But would you agree that in June of this year, a wholesale or retail customer, as you just defined it, switched from a 7(a) operation to a producer-handler?

A. I have been informed that that happened.

Q. Did you, in fact, investigate whether that happened?

A. We have on audit looked at -- as a regular course, we would look at a handler's customer list, whether it be a producer-handler or fully regulated.

Q. And did you conclude on audit that at least for one month during this year for the same wholesale customer, that a product in the same size package, the same product, being milk, whole, 2 percent, low fat, in a same size package with a similar label was sold from both a 7(a) operation and a producer-handler?

MS. DESKINS: Your Honor, I'm going to object. I think this is getting into -- he might have to reveal confidential information to answer that question.

JUDGE HILLSON: Do you have a response?

MR. ENGLISH: My response is they will have testimony about it from Shamrock Foods, being the 7(a). And what I'm really getting at is the interpretation of the Order.

MS. DESKINS: Your Honor, if he has another witness that can testify to it, then I don't think that this witness should answer that question, because he might have to reveal confidential information to answer that.

MR. ENGLISH: Will this witness then be available to testify afterwards about what permutations this witness may have assisted with when the decision was made?

MS. DESKINS: He could be available. If it gets into the confidential information, I'm going to have the same objection where he would have to reveal confidential information.

MR. ENGLISH: Let me see if I can try it this way for a moment since, apparently, I have to do hypotheticals.

BY MR. ENGLISH:

Q. In a situation where the wholesale customer, the same store, during the month, switches an account from a 7(a) operation to a producer-handler, do you interpret that as being a change that would end up meaning the producer-handler does not qualify under paragraph (e)?

A. We would not -- the Market Administrator has determined that inventory would not cause a producer-handler to be pooled if, on day one, that retail customer was serviced by a 7(a) plant; on day two, they switched over supply to a brand plant; therefore, they had inventory in their cooler from a 7(a) plant. We would not pool them for inventory.

Q. Is it inventory if on day ten days, one through ten, a 7(a) plant services a specific store and on days 11 through 30 a producer-handler services during the month with the same size package, the same product, and a similar label?

A. I would be uncomfortable answering that in a hypothetical way under a specific -- as I think you indicated, your witness will testify. I guess I'm unwilling to offer an interpretation that specific unless I'm given a specific instance.

Q. Okay. So, in other words, if the specific instance is testified to later, you'll be able to come back and testify?

MS. DESKINS: That would depend on what the evidence is. It's hard for me to say in advance.

JUDGE HILLSON: It's a difficult issue for me to direct him to answer or not. If, under any circumstances, you would allow him to answer, I think he needs to be available after the other witness testifies.

Can you make yourself available?

THE WITNESS: I'll be here.

MR. ENGLISH: That's it. Thank you.

MR. YALE: Some real simple questions.

CROSS-EXAMINATION

BY MR. YALE:

Q. I want to -- because the language that is proposed for Order 124 regarding this wholesale customer is identical to what currently exists in 131; right?

A. That's right. That's my understanding.

Q. And the expectation would be that they would be interpreted the same way; right?

A. I couldn't determine how an order is going to be interpreted unless it's actually in place, but I can tell you how that section of Order 131 has been interpreted.

Q. The practice, though, I mean, is within -- if you've got within the same Market Administrator's office and you're not going to interpret the same language differently?

A. It's reasonable to think it would be interpreted the same.

Q. All right. Is not the concern that happens to be on this provision 124 is to make sure that the regulated handler and the pool is balancing the pool for the producer-handler? Isn't that the real rub that we're trying to make sure does not happen?

A. Certainly that provision would -- are you asking me why that provision is in there? Let me ask you to rephrase your question.

Q. Why was that provision in there? What was the situation that was intended, sought to address?

A. That was put in there as a result of a hearing. It was put in there to address a situation where -- and to prevent a producer-handler from basically having 100 percent of its production in Class I and having the pool balance their accounts for them.

Q. I want to change to just another topic.

In the -- I think it's Exhibit 12, these are the monthly reports; right? I notice that you publish each month a page out of the Dairy Market News on the mailbox milk prices. For example, it says on page 6 -- I don't know if that's part of the exhibit. Yeah, page 6 of the exhibit.

A. I mean, normally, our policy was to get four pages back to back. We added relevant information, almost always, that was either from an official press release from the Department or something that was published in Dairy Market News.

I'm looking -- actually, the last one here -- not the last one but for January '99, page 6 is World Dairy Situation and Outlook. Page 7 is Estimated U.S. Supply and Use Projections.

So it varied. But our source was always an official press release to the Department or something out of the Dairy Market News.

Q. The Mailbox Milk Prices is something of interest to producers. That's one of the development information

that is available?
A. It's something that the Department publishes for the industry.
Q. I notice Arizona is not included in that.
A. What month are you --
Q. I'm looking at page 6 right from the beginning.
A. Okay. December '99?
Q. There. Mailbox prices for October '99.
A. Okay.
Q. Do you see that?
A. Yes, I do.
Q. And Arizona isn't listed.
A. That's correct.
Q. And is there a reason it's not listed?
A. It would have been restricted information.
Q. Do you participate in any way in the election for the Pacific Northwest?
A. No, I do not.
Q. And do you have any involvement at all in mailbox prices?
A. That's not something that's prepared under my protection.
MR. YALE: That's all I have. Thank you.
JUDGE HILLSON: Any more questions for Mr. Wise?
Okay. Mr. Wise, you may step down. You need to

be available on that one issue.

(Witness excused.)

MS. DESKINS: No further witnesses other than we will be recalling --

JUDGE HILLSON: It may be a little earlier than I anticipated. Since we're going to switch direction in a few minutes, let me just tell people before we go on break, my current plan is to go until about 6 tonight. My current plan is also to start about 8 a.m. tomorrow and go until about 6:30 or so. Just so you all know it. 8 a.m. to 6:30 p.m. approximately is what my plan is for tomorrow.

Okay. Let's take a 15-minute break.

(Recess at 2:35; resumed at 2:57.)

JUDGE HILLSON: Okay. Mr. Berde?

MR. BERDE: Your Honor, I'd like to call UDA's first witness, Jim Boyle.

I have here for distribution copies of Mr. Boyle's testimony and a couple of exhibits that I intend to offer through him. They are available for anybody that wants to look at them.

JUDGE HILLSON: Do you need to have them marked first?

MR. BERDE: I've already given them to the court reporter.

JUDGE HILLSON: How many exhibits are there? Is the statement going to be a numbered exhibit as well?

MR. BERDE: The first exhibit for identification is 15.

JUDGE HILLSON: What about his statement? Do you want that as an exhibit as well?

MR. BERDE: No. He'll just read it.

I'd like to have marked for identification an extract from a trade journal called Successful Farming, the article entitled "Milk Meisters," August 1995.

JUDGE HILLSON: That will be marked as Exhibit 15.

(Exhibit No. 15 marked for identification.)

MR. BERDE: And as No. 16 a document entitled Aggregate Dollar Loss to UDA Members, January 2000-July 2003 Resulting From Failure of Order to Pool Sarah Farms Estimated 18 Million Class I Pounds Monthly. That will be marked as 16.

(Exhibit No. 16 marked for identification.)

JUDGE HILLSON: Okay. Those two exhibits are marked.

Let me swear Mr. Boyle in.

JIM BOYLE,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: If you would just state and spell your name for the record, please.
THE WITNESS: My name is Jim Boyle, B-O-Y-L-E.

EXAMINATION

BY MR. BERDE:
Q. Mr. Boyle, are you familiar with a farm trade journal entitled Successful Farming?
A. Yes.
Q. And is that trade journal the kind of journal that the farm sector or economy relies on, generally, to assist them in their farming operation?
A. Most farmers are familiar with it.
MR. BERDE: We offer, Your Honor, the exhibit, the Milk Meisters story from the Successful Farming issue of August 1995.
JUDGE HILLSON: You don't want him to testify first?
MR. BERDE: And then I'm going to offer next --
JUDGE HILLSON: Do you want --
MR. BERDE: I'll put these first into the record, Your Honor.
JUDGE HILLSON: I see what appears to be an objection to your offer of evidence.
MR. RICCIARDI: I'm unclear at this point, Judge.

It sounds like, from the attempted foundation, that they intend to utilize Mr. Boyle as an expert because that's the way this was brought in, or attempted to be brought in.

If he intends to have him act as an expert, then I guess we need more foundation for his expertise before we let this in.

MR. BERDE: He's testifying as the president of proponent united Dairymen of Arizona. He's not testifying as an expert.

MR. RICCIARDI: Then, Your Honor, why is this document admissible? Because what he asked was whether or not that was something that, essentially, experts would rely upon.

MR. BERDE: Because he's a farmer and relies upon it.

JUDGE HILLSON: This is a rule-making hearing, not adjudicatory. The rules might not be quite the same. I'm going to let it in, give it the weight that it's worth based on the testimony that comes out as a result of what Mr. Boyle has to say.

MR. BERDE: The next document, Your Honor, Exhibit 16.

BY MR. BERDE:

Q. Mr. Boyle, are you familiar with the exhibit that was already identified and introduced into the record this morning by Mr. Wise relating to the effect on blend of the 18 million assumed pooled milk?

A. Yes, I've seen it.

Q. And did the Financial Director of UDA compute what the direct effect of that blend reduction would be on UDA's members?

A. Yes.

MR. BERDE: Your Honor, we offer Exhibit 16.

MR. RICCIARDI: We have a number of suppositions and assumptions and there's no foundation for this document.

JUDGE HILLSON: You'll be able to question him on it and see what he says about it; and then, as I said, the Administrator will make a decision how much weight to give it on making the decision.

BY MR. BERDE:

Q. You have a prepared statement, do you not?

A. Yes. My name is Jim Boyle. I've been a member of the UDA, United Dairymen of Arizona, for 24 years. I've served as president of the co-operative since 1995.

UDA is a co-operative association of 90 dairy farmers who supply approximately 88 percent of the milk pooled under the Order and who has provided the substantial financial resources required to construct and operate facilities to process the daily and seasonal surplus associated with supplying the fluid milk requirements of the marketing areas' handlers.

UDA requested USDA to call this hearing in order to correct what we believe is a basic flaw in the provisions of the Federal Order regulating the marketing of milk in the Order 131 marketing area.

Our dairymen have been taught over the years that the purpose of a Federal Order is to establish uniform prices among all handlers in the market and to provide that all producers in the market share in the total sales volume of their milk production on a marketwide basis. USDA's own Federal Marketing Order Program Bulletin Number 27 describes the program's benefits as follows:

Orders provide for the sharing among producers of the return from all milk uses by requiring that payments for milk be pooled and that a uniform, or average, price be paid to the individual dairy farmers or their co-operative associations.

That is not happening in this market. Instead, in this market, a single producer operating as an individual handler in the marketing of Class I products in the marketing area has been permitted to avoid the requirement applicable to all handlers that payments for milk be pooled.

The producer-handler has been permitted to operate what is, in effect, an individual handler pool inside of a marketwide pool. That's the basic flaw in the Order that we're asking the Secretary to correct.

UDA members and the other producers in the market who have joined our proposal would not be so greatly concerned about the single producer-handler's operation if it were an insignificant competitive factor in the market.

UDA is aware that, historically, the federal orders have exempted from full regulation and pooling small producer-handler operations which, in the words of the Secretary's decisions, are, quote, are so small that they have little or no effect on the pool, close quote.

This is not the case with the producer-handler whose operations in this market have prompted UDA to ask for this hearing.

In 1995, a reliable trade journal did a survey ranking the nation's 20 largest dairy farms based on cows in producing herds. Hein Hettinga, the operator of Sarah Farms, ranked second in the nation with 13,000 cows.

We are aware that since 1995, Mr. Hettinga has acquired additional dairy operations. He may now be the number one in the nation in number of cows in milk production.

We asked the Market Administrator to compute what the exemption of Sarah Farms from pooling has cost the dairy farmers in the market. His computation shows a loss amounting to 10-14 percent per hundredweight over the period of January 2000 through July 2003, amounting to a total loss of approximately $11,586,000, which is approximately $115,000 per producer. That's based on what we believe is a reasonable estimate of Sarah Farms' Class I sales of approximately 18 million pounds monthly.

An earlier Market Administrator computation for the period September 1997 through January 1999, based on Sarah Farms' assumed monthly Class I sales of 12 million pounds showed an average blend price loss for the period of over 10 cents per hundredweight and a total loss to UDA members of approximately $3 million.

We have always understood the Federal Orders were adopted so that the dairy farmers would have protection from the cost-cutting effects of handler competition. The Federal Order exemption of Sarah Farms from pooling has allowed this single handler to cause our dairy farmers the very milk price losses that the Federal Order was to prevent. We believe that that's a flaw in the Order that needs immediate correction.

In a 1967 decision in the Puget Sound Order, the Secretary said that an increase in producer-handler sales could disrupt orderly marketing and the operation of the Order to the detriment of other producers in the market. (32 Federal Register 10747). Though producer-handlers' sales in that market were less than 5 percent of Class I sales, the Secretary said that if producer-handler sales increase, either singly or in total, a public hearing should be held to consider regulation under the Order. We're far beyond the 5 percent figure in this market.

We believe that the exemption of Sarah Farms' 15 to 18 million pounds of Class I sales from pricing and pooling operates to the clear detriment of other producers in the market, requiring its regulation under the Order.

MR. BERDE: Your Honor, the witness is available for cross-examination.

JUDGE HILLSON: Thank you.

Anyone like to cross-examine Mr. Boyle?

EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Boyle, good afternoon. My name is Al Ricciardi. I represent Sarah Farms and I have some questions based upon your statement and your testimony.

Your current position with UDA is what?

A. President of the Board.

Q. And when did you become president?

A. 1995.

Q. Were you part of the decision-making process to file litigation against the Department regarding Sarah Farms and the Sarah Farms exemption?

A. Yes.

Q. And that was done back in about '95 or so; correct?

A. Somewhere in that time frame. '95, '97. I'm not sure.

Q. And at that point, how much milk was Sarah Farms producing and selling in the Arizona market?

A. I'm not -- I think we heard earlier testimony somewhere around the 12 million range, but I'm not real certain of that.

Q. You don't know, do you?

A. When we filed the lawsuit back in '95?

Q. Yes.

A. No, I don't.

Q. You don't even know today?

A. No. It's not published anywhere.

Q. So everything that you said is based on assumption. You're making assumptions, aren't you?

A. I would say educated assumptions, yes.

Q. Well, you said in your statement if, in fact, the single producer-handler's operation were an insignificant competitive factor in the market, they were a smaller producer-handler, then they wouldn't have an effect upon the pool; correct?

A. Right.

Q. What are you talking about?
A. I'm talking about the Sunrise Dairy that milks 100 cows, it's not a factor in the market as opposed to Mr. Hettinga who is milking somewhere between 10,000 and 20,000 cows.
Q. Well, you don't know that either, do you?
A. I know enough that it's in that neighborhood.
Q. And what's your information based on, sir?
A. I've been on three of his dairies where he milks 10,000 cows and I've been by his dairies in Chino where he milks cows.
Q. Do you know whether or not that milk is actually being sold in the Arizona market?
A. I know some of it is being sold in the Arizona market.
Q. You don't have any idea, do you?
A. How much?
Q. How much.
A. Well, the last time I drove from Yuma, I passed 13 trucks going back to Yuma from Tucson and Phoenix on Highway 8. So I know there was 13 trucks going out that day.
Q. You have no idea how much he's selling. When you put this together, you had no idea as to the amount of milk that is being sold in the marketplace?
A. We have talked to other handlers and other people

that have estimated.

Q. Let's get back to a point that I was trying to get at. We need a bright-line test from you.

We have insignificant amounts, which is okay, but I guess significant amounts of milk which, in your perception, is not okay. When do we cross the line between insignificant and significant, sir?

A. Oh, I think that 3 million pounds a month is more than significant.

Q. Okay. And what is that based on?

A. Why we found it significant?

Q. Yes, sir.

A. We were aware of the exemptions the Department has had with small producer-handlers and we know, from our experience, this market where Sunrise Dairy has not been a factor in this market. And that's about the size of an average UDA producer.

Q. Essentially, what you're telling everyone today is that you don't want competition in the market; correct?

A. No. We want competition between handlers, because more competition, the more milk. But we think they should all share.

Q. How much does Mr. Hettinga and Sarah Farms pay to balance his milk?

A. I have an understanding how he balances his milk.

Q. What's the cost that he pays to try to balance the milk?

A. I don't have that specific cost. I do know that he takes his Arizona milk back in to California and receives California quoted price for that milk, which is more than a producer in California receives for their milk.

Q. What's the cost that he pays to transport his milk?

A. I don't know.

Q. What's the cost that he pays to try to balance his milk?

A. I don't know.

Q. What's the cost that he pays to try to market his milk?

A. I don't know.

Q. Aren't those all factors that have to be taken a look at to determine what somebody receives ultimately?

A. It would fit into his bottom line, but I don't know what other handlers do to do that either.

Q. And the UDA has costs that it utilizes to balance its milk, for example, doesn't it?

A. Yes.

Q. To get to the bottom line as to what the other members of the co-operative receive; correct?

A. I don't understand that.

Q. All right. Well, there are costs that the UDA has in attempting to pool its milk, for example; correct?

A. I don't believe so.

Q. Are there advertising costs that the UDA pays?

A. To the national advertising program, not a branded product.

Q. How does the UDA attempt to balance its milk?

A. We build facilities. We have two drying plants at which, if it's not needed in the market, we dry the milk at a lesser price.

Q. And those facilities were built at some kind of substantial amount to UDA and its members?

A. Substantial cost, yes, sir.

Q. Just like Mr. Hettinga and Sarah Farms had substantial cost to build his plant; correct? You don't know what it is because you don't know what he paid for it, but you know he paid some cost; correct?

A. I assume.

Q. And you know he was at risk financially to do that; correct?

A. I assume he was.

Q. Shamrock Farms was a co-plaintiff in that litigation filed against the Secretary; correct?

A. Yes.

Q. Are you familiar with a magazine called Dairy

Foods?
A. Not really. I've seen it. I'm not real familiar with it.
Q. That's not one of the magazines that you will take a look at as an individual in this industry?
A. It's not a dairy magazine. It's a food processing magazine.
Q. So you're not aware as to the ranking of the top 100 producers and sellers of dairy products, of milk, in the country?
A. No.
Q. You would be -- you wouldn't be surprised that Shamrock Foods was number 58?
A. As far as milkers or all products?
Q. All products.
A. I guess it wouldn't surprise me.
Q. Would it surprise you that Dean Foods was number one?
A. No, that wouldn't surprise me.
Q. Would it surprise you that of the 100 top -- in the Dairy 100, there are 18 co-operatives?
A. It's possible.
Q. Would it surprise you that there's not one producer-handler in the top 100?
A. No, that wouldn't surprise me. You're talking

about a multinational company compared to an individual farmer, although it is a large market.

Q. Let me ask you some questions about the exhibits that were produced.

Exhibit 15, the agricultural article of the Milk Meisters, do you have that in front of you?

A. No, I don't.

Q. Are you familiar with it?

A. I've seen it quite some time ago.

Q. Did you ever read it?

A. When it first came out I did, yes, sir.

Q. Now, you have no idea whether or not the individuals who wrote this article got specific information from Mr. Hettinga or anyone else concerning the size of the dairy; correct?

A. No, I have no personal knowledge.

Q. And you don't know whether or not this information contained in this article is correct?

A. I know Mr. Hettinga milks a lot of cows. Whether it's 13,000 or 14 or 20, I know that it's more than 10.

Q. It could be more than 25?

A. 10,000, excuse me.

Q. Oh, okay.

But this article is not anything that you say that you relied upon or do rely upon in your business; correct?

A. It shows -- it's an interest that shows bigger producers in the country.
Q. And do you subscribe to this magazine every month?
A. I used to. I haven't lately.
Q. Are you familiar with the retail operations that sell dairy products?
A. Clarify.
Q. Are you -- for example, do you know if dairy products in the last five years have changed in terms of point of sale from a lot of smaller operations to larger supermarkets and wholesalers, et cetera?
A. That would be out of my expertise.
Q. Okay. Exhibit 16, then, is a document you didn't prepare; correct?
A. No.
Q. And if I went through and asked you to go through each one of these columns, would you be able to explain the bases of the information in Exhibit 16?
A. I believe I can.
Q. Have you got Exhibit 16 in front of you?
A. Yes.
Q. Who actually prepared this document?
A. Scott Vincent.
Q. He is?
A. The CFO of United Dairymen.

Q. This document, like other documents that have been produced, makes certain assumptions; correct?
A. It assumes that there is 18 million more pounds of Class I sales in the market.
Q. It also assumes that a certain amount of milk was pooled, correct, as opposed to members making decisions not to pool, send their milk to the UDA, for example?
A. I don't believe that statement makes any sense.
Q. Well, that's fine.
It says UDA members pooled milk. What does that mean?
A. That means the amount of UDA milk that was pooled in the market.
Q. Do members sometimes not pool their milk?
A. Individual members cannot unpool their milk, no.
Q. Do members sometimes not pool their milk?
A. Members don't, no.
Q. Okay.
Again, Exhibit 16 is based upon assumptions. It assumes a certain blend price. It assumes that there is an additional 18 million pounds of milk. It assumes that the milk is Class I milk and, therefore, assumes that UDA members would have received an additional amount of money; correct?
A. Yes.

Q. On the last page of your statement, you quote from a 1967 decision in the Puget Sound Order.
A. Yes.
Q. Where did you find that?
A. That was supplied by Mr. Berde.
Q. Have you read the entire order?
A. No.
Q. Were you actually the one that prepared this statement or was it Mr. Berde?
A. In conjunction with Mr. Berde.
Q. Did you read it?
A. Yes.
Q. It's your testimony, as I understand it, that somehow Mr. Hettinga, Sarah Farms, has some kind of unfair advantage. Is that what you're telling us?
A. Over the other handlers in the market, yes.
Q. Would he have an unfair advantage over Safeway, for example?
A. I believe so.
Q. Does Safeway have an unfair advantage over other handlers because it has its own stores?
A. That I don't know about.
Q. Well, doesn't it? I mean, it's got a ready market. It's integrated. It has its own stores and it sells to its own stores. Handlers don't have that. Other

handlers don't. Isn't that unfair?
A. The other handlers all pay the same price for the milk.
Q. You don't know what Mr. Hettinga pays for his milk, do you?
A. What's that?
Q. You don't know what Mr. Hettinga pays for the milk?
A. He can pay himself whatever he wants to pay for the milk.
Q. You don't know if it's a dollar or a hundred dollars, do you?
A. No.
Q. You don't know if it's a Class I price or a Class II price or whatever price?
A. It goes into one pocket.
Q. You don't know what the price is, do you, sir?
A. What he pays his own farms? No.
Q. Like you don't know what his costs are; correct?
A. No.
Q. And, again, getting back to my Safeway example, you agree with me that Safeway, as a handler which has its own stores and is an integrated handler, in fact, has an unfair advantage over other handlers; correct?
A. No. I agree that they pay the same price for the

milk.

Q. And if the handler pays the same price and Mr. Hettinga pays the same price for the milk, he doesn't have an unfair advantage either?

A. What's that?

Q. And if the handler pays the same price and Mr. Hettinga pays the same price for the milk, he doesn't have an unfair advantage either?

A. I don't understand -- he sets the price he pays for the milk. No one else does.

Q. He also balances his own milk; correct?

A. In a unique way, yes.

Q. He also takes all of the risk required --

I'm sure that the right side of the room will find that amusing.

He also takes all of the risk required to go ahead and produce his own milk; correct?

A. We all take our own risk in the dairy business.

Q. Did you take the risk of building your own plant?

A. Yes.

Q. You did personally?

A. Along with the other members.

Q. Out of your own members?

A. With the other members.

Q. With the other members?

A. Yes.

Q. Didn't put all of your financial wealth at issue in building a plant, did you, you personally?

A. I don't own the whole plant.

MR. RICCIARDI: Okay. I don't have any further questions.

JUDGE HILLSON: Anyone else choose to cross-examine Mr. Boyle?

MR. YALE: I just have a few questions.

Ben Yale for the producer-handlers in the Northwest.

EXAMINATION

BY MR. YALE:

Q. Are you testifying on behalf of changes to the producer-handlers' language in the Pacific Northwest Order 124?

A. No.

Q. And has UDA taken a position to support changes to Order 124?

A. Not -- I don't believe so.

Q. So your testimony that you've presented is not presented to the Secretary as the basis to make changes to Order 124?

A. I'm not familiar with 124 myself.

Q. So the statements you make about size and competitive advantage and everything are dealing with your understanding of Order 131 and not responsive to what you may or may not know about 124; is that right?
A. It might apply to 124. I personally am not that familiar with 124.
Q. And I guess with that, I think by just the recognition what happens on 124 is different than 131, that's different than California, that's different than other areas in terms of competitive situations. Is that a fair statement?
A. I don't know that I want to agree to all of the Orders because I don't know if they are all different or all the same.
Q. It's just never been part of your job to understand the other orders and what's going on in the markets?
A. No.
Q. And just so I clarify one statement, you made some statement about you don't know -- it goes from one pocket to another or something like that with Sarah Farms.
A. Well, he controls what he pays for his milk.
Q. I mean, that's kind of like with your -- as a farmer, if you raise your own heifers, what you treat them and their value -- you didn't buy them; right? It's just

per se; right?

A. Yeah. I can value them.

Q. Any way you want to; right?

A. Right.

Q. I'm not going to ask how you do your taxes, Jim.

A. My banker has something to say.

MR. YALE: Okay. Thank you very much.

JUDGE HILLSON: Anyone else?

Mr. Beshore?

MR. BESHORE: Marvin Beshore for DSA.

EXAMINATION

BY MR. BESHORE:

Q. You were asked what you considered significant, what was significant and what wasn't about Sarah Farms.

Is it your testimony that when the Market Administrators, Exhibit 6, Table 3, shows that the total Class I utilization in the Order for six months in 2003 has been 80 million pounds per month, that an exempt producer-handler with 18 million pounds per month of unpriced, unregulated sales into the market is a significant market factor?

A. That would be a significant -- I think that percentage in any market would be significant.

Q. And when you were asked whether you're concerned, you're trying to avoid competition or you don't like competition or something to that effect, is it your position that the handlers in the market, all handlers who distribute Class I sales, should pay the same minimum price for their milk, should be required to account to all producers in the Order for the same minimum price for that milk?

A. I think if you're going to have a system, I think it should be fair to all of the handlers and they should have the same price.

Q. In other words, there ought to be a level playing field among all handlers?

A. Exactly. Either you're going to have a program or you aren't going to have a program. If you have a handler that is exempt, it's just totally unfair to the other handlers.

MR. BESHORE: Thank you.

JUDGE HILLSON: Anyone else?

Okay. You may step down -- I'm sorry. Did you have any questions?

(Witness excused.)

MR. BERDE: Our next witness is Keith Murfield.

Before his testimony starts, I'd like to have marked for identification as Exhibit 17 a single-page document which is on the letterhead of Sarah Farms dated December 15, 1994, addressed to the Hearing Clerk, Department of Agriculture.

Your Honor, I have as Exhibit 17 a single-page document which is really from the official records of the Department of Agriculture which I'd like to have marked and offered into evidence as Exhibit 17. I'd like to offer this document in evidence.

JUDGE HILLSON: Any objection to it?

MR. RICCIARDI: I am making an objection, Your Honor. I'm walking down to the podium to do it.

This is a letter dated December 15, '94, this witness has no information about. It's from, apparently, a sales and operations manager at Sarah Farms for another proceeding, Your Honor. I don't know why a 1994 document like this is going to be relevant, nor can he lay the foundation for it.

MR. BERDE: The relevance will become apparent during the course of the testimony. It's an official document out of the records of a prior proceeding involving this order. It was filed by Sarah Farms.

JUDGE HILLSON: If it's going to be developed during his testimony --

MR. BERDE: Yes.

JUDGE HILLSON: -- let him testify and then I'll rule on it.

MR. RICCIARDI: Thank you, Your Honor.

KEITH MURFIELD,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: Why don't you please state and spell your name for the record?

THE WITNESS: Keith Murfield, M-U-R-F-I-E-L-D.

EXAMINATION

BY MR. BERDE:

A. My name is Keith Murfield. I've been the CEO of UDA for over three years and associated with UDA as Director of Operations for two years.

On June 10, 2002, UDA filed a petition with the UDA for a hearing to amend the producer-handler exemption of Order 131. That petition was joined in and supported by all of the Order's producers and regulated handlers. UDA's petition and follow-up letters informed the USDA that the explosive growth of Class I sales of the single producer-handler in the Arizona market, exempt from pooling or minimum prices applicable to all the handlers, poses a serious threat not only to orderly marketing but to the operation of the Federal Order system.

The last time that the USDA considered amending the producer-handler provision of Order 131 was over 10 years ago. In early 1993, the USDA called a hearing to amend the then Central Arizona producer-handler provision because one of the Order's three producer-handlers, Heartland Dairy, a limited partnership, was neither a typically family-type operation, nor did it maintain its own reserve supply.

Instead, Heartland Dairy was an investor-owned enterprise that produced enough milk to supply its single supermarket customer requirements during Heartland's peak production and relied on the customer-owned pool plant to supply the short-season deficit by drawing on the pool's reserve raw milk supply.

By the time the Secretary issued his recommended decision in November 1994 to amend the producer-handler provision to correct Heartland's abuse of the Order, Heartland Dairy had ended its operation but a new producer-handler, Sarah Farms, had entered the market.

At that point, UDA urged the Secretary to terminate the unfinished producer-handler rule-making proceeding and convene a new hearing to consider the entire producer-handler exemption issue because, as UDA explained to the Secretary:

Quote, the entry into the marketing area of a multiple-herd producer of a size outstripping Heartland Dairy with the opportunity to manipulate the manner in which the producer-handler associates milk with Order 131, and the ability to dispose of so-called surplus to Class I outlets in California or in Mexico, the presence of a disturbing element in the market is apparent.

In December 15, 1994, comments and objections to changes in the producer-handler provisions of the Order proposed by the Secretary's recommended decision, Sarah Farms claimed that it was an insignificant factor in the market, that its monthly raw milk production was less than 5 million pounds, of which it distributed less than 1.3 million pounds of Class I products in the marketing area. Exhibit 17.

At that time, Sarah Farms was one of three producer-handlers in the market whose total monthly Class I route disposition was approximately 2 million pounds, according to the Market Administrator's statistics.

By December of 1996, the Market Administrator statistics showed an increase in monthly Class I route disposition to over 6 million pounds. Since two of the three producer-handlers, other than Sarah Farms, had a minimal combined average monthly Class I distribution of less than 300,000 pounds, the entire producer-handler December 1995 to December 1996 Class I distribution increase, from 2 million to over 6 million pounds, can be attributed to Sarah Farms.

From September '98 until the present time, Sarah Farms has been the only producer-handler distributing Class I products in the Order 131 marketing area. Though the producer-handler route distribution is shown as combined with partially regulated and other order plant distribution data in the Market Administrator's statistics, the producer-handler distribution data can be derived from the statistics to show an increase from approximately 7 million pound average monthly Class I distribution in 1997 to approximate 15 million pounds in 2002, all attributed to Sarah Farms.

USDA has justified the exemption of producer-handlers from pooling by the claim that their operations are so small they have little or no effect on the pool or --

Q. That's a quote, is it not?

A. Yeah. That was a quote.

-- or not sufficiently significant to constitute a serious competitive factor in the marketing area. Neither of those reasons can justify continued exemption of Sarah Farms from pooling and pricing under the Order.

UDA was right when it asked the Secretary to reopen the 1994 hearing to consider the producer-handler exemption issue presented by Sarah Farms' entry into the market.

UDA was also right when it objected during the process of Order Reform to the Secretary's proposed continuation of unlimited producer-handler exemption from pricing and pooling under the Orders. The Secretary responded to UDA's objection with the explanation that it has been a long-standing policy to exempt producer-handlers because, quote, these entities are customarily small businesses that operate essentially in a self-sufficient manner. This is under 63 Federal Reserve 4939.

Q. Federal Register.

A. Yes. Excuse me.

UDA's response to that explanation bears repeating today. In its exemptions to the Secretary's proposed rule explaining the basis for the producer-handler exemption, UDA told the Secretary, again, a quote, the problem with that explanation is that it fails to explain why the proposed producer-handler provisions in the proposed rule exempt producer-handlers who are not small businesses by any measure, while subjecting to full regulation all other handlers whose route disposition is greater than 150,000 pounds.

UDA went on in its exception to the proposed rule to tell the Secretary that, quote, one of the nation's largest milk producers operates as a producer-handler in the Central Arizona marketing area. The producer-handler's distribution on routes in competition with fully regulated handlers threatens to reach 15 percent of the marketing area's Class I sales.

UDA pointed out in its exceptions that the Fluid Milk Promotion Act of 1990 authorized the Secretary to issue fluid milk promotion orders applicable to all fluid milk processors, including producer-handlers who process in excess of 500,000 pounds of fluid milk products per month.

UDA proposed that same standard should apply to producer-handlers under Federal Orders. UDA proposed that the proposed rule should be amended by incorporating a provision in each order limiting the exemption to producer-handlers whose Class I route disposition is 500,000 or less.

UDA's present proposal to limit the producer-handler exemption to persons whose monthly route disposition does not exceed 3 million pounds is compatible with provisions of the comparable 2002 changes to the Fluid Milk Promotion Act coverage.

UDA believes that the evidence to be presented at this hearing will persuade the Secretary that adoption of UDA's proposal is essential to maintain orderly marketing, provide uniform pricing among handlers, and to carry out the purposes of the Agricultural Marketing Agreement Act.

Dairy farmers appreciate the benefit of a stable and orderly marketing division that the Federal Order system has provided over the years. However, UDA's dairy farmers that have been attacked on marketing under other Federal Orders fear that continued unlimited federal exemption from producer-handlers from pricing and pooling threatens the effective operation of the Federal Orders and the loss of the benefit provided to dairy farmers. That's why we have asked the Secretary to call this hearing and to address the producer-handler exemption issue.

Q. Does that complete your statement?

A. Yes.

MR. BERDE: The witness is available for cross-examination, Your Honor.

EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Murfield, I'm Al Ricciardi.

As I understand your statement and listening to you read it, you're the Chief Executive Officer of UDA?

A. That's correct.

Q. And you are paid by UDA?

A. That's correct.

Q. Is your compensation tied in any way to how much

milk is produced?
A. No.
Q. Do you receive any type of bonus or commissions based on that?
A. No.
Q. As I understand the sequence of events, so it's clear to us, in '94 there was an issue with regard to Heartland, and your testimony and your statement deals with that; correct?
A. That's correct.
Q. But that was during a period of time that you weren't at UDA; correct?
A. That's correct.
Q. So you don't have any firsthand knowledge of any of these issues?
A. No. Just -- you know, just what I've read, what I've listened to.
Q. And what somebody told you?
A. Yes.
Q. So the information, therefore, in here regarding Heartland is not based upon your personal knowledge; correct?
A. Only what I've read.
Q. And so Exhibit 17, which was offered, a December 15, '94, letter from Sarah Farms purportedly, you weren't at

UDA when this occurred; correct?
A. No, I was not.
Q. And any information that you have regarding this is, again, based upon what was told to you; correct?
A. Yes, and what I can read.
Q. What you read in here?
A. What I can read, yes.
Q. Are you familiar as to whether or not, with regard to the Heartland matter -- I know this was told to you and maybe you read about it -- that the UDA actually paid Heartland some money?
A. They took over the dairy, took over that processing plant.
Q. Actually, they gave them approximately $3 million worth of base which Heartland then sold; correct?
A. Well, I can't answer that one because I do not know that.
Q. No one told you that?
A. I'll repeat. I do not know that.
Q. Okay. So that's not information that was in the records that you read to prepare this statement; correct?
A. Well, that's true.
Q. Again, as setting the basis for your testimony today, in '94, from which you read, there was a hearing with regard to Heartland Dairy at which time there was an issue

concerning whether it was a producer-handler, as I understand it. Am I correct?

A. That's correct.

Q. But at that same time, in '94, UDA asked the Secretary to have a new hearing to consider Sarah Farms; correct?

A. That's correct.

Q. At a time when at least you don't know whether Sarah Farms produced one pound of milk or a thousand pounds of milk per month; correct?

A. No. We just knew approximately what area they were at by their own admission.

Q. This is, again, the letter that is marked as Exhibit 17?

A. 17.

Q. Which were -- the letter had existed prior to the time that you came on to UDA?

A. A lot of things are on hand since I've been -- before UDA.

Q. I understand that.

So, then, when the Secretary decided not to convene a hearing, then litigation was filed regarding the Sarah Farms' exemption; correct?

A. True.

Q. Were you at the UDA then?

A. No. That was in -- that was before my time. I believe that was '96, '97.
Q. And what happened was at the District Court, that was dismissed and that District Court's decision was affirmed by the Ninth Circuit Court of Appeals. Are you aware of that?
A. I'm not sure which court it was.
Q. But you lost; right?
A. Okay.
Q. Am I right?
A. I assume we did not win.
Q. Okay. That would be losing.
Okay.
A. That's why we're here today.
Q. Correct.
A. Okay. Good.
Q. Having not gotten the issue back in '94, having lost the litigation and not liking what happened in the last rule-making session back in 1999-2000, UDA has made another request to the Secretary to change issues with regard to the producer-handler exemption; correct?
A. Yeah. We want fair grounds. You are correct in that statement.
Q. And what it is, is it is directed specifically at Sarah Farms. No one else. No other producer-handler. No

one else in this market other than Sarah Farms; correct?

A. Sarah Farms and anyone in the future.

Q. And I asked Mr. Boyle before what the sort of bright-line test was. You picked 3 million pounds a month. Why?

A. Okay. Did you read my -- you seem to be familiar with what I read. Do you want me to read it again?

Q. No. I did get it like a minute before you got up to testify so I'm not familiar with it.

A. You have to have a basis to go by. You know, there's been a lot of handlers. We had one up here in Sunrise or Taylor. They probably do what a classic producer-handler in our mind does; okay? We have no problem with that. They do not interfere with what we think in the marketing. We go by the one where they talk about the fluid milk promotion coverage, and that is what our basis of the 3 million pounds is.

Q. Okay. Let's assume that the folks up in Taylor decide that they are going to expand a little bit and now they are going to produce 500,000 pounds a month. That's okay?

A. We have to have some basis for it. We are not going to pull it out of the air. We want some basis for it. And this is what we use. Yes, they could produce 2,999,000. We used 3 million as a figure.

Q. And if they produced 2, 999,000, that would not disrupt the marketplace?

A. What we're saying is we have to pick a number, and we think anything above 3 million is --

Q. Let me ask you the question again.

If they produced 2,999,000 in Class I fluid sales, sold them into the market, that, in your opinion, would not disrupt the marketplace; correct?

A. We think that is a good number to use, yes.

Q. But once they kick over that extra pound, now we have a disruption; right?

A. You can -- you know, it probably goes in degrees, but, yes, we've used the number of 3 million pounds.

Q. Once we go from the one more pound, it's going to disrupt this marketplace; correct?

A. It continues on and I don't know where it stops. I mean, I know what you're getting at, but we're saying 3 million pounds.

Q. You basically picked an arbitrary number?

A. No, we did not pick one.

Q. Then give me the basis for the 3 million pounds.

A. Will you let me finish?

Q. I certainly will.

A. I said it before. We used this number of 3 million pounds because we didn't want to have to pull a number out of thin air. This is what we used and this is what we're going by. You can keep talking on this one, but this is what we used.

Q. It says: The proposal to limit the producer-handler exemption to persons whose monthly route disposition does not exceed 3 million pounds is compatible with the provisions of the comparable 2002 changes to the Fluid Milk Promotion Act coverage. Is that what it says?

A. Yes.

Q. Tell me how it's compatible with that.

A. It was 500,000. Then it increased to 3 million. We just agreed with that. That's what we're saying with that one.

Q. So you picked the Fluid Milk Promotion Act as the number?

A. Yes.

Q. How did the Fluid Milk Promotion Act have anything to do with the disorderly market?

A. Well, you know, it's a number that they have used with the producer-handlers because when they paid and not paid, it was 500,000. So whether it was only -- it was a number to us that made sense. You know, obviously, all producer-handlers -- we would like all dairymen to share alike in it, but there is still a producer-handler exemption and so we went with that number.

Q. There is currently a producer-handler exemption under the current regulations. Am I right?
A. That's correct.
Q. And the Secretary has determined that Sarah Farms fits within that exemption; correct?
A. That's what they said, yes.
Q. And what you want to do is -- and it's like the fourth time you're trying this -- you want them to change that with regard to Sarah Farms; right?
A. Yeah. We want an even playing field. That is correct.
Q. You've said that a couple of times. I've heard you say that.
A. I've heard you ask the same question several times.
Q. That's fine. I won't take offense. I don't want to fence with you.
A. It's up to you.
Q. The fact is if we're talking about a level playing field, would anybody who is a member of the UDA be required to go out and build his own production plant?
A. Would each individual go out?
Q. Yes, sir.
A. No. They put their equity in it. So, in essence, it's their money.

Q. They are not required to build their own production plant; correct?

A. The UDA is a co-op owned by the dairymen, so they are putting their money on the line as members of the co-op.

Q. I understand that part. In terms of attempting to balance milk, Sarah Farms is required to do its own balancing; correct?

A. They belong to another co-op that balances for them. But as far as I know --

Q. You don't know that, sir.

A. I know they are a member of Security Co-op, yes, I do.

Q. You don't have any personal knowledge of any of that, do you?

A. Yes, I have.

The fact is, in terms of attempting to figure out the amount of production needed for its customers, Sarah Farms takes the milk from its own dairy, produces it, transports it, sells it to its customers; correct?

A. Correct, just like all handlers, yes.

Q. All handlers have dairy farms?

A. Some.

Q. You said "all"?

A. No. I said all handlers have distribution costs, yes.

Q. They have distribution costs?
A. That's what I said.
Q. But they don't all have dairies; correct?
A. That is correct.
Q. And all handlers don't have their own integrated stores like Safeway, do they?
A. No.
Q. So, in fact, we have, in some ways, a disparity in the market when we have a handler such as Safeway versus someone else; correct?
A. Oh, I don't know that. Because they have their -- they have to be competitive. If they are behind by -- if a producer-handler has a tremendous advantage over them, they have to lower their revenue to meet the competition.
Q. And the producer-handler might have to deal with that in trying to compete with a Safeway which has its own stores and can sell at whatever price it wants to sell; correct?
A. Probably just -- yeah, what is comparable, I suppose.
MR. RICCIARDI: Nothing further. Thanks.
JUDGE HILLSON: Yes. Before you start, I am going to admit Exhibit 17 into evidence. Whatever weight it's worth is up to the Administrator, but I'm going to admit it into evidence.

MR. BERDE: Your Honor, as to the Exhibit 17, that is an official document of the Department of Agriculture.

JUDGE HILLSON: Whatever. I admitted it into evidence anyway.

MR. BERDE: Okay. I thought you put some limitation on its weight.

JUDGE HILLSON: Its weight -- well, official or not, the weight is whatever the weight is that the Administrator chooses to give.

MR. ENGLISH: Mr. Murfield, I'm Charles English.

EXAMINATION

BY MR. ENGLISH:

Q. You're familiar with other provisions of Federal Orders with respect to sort of hard-and-fast rules?

A. Yes.

Q. For instance, the Secretary has determined for this marketing area in Section 1131.7 that in order to be a fully regulated distributing plant, that plant must have 25 percent or more of the total quantity of fluid milk products basically sold in the market area; correct?

A. Correct.

Q. And at 24.99 percent, that plant is not a fully regulated plant; correct?

A. That is correct.

Q. And there are financial consequences to the pool and to the handler of being a 24.999 percent that are different than from hitting exactly 25 percent; correct?
A. That is correct.
Q. And the Secretary, in his or her wisdom, has determined that in order to maintain orderly marketing conditions, it is necessary to have that hard-and-fast rule of 25 percent versus 24.999 percent; correct?
A. Yes.
Q. Furthermore, there's a provision with respect to supply plants?
A. Yes.
Q. And, again, there is a fixed percentage of sales of Class I milk; correct?
A. Correct.
Q. And if you miss that by .001 percent, it's a hard-and-fast rule. You don't qualify?
A. You are out of luck that month.
Q. And, in fact, just for clarification, you talk about "they." The issue of the Fluid Milk Promotion Program is an act of Congress; correct?
A. Correct.
Q. And Congress, in its wisdom, had determined that 500,000 pounds was the number of pounds before one had to pay into the Fluid Milk Promotion Program; correct?

A. That is correct.

Q. And if you process 499,999, you didn't pay anything into the Fluid Milk Promotion Program; correct?

A. Correct.

Q. But if you had 500,000 pounds, in Congress' wisdom, you had to pay 25 percent on all of your production; correct?

A. Correct.

Q. And so Congress, in its wisdom in looking at whether that number was the right number, decided in the last several years that, no, 500,000 wasn't the right number for the promotion program, it should be 3 million pounds?

A. Correct.

Q. So the "they" that we're talking about is the United States Congress; correct?

A. Yes.

Q. And that "they" didn't say, "Oh, there's some sliding scale below 3 million pounds." No. If it's 2,999,999, what happens? They pay nothing; correct?

A. That is correct.

Q. Now, there's been several questions already concerning integrated processors, entities that may own their own stores.

Whether or not that grants a competitive advantage for Safeway in their sales, is that advantage at the raw

milk stage or at the sales to a customer stage?
A. Well, you know, it all depends on order premiums and everything else. How they handle their own plants, one of their own plants.
Q. Let me put it this way: Are retailers regulated?
A. No.
Q. What's regulated is the sale of raw milk received at a processing plant; correct?
A. That is correct.
Q. Does Safeway, because it is an integrated operator, have an advantage in the purchase of raw milk?
A. No, absolutely not.
Q. Does a producer-handler have an advantage with respect to raw milk that integrated processors like Safeway has?
A. They can pay themselves for their own milk. They do not have to pay the blend.
Q. And in not paying the blend, they are not contributing the difference of, basically, the Class I in the blend to the pool to be shared with all of the producers; correct?
A. That is correct. They do not pay on it.
Q. That is a financial benefit that they have that regulated handlers do not?
A. That is correct.

Q. Whether you are Safeway; correct?
A. Correct.
Q. Or Kroger?
A. Or Kroger.
Q. Or Shamrock; correct?
A. Or Shamrock.
MR. ENGLISH: I have no further questions.
MR. BESHORE: Marvin Beshore.

EXAMINATION

BY MR. BESHORE:
Q. Do you have Exhibit 16?
A. Yes.
Q. Are you familiar with the exhibit, with the information depicted there generally?
A. Yes.
Q. And the column UDA Members Pooled Milk is on a monthly basis. Those are accurate representations of the milk that your members pool on each month on Order 131; correct?
A. That is correct.
Q. Now, let's talk a little bit about what happens to UDA members' milk when an exempt producer-handler captures a customer.
A. Okay.

Q. Take a sale -- let's assume they get a sale in a chain store that is being supplied prior to them by a pool -- a regulated distributor under Order 131 which is UDA supplied milk. What happens when Sarah Farms gets that sale and your customer loses a sale?

A. At UDA?

Q. At UDA. That's what I want to talk about.

A. If we lose Class I sales to one of our three handlers' customers, that milk will go into Class IV in our plant because of -- we've already taken care of III, so our balancing surplus at our location is butter/powder, which is Class IV.

Q. So what happens is your customer orders X tankerloads of milk to be processed into Class I product?

A. That's correct.

Q. But you still have that milk, your members' production; correct?

A. Yeah.

Q. And then you must take that milk to your own manufacturing plant?

A. That is correct.

Q. And you said it's a Class IV. What products are made at the plant?

A. Well, what this would go into -- because we'll have all of the rest of our customer needs balanced. So when this -- our surplus operation is Class IV, which is butter/powder. If -- butter or, slash, cream. But it is, under the Market Administrator, considered Class IV how we utilize it.

Q. Okay. And that plant, is that plant owned by UDA?

A. Yes.

Q. And it represents a capital investment of all of the dairy farmer members of United Dairymen of Arizona; correct?

A. That is correct.

Q. A substantial investment I would assume?

A. Tens of millions.

Q. And that capital is at risk, as we've heard, other capital is at risk when people choose to make those investments; correct?

A. Absolutely.

Q. Now, do you have the same value for the milk in the pool after the Class I sales have been lost and the milk is then manufactured into powder and butter or cream?

A. Normally, the Class IV -- either Class III or Class IV is going to be the Class I mover. So it is normally below the blend price, and so, therefore, you bring down the blend to all of the dairymen in the Order, not just UDA but of the Order and so the dairymen will have a lower milk price.

Q. And that reduction in value of the pool is what is depicted and calculated on an estimated basis. It's calculated on Exhibit 16; is that correct?
A. That's correct.
Q. Now, besides the values or minimum pooled milk prices that UDA has with the pool, does it have costs for balancing its customers' Class I supplies?
A. Yes, because we do supply three handlers. Their orders vary. Their orders will vary sometimes with very short notice so that -- so, yes, we do have, obviously, a balancing cost to take care of that.
Q. Okay. Do you attempt to charge -- negotiate an overorder charge for those services with your handler so that they pay something more than the minimum value for the kind of service that you're providing to them?
A. Yes, we do.
Q. And can you tell us -- do you care to tell us what the approximate level of overorder charge prevailing in Order 131 has been?
A. Yes. It's 15 cents a hundredweight.
Q. Okay. So when one is comparing what it costs a regulated -- fully regulated distributing plant in Order 131 for milk and what it costs a producer-handler, the regulated plants pay the minimum price plus a charge to reflect some service for having the milk provided to them?

A. That is correct.
Q. With respect to the 3 million-pound limit, is it your position, in proposing that test, that you believe Congress has established in the Fluid Milk Promotion Act -- has made a determination that that's an important level in terms of fluid milk sales volume --
A. Yes.
Q. -- in the industry nationally?
A. Yes.
MR. BESHORE: Thank you.
MR. YALE: Good afternoon. Ben Yale for Smith Brothers Farms, Edaleen Dairy, and Mallorie Dairy.

EXAMINATION

BY MR. YALE:
Q. You testified, sir, about the market conditions and Order 131. I guess I'll just start off with that same question. First off, you've been in other Federal Orders in your career in the dairy; right?
A. That's true.
Q. And every market area tends to have its own little twists and turns and its own little market conditions. Would you agree with that?
A. That is true.
Q. What I want to talk to you about, or ask some

questions about, really has to do with some of our testimony talking about, I guess, this bright line. Now, I'm not suggesting we're wanting a line, but I want to talk about where that would be.

I think this may have been before your presence at UDA, but I think you testified that UDA had made a proposal during the Order Reform to limit the size of PDs; is that correct?

A. Yes.

MR. YALE: Your Honor, I would like to have an exhibit marked.

JUDGE HILLSON: Exhibit 18.

(Exhibit No. 18 marked for identification.)

BY MR. YALE:

Q. This has been marked as Exhibit 18. My supposition is that -- I think you have seen this before, a letter by your counsel, Mr. Berde, to Rich McKee regarding producer-handler definitions. Does this look familiar?

A. It's been a while, but yes.

Q. Okay. A very well-drafted argument in that position.

What I want to point out to you, though, is that the one thing of note that I saw as I was reading this in light of another exhibit, when we get to that, is this reference to the Gore case in the first line of that letter.

Do you see that?

A. Yes.

Q. Do you know anything about the Gore case or the Gores?

A. No, I don't.

Q. Are you aware that there was a producer-handler in Texas of a certain size that there was some discretion as to whether or not they should be regulated back in the late '80s, early '90s?

A. No, I don't.

Q. Over in Exhibit 17 -- are all of those exhibits up there? Not 16. I'm sorry. The one from Mr. -- I'm sorry. Number 15. Do you have Exhibit 15 up there?

A. No. I left them down below.

Q. I'm going to show you what's number 15. Would you note on there that down about in the middle there is a listing for a farm in Comanche, Texas, by the name of Gores? Do you see that?

A. Yes, I see that.

Q. And it's listed at approximately how many?

A. Number 16.

Q. And about 5,000 cows. What it is, it is.

You make a statement and, again, I'm trying to figure out where this line -- if the Department is going to draw a line, where it ought to be, and that's really where

I'm heading with this. Is that -- at least for the Texas Order, it's indicated that that line would include a producer with approximately 5,000 cows.

A. Okay.

Q. So that would be a little bit higher than your statement that -- or maybe -- this may be the question but not sufficiently significant to constitute a serious competitive factor in the marketing area. Is that the test rather than the size -- or I guess that's really my question. Is there a bright line or is it this subjective thing the Secretary has to decide?

A. Well, I think we basically went by what, in essence, of Congress setting that at that number of 3 million. We did not want to be subjective on that. So that's the number that we have used.

Q. But you would acknowledge that over the years, the Department has allowed larger PDs, larger than the 3 million, or do you know that?

A. Well, I do know that there are producer-handlers larger than 3 million, yes.

Q. And they have successfully defended other challenges to PD definitions in other orders over the years?

A. Yes. And it's because, as you well know, it's difficult to get a hearing on these. You are correct.

Q. But once they had a hearing, they seemed to

survive?
A. Yes.
Q. And they survived over the reform; right?
A. Yes.
Q. Now, you used the 3 million. Again, this question of line. If there's one that has got to be drawn -- and, by the way, I appreciate that you've given me a bright line because then I could know who was in and who was out for the proposal other than this other subjective deal. But with this 3 million, you reference the dairy promotion for the processors; right?
A. Correct.
Q. Now, isn't it true that the number was there for -- more for administrative convenience on the part of the Department than it was to deal with the voting and with auditing as opposed to saying that this is when you become a real process as opposed to a not real process?
A. You know, being -- I would just be guessing if I even made a comment on that one.
Q. I might be, too. But that's what I understood. I was just asking if you knew.
A. No, I do not know.
Q. You don't know that, in fact, that that was Congress trying to say, though, that 3 million is some kind of a magic number for other regulation?

A. As long as -- you can read a lot into it. You just assume that they want -- they do not want to touch the small producer-handlers and that's how -- what they considered smaller than 3 million.

Q. And then I want to move on to one other thing. Mr. English had some questions about these lines and once you cross them, regulation happens.

There are no limits on individual producers, though, right, in the Orders?

A. Limit as far as?

Q. The size.

A. Do you mean number of columns or --

Q. Right. Before they lose their benefit under the uniform blend or there's no -- if you get so big, you don't get as much or anything like that under the Federal Order; right?

A. No, I don't believe so.

MR. YALE: Your Honor, in light of the one question that we dealt with with regard to the Gores, we would like to have official notice taken of a decision issued by the Secretary of Agriculture. It's found at Federal Register Volume 54, 27179, and it's in re --

MR. BERDE: I think you mischaracterized that as a decision rather than a recommended decision.

MR. YALE: I was going to read this title, Mr. Berde, if you'll just give me a second.

It's found in the Federal Register and entitled "Milk in the Texas and Southwest Plains Market: A Recommended Decision. Opportunity to File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements in Two Orders." And there is a discussion of the producer definition, and we would like to have official notice taken of that decision.

JUDGE HILLSON: Okay. It's in the Federal Register. What's the problem?

MR. BERDE: The problem with that entire proceeding, Your Honor, is that it never terminated in a decision. Exceptions were filed and no decision emanated.

So I don't believe it has any persuasive influence or precedential value in terms of a decision in this order.

JUDGE HILLSON: To me that's an argument on weight issue and I'm just going to take notice.

MR. BERDE: Thank you.

JUDGE HILLSON: Are you done?

MR. YALE: I'm finished.

Thank you very much, Mr. Murfield.

Thank you very much, Your Honor.

MS. DESKINS: Gino has a question.

MR. YALE: There is one follow-up. It has to do with this question. There is a proposed rule that is in that same proceeding that is found at Volume 54, 36986 of the Federal Register dated September 6, 1989. And we'd like that as being part of the official notice taken of that as well.

JUDGE HILLSON: Consider it done.

Did you have an exhibit marked?

MR. YALE: I also ask that Exhibit No. 18 be admitted. I think with the writing of Mr. Berde, I can't imagine that he would object.

JUDGE HILLSON: I'm going to allow that in.

Okay. Exhibit 18 is admitted into evidence.

MS. DESKINS: Mr. Tosi has some questions.

EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Mr. Murfield. I'm Gino Tosi, dairy programs at USDA. I have a couple of questions.

Your testimony focuses on the need to regulate producer-handlers once a certain production or manufacturing level is achieved at 3 million pounds. Are you also supporting proposal of what will be published in the Federal Register as Proposal 3 that has an extensive set of other conditions for which it compro -- for which it -- how a producer-handler should be defined under the Order?

A. Correct.

Q. Also in your testimony, in your written statement, in some cases you cited Federal Register quotes. In other places you -- the written statement seems to suggest that you are quoting something from the decisions from the Department, but you don't identify the source of your quotes. Specifically, on page 3 that we're talking about how the Department has justified exemptions of producer-handlers from pooling, with the, quote, they are so small, they have little or no effect on the pool, unquote.

A. I'm sorry. Where are you at?

Q. On page 3, the second paragraph.

A. On the quote here?

Q. Yes. That was on the proceeding when they came down on the Heartland Dairy case?

A. The Heartland Dairy case.

Q. Thank you.

Did you read the Department's decision, the complete reason why the Secretary or the Department chose not to regulate producer-handlers as part of the Federal Order Reform?

A. Have I read the whole thing?

Q. Yes.

A. I've read bits and pieces. No, I've not read the whole thing. I rely on Sydney Berde to keep me informed.

Q. Do you know whether or not the Secretary chose not to regulate producer-handlers for reasons not to change the regular status of any entity as part of the Reform Act?

A. No. I don't know that exactly.

Q. Are you familiar with whether or not one of the reasons that the Department chose not to regulate producer-handlers under Federal Order Reform was because of a very long period of time where Congress, in amending the Agricultural Marketing Agreement, said we would not change the regulatory status of producer-handlers as the Department was currently regulating them?

A. That's true.

Q. Would it be your opinion that it's the -- with Congress not amending the Agricultural Marketing Agreement Act as part of the 1996 farm bill as speaking to the issue as to what Congressional intent is on the regulatory intent of producer-handlers?

A. Say that again?

Q. To the extent that Congress did not continue its regulatory exemption on producer-handlers as it had for many, many years prior to the 1996 farm bill?

A. Correct.

Q. To the extent that Congress made no mention or did not continue with the regulatory exemption, was that, in your opinion, Congressional intent that it reversed its regulatory intent on producer-handlers on how the Department should deal with that issue?

MR. BERDE: Well, Your Honor, I think I'm going to have to object to this line of questioning because it raises what is, essentially, in the nature of an argument connected to legal briefs. The suggestion that the language that appeared in the various amendments of the Agricultural Marketing Agreement Act from 1965 on which said, in effect, that nothing herein contained shall change the legal status of producer-handlers pursuant to this amendment, the suggestion that that had some effect on the authority of the Secretary to regulate producer-handlers is simply inconsistent with the Secretary -- with what the Secretary himself has said in his own decisions, which was that that language has absolutely no effect on the authority which continued, the authority of the Secretary to regulate producer-handlers.

In any event, that is a line of questioning that I suggest that can be treated more appropriately in legal briefs.

MR. RICCIARDI: Your Honor, may I be heard?

JUDGE HILLSON: Go ahead.

MR. RICCIARDI: The testimony of Mr. Murfield, which is replete with those kind of legal arguments, quotes from, et cetera, they opened the issue, they opened the door. I don't want to hear oral argument or closing argument. I think it's a fair question. He can ask it.

JUDGE HILLSON: Do you have any problems with this?

MS. DESKINS: We would point out that the Department hasn't filed any briefs in this and the purpose is to gather information. It certainly would be relevant to hear what his answer to that question is.

JUDGE HILLSON: I'll tell you what. I'll give you a couple more questions on this issue and then we'll just move on.

MR. TOSI: I'll accept whatever answer or opinion the witness has, Your Honor.

JUDGE HILLSON: Why don't you just answer this question and then we'll call it a day on that line of testimony?

THE WITNESS: I'm not sure what the intention was, why they left it out. I don't know if it was a mistake. I don't know why it was. I have no feelings on that one way or the other.

MR. TOSI: Thank you.

EXAMINATION

BY MR. ROWER:

Q. Mr. Murfield, I'm Jack Rower from AMS Dairy Programs. I just wanted to ask, are your comments limited again to -- as Mr. Boyle said his were -- to Order 131?

A. You know, yes. I have no knowledge of the Pacific Northwest Order. I never spent any time on their order, so I can't comment on that order.

Q. So we're limited to 131.

MR. RICCIARDI: Thank you.

EXAMINATION

BY MS. DESKINS:

Q. Sharlene Deskins with the Office of General Counsel, USDA. I had a couple of questions for you.

One is on page 2 of your testimony where you had that from September 1998 to the present, Sarah Farms has been the only producer-handler distributing Class I products in the Order 131 marketing area.

I was just wondering, to your knowledge, is this because the regulations make it difficult for there to be more -- for there to be more producer-handlers in the marketing area?

A. You know, obviously, there's -- well, Sunrise and Taylor is sometimes exempt, sometimes producer-handler; okay? So there is one there.

But your question is, has it made it -- ask it again.

Q. My question was: Is the reason that there's only been one producer-handler or, as you said, occasionally there is another one, does that have anything to do with the current regulations or is it due to marketing issues? Do you have any idea?

A. No, I don't. Whether -- I couldn't answer that one.

Q. Another question I had is on page 4. When you talk about the Fluid Milk Promotion Act of 1990 --

A. Page 4?

Q. Yes. This is a preliminary question. What were the changes that remain in the 2002 -- what 2002 changes include to the Fluid Milk Promotion Act?

A. The only one that we went by that I really looked at at all was just on the amount of total milk that they considered from -- raising it from 500,000 to 3 million.

Q. Under 3 million, you don't have to pay an assessment under that program?

A. That's correct.

Q. And to your knowledge, the purpose of the Fluid Milk Promotion Act is to promote milk; correct?

A. Correct.

Q. So its purposes are different than those of a marketing order which is to regulate the supply of milk?

A. Yeah. I guess it depends how Congress looks at it. The only reason -- I think the answer is yes. We just looked at it as when Congress looked at it of a producer-handler in size. But the answer to your question, I'm sure, is yes.

Q. What I'm trying to get at is if we have -- these marketing orders are aimed at the supply side of the equation, and the research and promotion, like fluid milk, are aimed at the demand side. I'm trying to understand how you can apply the standards used on one act to those of another.

A. Well, the only thing we looked at was that they were -- they gave the producer-handler an advantage when he or she or the company was under -- they are under a certain number and then they expanded it to 3 million and that's all. We were being consistent with that.

Q. Okay.

Do you know -- were there any reasons for doing that related to something to do with the Small Business Administration?

A. I don't know that answer.

Q. Okay. Then also, my other question was -- this is also on page 4 where you talk about UDA's proposal was essential to maintain orderly marketing. I was just wondering if you could tell us, how does a large producer-handler create disorderly marketing that would affect the supply of Class I milk?

A. Well, how is it disorderly? What happens is that we feel if you get somebody that has that much of an advantage, has that much of an advantage, it causes havoc with the other handlers in order for them to be able to compete. Pretty soon we have an overorder premium, albeit 15 cents.

What happens is, in order for them to compete, to keep the people coming in stores, whatever, they are at a disadvantage. It could unravel -- what we're scared of, it will unravel the Federal Order system as we know it today because the other companies, we don't feel long term, will be able to compete if there gets to be more and more producer-handlers of this size. That's really what we're getting at.

Q. You used the term "advantage." What do you mean by advantage?

A. The producer-handler does not pay into the Order, is not part of the Order, is not pooled in the Order. Other handlers, if they have all Class I sales, they end up -- you have the blend. You have the four classes: I, II, III, IV. They pay into the Order or pull out of the Order depending on their utilization.

So could be at a disadvantage of, depending on location factors, whatever, well over $2, $2.35 per hundredweight.

Q. And does a producer-handler have any disadvantage to having that status that a handler doesn't have?

A. Disadvantage, the only disadvantage would be that if they do not have maybe a place for surplus milk or something like that.

MS. DESKINS: That's all the questions I have. Thank you.

JUDGE HILLSON: Any further -- go ahead.

MR. RICCIARDI: Follow-up on the last set of questions.

JUDGE HILLSON: You're going to have to identify yourself.

MR. RICCIARDI: And I will identify, Your Honor. I've been doing well. I'm Al Ricciardi, again, on behalf of Sarah Farms, and I have some questions based on the last bit of testimony.

FURTHER EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Murfield, I believe what you said -- and correct me if I'm wrong -- is that the concern that you have, that UDA has, regarding the advantage you say that the producer-handlers have is that the use of the exemption would encourage larger producer-handlers and this would, ultimately, unravel the federal system; correct?

A. That's correct.

Q. Since Sarah Farms has been in this Order area, is there any other producer-handler that is as large as Sarah Farms?

A. Producer-handler?

Q. Yes.

A. Is that what you're asking me?

Q. Yes.

A. No, I don't believe so.

Q. If this is such a good deal to get this great advantage, then why don't we have a bunch of producer-handlers in this market?

A. I think that is a real possibility in the future. I feel it's a -- one of the things that I'm concerned about is that the people that are handlers that we sell milk to right now, one of them maybe could be a producer-handler, has his own cows but has chosen to continue on with the Federal Order system. We have a couple of other handlers that could decide, "We can't compete," and buy milk elsewhere.

Q. Well, you've got handlers that could decide to become producer-handlers if they were willing to make the investment in their own plant; correct?

A. Yes, that's what I -- that's what I said, yes, sir.

Q. Now, they could do that whether or not there was a limitation by the number of pounds per month or not; correct?

A. Under the current guidelines, is that what you're asking?

Q. Yes.

A. Yes.

Q. They could decide they don't want to be with the UDA; right?

A. That's correct.

Q. And other than facing a potential lawsuit or terminating the agreement with the UDA, they could go out and start their own -- become a producer-handler; correct?

A. Yes.

Q. As long as they are willing to make the investment as a producer-handler; right?

A. Investment?

Q. To build their own plant?

A. Well, they have their own plant.

Q. Then go ahead and get their own cows?

A. Yes, that would be the way to get milk.

Q. So we start off having a dairy and a plant and putting all of our investment in being able to sell our own milk; correct?

A. In order for that to get to the $2.35 advantage, but overorder premium around $2.50, in order to get that advantage of what you're talking about, yes, that is true.

Q. Okay. The advantage of going out and spending enough money to build a dairy and build a processing plant and sell to my own customers and balance my own milk, that's the advantage you're talking about?

A. To take the $2.50 and take that advantage and buy cows, that is what I'm talking about.

Q. And in the last eight years, that's such a great advantage that we have no other producer-handlers other than the one that came into the market because they changed the geographical limitation; correct?

A. We have no more in our Order.

MR. RICCIARDI: No further questions.

JUDGE HILLSON: Are there any further questions?

MR. BESHORE: Marvin Beshore.

FURTHER EXAMINATION

BY MR. BESHORE:

Q. Just to make it clear, the significance of the Fluid Milk Promotion Act is an exemption of 3 million pounds is 20 cents per hundredweight, is it not?

A. I believe that's correct.

Q. And every fluid milk handler handling more than 3 million pounds is obligated for 20 cents; and if you are

under 3 million pounds per month, it's zero?
A. Right.
Q. And your proposal would say that if you're 3 million pounds or above, you're required to pay minimum Federal Order prices?
A. That is correct.
Q. If you are less than 3 million pounds and otherwise qualified, you're exempt?
A. That's correct.
MR. BESHORE: Thank you.

FURTHER EXAMINATION
BY MR. ENGLISH:
Q. Because there were some suggestions suggesting that the program is completely diminished, isn't it a case that the Market Administrator collects that 20 cents?
A. That is correct.
MR. ENGLISH: Thank you.
FURTHER EXAMINATION
BY MR. BERDE:
Q. Keith, during Mr. Ricciardi's examination, he suggested that there was something arbitrary or unreasonable about a bright-line figure that differentiates exemption or nonexemption from the pool. Do you recall that?
A. Yes.

Q. And under the current provision of the Order, UDA has to move a fixed percentage of its producer milk to the distributing plants of other handlers in order to qualify its manufacturing plant; isn't that correct?

A. Yes, depending on the month.

Q. And if it falls one-tenth of 1 percent below that figure, the producers that moved into that plant are depooled; isn't that correct?

A. That is correct.

Q. He also suggested that UDA commenced a lawsuit which the Court dismissed which he characterized as UDA lost. Do you recall that?

A. Yes.

Q. Isn't it more correct to say that the Court directed UDA to bring its concerns to the Department of Agriculture, which is what we're doing right here today?

A. Yes.

Q. That there was no decision on the merits of that lawsuit whatsoever?

A. Yes.

MR. BERDE: Thank you.

JUDGE HILLSON: Okay. Mr. Murfield, I believe you can step down. Thank you very much.

(Witness excused.)

JUDGE HILLSON: I have -- next on my list, I have

John Hitchell. Is he ready to go?

JOHN HITCHELL,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: Could you state and spell your fame for the record?

EXAMINATION

BY MR. BERDE:

A. My name is John Hitchell. First name is J-O-H-N, H-I-T-C-H-E-L-L. I am employed by the Kroger Company Dairy Group/Manufacturing Division as a General Manager of Raw Milk Procurement and Regulation. I am located in Cincinnati, Ohio.

The Kroger Company owns and operates Swan Island Diary located in Portland, Oregon. Swan Island is a pool distributing plant regulated on the Pacific Northwest Order 124. Swan Island Dairy supplies food to the Fred Meyer stores throughout the Pacific Northwest Order.

In addition, the Kroger Company owns and operates Tolleson Dairy located in Tolleson, Arizona. The Tolleson Dairy is a pool distributing plant regulated on the

Arizona-Las Vegas Order No. 131. Tolleson Dairy supplies fluid milk to the Fry's stores in Arizona.

I'm appearing today to testify in support of Proposal 1 and 3.

The current regulations allow all producer-handlers under Order 124 and 131 to be exempt from the minimum pricing regulations. Kroger Company believes that market conditions that prevail in these orders establish the necessity to implement new regulatory guidelines that revise the status of producer-handlers.

In these two Federal Orders, producer-handlers are processors in the Class I fluid milk and are entering into direct competition with regulated handlers.

In today's market environment, the producer-handlers enjoy a competitive advantage by avoiding the minimum pooling and pricing provisions of these orders.

A pool distributing plant must remit to the pool the Class I order price as established by the Market Administrator. In comparison, the ability to avoid regulation allows a producer-handler to determine their cost of raw milk at a price well below the announced Federal Order minimum Class I price. In theory, the producer-handler can establish their raw milk cost at any level between the announced regulated Class I cost and their cost of production if they wish. This flexibility of determining at what level you establish your raw milk cost is a huge advantage when competing for sales in the market.

The customers of producer-handlers enjoy the benefits of these reduced costs. The competitive relationship in the retail markets where customers of producer-handlers compete with retail outlets supplied by regulated handlers have been altered.

The Kroger Company has been forced to respond to market situations created when producer-handlers supply retail competitors. In both Arizona and the Pacific Northwest markets, retail operations owned and operated by the Kroger Company are forced to respond to market conditions which are dictated by retail outlets supplied by producer-handlers. Our retail competitors that are supplied by producer-handlers have the ability to reduce their retail price while maintaining an adequate profit margin. If our retail outlets reduce milk prices to match their competitor supplied by a producer-handler, their margins are eroded.

The Kroger Company is well aware that we do business in one of the most competitive economic environments in the American economy. Within that environment, fluid milk is one of the essential categories that determine our ability to effectively compete in the marketplace.

On a category as essential in our stores as fluid milk, it is imperative that we compete on a level playing field. The ability to avoid minimum pricing in pooling provisions that the current regulatory environment provides a producer-handler destroys that level playing field and presents their customers with a significant competitive advantage.

The regulated price of raw milk is 70 percent of the cost of a gallon of fluid milk marketed at our retail outlets. Competitive advantages in the purchase, processing, and marketing of Class I fluid milk should not exist due to regulatory inequities that reside in Federal Milk Marketing Order Nos. 124 and 131. Producer-handlers, which exceed over 3 million pounds, supply Class I milk to the market in direct competition with regulated handlers. This inequity has provided producer-handlers and their customers an advantage that disrupts the competitive balance of the marketplace.

It is the belief of the Kroger Company that it has become necessary to reestablish the equilibrium to that marketplace.

Therefore, the Kroger Company requests the Secretary revise the Order language and implement Proposal 1 in Order No. 124 and Proposal 3 in Order No. 131.

We thank the Secretary for granting this hearing and providing the opportunity for testifying.

JUDGE HILLSON: Thank you.

Do you have questions or cross-examination for Mr. Hitchell?

EXAMINATION

BY MR. YALE:

Q. Good afternoon John.

A. Good afternoon, Ben. How are you?

Q. I'm fine.

I want to talk to you --

MR. YALE: Mr. Ben Yale on behalf of Smith Farms, Edaleen Dairy, and Mallorie Dairy.

These questions are directed to 124.

BY MR. YALE:

Q. What stores is Kroger competing with in the Northwest?

A. In the situation in the Northwest where the producer-handlers are smaller, it is somewhat different than the situation we have raised here in Arizona where we're competing against some of the larger competitors across the entire market.

The situation that we run into in 124 is that individual groups of stores run into competitors, smaller competitors, that in certain market areas, say, in parts of Portland, in parts of -- in Salem that are in direct competition with us that gives us -- that we are -- we are in competition for lower prices.

The individual stores that are there, they have not given me any exact information on that. They say they are smaller retailers. Sometimes convenience stores put smaller operations such as that.

Q. But you mentioned convenience stores. Is it not the case, though, that in the retail price of milk, that convenience stores tend to have a whole different pricing model than the grocery stores?

A. Not necessarily.

Q. You made the comment that -- I'll state it the way it's supposed to be.

I understood you to say that 70 percent of the price of milk in the store is the cost of the fluid milk.

A. That's correct.

Q. Are you aware of a study recently done by the USDA regarding retail pricing?

A. No, I'm not.

Q. Are you aware that the USDA has -- its Market Administrators have been going in to key markets within their marketing areas and taking the prices of three stores on a consistent basis to measure the price of fluid milk in those markets?

A. I'm somewhat aware of it. Let me clarify. It would be the cost of us -- not the retail price but the cost of the milk going into the store, our cost, processing and distributing.

Q. So if a gallon of milk sold for a dollar -- I'm going to use a number that's fanciful -- and the store wants a dime markup -- again, I'm not suggesting anything -- then what you're saying is that of that 90 cents, 63 cents of that is the cost of the fluid milk and the 27 cents would be whatever the distribution costs are and processing of the plant and then the dime would be the, what, the store markup? Is that how you understand it?

A. That's correct.

Q. Now, does Kroger sell milk to any independent outlets or do you sell it strictly to stores?

A. In these markets?

Q. Yes.

A. I believe in both of these markets we sell strictly to our own outlets.

Q. You made some comments about the ability of the producer-handler to, I guess, set its raw milk costs lower than the regulated price.

A. I said they have the ability to do that.

Q. They have the ability to do that?

A. Yes, sir.

Q. And do you have any knowledge that that, in fact, is what producer-handlers in Order 124 are doing?

A. I have no direct knowledge of it. We just have a concern about where retail prices are in a certain number of our stores versus what our costs are.

Q. You would agree, Mr. Hitchell, would you not, that a producer-handler -- there is a cost to that milk for that producer-handler; right?

A. Yes.

Q. And although they may ignore it from time to time, as in any business, there are real costs that they are going to have to address at some time in their operation; right?

A. I agree.

Q. And that that would be the cost of production -- the minimum would be the cost to produce the milk at the farm; right?

A. That is correct.

Q. So do you have any knowledge of whether the cost of production for a farm in the Northwest in Order 124 is less than or more than the Class I price in that market for the last two years?

A. Pure supposition on my part would say that the cost of production would be somewhat less than the Class I price in that market.

Q. But it might be more than the blend price?

A. It might be more than the blend price. Only over the last quarter the prices were extraordinarily low. At this point, I would think the cost of production is far lower than the Class I price is, say, for the month of September.

Q. But you've done no research on that to know what that is?

A. Not directly.

Q. And when it comes to a handler that is wanting to kind of follow along on this, you would agree that a producer-handler has a cost to balance that supply; right?

A. Depends.

Q. How do you say "depends"? Are there circumstances where a producer-handler doesn't have to balance their supply?

A. If a producer-handler is selling to a retail operation and the retail operation has two suppliers and the producer-handler supplies all the milk they can and the rest of the product that the store needs is balanced by a secondary supplier, they have a minimum. They have zero or almost no balancing cost.

Q. There's a proposal for 124 in language that already exists in 131 that addresses that issue; right?

A. I suppose, yes.

Q. You didn't see that proposal about it?

A. That's probably proposal 2.

Q. Yes. Right.
A. No.
Q. But let's assume that other than in that situation, a true producer-handler has the obligation to balance the supply; right? As everybody seems to describe it, whether they are small or whatever, the deal is they market all of the milk and they milk only what they market?
A. Right.
Q. You have been in the dairy industry for a long time. Isn't it true that the amount of milk that a handler in the Northwest would need, a Class I handler, would vary from -- sometimes from day to day and clearly from month to month; right?
A. It would certainly vary from month to month.
Q. Right. And during the week depending on situations, it might even vary from day to day; right?
A. In our circumstances, yes. I don't want to speak for any other retailers. But in our circumstances, yes.
Q. But the milk comes off the farm basically at a steady level irrespective of what the Class I handler wants on that particular day; right?
A. Most supplies, very seasonally.
Q. It's very seasonal.
The point of it is, is that for you, as a Class I handler, to have all of the milk you need and when you need

it, somebody has to bear that cost to balance that; right?
A. That's right.
Q. And that, in the Northwest, in your case, happens to be co-operatives; right?
A. That's correct.
Q. You don't have any independent producers?
A. We have no independent producers.
Q. You buy all of your milk from co-operatives?
A. That's correct.
Q. And you pay those co-operatives a price over and above that Class I price to cover that cost of handling; right?
A. Some amount, yes.
Q. Some amount because you recognize there's a cost associated with that?
A. That's correct.
Q. And so would you not agree that a producer-handler in the Northwest is going to have some cost associated with balancing his Class I needs?
A. I can't speak to that directly because I don't know what their supply arrangements are. Again, what I just suggested, they would have literally no balancing cost.
Q. Do you know of any handler in -- producer-handler in the Northwest that's in that circumstance?
A. I have no direct knowledge of that.

Q. Assuming that they are not trying to balance that way by giving all of their milk to a supplier and letting the retailer then go to a regulated handler to balance but whatever that retailer-handler or that retailer demands, they supply it on a day-in and day-out basis, they are going to have a balancing cost to ensure that retailer gets that volume of milk; right?
A. Of some amount.
Q. Some amount. We don't know what it is?
A. I have no idea.
Q. All right. So that would be a cost that would indicate that they have to bear that, that would come out of that Class I price; right?
A. It would come out of the cost of operation.
Q. Right. It reduces the, quote unquote, advantage of -- the economic advantage they have by not being regulated; right?
A. It might, yes.
Q. It might. Okay. Now, as a producer-handler, as a processor receiving milk in the Northwest, if you have a load of milk that is received that is inconsistent with the quality standard under the PMO or some other regulatory or even Kroger's own standards, who bears the cost of that milk?
A. We would reject it and it would be -- and then our

supplier would -- would balance that load.

Q. So as a producer-handler, if they have a rejected load off of their own farm, either you are going to have to short a customer or bear the cost somehow or another for supplying that as a handler; right?

A. I would say so.

Q. Now, are you aware of the fact that the producer-handlers that currently exist in the Northwest that are long-standing handlers in that market?

A. I'm aware that they have been for some time.

Q. Second, third, and in some cases employing the fourth generation of the family?

A. If that's the case, I have no idea.

Q. And is it your expectation that with this regulation is proposed that these producer-handlers would be able to continue to exist both as a farm and as a bottler?

A. I have no knowledge if they could or couldn't.

Q. And is it your position that if they can't be in business under these regulations, then that's just the name of the game and they are going to have to terminate one or both of the operations?

A. I would think under the current regulatory system, it would just be a level playing field and we would all be on the same level, buying milk at the same price and competing on the same level. I don't know why it would potentially end their opportunity to do business.

Q. What about -- there's a statement sometimes made in the dairy industry that volume is king, that the higher the volume, the greater the efficiencies and the better ability to compete. Is that a fairly accurate statement?

A. I would take some exception to that. We have plants that run the gamut from being as low as 7 million pounds of milk to as high as 40, and our most efficient plant is not the 40 million-pound by any stretch of the imagination. Volume helps, certainly.

Q. Do you have anything at 4 or 5 million?

A. No.

Q. And I take it none of the Kroger plants have ever been PDs?

A. We haven't had that opportunity.

Q. You haven't had that opportunity. So you don't -- I think I heard a murmur over here, you know. But you don't have -- so you don't have any knowledge of any of the costs associated with that.

And, in your professional career, have you ever worked with a producer-handler?

A. No, I have not.

Q. And as your position as procurement and the other functions you have in your job at Kroger, you haven't gotten into the analysis of the actual producer of -- cost of

production in any areas to -- any real knowledge?
A. Nothing more than informal conversations with dairymen who I know and respect as to what their cost of production is except for some of the larger farms that we do business with. As for an official analysis, no.
Q. Kroger is integrated with the stores. It's part of an integrated operation; is that correct?
A. That is correct.
Q. And a decision is made somewhere in which the cost of processing and -- processing that milk is transferred to the cost of the store; right?
A. That's correct.
Q. And that decision, is that a real simple one to make or is that one that's rife with all kind of politics between the processor and the store side?
A. Basically, what we do is calculate the cost of operating the plant, from purchasing the raw milk, processing it, sending it to the facility, cost of transportation, transfer that cost to our store.
Q. And capital cost?
A. It's a direct transfer of the product. We do -- the way our system runs, in fact, we are set up -- the stores do physically provide the milk back to us. We run a P and L.
Q. You have the option -- somebody at the highest

level gets to decide where to move that line, if they want to, to cover costs to put them on the store side or on the plant side; right? The same situation the producer-handler has; right?

A. Well, again, we have to get on both sides. Both sides have to make a profit. Our situation is we have a certain cost structure that we -- we cannot sell below the cost of the product and our cost of manufacturing within our system.

Q. You indicated that this is a competitive market situation in the dairy industry, very competitive I think was the term used.

How would you explain the fact that while it's stated that the producer-handlers have this advantage, why aren't the producer-handlers growing at a much more rapid pace if there's such an advantage in today's market condition?

A. First of all, not only stating as a processor but as a retailer -- as a retailer specifically, there is no more competitive industry in this country in my belief. As to why PDs are not growing, I think there's a whole lot of folks out there waiting to see the outcome of this hearing to determine how many we have in the next year or two.

Q. That's your supposition?

A. That's my opinion.

Q. Huh?
A. It's my opinion.
Q. I mean, you don't -- okay. Never mind.
MR. YALE: I have no further questions. Thank you, Your Honor.
MR. RICCIARDI: May I speak, Your Honor?
JUDGE HILLSON: Go right ahead.

EXAMINATION

BY MR. RICCIARDI:
Q. Al Ricciardi. I represent Sarah Farms in this hearing.
As I understand it, you are employed, based upon your statement, by the Kroger Company Dairy Group/Manufacturing Division; is that correct?
A. That is correct.
Q. Now, the Kroger Company dairy operations actually own approximately 18 plants throughout the United States; is that correct?
A. 16.
Q. Have you eliminated two recently?
A. There were two -- well, we have 18 plants for the purpose of this discussion here. We have two stand-alone ice cream pools that are not pooled under the Federal Order.
Q. And I think you said, based upon I think questions

that Mr. Yale asked you, that the amount of production is from 7 million to 40 million; is that right?

A. Per month, yes.

Q. Per month.

And Kroger Company dairy operation in 2002 had sales of approximately 1.9 billion; is that correct?

A. I don't know.

Q. Who would know that?

A. Nobody in this room.

Q. Are you familiar --

A. Yeah, I'm familiar with that magazine. That is pure supposition. We do not announce that information and we are not going to announce it.

Q. So you are not going to tell me whether you had 1.9 billion?

A. No.

Q. Am I a billion close? We're going to get to real money at some point.

A. No. That is proprietary information and I'm not going to reveal it.

Q. So you refuse to answer that question?

A. That is proprietary information and I'm not going to reveal it.

Q. So you refuse to answer my question?

MR. BESHORE: Your Honor, Mr. Ricciardi may not be familiar with the rules of these proceedings.

MR. RICCIARDI: I read them, sir.

JUDGE HILLSON: Just ask your next question.

MR. RICCIARDI: Thank you very much.

Your Honor, obviously, my point is we have large entities coming in here. That's the purpose for my question.

BY MR. RICCIARDI:

Q. If you don't want to answer that question, I understand it. We'll leave the number out there.

As I also understand it, based upon your testimony and questions asked by Mr. Yale, you sell, essentially, to your own stores?

A. That's correct, in this market.

Q. In this marketplace, in the 131 marketplace?

A. That is correct.

Q. You would compete -- Kroger would compete with Safeway in this marketplace?

A. That's correct.

Q. Do you attribute some of the overhead of the plant to each individual store?

A. No.

Q. In terms of the operation of the plant and transportation costs and other costs, are those passed on to the store?

A. In this marketplace, the stores run the transportation system, so we have a dock cost, and the warehouse delivers milk directly to the store.

Q. I think a similar question was asked of you and I'll ask that in this marketplace. Assuming, for whatever reason, a load of milk, gallons, half-gallons, whatever it is, was delivered to a Kroger store in this marketplace and it was rejected, who would bear the cost of that rejected load?

A. I think Mr. Yale was talking about raw milk and, in this case, hopefully, we would not -- we run quality checks to make sure bad milk doesn't get out.

Q. Okay. Does Kroger Company own a dairy?

A. Yeah.

Q. How many dairies does it own?

A. Well, dairy plants or dairy farms?

Q. Dairy farms.

A. We own no dairy farms.

Q. So Kroger Company owns no cows?

A. That's correct. Or we would be a PD.

Q. If you want to invest in the cows, you could become a PD?

A. In theory, but I have members of Congress telling me if we ever try it, there will be some bills put in the hopper pretty quick to make sure an organization of our size

can't do it.
Q. We're not sure exactly what that size is?
A. Well, any of our plants would be over 3 million pounds.
Q. Every one of the 18?
A. 16 fluid plants, yes.
Q. How much over the 3 million would they be?
A. Between 7 and 40 million.
Q. Okay. Do you know what the cost of production of a producer-handler is in the Order 131 area?
A. No, I do not.
Q. Do you know what the balancing cost for producer-handlers are in the 131 area?
A. Not directly, no.
Q. Give me a minute to take a look at your statement and I will get it back to you.
Thank you.
You indicate in your statement, I believe it's the second page, and I'll get it up to you if you want to look at it, in theory, the producer-handler can establish their raw milk cost at any level between announced Federal Order minimum and the cost of production if they wish?
A. Yes.
Q. You say that in theory that they could do that?
A. They could do that.

Q. In theory, Kroger could set its prices from its production plant to its retail stores at any prices they wanted to; right?
A. No.
Q. Why not?
A. Not in our system.
Q. Why not?
A. Because we would have to make a profit.
Q. So profit -- profit-driven business is what Kroger is operating?
A. That's correct.
Q. And you would agree with me that making a profit is not a bad thing in the United States of America?
A. Oh, no.
Q. That, in fact, there is not only profit as a theory, but it's also critical if a business is going to continue to operate?
A. I would agree with that.
Q. And that there are always costs of operation, costs of production, et cetera, in terms of selling any product, including milk?
A. I would agree with that.
MR. RICCIARDI: I don't have any further questions. Thanks.
JUDGE HILLSON: Any further questions?

Yes. Go ahead.

MR. BESHORE: Marvin Beshore. Good afternoon. John.

EXAMINATION

BY MR. BESHORE:

Q. John, who are the -- what types of entities are the Kroger Company's competitors for the consumers' purchase of fluid milk products?

A. Our competitors range from the size of certainly the largest retailer in the world, Wal-Mart, to someone as small as a gas station that sells milk outside of its -- you know, as a food mart from a gas station.

We have been asked in my position at times to react to retail prices on the street from organizations of both sizes, of all -- from many different sizes. Convenience stores we certainly take note of, especially with our own convenience stores in certain markets of the country, and of course what most people would call our competitors, being the same type of food retailers ourselves.

As I said in my statement, the competitive landscape in that part of my company of this industry has changed drastically since I started this job in 1987. In 1987, Wal-Mart was not one of our major competitors. I don't have to tell anybody what they are today.

An organization like Costco is now one of our major competitors. They certainly are in the Southern, Western and -- Western United States after our merger and, again, there have been some of the smaller entities that most people feel that you would not take a look at. We do because we do have to be competitive on milk on a daily basis.

Q. And, therefore, in a competitive marketplace, as you've described, if an entity, because of its exemption from regulatory minimum prices, is able to put fluid milk products into competing retail outlets at prices you cannot possibly match because of your regulated costs, that could be a problem for you?

A. Yes, that would be.

Q. And certainly if that entity was able to put those products into those stores utilizing the value of its regulatory exemption, put those products into stores at a volume level of 3 million pounds per month on a Federal Order market, that would be a competitive issue for you?

A. Yes, it would.

Q. And if that competitor, that exempt entity, put those products into, for instance, Costco stores as what you've mentioned at prices which you could not match given your regulatory costs, that would be a competitive problem for you?

A. It is a competitive problem.
Q. It is a competitive problem. In this market?
A. In this market.
Q. And not just for you, that is, the Kroger Company, but for every other regulated handler in the Order?
A. I really don't want to speak for anyone else, but it is for us.
Q. Well, you are a very knowledgeable person in this -- in terms of, you know, across the country and competition in these regulated markets. Is there any way that it could not be a problem for any regulated handler?
A. I would assume so.
Q. And just assume with me for a moment -- well, you've been here all day. You're aware that the Market Administrators's information shows that there are many fully regulated pool plants in Order 124, for instance, that are not as large as the Kroger Company by any means and that are smaller, on average, than the largest producer-handlers in the Order? You're aware of that data?
A. Yes, I am.
Q. Would they be in a difficult competitive situation against the producer-handlers of equal or greater volume that are unregulated?
A. I would assume so.
Q. Is there any way they could not be competitively

pressured?

A. I wouldn't think so, but I'm not here talking about it.

Q. In your view, if there is no limitation in terms of volume on the expansion of an unregulated exempt entity, is it possible for Federal Orders, as we know them today, to survive?

A. I would think it would be very difficult. I think we would probably start individual but I think it would be very difficult over time, as producer-handlers spread, for the regulated market as we know it today, to survive simply because we have to be competitive. Those in this industry, we have to be competitive with a similar raw cost. And right now the situation is in 19.9 percent of the situation when we have to compare -- when competitive situations occur at the retail level, I can go back, at least get a minimum cost that all of our competitors pay because of federal assistance except here where we have a major retail competitor supplied by an organization that is not -- that is exempt from pricing.

So under these circumstances, we do not know what they are paying and we can only surmise the fact that they are using that exemption as a benefit to their customer to have lower retails on the street, forcing us either to not lower retails and lose business or lower our retails and reduce our profit margin.

Q. Would it be your view that an estimate of the benefit of that regulatory exemption is basically the difference between the producer blend price and the Order of the Class I price?

A. That would be a fair assumption.

Q. Do you pay, in both of these orders, amounts over the minimum prices for your raw milk supply?

A. Yes, we do.

Q. And if the situation was posited to you by Mr. Yale that you reject a load of milk, a load of milk is rejected, your supplier bears that expense; is that right?

A. That's correct.

Q. If you need to order additional loads of milk, is it frequently required that you pay additional costs for spot loads or loads over and above your requirements in some cases?

A. In Order 131 it is not. In Order 124, how that cost is -- how we come to that cost, even day receipt credits, where we place an order the week in advance. And if we do not vary from that order, we get the credit if any order of that credit is reduced to help offset the cost of balancing our plants specifically.

MR. BESHORE: Thank you, John.

FURTHER EXAMINATION

BY MR. RICCIARDI:

Q. I'm Al Ricciardi for Sarah Farms, once again.

You used an example of Costco in this market in Federal Order 131 in your last testimony. Do you remember that?

A. Yes, that's correct.

Q. You don't know what Costco was paying for its gallon of milk; correct?

A. I do not know that, no.

Q. You don't know what Sarah Farms is selling?

A. I do not know that.

Q. You don't know what Costco's markup is on its milk; correct?

A. No, I do not know that.

Q. Do you know what Kroger's markup is?

A. Not in this market, no.

Q. Can you tell us whether or not it is more or less than 10 percent?

A. No, I really don't know. In my job, I stay as far away from retail prices as I can.

Q. I understand why.

The possibility exists, however, that Kroger's markup in this market is larger than Costco's, for example; correct?

A. I don't know.
Q. And the possibility also exists that Costco may, at various times, use milk as a loss leader regardless of what it pays for it; correct?
A. That's possible, yes.
Q. So, again, you just don't know what their profit margin is. You can't compare it to Kroger's profit margin. You don't know what they are paying for the milk, et cetera; correct?
A. No, I don't know.
MR. RICCIARDI: Nothing further.
JUDGE HILLSON: Anything else?
Don't forget to identify yourself.
MR. RITCHEY: Alan Ritchey with Alan Ritchey, Incorporated.

EXAMINATION

BY MR. RITCHEY:
Q. If you had a chance to buy milk in the Phoenix area, say just hypothetical, 20 cents a gallon cheaper than your cost of production through your plant, would you buy that from a producer-handler?
A. Would our stores?
Q. Yes.
A. I don't know. I don't make those decisions.

Q. But do you think it's possible you would?
A. I don't know.
Q. If you wouldn't, I don't see how you can say anybody else has an unfair advantage.
I mean -- one other question.
A. I didn't say I wouldn't. I said I don't know.
Q. Now, in the plant that -- for instance, stores in Phoenix, do you all provide more than one brand of milk?
A. Do you mean more than one label? I think we have two labels here. I think. I'm not certain. I know we bottle the Fry's label and I think we may have Mountain Dairy here, but I'm not certain about that.
Q. And do you sell both of those to retail customers at the same price?
A. I don't know.
Q. But as a rule, do you sell at the same price for different labels?
A. There are some plants where we manufacture products that are a label product that would be a brand product on a retailer basis, and those items would probably not be sold at the same cost. But in this market, I don't know. I don't know who transfers the milk from the plants to the stores.
Q. But it is true that both of those labels contain the same thing and it is the same milk; right?

A. Yes, that's true.

MR. RITCHEY: Okay. No further questions.

JUDGE HILLSON: Go ahead, Mr. English.

EXAMINATION

BY MR. ENGLISH:

Q. Mr. Hitchell, you were asked questions with respect to balancing with respect to wholesale customers. Were you in the room when I discussed this issue with Mr. Wise earlier today?

A. I'm not sure.

MR. ENGLISH: Okay. Thank you.

JUDGE HILLSON: Okay.

Mr. Hitchell. You may step down, I believe.

(Witness excused.)

JUDGE HILLSON: I have on my list the testimony of Michael Marsh.

MICHAEL L. H. MARSH, C.P.A.,

a witness herein, having been first duly sworn by the Judge to speak the truth and nothing but the truth, was examined and testified as follows:

JUDGE HILLSON: Will you please state and spell your name for the record?

THE WITNESS: Michael Marsh, M-I-C-H-A-E-L, M-A-R-S-H.

JUDGE HILLSON: You may testify.

EXAMINATION

BY MR. BERDE:

A. Thank you, Your Honor.

My name is Michael Marsh. I am the Chief Executive Officer of Western United Dairymen. Western United Dairymen is the largest producer/trade association in California representing approximately 1100 of California's 2000 dairy families.

I am also a Certified Public Accountant licensed to practice in the State of California.

Western United Dairymen is a grass-roots organization headquartered in Modesto, California. An elected Board of Directors governs our policy. Board members ship milk to all types of plants, and many effectively serve the industry on other boards. Our testimony was presented to the Board of Directors on September 12, 2003, for review, modification, and approval.

We are not here to testify as experts on the Federal Order system, nor do we plan to elaborate on specific data, as proponents will do be an excellent job at both. We are here, however, to express our support for the proposals put forth by United Dairymen of Arizona and the Northwest Dairy Association. We also hope to provide support for the regulated system in place in the dairy industry as well as to offer information on the way producer-distributors, or producer-handlers as referenced in the Federal Orders, are handled in California.

Western United Dairymen is in support of the regulated pricing and pooling system that has been established in both California and Federal Orders. The Agricultural Marketing Agreement Act of 1937 was established to bring about orderly marketing of dairy products. It provides authority for supplying several methods to achieve purposes such as:

One, to bring all distributors, which are handlers, in a prescribed marketing area under the scope of the regulatory mechanism, or the Order; two, to place all the handlers in the same competitive position by requiring the use of minimum prices for milk entering the same use, which is classified pricing; three, to provide for a uniform price for all producers under marketwide pooling; and, four, to extend classified pricing and pooling plants to all handlers and producers in a prescribed marketing order to overcome instability in fluid milk pricing.

A complex regulatory framework has been established to carry out these goals that has, for the most part, proven beneficial for both producers and processors in many ways. This complex regulatory scheme extends even to the marketing and promotion of dairy products. However, the system is not without imperfections, and as things have changed since its original implementation, changes to the framework have been made as well. Clearly, we're here today to discuss additional changes that need to be made to the system to assure the goals outlined above are still being met.

Outlined above is the reflective intent of Congress to place all handlers in the same competitive position through classified pricing and to provide uniform prices to all producers through marketwide pooling. It is clear, however, that not all processors and all producers are treated the same. This is due to many different pricing and pooling provisions in Federal Orders. Obviously, among the list of those treated differently are producer-distributors, or producer-handlers, who have historically been exempt from minimum pricing and pooling provisions as outlined in the Federal Order Reform Final Decision.

A primary basis for exempting producer-handlers from the pricing and pooling provisions of a milk order is that these entities are customarily small businesses that operate, essentially, in a self-sufficient manner. Also, during the history of producer-handler exemption from full regulation, there has been no demonstration that such entities have an advantage as either producers or handlers so long as they are responsible for balancing their fluid milk needs and cannot transfer balancing costs, including the cost of disposing of reserve milk supplies to other market participants.

With several of the PDs now reaching, or producer-handlers rather, now reaching larger sizes than independent fluid processors in both the Pacific Northwest and in Arizona-Las Vegas orders and the potential for further exploitation that this regulatory loophole represents in other areas of the country, clearly the original definition of producer-handlers has changed.

It is hard to argue that all PDs, or producer-handlers, are small businesses with no, quote, advantage as either producers or handlers, end quote. In fact, large PDs are currently using their regulatory exemption to acquire a competitive advantage over other processors, effectively taking greater and greater shares of the Class I market in both Federal Orders being discussed here. As the Class I markets are captured by exempt PDs, pooled milk is forced into other outlets, such as manufacturing purposes, directly impacting all markets and fomenting instability.

Western United Dairymen supports producers in endeavors to increase their profitability, including those who have successfully put together vertical enterprises such as a PD. However, we also support the regulatory framework in place that has made the success of all producers in the nation possible. We cannot sacrifice the success of all for the success of a few. Clearly, a growing unregulated island within a sea of regulation directly challenges the pricing and pooling systems in place.

California has put together a unique system that has allowed PDs to prosper while, at the same time, protected pooling for other producers in the state. It is apparent that Federal Orders need to also do something to address this situation immediately.

With regard to Proposals 1 and 3, Western United Dairymen is supportive of Proposals 1 and 3 which seek to place a cap on producer-distributors in the Pacific Northwest and Arizona-Las Vegas marketing orders.

Producer distributors, like most other business in the United States, have undergone rapid transformation. Many of the PDs that are currently exempt in the two Federal Orders are much different than the PDs that existed at the time that laws governing PDs were put into place. It only seems equitable that PDs who are a far cry from small family businesses participate in the pool, as do their competitors.

The consequence of the market instability created by the regulatory loophole for PDs is dire for consumers, processors and producers.

A little bit about California's solution for producer-distributors or producer-handlers. California's milk pricing and pooling history is not much different than that of the Federal Orders. Prior to 1969, producers competed fiercely to supply Class I plants in order to receive the highest price for their milk. Much like in Federal Orders, this situation led to many disorderly marketing practices. In 1969, the California legislature passed the Gonsalves Milk Pooling Act in order to stabilize the milk market.

It wasn't long ago that California faced a similar situation with growing PDs and corresponding increased exemptions from the pool. When the Gonsalves Milk Pooling Act was enacted in 1969, 49 PDs operated in the option exempt classification. They represented a combined exemption of 109,000 gallons per day, or equal to about 28.1 million pounds per month in a 30-day month, representing an average exemption of about 573,918 pounds per month.

Following the implementation of the Gonsalves Milk Pooling Act, several legislative actions changed the way PDs were handled in California, all with outcomes that allowed PDs to grow unabated without any obligations to the pool.

Over the years, the number of PDs was reduced dramatically but the processing capacities of those remaining grew rapidly. Those PDs that went out of business were able to sell their quota to other producers in California.

By 1995, six option-exempt and two fully exempt, with sales less than 500 gallons per day, PDs were operating in the State of California. The remaining six larger PDs had combined daily exemption of 87,080 gallons per day, or equal to about 22 million pounds per month in a 30-day month, representing an average exemption of about 3.7 million pounds her month.

Given the potential for unharnessed growth, by 1995, these six PDs were a direct threat to the stability of the California pooling system. The liberalized rules governing PDs were severely detrimental to California's dairy producers, processors, co-operatives, and consumers. Not only did the escalating Class I exemptions financially drain the over 2,000 producers in the state, but it also created an unfair competitive advantage for PDs over other fluid processors. Clearly, robust competition, not unfair regulatory advantage, is healthy for the entire industry.

In 1995, in order to correct the advantage inadvertently created for California PDs, a final piece of legislation, Senate Bill 105, was passed that capped the exemption volume for PDs as of March 1, 1995.

Today, there are two categories in which California PDs fall. As in Federal Orders, exempt producer-handlers are, similarly, not responsible to the pool for any of their Class I production. This would be similar to the situation in the Arizona-Las Vegas Order or the Pacific Northwest Order.

To qualify as a fully exempt producer-handler in California, they must own both the production and processing facilities; own farm production, their own farm production, must be less than 500 gallons per day for a 12-month period; or have sales averaging less than 500 gallons per day for a 12-month period.

Only two Class I processors in California qualify as fully exempt producer-distributors. They have exempt sales of less than 200,000 pounds per month combined.

There's also a separate and distinct category of producer-handlers. Producer-handlers who do not meet qualifying requirements for full exemption but have common ownership of the production and processing enterprises operate under another option-exempt classification.

Option-exempt producer-handlers are responsible to the pool for only the Class I production that is not covered by the exempt quota which they own or which they have purchased.

Producer-handlers operating under this option have their original pool quota plus any quota purchased prior to March 1, 1995, deducted from their Class I obligation to the pool. As long as they have not transferred any quota, an additional daily deduction of 150 pounds of fat and 375 pounds of solids-not-fat is made from such sales. The remainder of all production and usage is subject to pool accountability. This option does not impose any restrictions on retail sales or purchases from outside sources.

Five Class I processors in California operate under this option-exempt category. They have combined exempt sales of approximately 22 million pounds of Class I each month. This represents 4 to 5 percent of California's total Class I sales.

Through these two categories, California's system places an effective cap on producer-distributors in the state. Either a PD is rather small and, therefore, fits under the fully exempt category, or it is larger and able to qualify for some exemption. The exemption is a combination of the PD's original quota issued plus any quota they may have purchased prior to 1995. Any of the PD's production beyond this amount is subject to the pool. A PD can grow as large as they like; however, their exemption is fixed to a historical level. Also, regulation does not allow entry of any new PDs or acquisition of exempt quota.

And this has been a real problem in California because, indeed, we had to go to the legislature in order to make these changes to stop the unabated growth of PDs in California.

There is a need for a federal solution. Undoubtedly, PDs are handled much differently in California than in Federal Orders. While we are not advocating that the California system would work for Federal Orders, we are confident that the issues facing California in 1995 were very similar to those being discussed at this hearing. Clearly, when faced with a similar situation of growing PDs acquiring increasing exempt sales, California was able to adjust the regulation concerning PDs in order to protect the integrity of the California pooling system. It is time the Federal Orders address the same issue and adopt the proposals put forth by both NDA and UDA.

With regard to Proposal No. 4, simultaneous pooling on Arizona-Las Vegas and a state-operated order, we are supportive of Proposal Number 4 as put forth by UDA which eliminates simultaneous pooling in the Arizona-Las Vegas order. The idea behind pooling was to provide uniform prices to all producers. The loophole created by double-dipping is allowing some to take advantage of the system to acquire additional revenues beyond what they would receive from normal participation in the pool. Most often, those partaking in these schemes are not even servicing the Federal Order, yet they are drawing revenue from other producers who are.

This action directly threatens the stability of the Federal Order pooling system and diminishes support from participating producers. This practice has recently been eliminated in the Northwest, West, and Midwest Orders, and should be eliminated in the Arizona-Las Vegas Order as well.

This concludes my testimony. I am happy to entertain any questions.

Q. When California decided to cap the exempt producer-handler provision at 500 gallons per day for a 12-month period and 500 gallons per day for a 12-month period for average sales, that was a legislative judgment of whatever body undertook to make that determination; is that correct?

A. That's correct.

Q. Do you know what considerations went into that decision?

A. I believe that the considerations that went into the decision were with regard to the small business enterprise and the size of the entity. And 500 gallons a day, clearly those types of operations were small family businesses as almost anyone would agree today.

Q. And if the average farm production, if a bank producer exceeded 500 gallons per day, 501 gallons, that would result in withdrawal of the producer-handler designation?

A. Absolutely.

Q. And the same is true with the increase in average sales to more than 500 gallons per day?

A. Yes.

Q. Withdrawal of exemption?

A. That is correct.

MR. BERDE: Okay.

MR. YALE: Good afternoon, Mike.

MR. RICCIARDI: Hold on a sec. If you don't need the statement in front of you --

JUDGE HILLSON: I'm sure the reporter knows everyone's name by now.

MR. YALE: I am Ben Yale on behalf of the Northwest PDs.

EXAMINATION

BY MR. YALE:

Q. You talked about some differences between California and the Federal Order system and you mentioned quota. There is within the California system this ability of a producer to own quota; is that right?

A. That's correct.

Q. And what does the ownership of quota get you?
A. The ownership of quota assures a return of the overbase price plus $1.70 modified by the original quota adjusters that are included within the original producer's area.
Q. And is this quota commonly traded amongst producers?
A. Yes. Now, of course, that's different than the quota that may be issued to a --
Q. I'm not talking about producer-handler quota. I'm talking about straight producer quota.
A. Yes, that's correct. Excuse me. Subject to some limitations with regard to the amount of quota that is transferred to the handler at that individual time.
Q. What is that?
A. Ben, I think it's a certain number of pounds that there's a limitation on. We have to transfer so much at one time.
Q. And how is that price -- do you have any idea how that price is arrived at between -- is that a set price? Does the Department say this is what you have to pay for quota?
A. No, that's negotiated between buyer and seller.
Q. And what is the value of that quota? I mean, that is purchased. I mean do you know roughly how that is

derived?
A. Yes. It varies, Ben, with the marketplace.
Q. I mean, is it capitalized with a return of the difference between quota and overbase or do you know?
A. Well, it's interesting. Because in looking at financial statements prepared by dairy producers, there's almost inevitably it shows up as an asset on the balance sheet. Banks lend typically against the quoted value that the dairy producer holds and there is some value that is tangible to that asset and, again, that -- as it is transferable. It's similar to a stock or some other type of investment.
Q. Does the Department report -- I mean, I'm talking about the Department. Let's talk about the California Department of Food and Agriculture. Does it keep track of those transfers and the prices they are?
A. Yes, they do.
Q. And they make those available on a Web site that you can call up and see?
A. Yes, I believe they do, Ben.
MR. YALE: All right. Your Honor, I have an exhibit I would like to have identified.
JUDGE HILLSON: All right. I think we're on Exhibit No. 19.
(Exhibit No. 19 marked for identification.)

BY MR. YALE:

Q. I'd like to show you what has been marked as Exhibit 19. Take a look at that. I'll tell you I've taken this off of the Milk Pooling Web site.

Have you seen this before?

A. No, it's not.

Q. That's fair.

Do you ever see a summary of these transactions?

A. Actually, I have but in a different format. CDFA publishes a monthly publication -- I'm trying to think of the name of the publication -- where they essentially provide a synopsis of some of these transactions. I have staff that help facilitate some of the transactions, but that's the extent of my involvement through transfers.

Q. And that report, is that available on their Internet site?

A. I don't know. Is this where you got this?

Q. That's where I got this. You're not familiar with that?

A. No.

MR. YALE: Your Honor, I will provide the Web site. If we can't have this admitted, I'd like to have this admitted as an exhibit.

JUDGE HILLSON: You haven't tied it to anything in terms of any of his testimony at this point.

MR. YALE: Well, he's talked about the price, that this is the price of quota. This is the value that quota is traded.

BY MR. YALE:

Q. Is that not what this represents, Mr. Marsh?

A. I don't know. This is the first time I've seen this.

MR. YALE: All right. I'll withdraw it. I'll save everybody a lot of grief.

We'll ask for official notice that the CDFA, California Department of Food and Agriculture's Web site that defines trading of quota in that marketplace. It talks about the qualification or the pooling of milk in these different orders. We can -- we'll deal with another witness. I'm not going to waste a lot of time.

JUDGE HILLSON: Do you plan to put this document in?

MR. YALE: I'd like to leave it in. I'll have another witness talk about it.

JUDGE HILLSON: At this time, then maybe it will be withdrawn.

MR. YALE: Well, it's there. It's numbered. If somebody comes up, we can deal with it as the time comes.

JUDGE HILLSON: We'll save the number but I won't admit it at this point.

MR. BESHORE: I don't think whether it's admitted or whether the Web site is noticed, it doesn't have any relevance to the proceeding. The price is quoted in California.

MR. YALE: This witness testified about the double-dipping and the double-dipping comes from this quota right here.

MR. BESHORE: Proposal 4, not, 1, 2, or 3.

MR. YALE: And he testified about it, Proposal 4, and the double-dipping, and this deals expressly with double-dipping.

BY MR. YALE:

Q. It's your position, is it not, that a person should not be able to have milk, sell it to a Federal Order, and then receive quota? That's your position?

A. It's our position that something -- changes to the Order, the Arizona-Las Vegas Order, similar to those changes that were made in the Northwest, West, and Midwest Orders with regard to double-dipping should take place here as well.

Q. The producer in California, if they are fully pooled in California, receives either a quota base or an overbase price; right?

A. No.

Q. What else do they receive?

A. They typically would receive either the -- well, a blend, probably not both. The producer can have quota. The producer can have no quota or part of his milk is covered --

Q. I misstated the question.

The amount of milk for a given producer on the milk that he delivers, he's either going to receive an overbase price on some of that or all of that milk and a quota price on the remaining amount of that milk under the pooling system; right?

A. Yes, that would be more correct, subject to regional quota adjusters.

Q. Have you done any tracking? Is the Class IV or the overbase lower than the Federal Order Class III price generally?

A. I would -- for a period of time, since Class -- let's see. Of course, the difference in nomenclature that IV B--

Q. Right.

A. Over the past five years, there's an extended period of depressed prices in the cheese market, as I'm sure you're aware. I'm trying to think when that would have been where the overbase price would have been lower than the IV B price or Class III price until quite recently when I finally saw some recovery in the cheese markets.

Q. The point is, a producer in California who

receives a pool benefit under the California system, if it's overbase, has the risk of receiving less than the Class III price under the Federal Order program; right?
A. Oh, sure, because our system is different than the federal system.
Q. All right. Let's change subjects. Let's go to something else.
You talked about this as being fair, the PD is not being fair to the consumers. And, again, how are the PDs in the Northwest territory not being fair to consumers?
A. Well, I think that if -- well, as you think of it, unabated growth in producer-distributors such as you have available to them now in the Arizona-Las Vegas Order as well as the Pacific Northwest Order clearly puts at risk the stability of the market, the marketing order itself.
As that takes place, you would expect to see an increased or a decreased competition among the processing community, rather an increase in competition. When you have increased competition, it typically ends up in a better situation with regard to consumers.
I think probably something that is analogous in the recent past is if you consider a situation like automobiles. Automobile manufacturers have excess inventory. They are working hard to try to move cars and move SUVs, move pickups, whatever. They have increased the

competition by adding additional incentives in order to move the inventory out to the consumer. But that's what it means.

So if you have unabated growth and you have further consolidation of producer-distributors, and producer-handlers in Federal Orders as you call them, that clearly will ultimately end up with consumers on the losing end of the spectrum.

Q. So consolidation of regulated handlers is a good thing and consolidation of producer-handlers is a bad thing. Is that your testimony?

A. No, absolutely not. I'm not certain that the consolidation or the elimination of competition either, if they are regulated or not, is a positive thing. I think that having opportunity there with everyone using the same playing field, the same regulated playing field in this situation is imperative.

Q. How many new dairies, bottling and processing plants have started in California in the last five years?

A. I don't know.

Q. None, isn't that the answer?

A. I don't have any idea, Ben.

Q. How many new handlers of Class I milk would their processing in California have started?

A. I sure couldn't tell you. We have some litigation that's ongoing because we've got -- we have a problem with regard to milk coming in from out of state that is supplying our Class I market. So perhaps if that wasn't taking place, perhaps we would have additional need for the capacity, bottling capacity in California. But there's a regulatory loophole we're trying to address as well.

Q. Have you looked at the history of PDs in terms of being one of the entries into the processing market in terms of being the new kid on the block, so to speak?

A. No, I haven't, Ben. I know that actually, if memory recalls, in 1969 we had 92 PDs in California. In 1995 when the cap was applied, there were eight. In 2003 there are seven, as of today. So there has been relative stability put in place in California with regard to producer-distributors and producer-handlers with the advent of a cap.

Q. Going from 93 to 8 is stability?

A. I think, as you'll also recall, from 1969 -- 1969, goodness, we probably had 5800 dairies in the State of California. Today there are probably less than 2,000.

Q. That brings up another point. You make the statement that --

A. Excuse me. If I can just add to that. Of course, most of the PDs at that time in 1969, Ben -- thank you for reminding me -- were at 500 gallons. That was their size.

Q. What was the average size of a producer in 1969?
A. They were very small. I couldn't answer you.
Q. So you made a statement in your testimony that when the producer-handler thing -- the exemption was provided, that nobody saw them as anything but a small business or small entity. Is that a fair characterization of your testimony?
A. I think that was one of the -- recalling what I've read about it, in 1969 that was one of the considerations. There was also political consideration that went -- that was taken into account there as well.
Q. What about 1937 when the AMAA was passed?
A. My -- most of my experience with regard to the AMAA 1937 act is with regard to Ullman's. I used to work for the federal market order and Ullman's.
Q. Going back to this idea that the intent that they wouldn't be any bigger, I mean, was there any intent that producers be as big as they are in California when the AMAA was passed?
A. You know, I couldn't speak to that. Congress' intent in 1937 with regard to market conditions coming out of the Great Depression clearly are different than they are today. The economy of the United States and the population is quite different, too.
Q. Do you have members of Western United that have

5,000 cows?
A. Absolutely.
Q. Do you have some that are 10,000 cows?
A. I believe so.
Q. All right. Are those --
A. Including dry stock.
Q. Are those small family farms?
A. Yes. Excuse me. They are not small families. They are family farms.
Q. All right. Should they have any different regulation on them than a small family farm?
A. Some in the industry would suggest --
Q. I'm asking what you suggest.
A. Well, my opinion is directed by my Board of Directors, and they haven't indicated what my opinion should be on that.
Q. You did an excellent job.
Are you aware of how the United States Department of Labor or Department of Commerce has measured the size of a small processor?
A. No, I'm not.
Q. Are you suggesting the Department use a number different for defining a small processor, different than what the Department of Commerce is for small businesses?
A. I don't know either one so I really couldn't

opine.
Q. Is the WUD's position that small family businesses that include a producer function be put out of business by assessment of a higher cost?
A. Well, absolutely not. And we're not talking about an assessment of a higher cost. We're talking about a level playing field. That, at this time, is distorted because of a regulatory loophole in the Federal Orders.
Q. Are you aware of what the estimated imposition is going to be on producers in the Northwest if the proposal of DFA and Dairy Gold is implemented?
A. My guess is that based upon the relative size and the potential for unabated growth on those PDs, it would be very positive to producers in the Northwest.
Q. What about the producers that -- the existing producer-handlers?
A. I couldn't speak to that. I have not had access to the financial statements.
Q. But have you looked at the -- I mean, you don't need the financial statements if you know we've got testimony here that there is about a 5 million-pound average and there's a Class I price and a blend differential comes out to about 1.2 million a year.
A. That wasn't my testimony, and I've not analyzed those numbers.

Q. During the last two years, is it safe to say that producers in California have not been profitable?

A. During the past 19 to 20 months, I would say that that's probably been a pretty fair statement. There are some that I saw financial statements on, some we did the other day that, amazingly, their cost per hundredweight was about $8.34.

Q. Now, that is an amazing number.

A. That is.

Q. One of the things that happens in California that you need to compare to the federal government is that there is an analysis made of cost of production, audited farms; is that not correct?

A. Yes. Well, it's not an audit, because an audit is a test function which is governed by Generally Accepted Auditing Standards promulgated by AICPA.

Q. But there are people -- aren't they called auditors?

A. It's pretty loose.

Q. Okay. I'm -- from a CPA, I accept that.

But the California Department of Food and Agriculture has employees that goes out to farms, what, about 225 I think it is or something like that?

A. That's -- they have a fairly good size sample.

Q. And they go out and they check the records to try to make sure that the number that they come up with as the cost of production is as accurate as possible; is that correct?

A. Yes. The cost of production, of course, within the California system is not a determining factor in our pricing system.

Q. Oh, I understand that. But my point is that you're aware that they make those?

A. Sure.

Q. All right. Very well. And that those prices are reported by CDFA?

A. Yes.

Q. And do you ever see those forms?

A. No. I see the compilations.

Q. You see the compilations?

A. Right.

Q. And those compilations are sometimes used by WUD and other dairy producer organizations when you go before the Department and argue for changes in pricing; right?

A. I don't believe they have been used by Western United Dairymen since I've been with Western United Dairymen, October 1999. Now, other producer groups might support a variable, make allowance or something else they might use, those type of numbers, but we haven't.

MR. YALE: I've got two more exhibits, Your Honor, I would like to have --

JUDGE HILLSON: I'm wondering if this might be a reasonable time to break for the night. It's five minutes to 6.

MR. YALE: I can break at any time.

JUDGE HILLSON: He's only the first person questioning this witness. And I have a funny feeling that, judging by past performance, that we have an half-hour or so to go. You don't mind staying?

THE WITNESS: No. I'm leaving right away.

JUDGE HILLSON: Smile when you say that.

THE WITNESS: Yes, Your Honor.

JUDGE HILLSON: My thought, then, is that we'll break for the night. We'll reconvene at 8 a.m. tomorrow. The first thing we'll do is finish Mr. Marsh and then I think we have Mr. Hollon.

And I think first thing tomorrow at 8 o'clock, before we even go on the record, I will try to figure out what our schedule is going to be for tomorrow in terms of what the witnesses are. I think we'll have a better sense of how long this whole proceeding is going to go, whether we could even possibly finish on Friday if we went all day. I have a sense that maybe we couldn't and we may have to finish up at a later date. I don't know.

MR. YALE: The only witness that we know of is finishing Mr. Marsh and Mr. Hollon.

JUDGE HILLSON: I have two other people that told me that they wanted to testify today but that was at 9:30 this morning. I sense that there might be other people calling witnesses, but I don't know that right now at this point.

MR. YALE: Maybe -- and I'm not trying to get out of line, but maybe by noon tomorrow people could at least indicate who they think is going to testify so we could get some kind of idea.

JUDGE HILLSON: I'm hoping we can do that tomorrow morning.

(Whereupon, these proceedings were recessed at 5:58 p.m.)

STATE OF ARIZONA)
) SS.
COUNTY OF MARICOPA)

I, Elaine M. Cropper, hereby certify that I was present at the captioned proceedings; that I made a shorthand record of all oral matters had and adduced at said proceedings; that thereafter, the transcript of said proceedings, pages 1- 272, inclusive, were reduced to typewriting under my direction, and that the material contained herein is a true and accurate accounting of said matters, all to the best of my skill and ability.

DATED at Phoenix, Arizona, this 24th day of October 2003.

____

Elaine M. Cropper
Certified Court Reporter
Certificate No. 50491