

DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

Milk in the Upper Midwest Marketing Area;)
Hearing on Proposed Amendments to)
Tentative Marketing Agreements and Orders)

Docket No.: AO-361-A-35; DA-01-03

INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law are submitted on behalf of Proponents (see Exhibit 21) of Proposal number 1 in an effort to prevent continuation of a manifest injustice and disorderly marketing conditions in the Upper Midwest order – the double pooling of milk on both the Upper Midwest Federal Milk Marketing Order and a marketwide equalization pool maintained by a state government. The existence and large magnitude of the double pooling problem is simply not in genuine dispute. The impact on the Upper Midwest milk pool is also undisputed. The loss of producer income to those serving fluid milk handlers in the Upper Midwest is large and growing. The inability of at least one fluid milk handler to attract milk for fluid use is unchallenged, even as the milk pool is diluted. Those participating in the double pooling (the “Double Dippers”) justify the process based upon internal business decisions and needs, or by pointing their fingers to other supposed problems that are not really the responsibility of the Upper Midwest Order.

Proponents in revised Proposal 1, Exhibit 28, rely on a simple and straight forward proposition, that the same milk may be pooled on only one federal or state marketwide pool at a time. The hyperbole of the Double Dippers is unpersuasive. The double dipping benefits are too great, and the practice is too new and suddenly way too large, to permit grandfathering or a

theoretical, but impractical, limitation to California so-called non-quota milk. The double dipping practice is too similar to practices long prohibited between or among federal milk marketing orders to permit reliance on the “we cannot control” state government “excuse.” And federal milk marketing orders have for far too long explicitly, indeed with the active assistance of a predecessor of one of the Double Dippers, defined the marketwide pool maintained by California in ways entirely consistent with Proposal 1. The simple and straightforward proposal 1 should be adopted.

Moreover, emergency conditions in the Upper Midwest Order mandate quick and decisive action by the Secretary herein. When approximately \$1.5 to 2 million per month is being siphoned off for milk which is simultaneously earning money from the California marketwide pool, and when a significant Class I handler complains of difficulties obtaining milk supplies in the Upper Midwest, disorderly marketing conditions plainly exist. These conditions warrant immediate (Proponents urge implementation by no later than October 1, 2001) action by the Secretary in the form of adoption of Proposal 1.

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Pursuant to 5 U.S.C. § 557(c), proponents request that the Secretary make the following Findings of Fact and Conclusions of Law:

Factual Background

As a result of federal regulation of milk, much of the milk produced in the United States today is produced and sold to processors or manufacturers of milk (called handlers) who pay regulated minimum prices based upon the end use to which they put the milk they purchase. The proceeds for these milk sales are then shared among all participating dairy farmers through a

system of uniform prices enforced through federal milk order pools. Participation in federal milk order pricing and pooling is based upon rules developed over 65 years of federal regulation in order to assure an adequate supply of milk for fluid use and to assure uniform treatment of participants. 7 U.S.C. § 608c(5). Not surprisingly, industry participants studiously use the system for their economic advantage (proponents are not complaining of this fact). It is only when one or more players discover a mechanism which provides them an unexpected and unfair advantage that USDA can and should step in to modify the rules to again assure fairness and uniform treatment.

The problem before the Secretary is succinctly laid out in the testimony of the proponents (Neil Gulden, Curtis Kurth, Dennis Tonak and Bill Dropik). Under federal milk marketing orders the same milk may share in the proceeds of only one federal order and is not permitted to share in the proceeds of on another order on the same milk in the same month. (Tr. 57 lines 24-25 through page 58, line 1). Federal milk marketing orders did not always have such a provision; rather, in the 1960's and 1970's as milk moved longer distances and as federal milk orders more easily abutted one another, such provisions became necessary in order to prevent the double pooling of milk on federal orders. See e.g. 7 C.F.R. Part 1068, Section 1068.11 (Revised as of January 1, 1973) and Decision on Proposed Amendments to Marketing Agreements and to Orders, Milk in Minneapolis-St. Paul and Southeastern Minnesota-Northern Iowa (Dairyland Marketing Areas), 37 Fed. Reg. 3536-4535 (February 17, 1972) (officially noticed as part of Exhibit 32, Tr. 235-236).

It is indeed logical, and no participant objected, that federal milk orders should prevent pooling of the same milk on more than one federal milk order. Absent such a provision, the so-called paper pooling of milk would be taken to the logical extreme, and handlers, whether

cooperative or proprietary, would choose to pool as much, if not all, of their milk on multiple milk orders, drawing proceeds from as many federal orders as possible. Such a process would defeat the federal order system and would create as between and among handlers and producers disorderly marketing conditions in the form of unequal payments by and to all industry players. Multiple pooling of the same milk thus would make a mockery of the very system that permits such activities.

However, not all milk produced in the United States is marketed by handlers regulated by federal milk marketing orders. The program is a voluntary one for producers subject to certain rules concerning the handlers to whom producers sell their milk. Producers can opt in or out of the federal milk market order program by choosing whether to ship to regulated handlers. In some cases, such regulation takes the form of minimum classified prices that are not pooled among all producers (e.g. an individual handler pool as maintained in non-federally regulated portions of Pennsylvania). In some cases, a region and/or a state captures a Class I value, over and above the federal order price and shares that Class I value region or statewide (e.g. Northeast Compact and Maine). And in some cases, the state maintains a full blown milk classification and pricing system and a marketwide pool for all participating milk (e.g. California and Montana). As discussed in greater detail below, the Secretary has long since recognized in the regulatory regime the fact, existence and implication of the California milk classification and pricing and marketwide pooling system. Therefore, opponents of proposal 1 are unjustified in claiming that USDA should not recognize of the existence of that system in this proceeding.

To the knowledge of Proponents, little, if any, of the same milk, subject to a marketwide pool maintained by a state government was pooled on any federal milk order prior to the implementation of federal milk order reform. Proponents acknowledge the fact that a significant

change in federal orders adopting a price surface for every county in the continental United States created the incentive to pool milk both on the Upper Midwest and the California milk order. Before federal order reform, the Upper Midwest price applied to milk diverted to a plant in Orland, California was indeed significantly lower than the price applied to such milk delivered to a Twin Cities plant. And following federal order reform, that price is now identical (using a \$1.70 Class I differential). This is no different from incentives that grew up in the 1960's in the federal order system. The solution then was to prevent double pooling on federal orders of the same milk. That is what Proponents propose now. Moreover, given the length of time it takes to adjust federal Class I differentials and the involvement of Congress in that process, it is not practical to attempt to resolve the double pooling problem through such a complicated and convoluted process as amending Part 1000.

The Secretary should first promptly determine that a significant quantity of milk pooled on California's system is in fact being pooled on the Upper Midwest order. After testimony from both the California Department of Food and Agriculture and Hilmar Cheese's Mr. Jeter, there cannot be any serious dispute that California maintains a marketwide pool in which **all** milk, both quota and non-quota participates. Tr. 165-191 and 314 - 345 and Exs.10-22 and 35. Moreover, USDA has long defined California's system as being: "marketwide pooling of returns under a milk classification and pricing program that is imposed under authority of a State government" 7 C.F.R. § 1076(c). Mr. Conover's undisputed testimony established that (aside from approximately one million pounds of specialty cheese milk), at most, one million pounds of milk produced in California are not pooled in California. Thus, of the approximately 200 million pounds of California milk pooled on Order 30, it is undisputed that at least 199 million of those pounds are also being pooled in California. This discredits the Double Dipper's attempt to

suggest that California milk pooled on Order 30 was not also pooled in California. Indeed, the Double Dippers (Land O'Lakes, DFA and NFO (effectively DFA)) all acknowledged that milk pooled on Order 30 from California was most likely delivered once to an Order 30 pool plant and afterward diverted back to California operations. Tr. 275-276, 430-431 and 482-483.

The CDFA witnesses and the exhibits explaining the California system put the matter to rest. Contrary to the assertions of one attorney, who asserted without there ever being testimony of any kind to back him up, almost all milk produced in California is pooled on the California milk order. The only exceptions are milk shipped direct from the ranch to a non-California plant (accounted for by Mr. Conover as milk shipped to Oregon, Nevada or Arizona) and perhaps as much as 1,000,000 pounds per month of specialty cheese milk. The cold, hard truth, undeniable and in fact undenied by the Double Dippers is that **virtually all, if not all**, California milk pooled on Order 30 is also pooled on the California milk order.

The idea that California does not really operate a marketwide equalization pool or that non-quota milk does not share in the Class 1 market in California is absurd. First, CDFA testified to the contrary. Second, the testimony of Hilmar Cheese is otherwise particularly for months when the price inversion resulted in a non-quota price higher than Class 1 in California. Tr. 340-342. Finally, and quite simply overwhelming in its application herein, is USDA's own acceptance of California as maintaining such a system as shown in 7 C.F.R. § 1076(c).

Double Pooling Creates Disorderly Marketing

The receipt of funds from both Order 30 and the California pool is inequitable and violates the central thesis that producers share uniformly in the pool proceeds. Tr. 198 and 219. It also violates the principle that handlers pay uniform prices. It simply doesn't matter what happened to the money that resulted from double pooling. The money was available to those

market suppliers (producers and cooperatives) who double dipped and not to those who did not double dip, therefore creating a lack of uniformity, a primary element of disorderly marketing. The testimony of LOL as one Double Dipper is instructive. Tr. 273-274. Exhibit 25 establishes the inequity at its heart. For the month of April, California cheese milk which was also pooled on Order 30 received a California Order 4B price of \$12.12 and a California draw (assuming the double pooled milk was non-quota only) of \$0.83 per cwt. As a result of double pooling, that milk also received an Order 30 PPD (assuming the milk was diverted for instance in Orland, California in the \$1.70 zone) of an additional \$0.83 per cwt. However, milk in Order 30 which was manufactured into cheese received a cheese price of \$12.06 and the same federal order draw of \$0.83 (again assuming it was received in the \$1.70 zone). Having been pooled twice, the same California milk effectively drew two \$0.83 payments from each pool resulting in an \$0.89 price regulated price difference from its singly pooled Order 30 counterpart (\$12.12 plus \$0.83 California non-quota draw plus \$0.83 Order 30 draw compared to \$12.06 plus \$0.83 Order 30 draw).

While USDA has historically ignored over order prices paid in comparing uniform payments to producers, this double dipping is not the same thing as an over order price, it is the result of a regulatory loophole permitting the same milk to share in two government regulatory pools. While California's pool is not a federal order pool, it, by CDFR's testimony, functions in much the same way. Moreover, in adopting 7 C.F.R. § 1076(c), USDA has acknowledged both California's system and how it prices and pools milk.

Turning to the handler side of the equation, LOL has admitted that it uses the money drawn from the federal order pool as a handler in order to compensate it for losses associated with sales of milk to fluid milk operations previously owned by it and sold to Dean Foods.

However, since these same payments are not available to other handlers supplying milk to say, Marigold (which not coincidentally testified about the need to attract milk to its operations (Tr. 348-349), two handlers similarly situated are **NOT** making uniform payments for milk. Instead, LOL has acknowledged receipt of that extra \$0.83 per cwt in May on California milk as being used for its competitive purposes in Minnesota! Taken literally, for every pound of Class III milk double pooled by LOL, it effectively paid a net \$0.83 less on that milk than its Class III competitors. Alternatively, if the money was used for supplying Class I milk, the net cost to LOL and its Class I buyer was \$0.83 less than to Marigold. Either way, handlers are not making uniform payments for milk.

To the extent DFA as another Double Dipper acknowledged that its use of the double dipping proceeds are “equitably” distributed among its various Councils, this record is devoid of evidence as to where that money went. While the question is interesting in the academic sense (and perhaps to the industry in trying to understand where non-uniform distributions and payments come to rest), the answer remains the same – irrelevant and disorderly marketing. Tr. 219-222. Again, as a Class III handler, DFA on that volume of milk which received benefits from both the California and federal order pools had a net cost of \$0.83 less than any other Class III handler (other than LOL or NFO). The milk nevertheless received non-uniform payments as a result of regulation of which USDA is and must be aware.

In addition to the simple, but tremendous, problem resulting from the 10 to 16 cents per cwt removed from the Upper Midwest pool during 2001 as a result of double dipping, the above non-uniform results are a classic, if dramatic loss of federal order dollars. The Secretary cannot ignore the \$1.7 and \$1.5 million that was paid out as a result of a regulatory loophole.

Proposal One as Modified Should be Adopted

The problem is large and troublesome, but the solution is not difficult. Proposal 1 as modified in Exhibit 28 seeks to address the problem at the root – preventing double pooling of the same milk while still permitting single pooling if that milk performs (contrary to the unsubstantiated assertions of one Double Dipper). Simply put, diverted milk (treated as pool milk on Order 30) shall be denied that definition if that milk subject to minimum pricing provisions of another federal order or a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government.

The opponents apparently failed to take the time to understand what the changed proposal means. Contrary to their bald assertions, proponents do not seek to exclude milk from the Order 30 pool even if it performs. They intend and wrote the proposal to mean exactly the opposite. Instead milk which is diverted can be diverted subject to existing diversion limitations **unless** that same milk also draws from another marketwide equalization pool, federal or state. Milk from that jurisdiction, or any other jurisdiction, may perform and participate in the Upper Midwest pool; it just cannot draw from another pool as well.

Unlike Proposal 4, Proponents of Proposal 1 do not attempt to create a rule that is different in application based upon geography. It is irrelevant as to the terms of the proposal that the milk at issue is California milk. Milk receiving the benefit of the Montana pool should not be allowed to participate, if as proponents believe, USDA determines that that program is a marketwide equalization pool under a classification and pricing program imposed by Montana. The same milk pooled on another federal order pool should not be diverted milk also on Order 30.

Opponents confuse, deliberately proponents believe, the issue with respect to the so-called Idaho milk problem. The problem, if there is a problem, with the Idaho milk is that for whatever reason, the most economical federal order upon which it may be pooled is the Upper Midwest. But this Idaho milk is not pooled on two different federal orders or on a state order. Similarly, problems alleged to be occurring in the Pacific Northwest do not, as admitted by the witness, involve milk pooled twice on two federal orders or on state order and the applicable federal order. Tr. 547-549. The situations are not the same, even if the economic impacts are. The Idaho milk still must perform and does not draw money twice and thus does not create any of the disorderly marketing conditions discussed above with respect to uniform payments by handlers or to producers. Instead, if there is a problem regarding the Idaho milk, it would appear that the problem has to do with order provisions in other orders, order provisions not open for consideration at this hearing.

Again, USDA already knows what is a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government. Proponents are not creating a brand new definition that requires new USDA interpretation. Thus, the myriad, and irrelevant, questions regarding hypotheticals can be dispensed with. Moreover, the complaint that California may easily change its system ignores both USDA's earlier decisions to treat specially under 7 C.F.R. § 1076(c) with a similar issue regarding State government programs and the simple fact that as testified to by CDFA witnesses (Tr. 167 and Exs. 18-22) and as established by the California statutes officially noticed in Exhibit 32, much of detail of CDFA's system is subject to not-so-easily changed statutes as opposed to regulations (whether or not regulations can be easily changed). The Milk Stabilization Act and the Gonzalves Milk Pooling Act which create the milk classification and pricing system and

marketwide equalization pool under State government are both explicit and codified. Classes of milk are codified. Pooling is codified. Quota and non-quota price differences at \$1.70 per cwt are codified. The resulting fact that non-quota milk shares in all classes of milk is thus at least partially codified.

The proposal also has the advantage of administrative ease. Tr. 207-208. Again contrary to the red herring objections thrown up by the Double Dippers, the proposal would simply require a handler pooling milk that could also be pooled on an equalization pool under a milk classification and pricing program imposed under the authority of a State government to make such records available to permit proper audit. The suggestion that CDFA would not make the records available is absurd. The handler requesting pooling treatment of milk that might also be double pooled is required pursuant to 7 C.F.R. § 1000.27 to make available the required books and records including the records “of any other person” that “are relevant to the obligation of such handler.” The handler could be required to waive CDFA confidentiality in order to permit confidential USDA verification. And the refusal by the handler to permit such verification carries a heavy cost – that the milk shall be considered as used in the highest-priced class. Proponents are quite content with this enforcement tool and believe that the market administrator will be left with more than enough power to enforce the policy.

EMERGENCY CONSIDERATION AND DECISION

Proponents have more than demonstrated the emergency need for a rapid decision with implementation by October 1. According to Exhibit 23 the average impact on the Order 30 PPD has been \$0.096 per cwt since October, 2000 with the greatest impact in the most recent months after California double pooled milk exceeded 240 million pounds for three straight months. Exhibit 24 concludes that the impact has been \$5,930,712.26 for the months of March, April and

May, 2001. Exhibit 25 shows that from January 2000 through April 2001, the average non-uniform payments to producers on California double pooled milk has been \$11.945 compared to Order 30 only receipts of \$10.885.

Marigold testified that even though it is the one paying the \$1.70 Class I differential on Order 30, it is having trouble obtaining a milk supply. Tr. 347-349. Is it any wonder that when 10 cents per cwt is siphoned off into non-uniform distributions that Marigold may be having trouble obtaining milk? The present system is unfair, inequitable, non-uniform and results in disorderly marketing conditions of the most extreme nature.

Another red herring was the allegation that when a California plant became federally regulated, Proposal 1 would ban the plant from pooling the California milk. Leaving aside the absurdity of a California plant meeting the fully regulated rules of Order 30 (25% fluid milk distribution in the marketing area), if the plant becomes regulated then the milk received by it is not diverted. So Proposal 1 covers this problem by permitting that milk to be pooled in that circumstance.

The opponents of course want to slow the process down, or throw more alleged problems into the stew, or call for a national hearing and mix up the double pooling issue with the single, but alleged open pooling issue. They are not the same issues and do not rise to the same level of an emergency. USDA has the tools to deal with this specific problem addressed by Proposal 1 and deal with other pooling and pricing issues on a less time sensitive basis. Regardless, Proposal 1 is an emergency and must be treated as such. Double pooling results in non-uniform treatment and major league disorderly marketing.

Proposals 2 and 3 Lack Any Merit

LOL withdrew Proposal 2 and no other party endorsed the concept or the proposal. The concept of grandfathering the 240,000,000 pounds of California milk is unprecedented and unsupported, and thus, need not detain USDA.

Likewise Proposal 3 would permit continued pooling of California non-quota milk in the misguided belief that that milk does not share in the Class 1 dollars in California. CDFA witnesses testified that all classes share in all class proceeds. Tr. 167-169 and 180. There is one equalization pool in which \$1.70 is set aside for quota holders, but by definition Class 1 figures in the value of non-quota. To see why this is so, a simple example will suffice: assume two pools, both with \$1.70 set aside for quota and assume for simplicity that 50% of California milk is subject to quota (that is high). If the total pool is \$500 million on 40,000,000 cwt, the quota set aside value is \$34 million (20 million cwt X \$1.70). The total quota and non-quota values would be \$272 million and \$238 million respectively. But that \$238 million is inexorably tied to the value of Class 1. If for that month, Class 4b in California had been rapidly rising relative to Class 1, a greater percentage of the Class 1 would end up in non-quota value. Similarly if California consumers consumed more Class 1 in a given month, the pool might be \$520 million on that same volume, but the \$34 million remains fixed such that non-quota now shares in the extra \$20 million to the tune of \$10 million. The LOL claim that non-quota milk does not share in the Class 1 dollars is simply wrong.

Proposal 3 also fails to conform with the long-standing uniform federal order policy of not permitting pooling of the same milk on more than one federal order even though several federal orders have from time-to-time maintained two-tier pricing of milk (e.g. quota style system in former Oregon–Washington Order 124 and base-excess systems in old orders 4 and 7).

See Ex. 32, Official Notice documents I.H. - 7 C.F.R. Parts 1004, 1007, 1030 1068 and 1124 (effective as of January 1, 1989). Land O'Lakes concept that California non-quota milk should be treated differently has thus been rejected by USDA as to the pooling of the same milk (regardless of quota, non-quota , base, overbase, or excess status) on more than one federal order. The concept should be rejected here too especially because California state and industry witnesses have testified about the sharing of milk proceeds from all classes on both quota and non-quota milk.

Moreover, unlike Proposal 1 which provides administrative ease, Proposal 3 is virtually impossible to enforce. CDFA witnesses testified that there is no way to know which particular tanker is quota or non-quota, thus making it impossible to know which tanker of diverted milk would qualify or not qualify for double pooling. Tr. 190.

Finally, with well over 50% of the California milk supply actually being non-quota, the proposed solution is laughable. You would have more than enough California milk eligible for double pooling to equal and greatly exceed the quantities now being double pooled on California and Order 30. Proposal 3 then is no solution at all, instead it would institutionalize the very problem that Proponents of Proposal 1 are attempting to solve.

Proposals 2 and 3 should be rejected entirely.

Proposal 4 Does Not Solve Double Dipping Problem and Addresses Issue in Order 135

Proponents are genuinely concerned that Proposal 4 may distract the Secretary from the central issue of fairness in this proceeding. That distraction is wholly unnecessary both because Proposal 4 fails to address the problem in this case and because it attacks a purported problem that may be cured by dealing with issues in the Western Order 135.

Cross examination by Mr. Tonak of DFA's witness established that DFA's reliance on hauling costs to "exclude" the Idaho and California milk may be misplaced. Back hauls were not examined, leaving open the possibility that double pooled California milk could still be cost effective especially because of the value achieved from double pooling the milk (recall the over \$1.00 difference in total paid value as a result of double pooling shown on Exhibit 25). In addition, fluid milk products classified as Class I for classification and pooling purposes now includes certain concentrated milk products which California plants routinely process in order to meet the fluid milk standards of California. Tr. 442-443 and Exs. 10-12. This means that for qualification purposes, Proposal 4 may still permit milk receiving the benefit of the California pool to qualify for delivery purposes on a cost-benefit basis. All a party would do is deliver, as required, concentrated milk to Order 30 and then divert back regular milk supplies into California Class 4a or 4b. Even DFA's witness acknowledged that in such event Proposal 4 would not cure the problem addressed by Proposal 1, and that they might be able to support Proposal 1 (in conjunction to be sure with Proposal 4). Tr. 442-443 and 468.

Nonetheless, the above analysis proves that Proposal 4 does not address the issue raised by Proponents of Proposal 1 – double pooling – or all of the attendant non-uniform results.

Proposal 4 also is the wrong tool to deal with the alleged problem. The economic need to associate Idaho milk with the Upper Midwest order has very little to do with Order 30 and everything to do with real issues concerning the Pacific Northwest and Western Orders. It is simply not a solution to create barriers in Order 30 which fail to account for the issues of pooling milk in Idaho. That milk is not being pooled on either a federal order or a state order of any kind.

Finally, proponents are convinced that Proposal 4 creates illegal trade barriers to the movement of milk in federal orders. Idaho milk which performs like Minnesota milk should be just as eligible for pooling as the Minnesota milk, so long as the same milk is not pooled more than once. Similarly, eligibility requirements in other federal milk orders should not exclude milk or create different rules for association simply because the dairy farmers are located one foot over this or that state line. Proponents also note that the author of Proposal 4 acknowledged that milk received from Montana dairy farmers has a long association with the old Upper Midwest Order 68, meaning that theories of what is and what is not a historical supply is an uncertain test at best. Furthermore, a review of historical data reveals that Missouri milk was long associated with the old Texas order, but is now associated with the Southeast order. Changes in milk association can and do occur, and USDA should not create rigid rules as to when, where and how such associations may be permitted. Similarly reliance on an untested, and heretofore, through formal rule making, unknown provision from the Northeast Order which creates just such a trade barrier is unjustified. This is not the same thing as recognizing USDA's long standing definition made as the result of a federal order rule making hearing (upon a proposal by a DFA predecessor) found in the old Great Basin Order and now in Part 1000 that California operates a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government. Tr. 440-442 and Officially Noticed Great Basin Decision, 52 Fed. Reg. 27372 et seq. (July 21, 1987) and 53 Fed. Reg. 4589 et seq. (February 17, 1988); Tr. 563 (selected portions attached as Attachment I hereto with sections highlighted):

An IMPA [Intermountain Milk Producers Association] witness testified that some of the options currently available to determine the pool obligations of all partially regulated distributing plant operators are

inappropriate for determining **the obligations of such handlers that are regulated under a State order providing for marketwide pooling.**

...

§1139.76 Payments by a handler operating a partially regulated distributing plant.

...

(b) Each handler who operates a partially regulated distributing plant **which is subject to marketwide pooling of returns under a milk classification and pricing program that is imposed under the authority of a state government** shall pay on or before the 25th day after the end of the month to the market administrator for the producer-settlement fund an amount computed as follows;

...

(3) Determine the value of the remaining pounds according to the Class I – Class III price difference applicable at the location of the partially regulated distributing plant (but not to be less than zero), the skim price and the butterfat price, as determined under this Part, **and subtract the amount the handler pays under the state program, based on the classification and the appropriate class prices therefore of the products disposed of in the marketing area.**

It is abundantly clear that IMPA (now merged as part of DFA) and USDA have previously concluded that California's milk pricing and pooling program can be accounted for and considered in creating and enforcing federal milk order provisions. Proponents of Proposal 1 are thus not creating a new definition or new administrative burdens.

Proposal 4 also suffers from the fact that proponent made no showing that there is an emergency. Federal order reform was designed to resolve many critical issues and took a great deal of time and industry involvement. The unintended and unexpected result of double pooling of state pooled milk is very different in character from the issues raised by the proponents of proposal 4. Those issues are not raising the emergency conditions caused by the Double Dippers in creating disordering marketing conditions. Proposal 4 should, at a minimum, not be addressed as the same emergency that gives rise to Proposal 1.

Proponents urge rejection of Proposal 4 after consideration of a recommended decision.

CONCLUSION

For the foregoing reasons, Proposal 1 should be adopted on an emergency basis with the Secretary omitting a Recommended Decision and issuing a Proposed Interim Final Rule which can be implemented as soon as possible. Proponents urge the Secretary to act immediately to stop the bleeding of Upper Midwest dairy farmer income into the coffers of those who double pool milk, but, as the evidence shows, don't even return the money to the California farmers whose milk gave rise to the double pooling in the first place. Moreover, with uncontroverted record evidence of insufficient milk to serve Marigold's needs, an absolute demonstrable emergency exists as to the Order not bringing forth an adequate supply of milk. The inequalities and market disruptions have created massive disorderly marketing which only the Secretary, through prompt consideration and adoption of Proposal 1, can end.

Respectfully submitted,



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