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**GRIEVANCE BOARD**

**UNITED STATES DEPARTMENT OF AGRICULTURE**

**IN RE:**

**UPPER MIDWEST**

**Docket No. AO-361-A35**

**MILK MARKETING ORDER**

**DA-01-03**

Hearing held on the 26th day of June 2001

at Radisson Hotel South & Plaza Tower

7800 Normandale Boulevard

Bloomington, MN

TRANSCRIPT OF PROCEEDINGS

**BEFORE: THE HONORABLE JILL CLIFTON**

**APPEARANCES:**

GREGORY COOPER, GINO TOSI, WM. RICHMOND, MARVIN BESHORE,  
JOHN VETNE, ESQUIRE, RICHARD LAMERS, CHARLES ENGLISH,  
SYDNEY BERDE, VICTOR HALVERSON, NEIL GULDEN, ROBERT E.  
VANDER LINDEN, RODNEY CARLSON, CURTIS KURTH, DENNIS  
TONAK, BILL DROPIK, KELLY KRUG, ROBERT HORTON, CARL  
CONOVER, JIM HARSDORF, BILL HUGHES, JAMES HAHN, PETER  
HARDIN

York Stenographic Services, Inc.

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## P R O C E E D I N G S

June 26, 2001

1  
2  
3  
4 ADMINISTRATIVE LAW JUDGE: All right. Let us  
5 go on record. This record is being made on Tuesday,  
6 June 26, 2001 in the Bloomington, Minnesota area. My  
7 name is Jill Clifton, I'm an Administrative Law Judge  
8 with the United States Department of Agriculture. You  
9 can't hear? These microphones are for the record, we  
10 don't have any amplifying my voice. Let's go off record  
11 just a moment.

\*\*\*

[Off the record]

[On the record]

\*\*\*

16 ADMINISTRATIVE LAW JUDGE: Back on record  
17 please. My name is Jill Clifton. I'm the  
18 Administrative Law Judge with the Department of  
19 Agriculture, the U.S. Department of Agriculture, who has  
20 been assigned to conduct this Hearing. My function is  
21 to gather the evidence, that would be both the testimony  
22 that's provided by any of you here, and any exhibits  
23 that are presented and received, I then certify that  
24 record. I am not the decision maker, the Secretary is  
25 the decision maker. But the purpose here is to gather

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1 the evidence on which the decision will be made. I'd  
2 like for everyone who speaks here to speak directly into  
3 a microphone. The witness stand is to my right and  
4 there is a step leading up to it between the witness  
5 stand and the Court Reporter. So please avail yourself  
6 of that step if you come to testify. You'll want to  
7 present any written materials so they can be admitted as  
8 exhibits, and each person who speaks must please  
9 identify himself for the record when he first speaks,  
10 and spell his first and last name so that the record  
11 will be accurate. I'd like to begin with a presentation  
12 from employees by or of the United States Department of  
13 Agriculture, and I'd like to start with general Counsel.  
14 If you will introduce yourself please.

15 MR. COOPER: My name is Gregory Cooper, I'm  
16 with the Office of the General Counsel, the United  
17 States Department of Agriculture, Washington, D.C.

18 MR. TOSI: My name is Gino Tosi, I'm with  
19 Dairy Programs, Order Formulation Branch, Washington,  
20 D.C.

21 ADMINISTRATIVE LAW JUDGE: Mr. Cooper, I  
22 assume your name is spelled conventionally.

23 MR. COOPER: C-o-o-p-e-r, Your Honor.

24 ADMINISTRATIVE LAW JUDGE: And, Mr. Tosi,  
25 would you spell your first and last name please?

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1                   MR. TOSI: My first name is spelled G-i-n-o,  
2 the last name is spelled T, as in Tom, o-s-i.

3                   ADMINISTRATIVE LAW JUDGE: All right. Thank  
4 you.

5                   MR. RICHMOND: My name is William Richmond,  
6 R-i-c-h-m-o-n-d, USCA Dairy Programs in Washington, D.C.

7                   ADMINISTRATIVE LAW JUDGE: All right. And we  
8 have a few preliminary items. Would you address those  
9 please, Mr. Cooper?

10                  MR. COOPER: Yes, Your Honor. We have several  
11 exhibits that are required by law.

12                  ADMINISTRATIVE LAW JUDGE: Right into the  
13 microphone please.

14                  MR. COOPER: I'm sorry, Your Honor. We have  
15 several exhibits that are required by law to be  
16 introduced at these Hearings and they're rather a  
17 housekeeping nature. The first exhibit is the Notice of  
18 Hearing that was published in the Federal Register on  
19 June 11, 2001, Volume 66, Page 31185, and we get three  
20 copies of that for the record, Your Honor.

21                  ADMINISTRATIVE LAW JUDGE: Yes, yes. Would  
22 you please hand those to the Court Reporter to be  
23 marked?

24                  MR. COOPER: Okay.

25                  ADMINISTRATIVE LAW JUDGE: And how are you  
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1 marking those?

2 MR. COOPER: As Exhibit 1, Your Honor.

3 ADMINISTRATIVE LAW JUDGE: All right. Thank  
4 you.

5 MR. COOPER: The second document, Your Honor,  
6 is labeled Determination Regarding Mailing of Notice of  
7 Hearing. It's a mailing -- it's a notification that the  
8 Notice of Hearing was mailed to interested persons, and  
9 there are three copies of that for the record and I'd  
10 like it to be marked as Exhibit 2.

11 ADMINISTRATIVE LAW JUDGE: You may. Thank  
12 you.

13 MR. COOPER: The third document, Your Honor,  
14 is entitled AMS News Release and it's a press release  
15 announcing the Hearing and I've got three copies of that  
16 to be marked as Exhibit 3, Your Honor. The fourth  
17 document, Your Honor, is entitled Certificate of  
18 Officials Notified, and it's a certificate indicating  
19 that the Governor's of the States of California,  
20 Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota,  
21 Missouri, Montana and Nebraska, North Dakota, and South  
22 Dakota, and Wisconsin were notified of the Hearing. And  
23 I'd like to have that marked as Exhibit 4, Your Honor.  
24 Lastly, Your Honor, we have a letter that was sent out  
25 to a person who submitted a proposal that was not

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1       accepted for a Hearing, this is the only such letter  
2       sent out, and it was addressed to Mr. Richard J. Lamers,  
3       and it's dated June 5, 2001. I have three copies of  
4       that and we'd like to have that marked as Exhibit 5.  
5       And I'd like to have Exhibits 1 through 5 received in  
6       evidence, Your Honor.

7                   ADMINISTRATIVE LAW JUDGE: Thank you. Is  
8       there any objection? There being none, Exhibits 1  
9       through 5 are admitted into evidence.

10                  MR. COOPER: Next, Your Honor, we have a  
11       witness from the Market Administrator's Office who will  
12       be putting in official government statistics and I'd to  
13       call him to the stand and go through the statistics with  
14       him.

15                  ADMINISTRATIVE LAW JUDGE: All right. And his  
16       name?

17                  MR. COOPER: Mr. Halverson, would you please  
18       take the stand?

19                  ADMINISTRATIVE LAW JUDGE: Mr. Halverson,  
20       would you step up to the witness stand so that the other  
21       side has a step, but you don't need it. I'm going to  
22       swear you in in just a moment, but would you please  
23       state and spell your name for the record?

24                  MR. HALVERSON: Sure. My name is Victor  
25       Halverson, V-i-c-t-o-r, Halverson, H-a-l-v-e-r-s-o-n.

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1 ADMINISTRATIVE LAW JUDGE: All right. You'll  
2 need to speak more closely into that microphone. Would  
3 you stand and raise your right hand?

4 \*\*\*

5 [Witness sworn]

6 \*\*\*

7 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
8 be seated.

9 MR. HALVERSON: Thank you.

10 \*\*\*

11 VICTOR HALVERSON,  
12 having first been duly sworn, according to the law,  
13 testified as follows:

14 \*\*\*

15 BY MR. COOPER:

16 Q. Mr. Halverson, would you please indicate  
17 by whom are you employed?

18 A. The U.S. Department of Agriculture, the  
19 Upper Midwest Marketing Area, Federal Order 30.

20 Q. And in what capacity?

21 A. My title is Assistant Market  
22 Administrator.

23 \*\*\*

24 ADMINISTRATIVE LAW JUDGE: Mr. Halverson, move  
25 the mic closer to you please.

1 MR. HALVERSON: Okay.

2 \*\*\*

3 BY MR. COOPER:

4 Q. Have you brought with you today a  
5 document entitled Monthly Publications, February 2000  
6 through June 2001?

7 A. Yes, I have.

8 \*\*\*

9 ADMINISTRATIVE LAW JUDGE: Could we check and  
10 see if this mic is adequately loud for Mr. Halverson?  
11 Is it? -- Okay. -- good.

12 MR. COOPER: I'd like to have this document  
13 marked as Exhibit 6, Your Honor.

14 ADMINISTRATIVE LAW JUDGE: Yes, you may  
15 present it to the Court Reporter.

16 \*\*\*

17 BY MR. COOPER:

18 Q. Could you explain what this document is,  
19 Mr. Halverson?

20 A. Sure. This bound document is a copy of  
21 the Upper Midwest Dairy News monthly publication for  
22 each month of February 2000 through June of 2001. This  
23 is a monthly newsletter published by the upper Midwest  
24 Order that contains articles of general interest to the  
25 industry and several pages of statistical information

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1 each month. The February of 2000 issue was the first  
2 one published for the Consolidated Upper Midwest Order  
3 and it contains statistics for the January 2000 pool,  
4 the first pool run under the new Order. The publication  
5 is generally eight pages in length, the statistical  
6 information is on Pages 4, 5, 6, 7, and 8 of each month.  
7 The statistical information for the first Dairy News in  
8 February of 2000 was laid out somewhat different than in  
9 succeeding issues, but the type of information presented  
10 was the same, just the sequence of pages was different  
11 than in later issues. Except for this very first issue  
12 in February of 2000, Page 4 of the Dairy News contains  
13 the computation of the Producer Price Differential for  
14 the previous month. Page 5 is a Summary of Utilization  
15 and Classification from the previous month's pool with  
16 comparisons to the previous month and year when  
17 available. Pages 6 and 7 contain statistics showing a  
18 variety of Dairy Commodity Prices, Upper Midwest Order  
19 Market Statistics, Class Prices, and Producer Prices.  
20 These statistics are generally for the most recent month  
21 and the preceding 12 months before that. Page 8 each  
22 month shows a summary of Federal Order Data for the most  
23 recent month for each of the eleven Federal Milk  
24 Marketing Orders.

25 Q. I take it you bound these together just  
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1 for the convenience?

2 A. That's correct. All of this information  
3 was published except for the title page.

4 Q. And it's an official publication of the  
5 Market Administrator's Office?

6 A. Yes, it is.

7 Q. Okay. And have you brought with you  
8 another document today entitled, Compilation of  
9 Statistical Material, Federal Milk Order #30, Upper  
10 Midwest Marketing Area?

11 A. Yes, I have.

12 Q. I'd like to have three copies of that  
13 marked as Exhibit 7, Your Honor.

14 \*\*\*

15 ADMINISTRATIVE LAW JUDGE: You may.

16 \*\*\*

17 BY MR. COOPER:

18 Q. Mr. Halverson, is this a regular  
19 publication of the Market Administrator's Office or was  
20 this something that was prepared for this Hearing?

21 A. This was prepared for use at this  
22 Hearing.

23 Q. Was it at the request of the Market  
24 Administrator or of any particular interested person?

25 A. It was not prepared at the request of any  
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1 individual, it was prepared by our office under the  
2 direction of the Market Administrator simply for use at  
3 this Hearing.

4 Q. And was it prepared by you or under your  
5 supervision?

6 A. It was prepared under my supervision.

7 Q. And is the document, the data in here,  
8 from the official records of the Market Administrator's  
9 Office?

10 A. Yes, it is.

11 Q. And could you go through this publication  
12 and explain exactly what's in here?

13 A. Sure. All right. Let me repeat, all of  
14 the data in this compilation was from the -- the data  
15 were from records obtained from our office. Most of the  
16 data were derived from the monthly handler reports of  
17 receipts and utilization that are submitted at pool time  
18 and from Producer Payrolls, both of these are submitted  
19 monthly by handlers. Some of the data in the table were  
20 compiled using whole numbers and then rounded for  
21 inclusion in the tables in abbreviated form. Therefore,  
22 in some instances data may not add due to rounding. The  
23 compilation of statistical material consisted of 42  
24 pages, plus front and back cover pages, and a table of  
25 contents. There are eight tables and one map in the

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1 compilation and I will go through those. Table 1, which  
2 is on Pages 1 through 11, is a list of handlers, plants,  
3 and cooperative associations on the Upper Midwest Order  
4 in December of 2000. This list contains the complete  
5 names and addresses of handlers and cooperatives. For  
6 handlers with multiple plants the complete address of  
7 the organization headquarters is listed and individual  
8 plants are listed by city, state, pricing zone, and  
9 plant type. Names and addresses in other portions of  
10 the exhibit may appear in abbreviated form. Table 2 on  
11 Pages 12 and 13 is an alphabetical listing of pool  
12 distributing plants, pool supply plants, partially  
13 regulating distributing plants, and producer handlers  
14 for December of 2000. Also listed are cooperative  
15 associations acting as handlers. The plants from this  
16 table are shown on the map on Pages 20 and 21 in the  
17 middle of the Hearing compilation. Each plant is listed  
18 by name, state, county, and pricing zone. Table 3 on  
19 Page 14 shows the pounds and percentage of producer milk  
20 by class and in total for the four classes of  
21 utilization in the Upper Midwest Order for the months of  
22 January 2000 through May of 2001. Annual totals are  
23 shown for 2000, and year to date totals are shown for  
24 calendar year 2001. The pounds of producer milk in this  
25 table are based on reported pounds from pool reports and

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1 do not represent audited total. Audited totals --  
2 Pardon me. -- these are the pounds used to compute the  
3 monthly producer price differential on or about the  
4 twelfth of each month. Table 4 on Pages 15 and 16  
5 contains the class prices for the Upper Midwest Order  
6 for each month of January 2000 through May of 2001. The  
7 prices are given both for components in the class and on  
8 a three-and-a-half percent butter fat basis. The  
9 schematic cell adjustment, which applies to Classes II,  
10 III, and IV, is listed separately at the end of the  
11 table. Annual and year to date totals are given for  
12 each column. Table 5 on Page 7 provides prices for  
13 producer payments for each month of January 2000 through  
14 May of 2001. Minimum prices to producers under the  
15 Order consist of five items, these are the first five  
16 items shown, butter fat, protein, other solids, the  
17 Producer Price Differential, and the schematic cell  
18 adjustment on a per hundred weight basis. The  
19 Statistical Uniform Price and the Mailbox Price are  
20 provided for informational purposes only. Table 6 on  
21 Page 18 shows the pounds and percentage of producer milk  
22 by state for January 2000 through February 2001. These  
23 pounds are from audited payrolls submitted by handlers.  
24 These pounds may be somewhat different from the pounds  
25 shown in Table 3 on Page 14, which were based on pooled

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1 pounds. Producer milk was received from Montana for  
2 June of 2000 through February of 2001 and is included in  
3 the Wisconsin total for these months because the Montana  
4 data is restricted otherwise. There is one correction  
5 in this compilation of stats it is on this page.  
6 Footnote 1 is incorrect for the period covered. It  
7 should read includes producer milk from Montana for June  
8 of 2000 through February of 2001. So if you would cross  
9 out the word January and insert February. In the middle  
10 of the compilation there is a map of the Upper Midwest  
11 Marketing Area and the surrounding territory. The  
12 Marketing Area is identified by the heavy blue line, the  
13 counties in yellow are identified -- are counties from  
14 which producer milk was procured. California is not  
15 shown on the map. In December of 2000 producer milk was  
16 procured from 14 counties in California. If you're  
17 interested in which counties, those are covered later in  
18 the compilation. All other counties from which milk was  
19 procured and pooled on the Upper Midwest Marketing Area  
20 in December of 2000 are shown on the map. Regulated  
21 plants are identified by type on the map with symbols  
22 shown in the box in the lower left-hand corner of the  
23 map. For example, in Goodhue County in Southeast  
24 Minnesota we can see that there is two little triangles,  
25 that indicates that there were two pool supply plants in

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1 Goodhue County in Southeastern Minnesota. Six partially  
2 regulated distributing plants are not shown on the map  
3 but are included in the map index on Pages 12 and 13.  
4 Three of these are in California, one is Michigan, one  
5 is in Texas, and one is in Georgia. Table 7, which  
6 begins on Page 23 and runs through Page 37, provides the  
7 number of producers and the pounds of producer milk by  
8 state and county for January 2000 through December 2000.  
9 Several footnotes are listed at the end of the table on  
10 Page 37, data are restricted for a number of the  
11 counties. These are identified in the table or in the  
12 footnotes and are included in the state totals as noted  
13 and in the grand total for each month for the market.  
14 Table 8 shows the same type of data as Table 7 except it  
15 is for the period of January and February of 2001.  
16 February of 2001 is the most recent month for which this  
17 type of data is available. And state totals in these  
18 Tables 7 and 8, the state and county totals correspond  
19 to the data in Table 6 on Page 18, these are audited  
20 Producer Payroll totals. Mr. Cooper, that's all I have  
21 on that exhibit.

22 Q. Okay. Mr. Halverson, have you brought  
23 with you today one other document entitled, Estimated  
24 Pounds of Producer Milk from California and Idaho, March  
25 through May 2001?

1 A. I have, sir.

2 Q. And that's a one-page...

3 A. Yes.

4 Q. ...document?

5 A. Yes, it is.

6 Q. And I'd like to have that marked, Your  
7 Honor, as Exhibit 8.

8 \*\*\*

9 ADMINISTRATIVE LAW JUDGE: Yes, you may.

10 \*\*\*

11 BY MR. COOPER:

12 Q. Was this document prepared by you or  
13 under your supervision?

14 A. Yes, it was.

15 Q. And is it from data within the official  
16 records of the Federal Milk Market Administrator's  
17 Office of Order #30?

18 A. Yes, it is.

19 Q. And this I take it is not a regular  
20 publication of the Market Administrator's Office?

21 A. No, it is not, it was prepared for use at  
22 this Hearing.

23 Q. And was it at the request of any  
24 particular party or...

25 A. No, it was not.

1 Q. Okay. And could you explain what this  
2 document is?

3 A. Sure. This table entitled, Estimated  
4 Pounds of Producer Milk from California and Idaho, March  
5 through May of 2001. This table provides an estimate to  
6 the nearest million pounds of the producer milk pooled  
7 on the Upper Midwest Order from California and Idaho  
8 during the months of March, April, and May of 2001.  
9 These pounds are estimated from data submitted by  
10 handlers on pool reports. Final data on milk pooled  
11 from these states will not be available until producer  
12 payrolls are received, processed, and audited. And  
13 that's all I have on that.

14 Q. Okay. Are Exhibits 6, 7, and 8 offered  
15 in support of any particular proposal or for  
16 informational purposes only?

17 A. For informational purposes only.

18 \*\*\*

19 MR. COOPER: I have not further questions. I  
20 would move them into evidence but give the witness over  
21 to cross examination first.

22 ADMINISTRATIVE LAW JUDGE: Yes, let us first  
23 see if there are any objections to any of these  
24 exhibits. With regard to Exhibit 6 are there any  
25 objections to admission into evidence? There are none.

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1 Exhibit 6 is admitted into evidence. Of course cross  
2 examination can be made with regard to this witness or  
3 any other witness in the Hearing. With regard to  
4 Exhibit 7, are there any objections to the admission  
5 into evidence of Exhibit 7? There are none. Exhibit 7  
6 is admitted into evidence. With regard to Exhibit 8,  
7 are there any objections to the admission into evidence  
8 of Exhibit 8? There are none. Exhibit 8 is admitted  
9 into evidence. I would like to remind those here that  
10 if you wish to order a transcript of the Hearing you  
11 make those arrangements with the Court Reporter while  
12 you are here during one of the recesses please. -- All  
13 right. -- You may proceed, Counsel.

14 MR. COOPER: I have no further questions. I  
15 give the witness over for cross examination.

16 ADMINISTRATIVE LAW JUDGE: All right. Are  
17 there any cross examination questions for the witness?  
18 Yes, would you go to the microphone please and identify  
19 yourself.

20 \*\*\*

21 BY MR. ENGLISH:

22 Q. Good morning, Your Honor. My name is  
23 Charles English. I'm with the law firm of Thelen, Reid,  
24 and Priest at 701 Pennsylvania, Northwest, Suite 800,  
25 Washington, D.C., 20002. And I'm entering my appearance

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1 of proponents of Proposal #1, which are listed in the  
2 Hearing Notice. Mr. Halverson, turning for a moment to  
3 Page 6 -- I'm sorry. -- Exhibit 6, Page 6 of the last --  
4 this is the February 2001 Producer Price Differential  
5 calculation.

6 A. This is for the month of January...

7 Q. Yes.

8 A. ...2000?

9 Q. I'm sorry. They're done in reverse  
10 chronological -- Okay. I see. -- go to the first...

11 A. Yes.

12 Q. ...one then.

13 A. Okay.

14 Q. I apologize. And it would be Page 4,  
15 which is the Computation of Producer Price Differential.

16 A. For the month of May 2001?

17 Q. For the month of May 2001, yes.

18 A. Okay.

19 Q. Could you for this record, since I think  
20 there's going to be a fair amount of testimony about the  
21 Producer Price Differential, describe the Producer Price  
22 Differential and how it is calculated?

23 A. Okay. Each month the Market  
24 Administrator follows the rules set forth in the Order  
25 for computing a Producer Price Differential, on or about

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1 the twelfth we announce the Producer Price Differential,  
2 and a few days before that handlers start submitting  
3 reports. Reports are received from each plant and from  
4 many cooperatives that pool milk on the Order and  
5 essentially we add up the milk pooled on the Order and  
6 determine what class of utilization. There are four  
7 classes of utilization that the milk is used in and  
8 fundamentally the Producer Price Differential is each  
9 share of the producers -- each producer's share of the  
10 higher valued uses in the market over and above or below  
11 Class III. So when we see a 67-cent Producer Price  
12 Differential that's roughly the value of the Class I,  
13 II, and IV milk in the market over and above the Class  
14 III.

15 Q. And that is shared by all producers who  
16 are pooled on the Order?

17 A. That is shared equally with the exception  
18 of Location Adjustments by each producer pooled on the  
19 market on a per hundred weight basis.

20 Q. Turning to...

21 \*\*\*

22 ADMINISTRATIVE LAW JUDGE: Mr. English, if you  
23 need to move that mic...

24 MR. ENGLISH: That's okay. I...

25 ADMINISTRATIVE LAW JUDGE: ...do but I want

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1 you to speak right into it.

2 \*\*\*

3 BY MR. ENGLISH:

4 Q. Thank you, Your Honor. Exhibit 7, the  
5 Compilation of Statistical Material and the map in the  
6 middle of the page, you referred to I think milk in the  
7 procurement area and the fact that there were 14  
8 counties for December 2000 from California that weren't  
9 on the map.

10 A. Yes.

11 Q. When you refer to procurement area, does  
12 that necessarily mean that milk is received from each of  
13 those counties...

14 A. No...

15 Q. ...in any given month?

16 A. The procurement area refers to the farms  
17 where the milk started, it may not be received at a  
18 plant in that county and typically is not. If you look  
19 at any of the counties here that are in yellow, the pool  
20 plants are identified and there are also non-pool plants  
21 that may receive producer milk but it probably  
22 represents less than half the counties shown in yellow.

23 Q. Well, I guess the point is that just --  
24 you used the phrase milk is procured, saying that milk  
25 is procured does not necessarily mean that in any given

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1 month it is being received at a pool plant in the  
2 Marketing Area. Is that correct?

3 A. That is correct.

4 Q. Does your office keep track of how much  
5 of the milk from the 14 counties in December of 2000 was  
6 actually received by a pool plant?

7 A. We probably have that data, yes.

8 Q. Is it subject to confidentiality?

9 A. It may be. I do not have that data  
10 available to me.

11 Q. Couldn't you attempt to check so you can  
12 make that data available for one or two representative  
13 months subject to confidentiality provisions?

14 A. And please repeat your question? What  
15 exactly is it you want to know?

16 Q. What quantity of milk for the months  
17 October 2000 through the present, to the extent you can  
18 just tell us, that is in the procurement area of  
19 California counties was actually received at a pool  
20 plant on this Order?

21 A. We can look -- it is not the way our  
22 statistics are normally compiled but we can try and make  
23 an estimate.

24 Q. I would appreciate that very much.

25 A. Okay.

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MR. ENGLISH: That's all I have for this witness, Your Honor. Thank you.

ADMINISTRATIVE LAW JUDGE: You're welcome, Mr. English. Are there any other questions for Mr. Halverson? Let's see. We have two gentlemen. Let me take your first please. Would you come to the microphone?

\*\*\*

BY MR. BESHORE:

Q. Marvin Beshore, M-a-r-v-i-n, B-e-s-h-o-r-e. 130 State Street, Harrisburg, Pennsylvania. I'm here representing Dairy Farmers of America and the National Farmers Organization. Mr. Halverson, with respect to the procurement area map in Exhibit 7...

A. Yes.

Q. ...a portion of Order 30 Marketing Area is in the State of North Dakota and there is also procurement from counties in North Dakota outside the Marketing Area. Are you aware of whether the State of North Dakota has a State Marketing Order?

A. It has some sort of a State Milk Price plan and I'm not sure if they call it an Order but, yes, they do.

1           Q.    Okay.  And are there -- the plants that  
2           are identified as partially regulated distributing  
3           plants located in North Dakota, those plants, there's  
4           Order 30 milk in the counties where those plants are  
5           located in North Dakota.  Are you aware of that?

6           A.    Yes, there is.

7           Q.    Do you know whether the producers who  
8           supply Order 30 also supply those partially regulated  
9           North Dakota fluid distributing plants?

10          A.    I'm not sure I want to answer that for  
11          confidentiality reasons.  I think an individual handler  
12          is -- where they procure their milk is not something I  
13          want to refer to.

14          Q.    Okay.  If you had made this map for the  
15          months of, what, March and April...

16          A.    Yes.

17          Q.    ...or April and May of 2001, I gather  
18          that there would be additional counties in the State of  
19          Idaho which would be subject to yellow coloration if the  
20          state was on the map.  Is that correct?

21          A.    That is correct.

22          Q.    Do you know how many counties in Idaho  
23          had producers pooled on Order 30 in April and I...

24          A.    No, I do not.  We have not fully received  
25          all the producer payrolls and until we get that we don't

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1 know.

2 Q. But Exhibit 8 reflects that, what, 33  
3 million pounds approximately in April were pooled from  
4 the State of Idaho and 35 million in May.

5 A. Yes.

6 Q. Now I noticed in one of the tables that  
7 summarizes the states, Table 6 in Exhibit 7, which  
8 summarizes the source of milk poolings on Order 30 by  
9 state. That some over the period since the Order was  
10 formed, several of the states including Wisconsin and  
11 Minnesota, have experienced a significant decline in  
12 milk pooled in Order 30.

13 A. That's correct.

14 Q. Okay. Now to your knowledge does that  
15 reflect a decline in milk production in those states?

16 A. There has been a decline during part of  
17 the period in the milk production in those states.  
18 However, this on a percentage basis would certainly  
19 exceed that.

20 Q. Do you know what happened to the milk in  
21 Wisconsin that's not pooled on Order 30 that's still  
22 being produced?

23 A. Well, I know what our Order statistics  
24 say, which is simply that we have less milk pooled on  
25 our Order. Anecdotally I am told that that milk has

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1 gone to other markets but we do not have -- I do not  
2 have those statistics...

3 Q. Other...

4 A. ...available to me.

5 Q. Other Federal Order markets?

6 A. Other Federal Order markets, yes.

7 Q. Okay. So that although produced in  
8 Wisconsin it's been pulled on Federal Orders in other  
9 areas?

10 A. That's...

11 Q. Is your understanding?

12 A. That's my understanding, yes.

13 Q. Is the same thing true of some milk in  
14 the State of Minnesota?

15 A. I believe so, yes.

16 Q. In fact over the period we're concerned  
17 with here, it appears to me that total pooling in Order  
18 30 has declined quite substantially has it not?

19 A. It has.

20 Q. Do you know what the total amount, and  
21 maybe one of your exhibits shows it, the total amount  
22 pulled in April and May has been in Order 30?

23 A. Yes.

24 Q. Is it in Exhibit 6? It probably is.

25 A. It is in Exhibit 6. In April the total

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1 pooled pounds were 1,687,000,000 and in May about  
2 1,600,000,000.

3 Q. Okay. I gather since you don't have all  
4 the data from Idaho yet you would not, well, I'll just  
5 ask you the question. Would you have available the same  
6 information for Idaho that Mr. English requested of you  
7 with respect to California? That is the volumes of milk  
8 in Idaho delivered to pool distributing plants?

9 A. I don't believe so, no. Until we get the  
10 individual patron data showing where their milk went we  
11 would not have that.

12 Q. Okay. Going back to the procurement area  
13 map just for a minute.

14 A. Sure.

15 Q. Would it be fair to say that the  
16 procurement area reflected in the states on the map as  
17 shown, and not including California and Idaho...

18 A. Right.

19 Q. ...that that has been basically the  
20 procurement area for milk for the plants in Minnesota  
21 and Wisconsin? For the Federal Orders in Minnesota and  
22 Wisconsin for many years?

23 A. Let me answer the question as I  
24 understand it.

25 Q. Okay.



1 Q. That's better. Let me move it way up so  
2 that Marvin has trouble. Good morning, Mr. Halverson.

3 A. Good morning.

4 Q. I'm looking at and I have some of the  
5 same interests in these exhibits. I noticed a few  
6 things that Mr. Beshore noticed. Can you turn with me  
7 to Page 33 of Exhibit 7?

8 A. Okay.

9 Q. And this is, it says, the last four  
10 months of the year 2000 and go down to Illinois under  
11 Carroll County. In September of 2000 there were 22  
12 producers from Carroll County pooled on Order 30 and in  
13 the remaining months of the year there were five  
14 producers pooled from Order 30.

15 A. Yes.

16 Q. Am I reading that correctly?

17 A. You are reading that correctly, yes.

18 Q. Okay. And are you aware of any movement  
19 of producers from that part of Illinois out of the Order  
20 30 pool?

21 A. And again from what handlers tell us  
22 because we do not collect data on milk that is no longer  
23 part of our statistics.

24 Q. Yes.

25 A. But from what handlers tell us, that milk

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1 is being pooled -- milk from that part of the state, and  
2 I do not know that particular number, is being pooled on  
3 other Orders that historically had been pooled on  
4 Federal Order 30.

5 Q. Okay. You're not aware, are you, of any  
6 mass exodus of dairy farmers from Carroll County?

7 A. No, I'm not. No natural disaster or  
8 physical movement of producers, simply where the milk  
9 was pooled.

10 Q. Okay. And similarly down a few counties  
11 to Joe Davies, it went down 74 producers to twenty-  
12 seven, there would be a similar explanation of producers  
13 that were formally pooled in Order 30 are now pooled  
14 elsewhere?

15 A. Yes.

16 Q. Okay. Would information concerning  
17 producers from those counties and other counties in the  
18 Order 30 procurement area that were once there and are  
19 no longer there, or were once there and were no longer  
20 there and are now there again...

21 A. Yes.

22 Q. ...would that appear in the published  
23 data of the Market Administrators on producer milk by  
24 state and county for markets other than Order 30?

25 A. Yes, it would.

1 Q. Okay. And it's true that other Market  
2 Administrators regularly publish such data as do you?

3 A. Yes.

4 Q. And that's usually on a semi-annual  
5 basis. Is that correct?

6 A. I think the most detail is semi-annually  
7 and some do publish a state and county table like this  
8 for each month, but it's most widely distributed semi-  
9 annually, yes.

10 Q. Okay. In the case of producers and  
11 producer milk that appear in one month and do not appear  
12 in another month that have moved to a different pool...

13 A. Yes.

14 Q. ...not necessarily meaning that the milk  
15 is actually for each of those days production has moved,  
16 but the pooling association has moved. Correct?

17 A. I believe all orders require some  
18 physical movement of milk, but not every day it needs to  
19 go to another orders pool plant to be pooled on that  
20 market, yes.

21 Q. Okay. As is the case for Order 30?

22 A. That is correct.

23 Q. I'm thinking of a couple of ways in which  
24 that would happen. One way is for the producer to find,  
25 or the producer's marketing agent, to find a market in a

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1 different marketing Order and have the milk reported as  
2 producer milk. Is that one way?

3 A. That would be one way, yes.

4 Q. Okay. And another way is for the plant  
5 to which the producer has been associated to become  
6 regulated under a different Order.

7 A. That's correct. Yes.

8 Q. Okay. And there have been plants that  
9 have been moved off of Order 30 during the past couple  
10 years?

11 A. Yes.

12 Q. Okay. Would those plants be identified  
13 as shifting in any of these exhibits?

14 A. I don't believe we identified them by  
15 name, no.

16 Q. Okay. Can you identify them by memory?

17 A. No, I cannot, but I will answer by saying  
18 that we do have direct knowledge of plants which were  
19 formally pool plants on our market, which are listed as  
20 pool plants on other Market Administrator's  
21 publications. I couldn't give you a number or run down  
22 the list by memory, but there certainly are. That  
23 information is publicly available on web sites and  
24 Market Administrator publications.

25 Q. Okay. And have I exhausted the general

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1 ways in which a producer might shift, either the  
2 producer shifts markets individually or through his  
3 marketing agent, or the plant to which the producer  
4 shifts. Is there any other way that a producer might be  
5 reported in one pool one month and another pool the  
6 next?

7 A. Well, it's hard for me to speak on behalf  
8 of the other Orders, but I think in concept those are  
9 the two ways. You either shift who you ship your milk  
10 to or the organization that you shift to changes the  
11 regulation of the plant where you ship, yes.

12 Q. Okay. And this may be total coincidence,  
13 but I was looking at the map in the middle of the  
14 Exhibit 7 and I looked to the Northeast corner of Iowa.  
15 Am I correct that, well, let's see. Maybe I'm wrong  
16 there. The Marketing Area is in blue?

17 A. Yes.

18 Q. Now never mind.

19 A. Okay.

20 Q. Well, let me confirm here. Grant County  
21 in the -- and it looks like it's in the Northeast corner  
22 of Iowa is actually part of Illinois or part of  
23 Wisconsin. Is that...

24 A. Yes, Grant and Crawford Counties are in  
25 the State of Wisconsin are not in the Upper Midwest

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1 Marketing Area, they are in the Central Marketing Area.

2 Q. Okay. Got it. Thank you.

3 A. Okay.

4 \*\*\*

5 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

6 Vetne. Is there any other cross examination at this

7 time for Mr. Halverson? Yes, recall, Counsel.

8 \*\*\*

9 BY MR. ENGLISH:

10 Q. Charles English. Make John go back

11 there. I think Mr. Beshore and Mr. Vetne were asking

12 you some questions that basically go to a concept.

13 Would you agree, sir, that as to Federal Orders a dairy

14 farmer may not be considered a producer under more than

15 one Order as to the same milk?

16 A. The key phrase there is on the same milk,

17 the same milk may not be pooled on two Federal Orders at

18 the same time. That's correct.

19 Q. And so to the extent that Mr. Beshore and

20 Mr. Vetne have discussed with you changes in some of the

21 statistical material with respect to where milk is

22 pooled, that is because under the Federal Order system

23 that same milk may not be reported as being pooled on

24 two different Orders. Correct?

25 A. That's correct. Yes.

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1 Q. Thank you, sir.

2 \*\*\*

3 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
4 English. Is there any other examination of Mr.  
5 Halverson at this time? Yes, sir.

6 MR. LAMERS: Mr. Richard Lamers of Lamers  
7 Dairy of Appleton, Wisconsin.

8 ADMINISTRATIVE LAW JUDGE: Would you spell  
9 your last name?

10 \*\*\*

11 BY MR. LAMERS:

12 Q. L-a-m-e-r-s. Mr. Halverson, do you have  
13 any knowledge as to the causative factors of why  
14 handlers will move producers from one Order to another?

15 A. What is normally referred is that they  
16 will get a better price on those markets, but I cannot  
17 get inside their heads, that's just what is said.

18 Q. And these handlers receive these pool  
19 monies or the PPD's from the pool and they buy producer  
20 milk in competition in the competitive buying market.  
21 Is that not correct?

22 A. Certainly in certain circumstances there  
23 is competition for producer milk more than in some areas  
24 than in others.

25 Q. And so that it provides for handlers a  
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1 higher producer pay price, one Order over another at  
2 times.

3 A. Well, the Order revenue has come back.  
4 For example in May of 2001 I was asked about the PPD of  
5 67 cents. That is one source of revenue that can be  
6 used to pay producers. Obviously it's not the whole  
7 thing.

8 Q. That's all I need. Thank you very much.

9 A. Okay.

10 \*\*\*

11 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
12 Lamers. Is there any other examination of Mr. Halverson  
13 at this time? Any redirect examination, Counsel?

14 MR. COOPER: No, Your Honor.

15 ADMINISTRATIVE LAW JUDGE: Now it's my  
16 question at this point whether Mr. Halverson may be  
17 excused for the balance of the Hearing or whether he  
18 should be requested to stay in case he needs to be  
19 recalled at some point.

20 MR. COOPER: Your Honor, Mr. Halverson I think  
21 will be here for the rest of the Hearing, and there was  
22 a question to him about seeing if he could gather some  
23 information I believe from Mr. English. And he will  
24 report back to us one way or the other before the close  
25 of the Hearing on that.

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1                   ADMINISTRATIVE LAW JUDGE: Very good. Now I  
2 have reserved two days for this Hearing. If we finish  
3 today, great. If we go over until tomorrow, also good.  
4 So welcome for the duration of the Hearing, Mr.  
5 Halverson.

6                   MR. HALVERSON: Thank you.

7                   ADMINISTRATIVE LAW JUDGE: You're welcome.  
8 You may step down.

9                   MR. COOPER: Your Honor, we don't have any  
10 other witnesses at this time. I would add, however,  
11 that a question that -- let's say a reason to this  
12 Hearing in the opinion of some of the proponents is the  
13 pooling of California milk upon this Order, which raises  
14 questions of how California milk is pooled under the  
15 California State Order. There are two representatives  
16 here from the California State Department of Food and  
17 Agriculture and they would like to get on today and they  
18 will be available here today to testify concerning how  
19 milk is pooled on that particular Order and to take  
20 questions in that regard. However, we'd prefer I think  
21 at this time to start with one of the proponents,  
22 perhaps the proponents presentation will help people  
23 formulate better questions for these representatives  
24 from the State of California.

25                   ADMINISTRATIVE LAW JUDGE: All right. Do you

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1 have in mind which proponents would go...

2 MR. COOPER: Well, we...

3 ADMINISTRATIVE LAW JUDGE: ...in which order?

4 MR. COOPER: Well, normally we'd take  
5 Proponent 1 first and...

6 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
7 English.

8 MR. ENGLISH: I don't object to that procedure  
9 whatsoever with maybe some slight suggestion or  
10 modification. First depending on whether, I mean, a lot  
11 of the material we have are documents that are available  
12 on the Internet that are official documents of either  
13 other Federal Market Administrator's offices or the  
14 California Department of Food and Agriculture. Those  
15 are the kinds of materials, which we believe, are  
16 admissible as evidence as being documents created by a  
17 governmental entity for a purpose other than this  
18 Hearing. Having said that with the witnesses here, it  
19 may make more sense to have them on the stand to  
20 identify the documents and put them in as exhibits. By  
21 way of example, I have discussed this with Mr. Cooper,  
22 we have one three-page exhibit that we could either take  
23 official notice of, or if we could have Mr. Vander  
24 Linden of Order 32 on the stand we could get that in as  
25 one document. As to California, a number of the

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1 witnesses we have for Proposal 1 will testify as to  
2 their understanding from the California system, but it's  
3 based upon documents which I'd like to get into evidence  
4 first. So we have sort of a cart and a horse problem.  
5 I certainly understand the idea of having the witness on  
6 the stand when the questions may make more sense to  
7 people, on the other hand I have as one can readily see  
8 on the table here, 20 copies of various documents from  
9 California, which I believe need to be part of the  
10 record in order to establish how the California system  
11 works. It certainly would make sense to have the  
12 California witnesses then available to answer questions  
13 about interpretation. Potentially if no one objects, we  
14 could enter the documents and I will represent, you  
15 know, frankly what they are as each document. They are  
16 either materials that are available on the Internet from  
17 the California Department of Food and Agriculture, which  
18 maintains an excellent web site, or their materials that  
19 are developed by them as official documents that are  
20 published to the industry that I have copies of. Well,  
21 however Your Honor and the parties wish to handle it, I  
22 guess we have sort of a dichotomy. We have the Order 32  
23 material, I also have a witness, an expert, Mr. Conover,  
24 who will later testify about some of the material from  
25 the western Orders, Orders 124, 131, and 135. Again

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1 that Market Administrator is here, although those  
2 materials are again are materials that are available to  
3 the industry on the Internet.

4 ADMINISTRATIVE LAW JUDGE: The way I'd like to  
5 handle it, Mr. English, is I'd like to have you identify  
6 the documents, have them marked by the Court Reporter,  
7 take them into evidence if there is no objection, and  
8 then have each witness that has knowledge of those  
9 documents comment on those as if they were being  
10 introduced. So that we have a full record but we have  
11 the ease of administration. Now the documents have not  
12 yet been marked by the Court Reporter. Is that correct?

13 MR. ENGLISH: No, none of these documents have  
14 been marked.

15 ADMINISTRATIVE LAW JUDGE: All right. What  
16 I'd like to do, I would suspect that that process may  
17 take about 20 minutes?

18 MR. ENGLISH: Yes, if you want to do it all at  
19 once, yes, I need to handle them that way that would be  
20 fine, Your Honor.

21 ADMINISTRATIVE LAW JUDGE: Okay. Yes, I think  
22 that would be the most expeditious for us. So what I'd  
23 like to do, it's now just nearly 10:00. Let us go off  
24 record, let us reconvene at 10:30, and in the meantime,  
25 Mr. English, you can work with the Court Reporter.

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1 If necessary the witness is here if anybody has  
2 questions and I'm not sure people are going to have  
3 questions, it's a rather simple table. So I would move  
4 the admission of Exhibit 9.

5 ADMINISTRATIVE LAW JUDGE: And it's January  
6 through April 2001?

7 MR. ENGLISH: That's correct. Pounds of Milk  
8 Delivered by Producers by State, 2001 and it's got data  
9 filled in January through April.

10 ADMINISTRATIVE LAW JUDGE: All right. Is  
11 there any objection to the admission into evidence of  
12 Exhibit 9?

13 MR. COOPER: Your Honor, we'd like Mr. Vander  
14 Linden just to get on the stand to explain one aspect of  
15 it. Otherwise we don't have any objections.

16 MR. ENGLISH: It's certainly fine by me, Your  
17 Honor.

18 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
19 English, would you call your witness?

20 MR. ENGLISH: Mr. Vander Linden.

21 ADMINISTRATIVE LAW JUDGE: Thank you. Please  
22 be seated first and speak into the microphone your full  
23 name and spell it for the record please.

24 MR. VANDER LINDEN: My name is Robert Vander  
25 Linden, R-o-b-e-r-t, V-a-n-d-e-r, L-i-n-d-e-n.

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1 ADMINISTRATIVE LAW JUDGE: All right. And  
2 that's a capital "L?"

3 MR. VANDER LINDEN: A capital "V" and a  
4 capital "L."

5 ADMINISTRATIVE LAW JUDGE: All right, sir.  
6 Would you stand and raise your right hand?

7 \*\*\*

8 [Witness sworn]

9 \*\*\*

10 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
11 be seated, Mr. Vander Linden.

12 \*\*\*

13 ROBERT E. VANDER LINDEN,  
14 having first been duly sworn, according to the law,  
15 testified as follows:

16 \*\*\*

17 BY MR. ENGLISH:

18 Q. Do you have a copy of this document with  
19 you?

20 A. Yes, I do.

21 Q. Do you have a clarification concerning  
22 this document?

23 A. Yes, the percentages on the bottom on the  
24 Page 3, it totals 133.54, that's a pretty good  
25 percentage. It should be 100 percent and obviously the

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1 state percentages then need to be redivided. This was  
2 corrected before the month of May but we didn't catch it  
3 early enough for the April publication.

4 Q. But the numbers that are used to derive  
5 the percentage are correct?

6 A. The numbers are correct and the total by  
7 states are correct, it's just the percentages.

8 Q. Do you know what the number for May 2001  
9 is for California for Order 32?

10 A. It will be slightly larger. I do not  
11 know the exact number.

12 Q. Would it be larger than, what, eight --  
13 when you say larger...

14 A. It...

15 Q. ...than what, larger than April?

16 A. It would be larger than April.

17 Q. So larger than 36,630,963 pounds?

18 A. Yes.

19 \*\*\*

20 MR. ENGLISH: I have no other questions of  
21 this witness. If there are interested parties there are  
22 extra copies of this exhibit that has been identified as  
23 #9.

24 ADMINISTRATIVE LAW JUDGE: And where are the  
25 extra copies, Mr. English?

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BY MR. BESHORE:

Q. Yes, Marvin Beshore. I have just one question perhaps to avoid the necessity for Mr. Vander Linden to testify again. Did you prepare a map at Mr. Holland of the Dairy Farmers of America's request, which we haven't introduced yet, Your Honor, but which will be introduced with Mr. Holland's testimony, a map which just depicts the United States and the counties based on data from Order 30 for December 2000, the source of milk data?

A. Yes, our office did prepare that.

Q. Okay. That's all I...

A. And that was all based on Order 30 submission of data plus...

Q. And you just did the mapping on the basis of Order 30 data that's basically data that's been in the record through Mr. Halverson?

A. That is correct.

Q. Okay.

\*\*\*

ADMINISTRATIVE LAW JUDGE: Thank you, Mr. Beshore. Is there any objection to the admission into evidence of Exhibit 9? There is no objection. Exhibit 9 is admitted into evidence. Mr. Vander Linden, I

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1       assume you will stay?

2                   MR. VANDER LINDEN:  Yes, I will be here.

3                   ADMINISTRATIVE LAW JUDGE:  Thank you.  You may  
4       step down.

5                   MR. VANDER LINDEN:  Thank you.

6                   ADMINISTRATIVE LAW JUDGE:  On that note let me  
7       indicate that during the break I was advised there are  
8       some proponents or witnesses who were unavailable today  
9       and who intend to be here tomorrow and to present  
10      tomorrow.  So we will not conclude today.  I've also  
11      been advised that there are some witnesses who may wish  
12      to finish today because they do not intend to be here  
13      tomorrow and I want to accommodate those that I can.  So  
14      as we go through the day if we get to a point where you  
15      have some concern that you want to make sure your  
16      testimony is taken before we close today, please advise  
17      us all of that and we will order everyone with that  
18      objective in mind.  I understand that we have the room  
19      until eight o'clock tonight if we need it.  So we'll  
20      keep a flexible schedule to accommodate as many as we  
21      can.  Mr. English?

22                   MR. ENGLISH:  Thank you, Your Honor.  Your  
23      Honor, the next Exhibits 10 through 20 that have been  
24      pre-marked are a series of exhibits, publications, or  
25      other materials from the California Department of Food

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1 and Agriculture. I think what we are trying to do if  
2 possible, subject to not having objections, is to get  
3 these documents in, then the witness for the California  
4 Department of Food and Agriculture is here, but as  
5 proposed by Mr. Cooper and others, perhaps it would be  
6 better for that witness to testify after proponents  
7 because then questions may be more focused on what the  
8 issues are. But again we'll leave it up to you. If you  
9 want to have, you know, questions taken now of the CDFA  
10 witness that is fine. But I have a series of exhibits  
11 that have been pre-marked. The first one, Exhibit 10,  
12 is the Stabilization and Marketing Plan for Market Milk,  
13 as Amended, for the Southern California Marketing Area  
14 effective April 1, 2000. The second one, #11, is the  
15 Stabilization and Marketing Plan for Market Milk, as  
16 Amended, for the Northern California Marketing Area  
17 effective April 1 of 2000. The next document, Exhibit  
18 12, it's been pre-marked, Your Honor, is the California  
19 Pooling Plan for Market Milk, as Amended, effective July  
20 1, 1997. I will represent that all three of these  
21 documents are the documents as available on the Internet  
22 last week and, well, the Department witnesses can  
23 certainly speak for themselves, they are to my  
24 understanding the most recent effective documents.

25 ADMINISTRATIVE LAW JUDGE: With regard to each  
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1 of these exhibits, Mr. English, you have deposited three  
2 copies with the Court Reporter?

3 MR. ENGLISH: Yes, Your Honor. During the  
4 break the Court Reporter pre-marked, has three copies,  
5 and the Government Attorneys and the Market Specialists  
6 also have copies.

7 ADMINISTRATIVE LAW JUDGE: All right.

8 MR. ENGLISH: As well as in this particular  
9 instance, the California Department of Food and  
10 Agriculture, I gave them a copy during the break as  
11 well. Exhibit 13 as pre-marked, California Dairy  
12 Information Bulletin issued June 2001. It's a monthly  
13 publication not very different from the monthly  
14 publications of the Market Administrator's Offices at  
15 the USDA. Pre-marked Exhibit 14, Your Honor, is from  
16 the California Department of Food and Agriculture,  
17 California Dairy Statistics 2000. It's an annual  
18 publication again not different in scope or kind from  
19 Market Administrator statistics. Exhibit 15, Your  
20 Honor, conveniently or not for some of us who will be  
21 going there, on Thursday of this week there will be a  
22 Hearing held by the California Department of Food and  
23 Agriculture on issues unrelated to this Hearing. And  
24 for that the CDFA has issued something called a Hearing  
25 Background Resource, Dairy Industry Statistics Related

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1 to Hearing Issues and the California Milk Pricing and  
2 Pooling Programs. And I have copies of that document  
3 and this again is #15. Exhibit #16 pre-marked is  
4 labeled Milk Pricing in California, a publication of the  
5 Dairy Marketing Branch of the California Department of  
6 Food and Agriculture, it has an official publication  
7 number, DMB-SP-101. Pre-marked Exhibit #17 is titled  
8 California Milk Pricing Formulas issued by the  
9 California Department of Food and Agriculture, Dairy  
10 Marketing Branch, and it has the official publication  
11 title DMB-SP-108. That was #17. Marked Exhibit 18, the  
12 publication of the Dairy Marketing Branch, California  
13 Department of Food and Agriculture, History of the  
14 California Milk Pooling Program, DMB-SP-102. The other  
15 publications were documents again I got off either off  
16 the Internet or at a recent proceeding called a workshop  
17 at the California Department of Food and Agriculture.  
18 This one, DMB-SP-102, after I came today, the Department  
19 of Food and Agriculture for California graciously told  
20 me that it was a new document and so this is a brand new  
21 document that I just received today and the Court  
22 Reporter has the copies of the new version. Pre-marked  
23 Exhibit 19 is a one-page document labeled Milk Marketing  
24 Areas as of January 2000 for California. And finally  
25 proposed Exhibit 20 pre-marked is a two-page document,

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1 it's labeled California Dairy Information Bulletin and  
2 it has the cover page for the California Dairy  
3 Information Bulletin issued December '99. This is the  
4 same monthly publication that was introduced or has been  
5 requested for introduction for June 2001. One table is  
6 attached, the table on Page 10, which is Table 4-A and  
7 4-B, which also exist as Page 10 and Tables 4-A, 4-B in  
8 the June 2001 it just has a more historic data. But it  
9 is only the one page plus the cover page and that would  
10 be proposed Exhibit 20.

11 ADMINISTRATIVE LAW JUDGE: All right. And you  
12 move the admission...

13 MR. ENGLISH: I would move admission of all  
14 these documents. They are official publications of a  
15 state agency maintained in the regular course of  
16 business, not for the purposes of this Hearing. The  
17 witnesses would be available later for questions. If  
18 for admissibility purposes we need to address that now,  
19 I think that Mr. Cooper's suggestion makes sense, that  
20 the questions might be more focused after the proposals  
21 are heard, but for purposes of admissibility, I believe  
22 these documents stand on their own, but if we need to  
23 have a foundation laid we can do that.

24 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
25 English. Is there any objection to the admission into

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1 evidence of any of the Exhibits 10 through 20? There  
2 being none, Exhibits 10 through 20 are hereby admitted  
3 into evidence. Mr. English?

4 MR. ENGLISH: Then I would call my first  
5 witness for Proposal #1, Mr. Neil Gulden.

6 ADMINISTRATIVE LAW JUDGE: Mr. Gulden, please  
7 be seated to identify yourself and then I'll ask you to  
8 stand again. And please state and spell your names.

9 MR. GULDEN: My name is Neil Gulden, and  
10 that's N-e-i-l, G-u-l-d-e-n, Director of Fluid Marketing  
11 for Associated Milk Producers, Incorporated, and my  
12 office address is 315 North Broadway, New Ulm, and  
13 that's N-e-w U-l-m, Minnesota, 56073.

14 ADMINISTRATIVE LAW JUDGE: All right. And the  
15 spelling of that last name was G-u-l-d-e-n.

16 MR. GULDEN: Right.

17 ADMINISTRATIVE LAW JUDGE: Thank you. All  
18 right. Mr. Gulden, if you'll stand please to be sworn  
19 in?

20 \*\*\*

21 [Witness sworn]

22 \*\*\*

23 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
24 be seated. Mr. English?

25 MR. ENGLISH: Thank you, Your Honor. Mr.

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1 Gulden, before you proceed with your prepared statement,  
2 which we provided copies to the Court Reporter, but  
3 there are attached to your statement three pages for  
4 exhibit numbers. The first, Your Honor, is Entities in  
5 Support of Proposal #1, AMPI request for Federal Order  
6 1030 Hearing and it has twenty-one listed entities. May  
7 we have that marked as Exhibit 21?

8 ADMINISTRATIVE LAW JUDGE: You may. You may.

9 MR. ENGLISH: The second document in is an  
10 exhibit, it is labeled Calculation of Effect on Federal  
11 Milk Order 1030 PPD from California Milk Pool. May I  
12 have that marked as 22?

13 ADMINISTRATIVE LAW JUDGE: You may.

14 MR. ENGLISH: And the third document is  
15 Estimated California Effect on Federal Order 1030 PPD.  
16 May I have that marked as 23?

17 ADMINISTRATIVE LAW JUDGE: You may.

18 MR. ENGLISH: Would you proceed with your  
19 statement, Mr. Gulden?

20 \*\*\*

21 NEIL GULDEN,  
22 having first been duly sworn, according to the law,  
23 testified as follows:

24 MR. GULDEN: Thank you. AMPI represents  
25 approximately 5,000 dairy farmers in seven Midwest

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1 states, and our milk is pooled on Federal Order 1030,  
2 the Upper Midwest Marketing Area, and 1032, the Central  
3 Marketing Area, where we service several major bottling  
4 customers. We also own and operate 13 manufacturing  
5 plants in Minnesota, Wisconsin, South Dakota, and Iowa.  
6 My testimony is in support of Proposal #1, which also  
7 has the support of the entities listed on the attached  
8 Exhibit #21, who agreed to and whose names were included  
9 in our letter to the USDA requesting a Hearing on this  
10 issue. Section 1030.12(b)(3) states that a producer  
11 shall not include a dairy farmer whose milk is received  
12 by a diversion at a pool plant, from a handler regulated  
13 under another Federal Order if the other Federal Order  
14 designates the dairy farmer is a producer under that  
15 Order, and that milk is allocated by a request to a  
16 utilization other than Class I. And 1030.12(b)(4)  
17 states that a producer should not include a dairy farmer  
18 whose milk is reported as diverted to a fully regulated,  
19 well, to a plant fully regulated under another Federal  
20 Order with respect to that portion of the milk so  
21 diverted that is assigned to Class I under the  
22 provisions of such other Order. In short, the Order  
23 language is saying that a producer sharing in the  
24 proceeds of one Federal Order should not be allowed to  
25 share in the proceeds of another Federal Order on the

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1 same milk in the same month. Proposal #1 is simply  
2 asking that a producer sharing in the proceeds of a  
3 state marketwide pool not be allowed to share in a  
4 Federal Order on the same pounds of milk in the same  
5 month. This is exactly what has been happening with  
6 milk from California since October of 2000 to an  
7 increasing degree right up through May of 2001.  
8 California has chosen to opt for a State Marketwide  
9 Order for the dairy farmers. That's their right and  
10 that's their choice, but just as is the case between  
11 Federal Orders, their milk should not be allowed to be  
12 part of two marketwide pools at the same time. This is  
13 the regulatory loophole that must be closed to prevent  
14 the continued draw down of the Federal Order 1030  
15 Producer Price Differential, the PPD. Since October of  
16 2000 California milk has been pooled in increasing  
17 numbers on Federal Order 1030. The attached Exhibit 22  
18 shows my calculation for the effect on Federal Order  
19 1030 PPD of California milk pooled on the Order in the  
20 months of February and October of 2000, and February and  
21 May of 2001. These four examples show the methodology  
22 used to arrive at an estimated effect on the Federal  
23 Order 1030 PPD. The California pounds of milk pooled or  
24 estimated pooled and dollar value of Location Adjustment  
25 were subtracted from the producer milk and net PPD value

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1 published in the official Federal Order 1030  
2 "Computation of Producer Price Differential." This  
3 resulted in what the PPD would have been if no  
4 California milk had been pooled. Exhibit 23 shows the  
5 net effect of this same calculation from October 2000  
6 through May 2001. This adds up to over \$11,000,000 and  
7 a weighted average of almost 10 cents per hundredweight  
8 over an eight-month period. This was through these  
9 eight months and continues today to be money siphoned  
10 away from Midwest dairy farmers. It would not have been  
11 allowed between Federal Orders and should not be allowed  
12 to continue between a Federal Order and a State Order.  
13 In light of the obvious inequity and injurious and  
14 devastating effect on Midwest dairy farmers, we believe  
15 that the Secretary should handle this issue on an  
16 emergency basis going to directly to a final Decision  
17 without the time consuming intermediate steps of a  
18 recommended Decision. That concludes my statement, Your  
19 Honor.

20 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
21 Gulden. Mr. English?

22 \*\*\*

23 BY MR. ENGLISH:

24 Q. Thank you, Your Honor. Mr. Gulden, the  
25 exhibits attached to your statement, 21 through 23, were  
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1 they prepared under your direction and control?

2 A. Yes.

3 Q. Turning to Exhibit 22, could you for one  
4 of the months describe how it was you did your  
5 calculation. I think choose a month in which there is a  
6 hundredweight effect. So I guess don't pick February of  
7 2000.

8 A. All right. I choose May of 2001 on the  
9 bottom of that sheet. Under the -- going across from  
10 left to right under the total you have statistics that  
11 are announced by the Market Administrator in the  
12 computation of the Producer Price Differential. The  
13 producer milk that was announced for the Order for that  
14 month and the Net Pool Value, the dollar Net Pool Value.  
15 So if you divide the \$10,179,000 by the Producer Milk  
16 Pounds for that line you would get a 67-cent PPD. On  
17 the next line it says California is the milk that the  
18 Market Administrator has estimated is pooled on Federal  
19 Order 1030 from California for the month of May 2001 of  
20 241 million. The Location Adjustment was estimated from  
21 the Market Administrator's statistics from the counties  
22 in California that were listed as having milk pooled on  
23 Federal Order 1030 for May 2001. And the dollar amount  
24 was calculated by taking the difference between the  
25 \$1.80 Location Adjustment, Base Location Adjustment in

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1 Federal Order 1030, compared to the Location Adjustment  
2 in those counties. And that was -- so that is the sum  
3 total of the dollar amount of the difference in the  
4 Location Adjustment. That in effect for May of 2001 if  
5 you have a minus Location Adjustment it increases the  
6 value of the Federal Order pool. So in this case to  
7 back out the California numbers we showed that as a  
8 minus dollar amount on the pool. So then we subtracted  
9 those pounds from California and that Location  
10 Adjustment Difference and came up with the numbers you  
11 see for Producer Milk and Net Producer Milk Value, had  
12 there been no milk pooled from California on Federal  
13 Order 1030 and came up with a new PPD calculation of 78  
14 cents dividing those dollars by those pounds. And that  
15 was an 11-cent difference from the announced PPD, and if  
16 you multiply that times the Producer Milk, absent the  
17 California milk, you would come up with a one-and-a-half  
18 million dollar draw down of the Federal Order 32 because  
19 of the effect of California milk pooled on this Order.

20 Q. You mean Federal Order 30?

21 A. 30. Excuse me.

22 Q. And it is that one-and-a-half million  
23 dollars for one month which has risen substantially and  
24 significantly from October of last year that you say is  
25 an emergency at this point?

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1           A.    Yes.

2           Q.    And would it be fair to say that when you  
3 calculate this Net Pool Value, if the milk is on or off,  
4 excluding the Location Adjustment for a moment, that  
5 it's a wash having that California, you know, if you  
6 take it off. That's why you can do the calculation this  
7 way.

8           A.    In the Federal Order 30 pool it is  
9 basically a wash. Keep in mind the assumption made here  
10 is that that milk is going into Class III, that it would  
11 be classified as a Class III product going into cheese.  
12 And that that milk is charged into the pool at the same  
13 value that it draws out of the pool, so it has a net  
14 effect of adding no money to the Federal Order 30 pool  
15 value.

16          Q.    What's the basis for your assumption that  
17 it was going into Class III? Is it that if it's not  
18 going to Class III you'd be actually paying money in and  
19 it wouldn't make any sense to be pooling it on Order 30?

20          A.    Yes, especially in the case of Class IV.  
21 If you -- you wouldn't pull it if it was in Class IV  
22 because you would be paying more money into the Order  
23 pool.

24          Q.    And your assumption or your calculations  
25 on the Location Adjustment again are designed so as not

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1 to overstate the impact...

2 A. Correct.

3 Q. ...on Order 30 pool. Correct?

4 A. Correct.

5 Q. You've attempted to make an adjustment  
6 based upon the Location Adjustment?

7 A. Based on the homes and the information we  
8 had available to us.

9 Q. Now to your knowledge this California  
10 milk is also eligible for pooling on California?

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

12 Q. And your objection then is not that this  
13 is California milk, but that it is receiving a pool  
14 benefit twice. Correct?

15 A. Yes, I'm not singling out California,  
16 it's the double pulling that I'm singling out.

17 Q. Exhibit 23, proposed Exhibit 23, is based  
18 upon Exhibit 22. Is that correct?

19 A. Yes, for those months in Exhibit 22,  
20 those four months are also included in Exhibit 23 and on  
21 a -- included with the other eight months that I have  
22 here.

23 Q. But you did the calculation with the  
24 other eight months you just didn't show them in Exhibit  
25 22. Correct?

1 A. That's correct.

2 Q. But the same methodology was used to draw  
3 the results for Exhibit 23.

4 A. That's correct.

5 Q. Correct?

6 A. That's correct.

7 Q. And that then shows an effect since  
8 October of 2000 through May on Federal Order 30 pool of  
9 \$11.4 million dollars drawn out. Correct?

10 A. Yes, that's our estimate.

11 Q. And again that estimate based upon the  
12 idea that that money is drawing -- that milk that drew  
13 that 11.4, that same milk, also was available for  
14 benefiting to the most part in California's pool system.  
15 Correct?

16 A. That's correct.

17 Q. Mr. Gulden, there's a witness to follow  
18 you, Mr. Conover. Correct?

19 A. Yes.

20 Q. Who as his own curriculum vitae will show  
21 has been involved with Federal Orders for over 50 years  
22 and is it your understanding that Mr. Conover has some  
23 revised language for Proposal #1?

24 A. Yes, he does.

25 Q. And have you seen that language?

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1 A. Yes.

2 Q. And do you endorse it?

3 A. Yes.

4 Q. And while I'm certainly not going to  
5 limit questions to you, those technical questions about  
6 what that revised language would be would be better  
7 directed to Mr. Conover?

8 A. That would be correct.

9 \*\*\*

10 MR. ENGLISH: I have no further questions of  
11 this witness.

12 ADMINISTRATIVE LAW JUDGE: Thank you, Mr....

13 MR. ENGLISH: Available for cross examination  
14 and I move admissions of Exhibits 21, 22, and 23.

15 ADMINISTRATIVE LAW JUDGE: All right. Have  
16 you provided three copies of each of those to the Court  
17 Reporter?

18 MR. ENGLISH: Yes, we did, Your Honor.

19 ADMINISTRATIVE LAW JUDGE: All right. First  
20 of all with regard to the three exhibits, Exhibit 21,  
21 Exhibit 22, and Exhibit 23. Is there any objection to  
22 the admission into evidence to any of those three  
23 exhibits? There being none, Exhibits 21, 22, and 23 are  
24 hereby admitted into evidence. With regard to cross  
25 examination of Mr. Gulden I will hear from anyone who

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1 would like to cross examine at this time. Yes, please  
2 identify yourself again.

3 \*\*\*

4 BY MR. BESHORE:

5 Q. Marvin Beshore. Good morning, Neil.

6 A. Hello, Marvin.

7 Q. In your statement on the third page you  
8 make the comment after noting the calculations in  
9 Exhibits 22 and 23 that through the eight months and  
10 continuing today money is being siphoned away from  
11 Midwest dairy farmers. Who's a Midwest dairy farmer  
12 that you're concerned about there?

13 A. The dairy farmers pooled on Order 30.

14 Q. All dairy farmers pooled on Order 30  
15 today?

16 A. Through that time period.

17 Q. Okay. Is Montana a state in the Midwest?

18 A. Sort of. They're close.

19 Q. Are...

20 A. But we'd encompass their Midwestern  
21 heritage, you bet.

22 Q. So Montana dairy farmers fall within the  
23 category of those that you would seek to protect from  
24 money being siphoned away?

25 A. Well, only to the extent that they have  
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1 milk pooled on Order 30.

2 Q. Is Idaho a state in the Midwest?

3 A. No, I'd say not.

4 Q. Okay. Now you understand that in April  
5 and May of this year milk has been pooled from Idaho on  
6 Order 30. Correct?

7 A. Yes, I do.

8 Q. Okay. And your proposal doesn't seek to  
9 affect that milk in any way. Correct?

10 A. No, it doesn't, you know, I'm...

11 \*\*\*

12 [Off the record]

13 [On the record]

14 \*\*\*

15 MR. GULDEN: ...on a State Pool it's not  
16 sharing in another pool. My comments, Mr. Beshore, are  
17 designed toward the fact simply that we have milk pooled  
18 on this Order that's also sharing in another Class I  
19 distribution of money in a State Pool and I don't think  
20 they should be sharing in both.

21 \*\*\*

22 Q. Okay. Well, isn't it correct, Mr.  
23 Gulden, that every hundredweight of milk in Idaho that's  
24 pooled on Order 30 has exactly the same effect on the  
25 pool that every hundredweight of milk from California

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1 has?

2 A. Sure.

3 Q. Okay. So that in regard -- the pooling  
4 of whether any milk in California, or Idaho, or any  
5 other state is regulated in any way by the state in  
6 which it's located, if it's pooled on Order 30 it  
7 affects the Order 30 producers in the same way.

8 A. The affect is the same, yes.

9 Q. Okay. Is it your, well, is it your  
10 interest basically in your proposal to retain for the --  
11 shall we say traditional Order 30 producers, the PPD in  
12 Order 30. Is that your thought generally?

13 A. To retain it, is that what you said?

14 Q. Yes.

15 A. Well, not to retain it, to...

16 Q. Keep it from being...

17 A. ...keep it free from being diluted.

18 Q. Okay.

19 A. Yes, that would be my...

20 Q. Isn't that the flip side of retain?

21 A. No, well, do you mean retain prior to  
22 California milk being pooled on this Order?

23 Q. Sure.

24 A. Yes, to get back to a situation where as  
25 my exhibits explain you'd have a higher PPD if it

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1 wasn't.

2 Q. Okay. Would you -- shouldn't the same  
3 principle apply to other Federal Orders also?

4 A. No, not in my estimation. I think milk's  
5 going to flow and blend prices are going to determine  
6 where that milk flows and there's never been a  
7 restriction in the Federal Order, well, I shouldn't say  
8 that. Let me restate that. There has been restrictions  
9 over the years but in recent history the trend at least  
10 has been to allow producers to pool where it's to their  
11 best advantage as long as the bottling plants are being  
12 serviced and it doesn't hinder the ability of bottlers  
13 to get Class I milk.

14 Q. To your knowledge are bottling plants in  
15 Order 30 being serviced by the milk that's being pulled  
16 from Idaho?

17 A. I couldn't say for sure, I would...

18 Q. Not likely.

19 A. I guess, you know, your witness might  
20 have something to say on that. I don't know.

21 Q. Well, you know something about the  
22 economics of supplying milk to...

23 A. Yes, but I don't...

24 Q. ...fluid bottling plants in Order 30  
25 don't you?

1 A. Some.

2 Q. Yes. And would it be economical to  
3 service those plants with milk from Idaho?

4 A. Well, I don't know what kind of hauling  
5 rate they're getting. They, you know, but so I'm not  
6 involved with that milk, Mr. Beshore, so I really don't  
7 know what their situation. I don't have any Idaho milk  
8 and I'm not pooling any Idaho milk. So, you know, I  
9 have a hard time knowing what their economics are on it.

10 Q. Okay. Well, let's flip it around. Would  
11 you have any problem with milk from California being  
12 pooled if it was serving fluid markets in Order 30?

13 A. Yes, if it was also pooled on  
14 California's State Order that would still be a problem.

15 Q. It doesn't...

16 A. That's my issue.

17 Q. It doesn't matter whether it's serving  
18 the market or not, if it's part of a State Order it  
19 shouldn't be able to be pulled is your position?

20 A. A State Order with a marketwide pool  
21 where those same producers on that same milk are also  
22 sharing in that State Order distribution of Class I or  
23 any class enhancement in that particular state.

24 Q. Okay.

25 A. In that pool.

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1           Q.    Would you apply the same principle to  
2 producers who supply milk to state -- to plants not  
3 regulated by Federal Orders, which have minimum State  
4 Order regulations, minimum State Producer Price  
5 Regulations?

6           A.    Like I stated only if they have some --  
7 only if that milk is sharing in some type of a  
8 distribution of money in those State Pools.  If it is a  
9 distribution from that pool then that milk should not be  
10 pooled on a Federal Order.

11          Q.    Okay.  But your proposal makes a point of  
12 only addressing marketwide pools, so called marketwide  
13 pools.  Correct?

14          A.    Yes.

15          Q.    Okay.  Now under your proposal you would  
16 allow a producer, would you not, to ship to a State  
17 Regulated Individual Handler Pool Plant with minimum  
18 pricing five days of the week and send his milk to and  
19 Order 30 supply plant the rest of the week and be pooled  
20 on Order 30.  Correct?

21          A.    I hadn't thought about it much but, yes,  
22 I would.

23          Q.    Okay.  Right.  And actually that producer  
24 has a much greater advantage from the State regulations  
25 since it's an individual handler pool and he gets all

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1 the Class I, he has a much greater regulation from that  
2 State advantage and still draws the Order 30 pool on his  
3 surplus. Isn't that correct? The Order 30 PPD.

4 A. I imagine there could be circumstances  
5 like that, Marvin.

6 Q. Okay.

7 A. It wouldn't -- I'm not sure they would  
8 amount to much volume, I don't know where you're going  
9 with this or what states you're talking about but...

10 Q. Well, let's assume that we're looking for  
11 -- that there's some common interest in the proponents  
12 of Proposal 1 and 4 and maybe two and three also with  
13 addressing a problem in the current situation and trying  
14 to find the, you know, the proper or the best solution  
15 for that. I'm wondering if the attempt to define the  
16 solution in terms of milk regulated under State  
17 Regulations doesn't have some difficulties. By the way,  
18 what happens if California changes? How do you define  
19 marketwide by the way? What if -- is any draw from the  
20 pool sufficient to disqualify the California milk penny,  
21 the dime?

22 A. Absolutely.

23 Q. Okay.

24 A. Absolutely, you know, marketwide is  
25 marketwide. It's a sharing of money in another pool...

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1 Q. Yes.

2 A. ...since we pool it and if that's  
3 happening...

4 Q. So if California went to a system that  
5 didn't meet your definition of marketwide you'd have no  
6 problem with California milk that was going to  
7 manufacturing uses in California being paper pooled on  
8 Order 30?

9 A. If they were not part of the California  
10 pool. Is that what you're asking?

11 Q. Well, if California changed its  
12 regulations so they didn't meet your definition of  
13 marketwide pooling you'd have no problem with the milk  
14 from California being pooled on Order 30.

15 A. If it wasn't drawing a distribution out  
16 of a California pool then it wouldn't be any different  
17 than Idaho milk.

18 Q. Okay. Even though it would have the same  
19 affect on the blend price in Order 30 that it has today?

20 A. That would, well, sure that would be  
21 correct. California would have to change their law to  
22 do that and...

23 Q. Okay.

24 A. ...if they did...

25 Q. But if they did you wouldn't have any

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1 problem with it?

2 A. Well, if they did that we'd have to think  
3 about it I guess. We might be right back here again.

4 Q. Okay. By the way the exhibit -- the  
5 compilation of statistical material offered by the  
6 Market Administrator of Order 30 shows that Associated  
7 Milk Producers has a number of pool supply plants on  
8 Order 30. Is that correct? Maybe -- Let's see. --  
9 Blair, Wisconsin, Glencoe, Minnesota...

10 A. Which table are you referring to?

11 \*\*\*

12 MR. ENGLISH: That's seven.

13 MR. RICHMOND: Table 1 -- I'm sorry.

14 MR. GULDEN: Table 1?

15 MR. ENGLISH: It's Exhibit 7, Marvin.

16 \*\*\*

17 BY MR. BESHORE:

18 Q. Okay. So you have five pool supply  
19 plants on Order 30. Is that correct?

20 A. What page are you on, the first page?

21 Q. I'm sorry. Page 1, Table 1, yes.

22 A. Yes. That's correct.

23 Q. Okay. Do you have any pool supply plants  
24 located in the States of Minnesota or Wisconsin, which  
25 are pooled on other Federal Orders?

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1 A. No, we don't.

2 Q. Okay. Do you have milk in Minnesota and  
3 Wisconsin that's pooled on other Federal Orders?

4 A. Yes, we do.

5 Q. And milk that's delivered for  
6 manufacturing purposes in Minnesota and Wisconsin that's  
7 pooled on other Federal Orders?

8 A. Yes, we do.

9 Q. Okay. Now with the pool supply plants  
10 you have on Order 30, if you chose to pool milk from  
11 distant areas, Idaho or California, you would have the  
12 ability to do that under the present regulations would  
13 you not?

14 A. To the extent that we had Class I sales  
15 to cover that.

16 Q. Okay. Well, you don't -- how many --  
17 what volume of Class I sales do you need from a supply  
18 plant in the month of May 2001 in Order 30?

19 A. 10 percent.

20 Q. Okay. So 10 percent of the receipts at  
21 the supply plant?

22 A. 10 percent of your total milk pooled.

23 Q. Okay. Thank you.

24 \*\*\*

25 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

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1 Beshore. Other cross examination of Mr. Gulden? Yes,  
2 sir. Please identify yourself again.

3 \*\*\*

4 BY MR. LAMERS:

5 Q. Dick Lamers or Richard Lamers. Mr.  
6 Gulden, referring to Exhibit #22, well, first of all,  
7 you are representing the AMPI producers or are you  
8 representing the plants, the handlers as a handler?

9 A. I am up here testifying and representing  
10 AMPI producers.

11 Q. Well, the AMPI also has supply plants and  
12 you're also a handler. Is that not correct?

13 A. Well, the dairy farmers of AMPI are  
14 cooperative and they own those plants. So...

15 Q. So you're also a handler -- All right. --  
16 now you show on Exhibit 22 a one-and-a-half million  
17 dollar difference on the month of May 2001, and that has  
18 got to be the difference of dollars that actually went  
19 to California for the milk. Is that correct?

20 A. Yes, that would be the amount that the  
21 California milk, the 241 million pounds drew out of the  
22 Order 30 pool for that month.

23 Q. That's correct. And in order for the  
24 California milk to be able to be pooled under Order 30  
25 this means this milk had to be qualified by a pool plant

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1 from Order 30. Is that not correct?

2 A. Yes. That's correct. One time, one days  
3 production.

4 Q. One days production?

5 A. Yes.

6 Q. In your estimation do you think this pool  
7 plant is going to do this for these California producers  
8 out of the goodness of their heart or are they getting  
9 some remuneration?

10 A. It's their own heart.

11 Q. It's their own heart. So you...

12 A. The people are doing this and I don't  
13 have to go into that, but the people who are doing this  
14 have pool plants in Order 30.

15 Q. Do you have any knowledge of any  
16 remuneration?

17 A. Any what, sir?

18 Q. Remuneration, kickbacks.

19 A. I have no knowledge of that, no.

20 Q. When you are pooling milk under other  
21 orders under Order 30, other than Order 30...

22 A. One order, yes.

23 Q. Yes, in one order. And are you paying  
24 any kickbacks to the pool plant that's referring you,  
25 you know, qualifying milk under other orders?

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1 \*\*\*

2 MR. ENGLISH: I object to the form of the  
3 question and the question, I mean, the witness can  
4 certainly answer but I certainly object to the  
5 characterization of the word kickback.

6 \*\*\*

7 BY MR. LAMERS:

8 Q. Well, we'll take away the word kickback  
9 and we'll take a handling cost and a handling charge for  
10 pooling or whatever you want to call it.

11 A. No, we have always had customers in the  
12 other Order that I'm pooling milk and it's -- if we...

13 Q. So essentially your organization  
14 basically has producers in the other Orders as well?

15 A. Yes.

16 Q. So you just move them back and forth, the  
17 producers?

18 A. Yes, to pool them, yes.

19 Q. That's right.

20 A. That's what's happening.

21 Q. Okay. Thank you very much.

22 \*\*\*

23 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
24 Lamers. Any other examination of Mr. Gulden? Yes,  
25 please identify yourself again.

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1 also a pool plant, a pool supply plant. We have a  
2 manufacturing plant in Sibley in Sanborn, Iowa,  
3 Northwest Iowa, which are also pool plants. Are you  
4 keeping track?

5 Q. Yes, I am.

6 A. Okay. We have plants in Northeast Iowa  
7 at Arlington, Iowa, which is also a pool plant on Order  
8 32, and we have -- I'm trying to think now. -- how many  
9 do you have so far?

10 Q. We're short five manufacturing plants.

11 A. We are?

12 Q. Yes.

13 A. My goodness. I'm must have lost them.

14 Q. Yes. Do you have non-pool manufacturing  
15 plants?

16 A. Yes, we have a plant at Dawson,  
17 Minnesota, which is just a cheese plant, we have a plant  
18 at New Ulm, Minnesota, which is a butter churning  
19 operation. It receives milk but then that milk is  
20 shipped to other locations for processing and any excess  
21 cream is shipped back to New Ulm for butter churning.  
22 Let me see. What am I missing? We have a plant in  
23 Mason City, Iowa that makes instant non-fat dry milk, it  
24 does not receive any milk, that's one of the plants. We  
25 have a plant at Portage, Wisconsin that's a cheese

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1 cutting and wrapping plant, no milk received.

2 Q. Was that included in the thirteen...

3 A. Yes.

4 Q. ...plants that you identified? -- Okay.

5 A. Am I missing one?

6 Q. Yes, you're missing just one but that's  
7 close enough.

8 A. Okay.

9 Q. Does AMPI also supply milk to non-pool  
10 plants owned by other entities?

11 A. Yes.

12 Q. On a regular basis?

13 A. On a straight milk sales basis it's  
14 irregular, it's spot, you know, spot sales. We do have  
15 some milk swap arrangements that we do on a regular  
16 basis where we put milk into somebody else's plant and  
17 they put milk into our plant for the purpose of saving  
18 freight.

19 Q. Does AMPI pool milk produced by non-  
20 member producers of AMPI?

21 A. I'm trying to think. Not on a normal  
22 basis. We have some cooperative feeder plants that sell  
23 milk to AMPI and we pool their milk...

24 Q. Milk that's...

25 A. ...that are located in the Marketing Area

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1 of Order 30.

2 Q. Okay. Milk of dairy cup cooperatives  
3 that are not by themselves pool handlers?

4 A. Yes.

5 Q. Okay. I'm holding up the middle page of  
6 Exhibit 7, the map.

7 A. Uh-hum.

8 Q. Does AMPI have producers in the whole  
9 procurement area or are you more or less focused in  
10 parts of the procurement area?

11 A. In the Upper Midwest area?

12 Q. Yes.

13 A. Yes, we have producers. A small amount  
14 of producers in Southern North Dakota, we have producers  
15 in Eastern South Dakota, almost all of Minnesota, and  
16 Western Wisconsin. And in that northern tier of Iowa  
17 counties we have some producers.

18 Q. Okay. And do you have other producers  
19 extending further down into Iowa that are Order 32 pool  
20 producers?

21 A. Yes.

22 Q. And also in Illinois or...

23 A. Not in Illinois.

24 Q. ...to the West?

25 A. We have producers in Nebraska...

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1 Q. Uh-hum.

2 A. ...Iowa, Missouri.

3 Q. Okay. And they are all associated with  
4 Order 32?

5 A. Yes.

6 Q. Your testimony you say AMPI pools  
7 producers in Order 30 and Order 32.

8 A. Uh-hum.

9 Q. My assumption is that you were intending  
10 present tense status. Have you in the past pooled  
11 producers in other markets?

12 A. Not under the current -- under the  
13 current configuration of Federal Orders?

14 Q. Say since January of 2000, yes.

15 A. Yes, no those are the only two Orders.

16 Q. In the manufacturing plants, pool and  
17 non-pool plants that you operate, well, let's start with  
18 the pool manufacturing plants. Do you have producers  
19 whose milk is received at those manufacturing plants 365  
20 days a year?

21 A. Yes, we have some of that.

22 Q. Are your producers generally affiliated  
23 in their marketing of milk with one of your plants or  
24 another?

25 A. Generally that's the case. We do have

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1       some milk that is pivotal, it can go to several  
2       locations but generally it's associated with a -- at  
3       least it's identified as being associated with a plant.

4               Q.    Okay.  The distributing plants that you  
5       serve, do you have a full supply agreement with any of  
6       them?

7               A.    Just with one and that's in Duluth,  
8       Minnesota.

9               Q.    Okay.  And with respect to the other  
10      plants, do you have a specific volume agreement, or  
11      commitment, or percentage of need commitment to any of  
12      the plants?

13              A.    We do have some.  We do have commitments,  
14      committed amounts that we have agreed to ahead of time  
15      and anything more than that is subject to negotiation.

16              Q.    Okay.  And with respect to the  
17      distributing plants that you serve, are they generally  
18      served directly from member farms delivered to the  
19      distributing plant?

20              A.    Yes, for the most part they are.  We do  
21      have some supply plant milk going into Minneapolis from  
22      that Turtle Lake location that I mentioned to you but  
23      that's basically the only supply plant milk that we  
24      have.  Otherwise it's direct shipped from producer's  
25      farms.

1 Q. Okay. With respect to your other supply  
2 plants then, to the extent that the producers are pooled  
3 through a particular supply plant, if their milk goes to  
4 a distributing plant it goes from the farm to the  
5 distributing plant, what Order 30 used to call a Divert  
6 Transfer. Is that correct?

7 A. It's 9-C Milk direct shipped to a  
8 distributing plant.

9 Q. Okay. Is your milk all pooled through  
10 supply plant performance, do you have milk that is  
11 pooled through non-plant performance such as cooperative  
12 association, aggregate milk supply, or any other means?

13 A. Well, it's pooled -- you better run that  
14 one by me again.

15 Q. Okay. Well...

16 A. Does it mean through other cooperatives?

17 Q. Is any of your milk pooled not through  
18 supply plant performance requirements?

19 A. Well, supply plant performance  
20 requirements in addition to direct shipped milk...

21 Q. Okay.

22 A. ...requirements.

23 Q. Okay. And are your supply plants pooled  
24 as a unit?

25 A. Yes.

1 Q. Okay. Which allows some plants to be  
2 pooled with fewer actual shipments than others?

3 A. Yes.

4 Q. Okay. When you service distributing  
5 plants directly from the farm, are those plants served  
6 by your member producers generally located closest to  
7 your distributing plant customers?

8 A. That would be the general rule, yes.

9 Q. Okay. And would it be the general  
10 procedure for milk of those conveniently located  
11 producers to go to your distributing plant customer all  
12 the time or most of the time?

13 A. Yes, generally you would have the same  
14 basic producer group going to the distributing plant.  
15 At least on the days that the plant wants the milk and  
16 those fluctuate sometimes weekly.

17 Q. Okay. You indicated that you had a  
18 supply plant in South Dakota but that's on Order 32  
19 supply plant.

20 A. Yes.

21 Q. Is that correct?

22 A. That's correct.

23 Q. And you have producers in Eastern North  
24 Dakota?

25 A. Southeastern.

1 Q. Southeastern North Dakota. Pooled in  
2 Order 30?

3 A. I don't -- there aren't very many of  
4 them.

5 Q. Okay.

6 A. I'd have to check and I...

7 Q. They'd be mostly Order 32. Is that  
8 correct?

9 A. Yes.

10 Q. Okay.

11 A. Mostly 32.

12 Q. Which of your Minnesota or Wisconsin  
13 manufacturing plants, looking at the map again, well,  
14 let's say supply plants. Can you identify the counties  
15 in Minnesota where your supply plants are located?

16 A. Sure.

17 Q. They should be on the map there  
18 hopefully. Well, you know, I'm trying to save time  
19 searching.

20 A. Stearns County in Minnesota. I believe  
21 in McLeod County...

22 Q. Yes.

23 A. ...it would be Glencoe, and we go up into  
24 Barron County, Wisconsin, Turtle Lake. We go into  
25 Chippewa County in Wisconsin...

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1 Q. I see.

2 A. ...would be Jim Falls, and Trempealeau  
3 County would be Blair.

4 Q. Okay. What was the last one?

5 A. Trempealeau in Wisconsin.

6 Q. Where's that in relation to Chippewa,  
7 East, West, North, South?

8 A. One county. You skip over one county  
9 directly South.

10 Q. Yes. -- Okay. -- the Chippewa County  
11 plant, what kind of plant was that again?

12 A. That's a cheddar cheese operation.

13 Q. Okay. Is that one of the plants that  
14 ordinarily is supplied by a group of producers who are  
15 associated with the plant 52 weeks a year?

16 A. Yes, they're continually associated with  
17 the plant.

18 Q. And who ship to...

19 \*\*\*

20 [Off the record]

21 [On the record]

22 \*\*\*

23 BY MR. VETNE:

24 Q. ...associate the producers of Chippewa --  
25 that supply the Chippewa County plant. If AMPI had to

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1 ship, physically ship 10 percent of the milk production  
2 of those producers to a pool distributing plant, what  
3 affect would that have on the income of those producers  
4 or AMPI?

5 A. Well, some obvious freight  
6 considerations, we've got milk much closer to the fluid  
7 markets that we supply.

8 Q. Let me stop you there. If Chippewa  
9 County milk, 10 percent each month, were shipped to the  
10 fluid markets you would incur more freight for the  
11 Chippewa County milk. Correct?

12 A. Sure.

13 Q. And you would also have to find a home  
14 for the milk that's closer to the distributing plants  
15 that's displaced by the Chippewa County milk so there's  
16 freight going a different direction. Is that correct?

17 A. Well, we'd probably honk at each other's  
18 trucks going back and forth because it would come back  
19 to Chippewa County. We, you know, we have certain needs  
20 at the plant and we're going to run that plant full and  
21 I think that the, you know, the Order provisions have  
22 provided us a way to do that and I don't think that -- I  
23 think that's good. Milk should move the most economical  
24 way it can.

25 Q. Okay. With respect to your proposal as

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1 it applies to California milk. If there is in  
2 California, and I'm not sure there is, but if there is  
3 in California a manufacturing plant that does not  
4 participate in the California pool and whose milk does  
5 not become California pooled milk as a result of the  
6 delivery to that California manufacturing plant, under  
7 your proposal you would have no problem with that milk  
8 being pooled in Order 30 and diverted to the -- both  
9 Federal Order and the California Order non-pool plant  
10 when it's not shipped to the Midwest. Correct?

11 A. Would I have a problem with it?

12 Q. No, under the proposal that would be  
13 under your proposal.

14 A. Under the proposal that would be allowed  
15 I believe.

16 Q. Which other than distance is pretty much  
17 the way it works for manufacturing plants located in the  
18 Midwest also?

19 A. Yes.

20 Q. Thank you.

21 \*\*\*

22 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
23 Vetne. Any other examination of Mr. Gulden? Yes, sir.

24 MR. BERDE: I'm not as tall as the rest of  
25 these goes.

1 ADMINISTRATIVE LAW JUDGE: No one is as tall  
2 as Mr. Vetne.

3 MR. BERDE: My name is Sydney Berde,  
4 B-e-r-d-e, I'm an Attorney representing here of  
5 Northwest Milk Marketing Federation and the United  
6 Dairymen of Arizona, which has a peripheral interest in  
7 these proceedings. My address is 2221 Youngman Avenue,  
8 Suite 402, St. Paul, Minnesota, 55116.

9 ADMINISTRATIVE LAW JUDGE: May I clarify the  
10 spelling of your name? It starts with a B, as in boy?

11 MR. BERDE: B, as in boy.

12 ADMINISTRATIVE LAW JUDGE: Thank you.

13 MR. BERDE: E-r-d-e.

14 ADMINISTRATIVE LAW JUDGE: Thank you, sir.

15 \*\*\*

16 BY MR. BERDE:

17 Q. Good morning, Neil.

18 A. Good morning, Syd.

19 Q. How are you?

20 A. Great.

21 Q. Good. Neil, you're aware I'm sure that  
22 all Federal Orders contain provisions which define the  
23 term producer and producer milk. Is that correct?

24 A. Generally, yes.

25 Q. And the reason that the Orders

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1 differentiate among dairy farmers by excluding some  
2 dairy farmers from the definition of producer milk, or  
3 producer and producer milk, is in recognition of the  
4 fact that those who are defined as producers are  
5 recognized as providing some economic service to the  
6 market. Isn't that correct?

7 A. Well, they're provided a means of pooling  
8 their milk. An economic service in terms of performing.  
9 Is that what you're asking, Syd?

10 Q. Well, they constitute what the Secretary  
11 considers as a reliable source of milk for fluid  
12 handlers and handling the reserve supply of the market.

13 A. Yes.

14 Q. And in recognition of that fact they are  
15 entitled to participate in and receive their pro rata  
16 share of the market's revenues.

17 A. That's correct.

18 Q. Is that correct?

19 A. That's correct.

20 Q. Now what economic service to the market  
21 Upper Midwest Regional Marketing Area do the California  
22 handlers, or rather the California producers, who are  
23 pooled in the Upper Midwest quarter, what economic  
24 service in terms of the criteria that you have just  
25 agreed to do those producers provide to the Upper

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1 Midwest Order?

2 A. Well, none that I can identify.

3 Q. So the fact that they provide no economic  
4 service is really irrelevant to the question of whether  
5 they are subject to a marketwide or some kind of a  
6 pricing system in California or not. Isn't that  
7 correct?

8 A. No, that is my exact point. That it's  
9 not irrelevant, my testimony is direct toward that point  
10 specifically. And, you know, we could argue all day  
11 about what is a reserve supply and I don't consider  
12 California a reserve supply for the Midwest bottler, but  
13 a lot of that is subject to interpretation I would  
14 think.

15 Q. Well, if those producers in California,  
16 or Idaho, or anywhere else that we have milk pooled by  
17 diversion that is remote from the Upper Midwest Order  
18 providing those service to the market, what difference  
19 does it make whether that milk emanates from a region  
20 that is or is not subject to some kind of a pricing  
21 system?

22 A. Well, the difference in my mind, Syd, is  
23 that they are generating or they are extracting money  
24 out of two pools. Simply put they're taking money out  
25 of -- they are part of a system in the State that allows

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1       them to have benefits from a pool of money generated by  
2       charges to the classification of the milk. And in so  
3       doing shouldn't have the ability to also draw on a  
4       Federal pool at the same time.

5               Q.    Well, let's direct our attention then to  
6       the Idaho producers. They also are extracting money  
7       from the Upper Midwest pool and providing no economic  
8       service, as we have defined it, to the handlers in this  
9       Order. Isn't that correct?

10              A.    Sure.

11              Q.    And the adverse impact on the price  
12       received by your producers is the same whether that milk  
13       comes from Idaho or California.

14              A.    The impact's the same, yes.

15              Q.    The impact is the same.

16              A.    But definitely different in terms of  
17       being pooled on another Order. That milk's not pooled  
18       on another Order.

19              Q.    Well, the only difference is that the  
20       California's sourced milk is getting two cracks at the  
21       pot of money whereas the Idaho pooling handler is only  
22       getting one crack, namely the Upper Midwest Order. But  
23       the impact is the same, is it not...

24              A.    Yes.

25              Q.    ...in terms of your producers?

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1           A.    The impact is the same.

2           Q.    Now in thinking about solutions to the  
3           adverse impact on the prices received by your producers  
4           to solve this problem of pooling milk by diversion that  
5           provides no function and no economic service to the  
6           market, did you consider the one solution for example of  
7           amending sections of the Order?  Let's say Section 13 to  
8           provide that, for example, the milk of a dairy farmer  
9           located outside the states that you name, or somebody  
10          names in their proposal, shall not be eligible for  
11          diversion unless at least one days production is  
12          physically received at pool plants during the month.  
13          Did you consider such an amendment?

14          A.    No.

15          Q.    That would take care of a part of your  
16          problem or perhaps all of it wouldn't it?

17          A.    Well...

18          Q.    For example, if California milk had to  
19          come in every month...

20          A.    Yes.

21          Q.    ...that would constitute a pretty  
22          substantial deterrent to the pooling of that milk in the  
23          Upper Midwest Order wouldn't it?

24          A.    I would say it might.  It might, Syd, but  
25          I'm, you know, I'm not testifying to that.

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1           Q.    I understand you're not but I'm just  
2 simply suggesting that that might be an alternative to  
3 solve your problem.

4           A.    Well, I wouldn't support it because it  
5 has other ramifications, Syd, in other Federal Orders.

6           Q.    Uh-hum.

7           A.    And I, you know, to be brutally honest I  
8 don't want to -- I'm not going to do something -- I'm  
9 not going to support something that's going to hurt what  
10 I'm doing in another contiguous Order.

11          Q.    Well, I understand.  But if it were so  
12 drafted using that concept as to be focused on and  
13 limited in its impact to milk emanating from a remote  
14 place, such as Idaho or California, and would have no  
15 adverse impact on the other Orders on which you're  
16 involved, that might be one solution to be considered.

17          A.    That would be possible, you know, we'd  
18 have to look at how it's drafted and how it's worded.

19          Q.    And you're aware of the fact, are you  
20 not, that I think it was in 1990 the Act was amended to  
21 authorize the Secretary to include in the Orders a  
22 Location Adjustment to producers that differed from the  
23 Location Adjustment to handlers.  Are you aware of that?

24          A.    Yes.

25          Q.    And you're also aware that prior to Order  
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1 reform, all of the Orders contained a provision that  
2 provided for a Location Adjustment to producers. Some  
3 of which for example reduced the price paid to producers  
4 by one-and-a-half cents for every ten miles or a  
5 fraction thereof, or were something of that kind. Do  
6 you recall that?

7 A. Yes.

8 Q. Did you consider the possibility that the  
9 California/Idaho problem might be solved by  
10 incorporating in the Order, in the Upper Midwest Order,  
11 a Location Adjustment to producers in Section 75 that  
12 might provide for example that for purposes of making  
13 payment to producers from producer milk delivered to  
14 non-pool plants located outside whatever area you want  
15 to mention, a Plant Location Adjustment should be  
16 determined by subtracting from the uniform price some  
17 factor. Did you ever consider anything of that kind?

18 A. No.

19 Q. Would you agree that such a provision, if  
20 submitted and supported by testimony, might solve your  
21 problem?

22 A. Well, like I say I didn't consider it so  
23 I don't know if, you know, you have -- I guess if you  
24 have a witness that wants to put that in the record, we  
25 would consider it.

1 Q. I might do that in another Hearing.

2 \*\*\*

3 MR. BERDE: Thank you. I have nothing  
4 further.

5 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
6 Berde. Yes, sir? Let's go off the record and take  
7 about a two-minute stretch break in place.

8 \*\*\*

9 [Off the record]

10 [On the record]

11 \*\*\*

12 ADMINISTRATIVE LAW JUDGE: ...record. This  
13 record resumes at 11:58. Would you identify yourself  
14 please?

15 MR. CARLSON: Yes, my name is Rodney Carlson,  
16 C-a-r-l-s-o-n.

17 ADMINISTRATIVE LAW JUDGE: You'll need to  
18 adjust that mic.

19 MR. CARLSON: Okay. There we go. Let's try  
20 that.

21 ADMINISTRATIVE LAW JUDGE: That's much better.  
22 Thank you.

23 \*\*\*

24 BY MR. CARLSON:

25 Q. Okay. I am representing Maryland and  
York Stenographic Services, Inc.

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1 Virginia milk producers. A question, Mr. Gulden. Was  
2 milk from California pooled on the Upper Midwest Order  
3 to your knowledge prior to January of 2000?

4 A. I couldn't say for sure.

5 Q. But if it was it was rather insignificant  
6 in your opinion?

7 A. If it was it was fairly minimal, and as  
8 you can see prior to October of 2000 it was somewhere in  
9 the neighborhood of eight million pounds a month pooled  
10 all the way back through January of 2000. And an  
11 assumption could be made I guess that some was pooled  
12 prior to that.

13 Q. Or might have been?

14 A. Yes.

15 Q. Okay. Were there different restrictions  
16 in the Upper Midwest Order prior to January of 2000,  
17 pooling restrictions...

18 A. No.

19 Q. ...in any way, shape, or form? They're  
20 pretty much the same as...

21 A. Pretty much similar. Pretty much  
22 similar.

23 Q. They're pretty much similar?

24 A. Yes.

25 Q. Okay. So what is the difference. Why is

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1 that California milk now being attracted to this market  
2 where it wasn't before?

3 A. I think it's money actually.

4 Q. All right. What has caused that  
5 difference?

6 A. That caused the difference is the change  
7 in the Federal Order Reform effective January of 2000.  
8 That's one of the changes. First of all it increased  
9 the Class I differential in Order 30...

10 Q. Right.

11 A. ...by about 50 cents. Some of the  
12 unforeseen occurrences from Federal Order Reform have  
13 been the higher off provision that have added value to  
14 the pools. So basically you had an increase from  
15 somewhere in the neighborhood of a ten to 15-cent draw  
16 out of the Order 30 pool to anywhere up to \$1 and 40 to  
17 50 cents draw out of the Federal Order 30 pool. And so  
18 that's the basic difference, it's provided an economic  
19 incentive to attach milk.

20 Q. Prior to January of 2000, would that  
21 California milk have drawn that kind of a PPD if it had  
22 been attached to this market?

23 A. No, it would have been much less of  
24 course.

25 Q. Because...

1 A. But...

2 Q. Because of?

3 A. Well, the two things I mentioned. One is  
4 the increase in the Class I differential, which added  
5 value to the pool...

6 Q. Right.

7 A. ...and the fact that the higher of  
8 provision, the higher up Class III or IV provision,  
9 which sets Class I prices, wasn't as significant -- it  
10 wasn't in effect prior to 2000 of January.

11 Q. But that milk would also have been zoned  
12 out or the value of that milk would have been zoned out  
13 from the market to which it was attached...

14 A. Yes.

15 Q. ...as well.

16 A. Yes.

17 Q. And would that have been a significant  
18 factor in preventing that milk from being attached from  
19 the pool?

20 A. Yes. Absolutely.

21 Q. Okay. Thank you.

22 \*\*\*

23 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
24 Carlson. Any other questions for Mr. Gulden? Yes, Mr.  
25 Tosi. But again identify yourself.

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1 \*\*\*

2 BY MR. TOSI:

3 Q. Yes, I'm Gino Tosi with Dairy Programs.  
4 Mr. Gulden, have you...

5 \*\*\*

6 ADMINISTRATIVE LAW JUDGE: A little closer to  
7 the mic please.

8 \*\*\*

9 BY MR. TOSI:

10 Q. You petitioned the Secretary to consider  
11 Proposal #1 and you've done so on an emergency basis?

12 A. Yes, sir.

13 Q. And so what you're asking for is that we  
14 eliminate a recommended Decision and move to a final  
15 Decision and then take comments on the final Decision?

16 A. Yes, sir.

17 Q. Okay. Also have you made any effort or  
18 your organization made any effort to petition the State  
19 of California to amend its rules?

20 A. No, no, we haven't done that.

21 Q. Okay. Thank you.

22 \*\*\*

23 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

24 Tosi. Any further questions for Mr. Gulden? Yes, Mr.  
25 English.

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BY MR. ENGLISH:

Q. Are you aware of any portion of the California program that could be changed that would prevent this from the California point of view? Have you done any study of that?

A. No study. I thought about it but I don't know what they could do.

Q. Isn't it true that in the Federal Order system in order to deal with this that what Federal Orders have done is provide within a Federal Order language that says that on the same milk the producer may not be pooled twice. Correct?

A. That's correct. Yes.

Q. And that's uniform in all Federal Orders. Correct?

A. Yes.

Q. And if that provision did not exist you could then, for instance for your plant in South Dakota, pool milk on Order 32 and Order 30 and have it be the same milk drawn twice. Correct?

A. Sure.

Q. And Federal Orders have made a determination over 30 years ago to prevent that very activity. Correct?



1 ADMINISTRATIVE LAW JUDGE: A little closer  
2 please. A little closer to the microphone.

3 MR. BERDE: My name is Sydney Berde, I was  
4 just here. I object to the question on the grounds that  
5 it clearly calls for a legal conclusion that it took  
6 three Courts and finally the United States Supreme Court  
7 to agonize over before it decided the question of what  
8 is or what is not a trade barrier under 8(c)(5)(g) of  
9 the Act. And I don't believe this witness is competent  
10 to answer that question.

11 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
12 Berde. Mr. Beshore?

13 MR. BESHORE: Yes, I join in the objection.  
14 If we get into asking these witnesses to interpret the  
15 Act, we're going to be around for longer than we would  
16 like to be.

17 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
18 Beshore. Mr. English?

19 MR. ENGLISH: The purpose of the question is  
20 to get at questions that were asked why didn't you  
21 consider Acts or why didn't you consider why. It seems  
22 to me it is a perfectly appropriate answer to say we  
23 didn't consider "X," or we didn't try "Y," or we don't  
24 think "Z" is an answer because.

25 ADMINISTRATIVE LAW JUDGE: Mr. English, do you  
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1 want to comment at this time or do you want your witness  
2 to answer the question?

3 MR. ENGLISH: I'm asking on the objection of  
4 why it's an irrelevant question, it's not asking for his  
5 legal opinion. I want the witness to answer the  
6 question.

7 ADMINISTRATIVE LAW JUDGE: All right.

8 MR. ENGLISH: If he knows why he didn't do  
9 those things.

10 ADMINISTRATIVE LAW JUDGE: All right. Thank  
11 you. Do you remember the question, Mr. Gulden, or would  
12 you like Mr. English to repeat it?

13 MR. GULDEN: I think we better have that one  
14 more time.

15 ADMINISTRATIVE LAW JUDGE: All right. I would  
16 like you to repeat it, Mr. English, rather than have it  
17 played back. But if you prefer we'll play it back.

18 \*\*\*

19 BY MR. ENGLISH:

20 Q. I'll try to repeat it or rephrase it in  
21 some way to make it a little less offensive to Mr. Berde  
22 and Mr. Beshore. Is there any reason that you know of  
23 that the provisions suggested, the kinds of provisions  
24 suggested by Mr. Berde or Mr. Beshore, were rejected by  
25 you or your coalition with respect to dealing with this

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1 problem that you perceived from California regarding  
2 pooling of milk twice? The kinds of provisions you've  
3 heard which would basically set up a mechanism for  
4 performance outside the Marketing Area different from  
5 inside the Marketing Area.

6 A. Yes, no we did consider and we did talk  
7 about those things and did not include them in our  
8 proposal. Basically because we feel what the Department  
9 has done to make access to Federal Orders available and  
10 leave those determinations up to the individual co-ops  
11 or producers has been in the right direction. And we  
12 think free movement of milk between Orders is  
13 appropriate and that's why we didn't consider it.

14 Q. Thank you, sir.

15 \*\*\*

16 ADMINISTRATIVE LAW JUDGE: Mr. English, you've  
17 raised a point that I think needs clarification at this  
18 point. You have assumed by your question that proposals  
19 suggested by Mr. Beshore or Mr. Berde treated areas  
20 outside the geographic area differently from areas  
21 within the geographic area. And that may not be an  
22 accurate assessment of suggestions made by them. I want  
23 to make sure that -- I believe the witness has properly  
24 fielded your question, but I just want that point  
25 clarified.

1                   MR. ENGLISH: I am content with the answer and  
2 I think I'm also content with the questions in the  
3 record as they are stated. That effectively say that,  
4 you know, a performance standard for someone outside the  
5 Marketing Area, as I am rephrasing Mr. Berde's proposal.  
6 But if one of those was that a performance standard for  
7 a producer outside the Marketing Area would be to touch  
8 base once a month, and that was different from, it  
9 wasn't suggested that the same provision exist for  
10 inside the Marketing Area.

11                   ADMINISTRATIVE LAW JUDGE: I see.

12                   MR. ENGLISH: That is all I can say about it  
13 but I am content with the witness's answer.

14                   ADMINISTRATIVE LAW JUDGE: All right. Thank  
15 you. Yes, Mr. Vetne.

16                   MR. VETNE: Your Honor, I don't have a  
17 question for the witness. But I want to make a very  
18 belated objection...

19                   ADMINISTRATIVE LAW JUDGE: Yes.

20                   MR. VETNE: ...with the hope of saving time  
21 down the road here. Many of the what ifs that were  
22 discussed on cross examination with Mr. Gulden involved  
23 possible solutions, which are not in the proposals that  
24 were published and not logically an extension of the  
25 proposals published. If we get into what ifs that are

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1 not focused on these proposals we may also be here a  
2 long time. And the next time somebody asks a question  
3 like that, if to follow-up, I will stand up because I  
4 think all of us need to focus on the proposals and I  
5 think discussion of things like Location Adjustments to  
6 producers are way beyond the scope of this Hearing  
7 proposal. Thank you.

8 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
9 Vetne. Are there any other questions of Mr. Gulden?  
10 Mr. English, any further redirect?

11 MR. ENGLISH: No, Your Honor. Thank you.

12 ADMINISTRATIVE LAW JUDGE: All right. Thank  
13 you. Mr. Gulden, you may step down. Thank you.

14 MR. GULDEN: Thank you.

15 ADMINISTRATIVE LAW JUDGE: Mr. English,  
16 scheduling wise what would be your preference?

17 MR. ENGLISH: We're ready to go with the next  
18 witness if you want to do that now before lunch, we're  
19 perfectly content to move on. I have Mr. Curtis  
20 Kurth...

21 ADMINISTRATIVE LAW JUDGE: All right.

22 MR. ENGLISH: ...as the next witness.

23 ADMINISTRATIVE LAW JUDGE: And he would be a  
24 lengthy witness?

25 MR. ENGLISH: I'm sort of trusting that maybe

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1 they won't be quite as lengthy as time goes on and I  
2 will remind people that to the extent that we have, you  
3 know, technical questions about the proposal or to the  
4 extent they're logical what ifs, that Mr. Conover is the  
5 expert witness who will be testifying. He's very  
6 familiar -- everyone is very familiar with Mr. Conover.  
7 That's not to cut off questions of any particular  
8 witness, but it seems to me that we don't need to  
9 duplicate every time. I don't think the series of the  
10 next three witnesses should not be as long as Mr.  
11 Gulden.

12 ADMINISTRATIVE LAW JUDGE: All right.

13 MR. ENGLISH: In my opinion.

14 ADMINISTRATIVE LAW JUDGE: Very fine. You may  
15 call your next witness.

16 MR. ENGLISH: Mr. Curtis Kurth.

17 ADMINISTRATIVE LAW JUDGE: Are we still on the  
18 record? I'd like the witness please to state his name,  
19 and spell it, and identify himself for the record.

20 MR. KURTH: My name is Curtis Kurth.

21 C-u-r-t-i-s, K-u-r-t-h. I am employed by Foremost  
22 Farms, USA and my mailing address is E10889-A, Penny  
23 Lane, P.O. Box 111, Baraboo, B-a-r-a-b-o-o, Wisconsin,  
24 53913.

25 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

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1 Kurth. Would you stand and raise your right hand  
2 please?

3 \*\*\*

4 [Witness sworn]

5 \*\*\*

6 ADMINISTRATIVE LAW JUDGE: Thank you. Mr.  
7 English?

8 MR. ENGLISH: Thank you, Your Honor. Mr.  
9 Kurth has a one-page statement followed by four pages.  
10 Could I have the four pages attached to his statement be  
11 marked as Exhibit 24? Is that what we're -- 24?

12 ADMINISTRATIVE LAW JUDGE: I'm going to ask  
13 the Court Reporter to tell me what would be the next  
14 exhibit.

15 COURT REPORTER: Twenty-four is correct.

16 ADMINISTRATIVE LAW JUDGE: All right. Thank  
17 you. Twenty-four it is.

18 MR. ENGLISH: Mr. Kurth, would you read your  
19 prepared statement then please?

20 \*\*\*

21 CURTIS KURTH,  
22 having first been duly sworn, according to the law,  
23 testified as follows:

24 \*\*\*

25 MR. KURTH: Okay. My name is Curtis Kurth  
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1 employed by Foremost Farms, USA, and I've given my  
2 mailing address. Foremost Farms is a dairy co-op with  
3 members in Wisconsin, Minnesota, Iowa, Illinois,  
4 Indiana, Ohio, and Michigan. Foremost owns and operates  
5 manufacturing facilities in Wisconsin, Iowa, and  
6 Minnesota along with two distributing plants in  
7 Wisconsin. In addition to the four-and-a-half to five  
8 billion pounds of milk annually through our own plants,  
9 we also supply distributing plants and Federal Orders 5,  
10 30, 32, and 33. Foremost, along with other handlers in  
11 Order 30, has faced an unusual and unfortunate problem  
12 beginning in October of 2000. Additional milk from  
13 California started reducing the Upper Midwest Producer  
14 Price Differential from less than ten million pounds in  
15 any month previous to October, it has continued to  
16 increase and has averaged 260 million pounds in the past  
17 three months. Why has this happened? It's happened  
18 because California is not a part of the Federal Order  
19 system. California milk has the luxury of being pooled  
20 in both the State Order and a Federal Order and drawing  
21 monies from both. There are those who believe that the  
22 answer is to tighten pooling requirements. Foremost is  
23 opposed to this method of attempting to solve the  
24 problem. We believe the only answer is to eliminate  
25 milk from being pooled on a Federal Order if it is

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1 pooled on a State Milk Order with a marketwide pool. In  
2 our letter dated March 15 we requested the Department to  
3 hold this emergency expedited Hearing. According to our  
4 calculations during the past three months California  
5 milk has affected the Order 30 pool by nearly  
6 \$6,000,000, and that's Exhibit #24. Is that what we  
7 had?

8 ADMINISTRATIVE LAW JUDGE: That's correct.

9 MR. KURTH: Twenty-four. This revenue has  
10 come from the Upper Midwest farmers who already have the  
11 lowest base price PPD in the entire Federal Order  
12 system. That concludes my statement.

13 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
14 Kurth. Mr. English?

15 \*\*\*

16 BY MR. ENGLISH:

17 Q. Mr. Kurth, when you say that the answer  
18 is to eliminate milk being pooled on the Federal Order  
19 if the milk is pooled on a State Order with a marketwide  
20 pool, you make that statement and at the same time you  
21 recognize that the Federal Orders already have such a  
22 provision...

23 A. That's right.

24 Q. ...in place for Federal Orders. Correct?

25 A. That's correct.

1 Q. So all you're trying to do is treat state  
2 wide Orders with marketwide pooling the same as another  
3 Federal Order pool?

4 A. That would be correct.

5 Q. You have done your own calculations on  
6 Exhibit 24. The first three pages as I understand it  
7 are calculations for March, April, and May and the  
8 fourth page is using that on a summary sheet. Correct?

9 A. That's right.

10 Q. Could you for one of those months, March,  
11 April, or May, your choice, tell us what you did?

12 A. Well, one of the gentlemen at the office  
13 did this, but we started out by looking at the  
14 California milk and assuming that the components were  
15 the same as the entire marketwide pool and just went  
16 down using the same Class I volumes in two and four, so  
17 we're basing the assumption that the California milk is  
18 Class III that's pooled on Order 30. We do not know  
19 and, you know, have not the access to those exact  
20 numbers. But simply ran a pool the same as the MA's  
21 office would run it. And I think in Neil's, and I don't  
22 have really Neil's testimony here. We had one month  
23 where there was one-cent difference and I believe that  
24 was because of when you took the California milk out you  
25 would be carrying too big a reserve, you would have been

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1 over a nickel, and we don't like Paul having too big a  
2 reserve. So that really affected the PPD by a cent. It  
3 would have increased the PPD by one-cent and that's the  
4 only difference. And we also used the average location  
5 I think as Neil did in his.

6 Q. How...

7 A. And now obviously there was some  
8 locations, some counties where you have restricted  
9 information and we could not pick up those in entirety  
10 but used the average on the California milk.

11 Q. And the point of this exhibit, you know,  
12 recognizing that without confidential data we can't get  
13 it exact. The point of the exhibit is to show a  
14 magnitude of loss whether it's the precise...

15 A. That's...

16 Q. ...factors or not?

17 A. That's right. That's right. It's  
18 immaterial whether it is six cents in a month or eight  
19 cents in a month, but the principle of the thing and the  
20 affect of close to \$6,000,000 in a three-month period.

21 Q. And then the fourth page is simply a  
22 summary using the first three pages, the pounds per  
23 month, plus the difference in the PPD, and coming up  
24 with a value.

25 A. That's right. That's right.

1           Q.    And why did you make the assumption that  
2 the, well, let me backtrack for a moment.  You said that  
3 another person in your office did this, but the other  
4 person in this office did this under your direction and  
5 control.  Is that correct?

6           A.    Right.

7           Q.    And what determination did you make with  
8 him with respect to the assumption that this would be  
9 Class III milk in California?  Well, actually it's Class  
10 III for Federal Order...

11          A.    We have milk...

12          Q.    ...purposes but the...

13          A.    Right.  And we have no reason to believe  
14 that it is not Class III.

15          Q.    Right.

16          A.    You know, the only exception to that I  
17 assume would be if milk came into the Order for the  
18 first time in one of those three months and hit a pool  
19 distributing plant.  I do not know whether or not that  
20 happened.

21          Q.    All right.  But again the point is to  
22 show the magnitude and not the precise numbers.  
23 Correct?

24          A.    That's right.

25          Q.    And this \$6,000,000 in three months is  
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1 what you believe has constituted an emergency for the  
2 Upper Midwest.

3 A. That's correct.

4 Q. Correct?

5 A. That's correct.

6 \*\*\*

7 MR. ENGLISH: The witness is available for  
8 cross examination and I move the admission of Exhibit  
9 24.

10 ADMINISTRATIVE LAW JUDGE: Is there any  
11 objection to the admission of Exhibit 24 into evidence?  
12 There being none, Exhibit 24 is hereby admitted into  
13 evidence. Does anyone else have questions for Mr.  
14 Kurth? Cross examination of Mr. Kurth. Yes.

15 \*\*\*

16 BY MR. LAMERS:

17 Q. Mr. Kurth, Dick Lamers. Richard Lamers  
18 by the way, yes. And you as a producer's cooperative  
19 are a handler and is it the handler that moves milk  
20 between orders and locations, or is it actually your  
21 producers?

22 A. Well, in most instance it would be the  
23 handler who would make that decision.

24 Q. And so actually the handlers are the  
25 people that moves milk from location to location, to

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1 Order to Order. Is that...

2 A. That would be normal.

3 Q. Yes.

4 \*\*\*

5 MR. LAMERS: Thank you very much.

6 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

7 Lamers. Any further questions for Mr. Kurth? Yes, Mr.

8 Beshore.

9 \*\*\*

10 BY MR. BESHORE:

11 Q. Curt, has Foremost Farms pooled any milk  
12 from California on Order 30?

13 A. No.

14 Q. Okay. You have pool plants in Order 30  
15 as you've indicated...

16 A. Yes.

17 Q. ...however.

18 A. That's right.

19 Q. And, therefore, you would have had the  
20 ability to pool milk from California if you chose to?

21 A. Yes.

22 Q. The milk that you say you supply  
23 distributing plants in Orders 5, 30, 32, and 33, do you  
24 pool milk in all those Orders?

25 A. Yes, we do. The milk we would have

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1 pooled in five would be almost an insignificant amount,  
2 and there's a route that goes to one handler in Order 5.

3 Q. Okay. The information from the Order 30  
4 Market Administrator showed that over the past six or  
5 eight months, don't hold me to the exact time period,  
6 there has been, or over the past year, there's been  
7 about 500 million pounds or 600 million pounds of milk  
8 in Wisconsin that has disappeared from Order 30. Is any  
9 of that milk Foremost Farms milk?

10 A. Sure. Yes, it is.

11 Q. And to a -- and the milk's still in the  
12 State of Wisconsin however. Correct?

13 A. That's correct.

14 Q. It's been moved by paper to another  
15 Federal Market Administrator's report.

16 A. Yes.

17 Q. Correct?

18 A. Yes.

19 Q. Where has it been pooled?

20 A. If we looked at in our reports compared  
21 to a year ago, I would say that we have, you know, less  
22 milk obviously on Order 30, some less on thirty-two, but  
23 more on Order 33.

24 Q. Thirty-three?

25 A. Than a year ago.

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1                   Q.    Okay.  The milk in Idaho has the same  
2                   impact on Order 30 as does the milk in California.  
3                   Would you agree with Neil on that?

4                   A.    Yes, or it would affect the PPD in the  
5                   same way.

6                   Q.    Okay.  And by the way, your milk in  
7                   Wisconsin affects the producer milk on Order 33.  The  
8                   milk that was moved from Order 30 to Order 33 has the  
9                   same affect on the PPD in Order 33 as the California  
10                  milk on the PPD in Order 30.  Does it not?

11                  A.    That's right.  Any milk that moves from  
12                  one geographic area to another has that affect.  That's  
13                  right.

14                  Q.    Okay.  Your proposal, Proposal 1,  
15                  however, by focusing on state regulation would have no  
16                  impact upon the pooling on paper of Idaho milk in Order  
17                  30.

18                  A.    That's correct.

19                  Q.    Correct?

20                  A.    That's correct.

21                  Q.    And also by limiting the prohibition in  
22                  your proposal to marketwide pooled State Order milk, it  
23                  has no impact upon the ability of producers who may have  
24                  individual handler pooling sources in State Orders to  
25                  pool their surplus on Order 30.  Would you not agree

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1 with that? Milk that's not delivered to a distributing  
2 plant but it is delivered to an Order 30 plant is going  
3 to be pooled here even if it had the full Class I price  
4 on non-Order 30 plants?

5 A. That would be correct.

6 Q. You don't see any problem with that?

7 A. Not particularly.

8 Q. Now you are opposed to changing the  
9 pooling requirements in Order 30 to address the  
10 additional milk being pooled there your statement says.  
11 Is that correct?

12 A. That's right.

13 Q. So you believe the pool should be open to  
14 additional volumes of milk as long as they're not from  
15 California, whatever amounts...

16 A. No, as long as...

17 Q. ...or maybe from anywhere?

18 \*\*\*

19 UNIDENTIFIED SPEAKER: Objection.

20 ADMINISTRATIVE LAW JUDGE: The objection is  
21 sustained. Please restate that, Mr. Beshore.

22 \*\*\*

23 BY MR. BESHORE:

24 Q. Okay. In your view the Order 30 pool  
25 should be open to poolings of additional volumes of milk

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1 from any geographic area so long as they're not on what  
2 you call a State marketwide pool. Correct?

3 A. No, as long as they're not already  
4 drawing monies on the same milk out of a State Order.  
5 Right.

6 Q. Okay. Thank you.

7 \*\*\*

8 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
9 Beshore. Any additional questions for Mr. Kurth? Yes,  
10 Mr. Tosi?

11 \*\*\*

12 BY MR. TOSI:

13 Q. Hello, Mr. Kurth. I'm Gino Tosi. Are  
14 you of the opinion that pooling requirements be based on  
15 some criteria of performance?

16 A. For pooling requirements in...

17 Q. For producers, or their milk, or plants.

18 A. In general in any Order? Yes.

19 Q. Okay. And the performance in your  
20 opinion is based to -- is required to do to serve  
21 something. Would it be the Class I needs or just the  
22 accommodation of any producer anywhere for the purposes  
23 of...

24 A. Well, I think it's a combination of.

25 Q. Can you please elaborate?

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1 microphone?

2 MR. TOSI: Sure.

3 ADMINISTRATIVE LAW JUDGE: Thank you.

4 \*\*\*

5 BY MR. TOSI:

6 Q. And that the Class I use in the market is  
7 between say 15 and 20 percent has been typical since  
8 reform?

9 A. Well, obviously the Class I if you have  
10 more milk that has left Order 30 than has been attached  
11 from California the Class I utilization has gone up  
12 some. But, yes, fifteen to twenty is a ballpark number.

13 Q. Okay. And would you find say for example  
14 that a shipping standard for the market in general  
15 should equal at least what the Class I needs of the  
16 market would be?

17 A. I'm not sure what you're getting at. Are  
18 you suggesting that if you had a market, a Class I  
19 utilization of 18 percent that you should have a  
20 shipping requirement of 18 percent? Something like  
21 that?

22 Q. It would be something like that. I guess  
23 my question is is that if you had a consistent 15 to 20  
24 percent Class I use and the shipping standard were say 5  
25 percent or 10 percent, is that 5 or 10 percent

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1 reasonable with regard to having some set of pooling  
2 standards that speak to serving the needs of the Class I  
3 market?

4 A. Well, I'm not sure that I'm getting you  
5 but I would think 10 percent would. Obviously you can't  
6 get it ultra close to the true Class I utilization  
7 because you have a lot of milk, distributing plant milk,  
8 whether it's Foremost or anyone else's you may be moving  
9 Foremost, or others may be moving 45 or 50 percent. And  
10 if that volume is being taken up the supply plants  
11 wouldn't have -- the market would not have room for 18  
12 percent from supply plants or probably even 15 percent  
13 from supply plants.

14 Q. Okay. Okay. A couple of other small  
15 things. Do you support the elimination of a recommended  
16 Decision on this proceeding?

17 A. I certainly do.

18 \*\*\*

19 MR. TOSI: And that's all I have. Thank you.

20 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

21 Tosi. Any other questions for Mr. Kurth? Mr. English?

22 \*\*\*

23 BY MR. ENGLISH:

24 Q. Mr. Kurth, on the omission of a  
25 recommended Decision. If the Secretary determines that

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1 some portion of this Hearing, such as the issue that  
2 you're addressing is an emergency but some other portion  
3 is not, would you be in favor of having the Decision  
4 come out at least on your portion?

5 A. Yes, we certainly would.

6 \*\*\*

7 MR. ENGLISH: Thank you.

8 ADMINISTRATIVE LAW JUDGE: Mr. Beshore?

9 \*\*\*

10 BY MR. BESHORE:

11 Q. With respect to the emergency issue,  
12 Curtis, if it's an emergency to Order 30 producers to  
13 have their PPD reduced by the present pooling system in  
14 the manner it has, would it not be the same emergency  
15 for the producers in Order 33, or Order 32 whose PPD is  
16 being reduced in the same fashion by the couple of  
17 hundred million pounds of milk from the Upper Midwest  
18 that are now being pooled on those Orders, and for which  
19 request for Hearings have been or will be requested?

20 A. I don't believe so because I don't think  
21 that the additional milk that might be pooled in thirty-  
22 two or thirty-three with the exception of some  
23 California milk that's moving to thirty-two, is drawing  
24 monies out of two different Orders and I don't look at  
25 it as the same thing.

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1 Q. Okay. So it's the same amount of money  
2 perhaps but -- so it's not the money that makes it an  
3 emergency, it's the principle that makes it an emergency  
4 in your view?

5 A. Yes, there's two things and one of them  
6 is the principle, and obviously we don't know -- I don't  
7 know sitting here what happens to the extra monies, you  
8 know, the milk that's being pooled on Order 30 is being  
9 pooled by people who also have milk in California. So  
10 when those monies come out of the State Order and also  
11 out of the Federal Order on the same milk, where do  
12 those monies go? I don't know. I don't have the answer  
13 to that.

14 Q. What if the money was staying in the  
15 Upper Midwest. Would that be a plus or a minus?

16 A. Well, I would say that it probably from a  
17 competitive standpoint it would certainly be a minus.  
18 Because those, the members of the people pooling  
19 California milk on Order 30 would have those monies to  
20 be available at the farm level.

21 Q. So that would be a minus?

22 A. That would be a minus from a...

23 Q. More money? More money to farmers in the  
24 Order 30 area?

25 A. It would be more money for producers who

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1 have California producers being pooled, but certainly  
2 not for any of the rest of them.

3 Q. But it would be more money to dairy  
4 farmers in the Upper Midwest wouldn't it not?

5 A. Not in general and you tell me how many  
6 producers they have and I'll tell you how many producers  
7 it will be more money for.

8 Q. Okay. Thank you.

9 \*\*\*

10 ADMINISTRATIVE LAW JUDGE: Mr. English?

11 \*\*\*

12 BY MR. ENGLISH:

13 Q. And how many years experience do you have  
14 in Federal Orders, Mr. Kurth?

15 A. I don't know. Thirty-five, something  
16 like that.

17 Q. Assuming for a moment and we don't know  
18 at the moment, but assuming for a moment the money is  
19 staying in the Upper Midwest and is paid only to those  
20 producers who are associated with producers who have  
21 California milk. To that extent and that competitive  
22 situation that has developed, does that not create a  
23 disorderly market condition?

24 A. It could, yes. It would if those monies  
25 were actually being moved from the California milk and

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1 left in the Midwest to those producers it would be.

2 Q. Thank you, sir.

3 \*\*\*

4 ADMINISTRATIVE LAW JUDGE: Mr. Lamers?

5 \*\*\*

6 BY MR. LAMERS:

7 Q. Curt, I recall the -- I don't know if I  
8 heard you correctly, but did you say that there are  
9 times when you have difficulty attracting milk to your  
10 fluid milk lines?

11 A. Yes.

12 Q. Could you elaborate on that at all?

13 A. Did I?

14 Q. No, can you.

15 A. No.

16 Q. Can you elaborate on the -- you can't do  
17 it?

18 A. Yes, part of that problem is obviously  
19 because of the Order 30 price in general, you know, the  
20 Producer Price Differential, and as people would have  
21 options to pool milk on other Orders, the 10 percent  
22 shipping requirement -- I'll give you a for instance.  
23 Let's just say somebody had a 100 million pounds of milk  
24 and their normal shipments, and they were not in a  
25 system, so they ship ten million pounds. If they had

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1 the option of being able to pool 30 million pounds  
2 somewhere else, now they're down to 70 million pounds  
3 and they're only going to want to ship seven million  
4 pounds. So you just, you know, you take some milk away  
5 from the distributing plants. And the only way you can  
6 keep that milk in the distributing plants would be to  
7 pay some extra monies for it.

8 Q. So they refuse to ship it and then  
9 they...

10 A. No, they're not refusing, they are  
11 meeting -- they would be meeting the Order requirements,  
12 they would be shipping their 10 percent.

13 Q. Okay. All right. Now if they were able  
14 to draw a Class I price directly for that month would  
15 that help?

16 A. I suppose it would.

17 Q. Thank you.

18 \*\*\*

19 ADMINISTRATIVE LAW JUDGE: Any further  
20 questions for Mr. Kurth? Mr. English, any further  
21 redirect examination?

22 MR. ENGLISH: No, Your Honor.

23 ADMINISTRATIVE LAW JUDGE: All right. Thank  
24 you, Mr. Kurth. You may step down. Mr. English, let's  
25 break for lunch and I'll be guided by you as to how long

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1 we should take.

2 MR. ENGLISH: These people never like that.

3 MR. COOPER: What time is it?

4 MR. ENGLISH: And hour and ten minutes, get  
5 back at quarter to 1:00, Your Honor?

6 ADMINISTRATIVE LAW JUDGE: All right. That  
7 sounds good. So come back please...

8 MR. ENGLISH: At quarter of 2:00.

9 ADMINISTRATIVE LAW JUDGE: At what...

10 MR. ENGLISH: I was readjusting my clock too  
11 much.

12 ADMINISTRATIVE LAW JUDGE: At 1:45 we'll go  
13 back on record. Thank you.

14 \*\*\*

15 [Off the record]

16 [On the record]

17 \*\*\*

18 ADMINISTRATIVE LAW JUDGE: Back on record.  
19 We're back on record now at 1:46. Mr. English, you may  
20 proceed.

21 MR. ENGLISH: Thank you, Your Honor. The next  
22 witness I would call is Dennis Tonak and Mr. Tonak has a  
23 prepared statement and a one-page exhibit.

24 MR. TONAK: My name is Dennis Tonak.

25 D-e-n-n-i-s, the last name, T-o-n-a-k.

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1 ADMINISTRATIVE LAW JUDGE: All right. And,  
2 Mr. Tonak, will you identify yourself by occupation or  
3 work?

4 MR. TONAK: I'm the manager of Midwest  
5 Dairymen's Company, the business address 4313 West State  
6 Street, Rockford, Illinois. The zip code is 61102.

7 ADMINISTRATIVE LAW JUDGE: All right. Would  
8 you stand and raise your right hand?

9 \*\*\*

10 [Witness sworn]

11 \*\*\*

12 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
13 be seated. Mr. English?

14 MR. ENGLISH: Mr. Tonak, you have a prepared  
15 statement. Correct?

16 MR. TONAK: I do.

17 MR. ENGLISH: And you also have what I've  
18 handed out separately from the statement, although it's  
19 also attached to the statement is a one-page document  
20 that we have marked as an exhibit. Is that correct?

21 MR. TONAK: That is correct.

22 MR. ENGLISH: Could I have that marked as  
23 Exhibit 25, Your Honor?

24 ADMINISTRATIVE LAW JUDGE: You may.

25 \*\*\*



1 equity among producers. Over the last 25 years  
2 individual handler pools have been eliminated from the  
3 Federal Order Dairy Program. Smaller Federal Orders  
4 such as the Central Illinois Order and the Peducah  
5 Order, which operated almost as individual handler  
6 pools, have been eliminated through merger and  
7 consolidation. This helps create equity among producers  
8 over larger geographic areas. Equity among producers  
9 has been a major concern in California also as seen in  
10 the California Department of Food and Agriculture,  
11 Publication History of the California Milk Pooling  
12 Program. It is evident that in both the Federal Order  
13 Program and the California Milk Pooling Plan equity of  
14 the regulated pricing among producers in the same  
15 geographic area is very important. Marketwide pooling  
16 in both the Federal Order Program and California State  
17 Program is a basic cornerstone of establishing equity in  
18 the minimum regulated producer prices. In a marketwide  
19 pool the milk value is from many plants that are pooled  
20 or shared among all the producers supplying those  
21 plants. The information contained in how quota based  
22 and overbase prices are derived and milk pricing in  
23 California publications from CDFA, Dairy Marketing  
24 Branch, explains in relatively simple terminology the  
25 operation of a marketwide pool in California. The

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1 Federal Order Program also offers a good example of a  
2 marketwide pool. The Federal Order Program limits the  
3 pooling of a producer's milk to only one Federal Order  
4 at any given time. The same milk cannot be pooled on  
5 two different Orders at the same time. If a producer's  
6 milk was allowed to share in two or more Federal Order  
7 pools to double dip the system and draw money from more  
8 than one pool, there would not be equity among  
9 producers. The money from one Federal Order pool  
10 maintains equity and is justifiable. But drawing money  
11 from a second Federal Order pool on the same milk would  
12 destroy equity among the producers. That is why dual  
13 pooling is prohibited in the Federal Order system.  
14 Let's move on from philosophizing about equity for  
15 producers and look at some real numbers. In Exhibit 25  
16 for the 16 months beginning in January 2000 through  
17 April 2001 the Federal Order Statistical Uniform Price  
18 averaged \$10.88-and-a-half cents. The pool draw was 84-  
19 and-a-half cents. During the same 16-month period the  
20 California overbase price averaged \$11.10, 21-and-a-half  
21 cents higher than the Order 30 Uniform Price. The  
22 California quota price is \$1.70 higher than the overbase  
23 price, which makes 16-month average quota price \$12.80.  
24 In affect, the California dairyman receives from the  
25 California pool a higher regulated minimum price than

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1 does a Wisconsin producer from the Federal Order 30  
2 pool. On top of that, the California milk pooled on the  
3 Upper Midwest Order draws an additional 84-and-a-half  
4 cent pool payment via double dipping. That 84-and-a-  
5 half cents is roughly half of the \$1.70 added value for  
6 the California quota milk. I imagine that in California  
7 some plants and producers, if they are not pooling milk  
8 on Order 30, are asking themselves how do we compete  
9 with the added dollars coming to California from the  
10 Federal Order 30 pool draw, and I am asking myself how  
11 do I compete if those dollars do not go to California  
12 but stay in the Midwest. How do I attract milk to the  
13 Muller Pinehurst fluid plant in Rockford, Illinois? Do  
14 I have to go to California and market the milk of  
15 California producers to gain money to compete in the  
16 Upper Midwest marketplace? If the Federal Order does  
17 eliminate the double dipping, there will not be equity  
18 in the regulated price among producers in the Midwest or  
19 in California. Proposal 2 calls for the adoption of a  
20 grandfather clause. A true grandfather clause or a true  
21 grandfather approach should be related to milk that has  
22 a long history of being associated with the market. As  
23 such a grandfather clause would allow very little  
24 California milk to be pooled on Federal Order 30 from my  
25 perspective. Let me explain. I am a grandfather, my

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1 grandson is 15 months old. Since much of the California  
2 milk has been associated with the Federal Order 30 pool  
3 for less than a year, I think what Proposal 2 really  
4 wants to do is not grandfather, but grandson the  
5 California milk. Proposal 3 requests that California  
6 non-quota milk be the only milk, the only California  
7 milk, allowed to pool on Order 30. According to  
8 California statistics 68 percent of the milk produced in  
9 1999 was non-quota production. So Proposal 3 would  
10 allow two-thirds of California milk production to double  
11 dip the Federal Order pool. Since non-quota milk is  
12 already benefiting from the marketwide pooling in  
13 California, the adoption of this proposal would allow a  
14 blatant abuse of the Federal Order Milk Pricing system  
15 to continue. Proposal 4 does not directly address the  
16 inequity created by milk pooled on both a State Order  
17 with a marketwide pool and a Federal Order. While it  
18 calls for a minimum level of marketplace performance,  
19 the proposal still does not address the problem of  
20 double dipping. The matter to be addressed in Proposal  
21 1 should be handled on an emergency or expedited basis  
22 omitting a recommended Decision. The adoption of  
23 Proposal 1 would not change the movement or marketing of  
24 milk in any significant fashion. The same trucks would  
25 pick up the milk at the farm and take it to the same

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1 plants as is being done today. The only change would be  
2 the elimination of the financial benefit from double  
3 pooling. In conclusion we request the Secretary to take  
4 action to end the disparity that currently exists due to  
5 double pooling, the adoption of Proposal 1 on an  
6 expedited basis would accomplish this goal. This  
7 concludes my prepared statement.

8 ADMINISTRATIVE LAW JUDGE: Thank you. Mr.  
9 English?

10 \*\*\*

11 BY MR. ENGLISH:

12 Q. Thank you, Your Honor. Mr. Tonak,  
13 proposed Exhibit 25, a one-page document, could you  
14 briefly discuss what this is? And first may I ask, did  
15 you prepare this document?

16 A. I prepared this document.

17 Q. So would you then inform us as to what  
18 this document is?

19 A. Basically what it does is take from  
20 California and Federal Order statistics various  
21 information. The first column following the months is  
22 the Federal Order Class III milk price or the price for  
23 milk used in the manufacture of cheese. The second  
24 column would be the Federal Order 30 Uniform Statistical  
25 Price, the third column being the Pool Draw. The next

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1 column would be the California Order 4-B Price for each  
2 of those months, using the 4-B Price since that is the  
3 price of milk used for the classification for cheese  
4 manufactured. The California Overbase Price is the  
5 California Overbase Price as acknowledged by the  
6 California Department of Agriculture, and as a way of  
7 comparison to the Federal Order 30 Pool Draw where we  
8 compare the Class III price and the Statistical Uniform  
9 Price, use the California 4-B Price, and the Overbase  
10 Price to impute if you will a producer draw.

11 Q. That is by way of saying that you have  
12 sort of created a heading for that last column and...

13 A. That's correct.

14 Q. That's not an official title?

15 A. That's not an official title or an  
16 official reference.

17 Q. Fine. And we're not trying to impute  
18 that, but that's just something that you're trying to  
19 create as a mechanism for comparison purposes only.

20 A. For comparison purposes only.

21 Q. On Page 4 of your testimony you were  
22 saying I'm asking myself, "How do I compete if these  
23 dollars do not go to California but stay in the  
24 Midwest?" And you asked yourself, "How do I attract  
25 milk to the Muller Pinehurst fluid plant in Rockford,

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1 Illinois?" Let me ask you just a couple questions if I  
2 may. To the extent that the pooling of milk on Order 30  
3 that is also pooled on a State pool with marketwide  
4 returns, that is to say in this instance California, to  
5 the extent that it's occurred, and you have seen the  
6 numbers put in my Mr. Gulden and Mr. Kurth. Correct?

7 A. That is correct.

8 Q. And you agree in essence with their range  
9 of numbers and the impact. Correct?

10 A. That is correct.

11 Q. To the extent that that has depressed the  
12 Producer Price Differential in the Upper Midwest,  
13 relative, well, it's depressed it absolutely. Correct?

14 A. That is correct.

15 Q. It's also depressed it relative to the  
16 neighboring Orders. Correct?

17 A. That is correct.

18 Q. And is that what you mean by having  
19 difficulty or to attract fluid milk to the Rockford,  
20 Illinois plant?

21 A. That is -- there is two concerns. That  
22 is one of them, the other concern is if the Pool Draw  
23 dollars stay in the Upper Midwest and paid out to  
24 producers of those handlers who are, as it had been  
25 indicated earlier, have both milk in California and the

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1 Upper Midwest. It creates a competitive disparity that  
2 it is difficult to overcome in attracting milk to the  
3 fluid plant.

4 Q. And that would in your mind create  
5 disorderly marketing conditions?

6 A. That is correct.

7 \*\*\*

8 MR. ENGLISH: I move admission of Exhibit 25  
9 and the witness is available for cross examination.

10 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
11 English. Is there any objection to the admission into  
12 evidence of Exhibit 25? There being none, Exhibit 25 is  
13 hereby admitted into evidence. Does anyone have  
14 questions for Mr. Tonak, cross examination of Mr. Tonak?  
15 Yes, Mr. Lamers.

16 \*\*\*

17 BY MR. LAMERS:

18 Q. Good afternoon, Mr. Tonak.

19 A. Good afternoon.

20 Q. You related earlier about your concern of  
21 equity among handlers, and the classified pricing, and  
22 that all handlers are treated the same under classified  
23 pricing. Is that not correct?

24 A. That would be correct. In regards to  
25 handlers making similar products.

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1           Q.    All righty.  Then we do have handlers in  
2           the market that make the combination of products, both  
3           the manufactured and the Class I products.  Is that not  
4           correct?

5           A.    That would be correct.

6           Q.    And then so that there dealing or margins  
7           in each area come to the whole.  That is they affect the  
8           operation of that entire business, both the manufactured  
9           part of the business and the Class I part of that  
10          business.  Is that correct?

11          A.    Well, what I'm referencing is that if  
12          you're making cheese and sharing in the Federal Order 30  
13          pool, every cheese plant is accounting to the pool for  
14          the Class III value of the milk.  If they're making  
15          cottage cheese they're accounting to the pool for the  
16          Class II value of the milk, if they're making fluid milk  
17          or packaging fluid milk, they're accounting for the  
18          Class I value.

19          Q.    But you know what the make allowance is  
20          relative to establishment of Class III and Class IV  
21          prices?

22          A.    It's in the Order.  I, you know, I'm not  
23          prepared to talk about that, that's not as far as I know  
24          involved in this Hearing.

25          Q.    Well, equity is involved though is it

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1 not?

2 A. From the standpoint of the existence of  
3 the current classified pricing.

4 Q. Right. And while there is a make  
5 allowance which allows a return for manufacturing, the  
6 cost of marketing, and the return on investment in Class  
7 III and IV prices, is this also figured in for Class I  
8 pricing under the Orders?

9 A. I didn't develop the Class I pricing  
10 formulas so I really don't know what's there, I just  
11 know what values are assigned. And there again, I'm not  
12 prepared to talk about the Class I Location Adjustments,  
13 or Class I differentials, I think that's at least my  
14 opinion beyond the scope of what's going on here today.

15 Q. Not if we're talking about equity though  
16 are we, huh? There are...

17 A. I'm referring to...

18 Q. There are no provisions for any in the  
19 manufacturing or anything Class I pricing. Correct? In  
20 the make allowances in return.

21 A. When I'm talking about equity it's again  
22 referring to equity amongst producers based on the  
23 current regulatory environment we're operating in.

24 Q. Yes.

25 A. If those regulations are incorrect,

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1 that's something to be addressed at another Hearing in  
2 my opinion.

3 Q. Thank you, sir.

4 \*\*\*

5 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
6 Lamers. Any other cross examination questions? Yes,  
7 Mr. Beshore.

8 \*\*\*

9 BY MR. BESHORE:

10 Q. Dennis, with respect to the 4,000 Lake  
11 Shore federated producers, you say they're primarily  
12 pooled on the Upper Midwest. How many are pool in the  
13 Upper Midwest. Do you know?

14 A. I don't have a breakdown of that.

15 Q. Would primarily mean more than half?

16 A. I would think so.

17 Q. But you wrote it that's why I wondered.

18 A. Well, as far as I know more than half  
19 are.

20 Q. Okay. Do you know how many are pooled on  
21 the Central Order 32?

22 A. No, I do not.

23 Q. How about Mideast Order 33?

24 A. No, I don't.

25 Q. Does Midwest Dairymen's, your

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1 organization, have milk pooled on more than one Federal  
2 Order?

3 A. Yes, we do.

4 Q. And where, which Orders do you pool milk  
5 on?

6 A. We've got a small amount of milk pooled  
7 on Federal Order 33 because of a sales commitment of a  
8 small volume of milk to an Order 33 regulated handler.

9 Q. Okay. And the rest is pooled on Order  
10 30?

11 A. That is correct.

12 Q. No milk pooled on Order 32 at the present  
13 time?

14 A. That is correct.

15 Q. Have you in the past had milk on thirty-  
16 two?

17 A. The Midwest back in the '70s pooled milk  
18 on thirty-two, I mean, you know, we can go back there...

19 Q. Okay.

20 A. ...if we need to but...

21 Q. I wasn't thinking back that far.

22 A. Okay.

23 Q. You go back further than I do. The blend  
24 price you get on the Order 33 milk is different than on  
25 the Order 30 milk is it not?

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1 A. Yes, there is a different blend price.

2 Q. The milk in Idaho I don't think you  
3 addressed. That has the same affect on the Order 30  
4 pool for every hundredweight that the milk in California  
5 does does it not?

6 A. I didn't know I addressed any milk in  
7 Idaho did I?

8 Q. No, I said I don't think you did address  
9 it.

10 A. Okay.

11 Q. I wanted to address it.

12 A. Okay. Yes, yes.

13 Q. I wanted you to address it.

14 A. The Idaho milk on a pound for pound basis  
15 would have the same impact on the Order 30 blend price  
16 as any Class III milk anywhere be it in Wisconsin, or  
17 Minnesota, or Illinois, or, you know, anywhere.

18 Q. Okay. Is that milk being pooled through  
19 the unitive supply plants, the Lake Shore unitive supply  
20 plants?

21 A. No.

22 Q. Or does the Midwest have its own unitive  
23 supply plants that are pools?

24 A. Yes.

25 Q. And is the Idaho milk pooled through that

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1 unitive supply plants?

2 A. No, it's -- yes, I guess it would be.

3 Q. Through the Kraft system?

4 A. Midwest has included the Idaho milk on  
5 their pool report.

6 Q. And I gather you, in support of Proposal  
7 1, you would desire to continue to include the Idaho  
8 milk on your pool report?

9 A. Well, I see no more problem with  
10 including the Idaho milk on our pool report than if we  
11 were including milk in Northern Minnesota or, you know,  
12 any other area. So...

13 Q. How much of that Idaho milk was delivered  
14 to distributing plants in Order 30 during April and May?

15 A. I'm not sure because initially it went to  
16 the pool supply plant of another handler.

17 Q. Okay.

18 A. So I don't know what shipments they may  
19 have had on that milk to an Order 30 distributing plant.

20 Q. So the Idaho milk was qualified through a  
21 pool supply plant of another handler?

22 A. That is correct.

23 Q. Correct? And is that pool supply plant  
24 associated with a manufacturing facility at the same  
25 location?

1 A. I would believe so.

2 Q. Okay. And you're not aware of whether or  
3 not there were any shipments from that supply plant to  
4 the fluid market in Order 30 on that Idaho milk?

5 A. No, I am not.

6 Q. Is all of the milk you pool on Order 33  
7 delivered to Order 33 -- or is any of it delivered to  
8 Order 33 distributing plants?

9 A. That milk is delivered to an Order 33  
10 supply plant, and I'm not sure there again what may or  
11 may not happen with the milk once it arrives at that  
12 Order 33 supply plant.

13 Q. Okay. So is that Order 33 supply plant a  
14 manufacturing plant?

15 A. Yes, it is.

16 Q. So assuming...

17 A. I need to interject one thing here. Not  
18 all of the Order 33 milk is delivered to that supply  
19 plant, some of it may end up diverted to an Order 30  
20 fluid plant depending on which route it is picked up on,  
21 on any given day.

22 Q. Okay. Or, well, if it's diverted back to  
23 an Order 30 fluid plant it's not necessarily going to be  
24 pooled on Order 33 is it?

25 A. Well...

1 Q. Or is it...

2 A. When I say fluid plant it's a plant that  
3 I refer to as a fluid plant, it does have some Class II,  
4 Class IV utilizations also.

5 Q. Okay.

6 A. I would add just out of to help you  
7 assess this situation that Midwest draws no money and  
8 has not drawn any money the last few months out of the  
9 Order 33 pool but actually pays into the Order 33 pool  
10 also.

11 Q. And how does that occur if you're  
12 shipping to a cheese plant?

13 A. I think it probably has to do with the  
14 Class II values the way the milk is assigned when it's  
15 diverted.

16 Q. Okay. Are there times when -- I assume  
17 most of the times, the sales to a supply plant and to an  
18 Order 33 manufacturing plant, you're drawing out of that  
19 pool. By the way, where is the Order 33 manufacturing  
20 plant located?

21 A. Stockton, Illinois.

22 Q. Okay. So there's a -- and that's a  
23 cheese plant. Right?

24 A. Yes. That is correct.

25 Q. There's a cheese plant in Stockton,

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1 Illinois that's -- is located in the Order 30 area?

2 A. Yes, it is.

3 Q. Okay. But it's pooled on the Order 33  
4 market, which is the Mideast Marketing Order. Correct?

5 A. That would, yes.

6 Q. Well...

7 A. Based on the Market Administrator Pool  
8 documents that's where it's pooled.

9 Q. But the Order 33 market is the Mideast  
10 Marketing Area. Correct?

11 A. That's correct.

12 Q. Which is the marketing area for Western  
13 Pennsylvania, Ohio, and Michigan, and where else,  
14 Indiana?

15 A. Indiana.

16 Q. Okay. Do you know how many other pool  
17 plants in the Order 30 marketing area are pooled on  
18 Order 33?

19 A. No, I do not.

20 Q. In the Lake Shore group do you know how  
21 much of the 500 or 600 million pounds per month of milk  
22 that's been taken off of the Order 30 pool is milk of  
23 the Lake Shore federated group?

24 A. No, I do not. I would estimate that  
25 there's a portion of it, maybe 5 percent, maybe 3

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1 percent. I really don't know.

2 Q. Thanks, Dennis.

3 \*\*\*

4 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
5 Beshore. Any further cross examination of Mr. Tonak?  
6 Mr. English, any redirect?

7 \*\*\*

8 BY MR. ENGLISH:

9 Q. Mr. Tonak, in response to a question, and  
10 it may just have been how the question and the answer  
11 were phrased, but I want to make sure that the record is  
12 not left, you know, unclear. You indicated that your  
13 organization pools milk on more than one Order.

14 A. That is correct.

15 Q. But not the same milk?

16 A. That is correct.

17 Q. Okay. So for instance if you had 2,000  
18 hundredweight and 1,000 hundredweight are on Order 33  
19 and 1,000 on Order 30, only 1,000 hundredweight are  
20 going to be pooled on each of those Orders. Correct?

21 A. That would be correct.

22 Q. Okay.

23 \*\*\*

24 MR. ENGLISH: That's the only question I have.

25 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.

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1 English. Mr. Tonak, you may step down. Thank you.

2 Yes, Mr. Tosi?

3

\*\*\*

4 BY MR. TOSI:

5 Q. I'm sorry. I would -- thank you. I'm  
6 sorry, Mr. Tonak, I was expecting other Attorneys to ask  
7 questions.

8 A. That's all right. I needed a stretch  
9 anyhow.

10 Q. Okay. I have a question. You were  
11 concerned about an Order, a Milk Marketing Order, being  
12 designed to help satisfy the Class I needs of a market  
13 and that's implied in your testimony.

14 A. Yes.

15 Q. Okay. And in that regard, do you think  
16 there should be a relationship between the Class I needs  
17 of the market and it's pooling standards, and the  
18 pooling standards being the pool plant definition, the  
19 producer definition, and the producer milk definition?

20 A. I think there needs to be some  
21 relationship, I don't know that you can tie it very  
22 tightly. From my own personal perspective, I'd like to  
23 see like a 60 percent shipping requirement in Order 30  
24 because that would definitely move the milk to the fluid  
25 plant. At the same time as the Upper Midwest Order has

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1 developed it's tried to be inclusive of all Grade A  
2 producers in the general region, and that 60 percent  
3 level would be prohibitive of continuing that  
4 inclusionary policy.

5 Q. Okay.

6 A. I don't know. Does that answer your  
7 question?

8 Q. Yes, it does. Also I'd like for you just  
9 a hypothetical question. If there were no California  
10 State program, and let's say the California milk that's  
11 currently pooled here in the Upper Midwest would  
12 continue to be pooled, however that milk stays in  
13 California, would you be of the opinion that that milk  
14 is reasonably associated with the Upper Midwest with  
15 respect to its ability to service the Class I needs of  
16 the market?

17 A. I would view that basically in the same  
18 light as I view the Idaho milk or milk going to a cheese  
19 plant in Northern Minnesota or Wisconsin. We're  
20 including it, if necessary, it could supply the fluid  
21 needs of the market because it has been able to make the  
22 deliveries to be pooled under the market.

23 Q. Okay. Also different markets have  
24 different Class I uses as we all know for our experience  
25 in the Federal Order Program. Would you be of the

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1 opinion that markets that tend to have a higher Class I  
2 use of milk would require pooling standards that would  
3 require more performance in terms of regular association  
4 with the market given a market where its Class I use is  
5 not as high?

6 A. If I understand what you're asking, it's  
7 if a market that has higher Class I utilization could  
8 reasonably have a higher standard of associating milk  
9 with that market, be it on a shipping percentage,  
10 something like that I'd say yes.

11 Q. Okay. I'll just give you another  
12 example. Let's say for example if Florida's Class I use  
13 is 90 percent Class I and if the Upper Midwest Order  
14 Class I use were 15 percent, would you be of the opinion  
15 that Florida would need to have in its Order, to attract  
16 an adequate supply of milk for fluid use, that it would  
17 need pooling standards that would be tighter, more  
18 demanding, require higher shipping percentages, require  
19 other things that would be different than the  
20 requirements for pooling milk in the Upper Midwest?

21 A. I would think that would appropriate to  
22 require a higher shipping percentage or a different  
23 touch base days delivered by individual producers or  
24 something like that. I think there is some reason to  
25 say yes.

1 Q. Okay. Thank you. I appreciate it.

2 \*\*\*

3 ADMINISTRATIVE LAW JUDGE: Any further  
4 redirect, Mr. English?

5 MR. ENGLISH: No, Your Honor.

6 ADMINISTRATIVE LAW JUDGE: Mr. Berde, did you  
7 have a question to follow-up Mr. Tosi's question?

8 \*\*\*

9 BY MR. BERDE:

10 Q. Yes, I want to just to clear up  
11 something, maybe I misunderstood it. Did I understand  
12 your testimony to suggest that milk produced in Northern  
13 Minnesota for example is associated with the Upper  
14 Midwest Market in the same fashion, or it's reasonable  
15 to consider that milk as associated in the same fashion  
16 as milk produced in Idaho or California?

17 A. Yes.

18 Q. And you see no difference with respect to  
19 the location values of that milk in Idaho or California  
20 as compared to the cost of moving milk from Northern  
21 Minnesota to a pool plant?

22 \*\*\*

23 MR. VETNE: Objection, Your Honor. This is  
24 what I...

25 ADMINISTRATIVE LAW JUDGE: Mr. Vetne, please  
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1 talk into the mic.

2 MR. VETNE: This is what I referred to before  
3 when I said I would get up and object. Location values,  
4 that is the location price for plants or producers is  
5 not part of this Hearing, it's been addressed before,  
6 it's beyond the scope, and it wastes time. And I object  
7 to the question and to the answer if it's coming.

8 MR. BERDE: Well, I'm...

9 ADMINISTRATIVE LAW JUDGE: All right. Thank  
10 you. Mr. Beshore? Just a moment please, Mr. Berde.  
11 Let me hear the other comment.

12 MR. BERDE: Go ahead.

13 MR. BESHORE: I think the...

14 ADMINISTRATIVE LAW JUDGE: Into the mic.

15 MR. BESHORE: The question is entirely  
16 appropriate and it is relevant. The witness made the  
17 contention that Mr. Berde's addressing and it's  
18 pertinent to Proposal 1 and Proposal 4. It's not going  
19 off on other hypothetical proposals, it's related to  
20 the, you know, the justification for Proposal 1 that  
21 says Idaho is the same as, you know, or California is  
22 the same as Northern Minnesota.

23 ADMINISTRATIVE LAW JUDGE: And, Mr. English,  
24 I'll ask for you to comment before I hear from Mr.  
25 Berde.



1 question. Let us suppose that you have a group of  
2 producers in California with no quota and some broker  
3 decides to put their milk on a truck and to pool it up  
4 in the Upper Midwest and divert it out to some place in  
5 California. They draw nothing from the California pool.  
6 Do I understand you have no objection to that kind of an  
7 arrangement in terms of the resulting impact on the  
8 price received by your producers?

9 \*\*\*

10 MR. ENGLISH: I will object in advance to the  
11 characterization of the California system because I  
12 don't believe that's how it works. But with that in  
13 mind I'll let the question be answered.

14 \*\*\*

15 BY MR. BERDE:

16 Q. Well, I can assure you there's California  
17 milk that holds no quota and is not part of the  
18 California system pricing. Just assume with me for a  
19 minute that that's correct and those producers are is  
20 whoever arranging that milk transfer does not  
21 participate in the California system. You have no  
22 objection to that milk?

23 A. Philosophically I have no objection, but  
24 at the same time I will state the other side of the  
25 coin. Let's tighten up the pooling and eliminate all

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1 milk that's going into cheese plants that don't perform  
2 in delivering to the fluid market.

3 Q. Of course that proposal is not before the  
4 Hearing is it?

5 A. That proposal is not before the  
6 Hearing...

7 Q. Yes.

8 A. ...nor do I believe there is any Grade A  
9 milk in California that does not participate in the  
10 California program.

11 Q. Thank you.

12 \*\*\*

13 MR. ENGLISH: Yes.

14 ADMINISTRATIVE LAW JUDGE: And, Mr. English,  
15 I'll allow you to clarify, otherwise we'll move on. All  
16 right. Thank you. Thank you very much. You may step  
17 down, Mr. Tonak. Mr. English, your next witness.

18 MR. ENGLISH: My next witness is from First  
19 District Association, Bill Dropik.

20 MR. DROPIK: Thank you. My name is Bill  
21 Dropik. B-i-l-l D-r-o-p-i-k. My address is 7617  
22 Highway 27, Nelson, Minnesota. I am a dairy farmer...

23 ADMINISTRATIVE LAW JUDGE: Just a moment and  
24 I'll swear you in. If you'd raise your right hand  
25 please?

1 \*\*\*

2 [Witness sworn]

3 \*\*\*

4 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
5 be seated.

6 \*\*\*

7 BILL DROPIK,  
8 having first been duly sworn, according to the law,  
9 testified as follows:

10 MR. DROPIK: I am a dairy farmer from Nelson,  
11 Minnesota, I milk 44 cows with my son. Our milk is  
12 marketed through the Nelson Co-op Creamery at Nelson,  
13 Minnesota and ends up being transferred to the First  
14 District Cheese Plant at Litchfield, Minnesota and  
15 processed into cheese. I serve as the President of the  
16 Nelson Creamery Association on the Board of Directors, I  
17 also serve as Chairman of the Board of the First  
18 District Association at Litchfield, the cheese plant. I  
19 also serve on Minnesota Milk Producer's Organization,  
20 which is a State organization, lobbying or working for  
21 the best interest of dairy farmers legislatively, and in  
22 rule making and that, I serve as Vice President of that  
23 organization. The First District Association represents  
24 approximately about 1400 dairy producers. Minnesota  
25 Milk Producers are a statewide organization, we have

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1 right now approximately 3500 dairy producers in the  
2 State of Minnesota that we represent. I am here today  
3 on behalf of most dairy farmers in the Upper Midwest.  
4 We feel it is unfair and it's wrong for the milk prices  
5 in Federal Order 30 to be intentionally diluted by 15 to  
6 17 cents per hundredweight as a result of the California  
7 milk being pooled on this Order. California has their  
8 own statewide regulated milk pricing system and has  
9 chosen not to be regulated by the Federal Order system.  
10 The practice of double dipping from a State and Federal  
11 pool at the same time is clearly unfair and wrong. The  
12 Upper Midwest dairy farmers thank you for hearing our  
13 concerns and we ask that this unfair practice be stopped  
14 immediately. Again, thank you.

15 ADMINISTRATIVE LAW JUDGE: Thank you. Mr.  
16 English?

17 \*\*\*

18 BY MR. ENGLISH:

19 Q. When you say the practice is unfair and  
20 wrong, Mr. Dropik, you are aware I understand I believe  
21 that in Federal Orders you are not able to pool the same  
22 milk on more than one Federal Order at the same time.  
23 Correct?

24 A. Correct.

25 Q. And that is the unfairness that you're

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1 getting at when you speak about that in your testimony.  
2 Correct?

3 A. That is correct.

4 \*\*\*

5 MR. ENGLISH: The witness is available for  
6 cross examination.

7 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
8 English. Does anyone have any cross examination  
9 questions for Mr. Dropik? Mr. Dropik, thank you. You  
10 may step down.

11 MR. DROPIK: Thank you.

12 ADMINISTRATIVE LAW JUDGE: Mr. English?

13 MR. ENGLISH: I don't know if we need to go  
14 off the record, Your Honor. We had had a discussion  
15 before the lunch break with the Government about whether  
16 this would be the appropriate time to put CDFA  
17 witnesses. Mr. Conover is prepared but is likely to go  
18 a fairly long time I would expect and I don't want to  
19 keep the CDFA witnesses who have come here graciously  
20 with their time too long. But I leave it up to you, Mr.  
21 Cooper, and...

22 MR. COOPER: Yes, I...

23 MR. ENGLISH: ...well, CDFA.

24 MR. COOPER: ...think we'd like to have the  
25 California Department of Food and Agriculture witnesses

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1 the Division of Marketing Services for the California  
2 Department of Food and Agriculture.

3 ADMINISTRATIVE LAW JUDGE: And how are your  
4 names spelled?

5 MR. KRUG: Kelly, K-e-l-l-y, Krug, K-r-u-g.

6 ADMINISTRATIVE LAW JUDGE: All right. Thank  
7 you. And to your right?

8 MR. HORTON: My name is Robert Horton,  
9 R-o-b-e-r-t, H-o-r-t-o-n. I am the Chief of the Milk  
10 Pooling Branch for the California Department of Food and  
11 Agriculture.

12 ADMINISTRATIVE LAW JUDGE: Gentlemen, I thank  
13 both of you for being here. Mr. Krug, would you tell  
14 me, and I'll swear you both in in a moment, but would  
15 you tell me how you envision your proceeding here?

16 MR. KRUG: Yes, I'd like to give a short  
17 opening statement, Mr. Horton then would follow with a  
18 more detailed summary or overview of the milk pooling  
19 system.

20 ADMINISTRATIVE LAW JUDGE: All right. Fine.  
21 If each of you would raise your right hand? You may  
22 remain seated.

23 \*\*\*

24 [Witnesses sworn]

25 \*\*\*

1 ADMINISTRATIVE LAW JUDGE: Thank you. Both  
2 Mr. Krug and Mr. Horton are sworn in. Mr. Krug, you may  
3 proceed.

4 \*\*\*

5 KELLY KRUG,  
6 having first been duly sworn, according to the law,  
7 testified as follows:

8 MR. KRUG: Thank you, Judge Clifton, USDA  
9 staff, and interested parties. My name is Kelly Krug,  
10 I'm the Director of Marketing Services for California  
11 Department of Food and Agriculture. The operation of  
12 CDFA's pricing and pooling system occurs in the  
13 Marketing Services Division. With me today is Robert  
14 Horton, Chief of the Milk Pooling Branch. We were  
15 requested by USDA to participate at this Hearing to  
16 provide information on the operation of the pooling  
17 system administered by CDFA. The CDFA takes no position  
18 on the petitions at the Hearing. Mr. Horton has  
19 prepared an overview the California Department of Food  
20 and Agriculture's pooling program that we are able to  
21 present in the record. In fact, it was put in the  
22 record this morning by one of the Attorneys and I think  
23 that was Hearing Exhibit #18. We also, well, our  
24 participation today is to provide factual and technical  
25 public data and we're not authorized to provide

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1 opinions, speculation, or discuss matters that are  
2 before litigation with the Department. Thank you.

3 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
4 Krug. If you'd hand the microphone to Mr. Horton.

5 \*\*\*

6 ROBERT HORTON,  
7 having first been duly sworn, according to the law,  
8 testified as follows:

9 MR. HORTON: Thank you. The Gonzalves Milk  
10 Pooling Act, which went into effect on July 1, 1969  
11 authorizes the Secretary of the California Department of  
12 Food and Agriculture to operate a statewide pooling  
13 system under specific guidelines. These statutes  
14 provide for the formulation and adoption of the milk  
15 pooling plans for market milk. The California pooling  
16 system is similar to the Federal Orders except  
17 California has a quota system. During the preliminary  
18 stages of formulating a plan, basic milk production was  
19 gathered to establish two benchmarks for each producer,  
20 production base and pool quota. Production base and  
21 pool quota were established for each producer by milk  
22 fat and solids non-fat on an average daily basis. The  
23 production base was computed by dividing the total  
24 production during the base period by the number of days  
25 milk was produced. Pool quota was established as 110

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1 percent of the Class I utilization accounted for during  
2 the base period, divided by the number of days in that  
3 period the producer actually shipped Class I  
4 utilization. The amount by which the production base  
5 exceeds pool quota was designated as base. Producer's  
6 production base and pool quota is transferable with some  
7 restrictions. Market milk shipped by a producer through  
8 a pool handler cannot be defined as quota milk or  
9 overbase milk.

10 \*\*\*

11 [Off the record]

12 [On the record]

13 \*\*\*

14 MR. HORTON: A cooperative association is  
15 treated as a single producer for both producer payment  
16 and pool settlement purposes. The daily production base  
17 and pool quota entitlements for members of a cooperative  
18 association belong to the individual producers but is  
19 assigned to the custody and control of the cooperative  
20 association. As in Federal Orders, the California Order  
21 is designed to promote orderly marketing conditions by  
22 applying a uniform pricing system throughout the market.  
23 The pooling system provides the sharing among producers,  
24 the value of all milk uses. California has a pricing  
25 system, which handlers pay for bulk milk based on their

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1 monthly usage. This usage is accumulated by the pooling  
2 system statewide to determine producer prices.  
3 Producers are paid on their allocated quota base and  
4 overbase by components as determined by the producer's  
5 actual butterfat and solids not fat. Since cooperatives  
6 are treated as a single producer, the individual  
7 producer daily production base and pool entitlements are  
8 added together to determine the cooperative's pool  
9 settlement. In January 1994, the California legislature  
10 adopted a major milk pooling reform language at the  
11 request of producers. The value between the quota price  
12 and the overbase price was fixed at \$1.70 a  
13 hundredweight. This change was determined to be a more  
14 equitable method by producers to share all revenue  
15 contained in the pool. Prior to the amendments the  
16 difference between quota and overbase prices fluctuated  
17 greatly in the range of \$5 a hundredweight to on  
18 occasion overbase price being more than the quota price.  
19 The other changes made by this legislation was to fix  
20 the base price at the same level as the overbase price.  
21 All market milk produced and marketed through a pool  
22 plant in California is pooled. To become a pool plant a  
23 California handler or a cooperative must have direct or  
24 indirect Class I or Class II usage. A California non-  
25 pool plant is a plant that does not qualify as pool

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1 plant. A non-pool cheese plant can qualify as a pool  
2 plant if they have contract producers and ship milk each  
3 month to a pool plant that produces Class I or Class II  
4 products. If a pool plant transfers or diverts milk to  
5 a non-pool plant, the milk is pooled because it's  
6 marketed through a pool plant. In California, all  
7 cooperatives are qualified to be pool plants and all  
8 their members market milk is pooled except market milk  
9 shipped directly to handlers out of state. Milk shipped  
10 directly out of state by a producer, including a  
11 cooperative acting for their member, is not pooled, and  
12 not accounted for in the California pooling system. For  
13 the purpose of this Hearing I present the attached table  
14 comparing milk prices for Class 4-B cheese milk and the  
15 California overbase price. The table covers the period  
16 of September 1999...

17 ADMINISTRATIVE LAW JUDGE: Yes, let's go off  
18 record just a moment, and may I interrupt you...

19 MR. HORTON: Sure.

20 ADMINISTRATIVE LAW JUDGE: ...while we do  
21 that.

22 \*\*\*

23 [Off the record]

24 [On the record]

25 \*\*\*

1 ADMINISTRATIVE LAW JUDGE: Back on record now  
2 at 2:37. I'd like to ask the Court Reporter if this is  
3 Exhibit 26.

4 COURT REPORTER: It is.

5 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
6 Horton, you may resume.

7 MR. HORTON: This table shows the  
8 period of September 1999 through April 2001 and it shows  
9 the differences between the overbase price and the Class  
10 4-B cheese price. September was chosen because it was  
11 the last time that the 4-B price exceeded the overbase  
12 price. For the months of October 1999 through April  
13 2001 the overbase price exceeded the Class 4-B price by  
14 at least 45 cents a hundredweight and as much as \$2.28 a  
15 hundredweight. This concludes my testimony. Mr. Krug  
16 and I will be happy to answer any questions regarding  
17 how the California pool works.

18 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
19 Horton. I wanted to make sure that anyone asking a  
20 question will indicate whether it's directed to one of  
21 these gentlemen in particular or whether either of them  
22 may answer. Who would like to ask the first question?  
23 Mr. English will be first. Thank you.

24 \*\*\*

25 BY MR. ENGLISH:

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1 Q. Gentlemen, thank you very much for the  
2 courtesy of coming here today and helping explain the  
3 system for this record. Earlier today, as you know, I  
4 had admitted into evidence a number of documents  
5 including Exhibit 13, which is the June 2001 bulletin,  
6 monthly bulletin. Did you bring those up with you?

7 A. No, I have it back there.

8 Q. I'll hand you this one for a moment. May  
9 I approach, Your Honor?

10 \*\*\*

11 ADMINISTRATIVE LAW JUDGE: You may.

12 \*\*\*

13 BY MR. ENGLISH:

14 Q. And from, Your Honor, either witness may  
15 answer the question. I'm not trying to get one witness  
16 tied to this. Obviously they are speaking for the  
17 Department. I just want to clarify some issues on what  
18 kind of data appears on Page 10 of this monthly report.  
19 And let me first ask, since I made the representation  
20 earlier today, this is a monthly bulletin that is  
21 prepared by your office. Correct?

22 A. Yes, it is.

23 Q. And this would be the most recent  
24 addition of this document that has been published.  
25 Correct?

1 A. Yes.

2 Q. And would I be correct that Page 10,  
3 Table 4-A and 4-B appears each month and the only  
4 difference is you've updated for the next month and then  
5 you have the prior year data as well.

6 A. Yes.

7 Q. Okay.

8 A. It's a monthly table that we update.

9 Q. So...

10 \*\*\*

11 ADMINISTRATIVE LAW JUDGE: And that was Mr.  
12 Horton.

13 MR. KRUG: Krug.

14 MR. ENGLISH: Krug.

15 ADMINISTRATIVE LAW JUDGE: I'm sorry. Mr.  
16 Krug. Thank you.

17 \*\*\*

18 BY MR. ENGLISH:

19 Q. The first set of columns on Table 4-A are  
20 labeled Pool Milk. Would this then be the all market  
21 milk produced and marketed through a pool plant in  
22 California?

23 A. Yes.

24 Q. Okay. Now...

25 \*\*\*

1 ADMINISTRATIVE LAW JUDGE: It will...

2 MR. ENGLISH: That again...

3 ADMINISTRATIVE LAW JUDGE: It will help if  
4 you'll identify yourself because you're both speaking  
5 into the same mic so there's no differentiation.

6 \*\*\*

7 BY MR. ENGLISH:

8 Q. So that was Mr. Krug again. The second  
9 set of columns are labeled Grade A milk not pooled with  
10 a footnote. And may I just for a moment, as I  
11 understand it, what is totaled in that number is milk  
12 that is shipped direct from the farm to out of state  
13 plants and milk that is shipped to exempt  
14 producer/handlers under your system. Correct?

15 A. It's Mr. Krug. Yes. That is correct.

16 Q. Okay. The third set of columns then are  
17 basically the summation of the first two sets of  
18 columns. Correct?

19 A. Mr. Krug, yes.

20 Q. Turning to Table 4-B for a moment, the  
21 third set of two columns, Production Leaving California,  
22 2000-2001. Is milk -- With a caveat in a moment in  
23 terms of what may be left out. -- but is milk that is  
24 delivered direct from a California dairy ranch to a non-  
25 California plant. Correct?

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1           A.    That is correct.  This is Mr. Krug and  
2           there are two components.  The information we obtained  
3           from our own plants in California and information from  
4           Federal Order Market Order Administrators who provide  
5           some of that information.

6           Q.    Now the footnote indicates that these are  
7           lower limits, that in essence as I understand it some of  
8           the milk that leaves California direct from the ranch to  
9           a non-California plant is not captured within that data.  
10          Correct?

11          A.    We're uncertain if it's all captured or  
12          not.  We know the figures we have in here we feel are  
13          reliable, there may be some that is not captured.

14          Q.    And that was Mr. Krug again.  Sorry.  To  
15          your knowledge if something has not been captured your  
16          belief is it's a relatively small number.  Correct?

17          A.    Yes.  This is Mr. Krug.

18          Q.    And would I be correct that if you take  
19          the third set of columns from Table 4-B that those  
20          numbers are contained in the second set of columns of  
21          Table 4-A.  That those numbers are subsumed within the  
22          second set of columns, Grade A Milk not Pooled, Table 4-  
23          A.

24          A.    Mr. Krug, yes.

25          Q.    Is there to your knowledge during the  
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1 year 2001 quantities of Grade A milk produced on  
2 California dairy ranches received by California plants  
3 that is not being pooled on the California system?

4 A. This is Mr. Horton. I would say that the  
5 vast majority of all Grade A market milk produced in  
6 California and delivered to California plants is pooled.  
7 There is a small amount that farms the cheese that is  
8 not pooled.

9 Q. Do you have an approximate, you know, a  
10 range of a percentage or approximate percentage for  
11 that?

12 A. It would have to be very small.

13 Q. Would very small be less than one million  
14 pounds a month?

15 A. I would assume so.

16 Q. So that would mean other than one million  
17 pounds of milk that isn't pooled for that reason, exempt  
18 producer handler milk and milk that is direct shipped  
19 and represented outside of California and is represented  
20 on Table 4-B, that all other Grade A milk produced in  
21 California is pooled.

22 A. That would be correct.

23 \*\*\*

24 MR. ENGLISH: I have no further questions.

25 Again I thank you for your attendance.

1 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
2 English. Any other cross examination of either of these  
3 witnesses? Mr. Beshore?

4 \*\*\*

5 CROSS EXAMINATION

6 BY MR. BESHORE:

7 Q. Either Mr. Krug or Mr. Horton. Would  
8 audited information with respect to any data in the  
9 California system be available to the Federal Order  
10 system if it were important in implementing a regulation  
11 such as Proposal 1?

12 A. It's Mr. Krug. Are you speaking of  
13 aggregate numbers or are you speaking of...

14 Q. No, I'm speaking of individual producer  
15 numbers or individual handler numbers.

16 A. That our department would deem to be  
17 confidential.

18 Q. Okay. So the information would not be  
19 available?

20 A. Correct.

21 Q. Okay. With respect -- quota you say is  
22 owned by individual producers but, and I'll address this  
23 to Mr. Horton, you've got the microphone, owned by  
24 individual producers but assigned to and utilized by  
25 cooperative associations. Did I understand that

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1 correctly?

2 A. This is Mr. Horton. Yes. That's  
3 correct.

4 Q. Okay. How would -- is base and overbase  
5 handled the same way?

6 A. Those are pricing amounts and so  
7 depending on the entitlements for all the co-ops  
8 members, they would be settled with the pool based on  
9 the aggregate of all their members entitlement.

10 Q. Okay. For an individual producer, is his  
11 entitlement to minimum payments in California determined  
12 in part by the proportion of his production, which is  
13 base and overbase?

14 A. I'm not sure I understand.

15 Q. I'm not sure I understand. If I'm a  
16 California milk producer, is my -- the payments I  
17 receive at the end of the month for milk determined in  
18 part by whether I own quota or not?

19 A. Yes.

20 Q. Okay. To the extent I own quota I'm paid  
21 more for that volume of milk. Is that correct?

22 A. That's correct.

23 Q. Okay. Now to the extent that my  
24 production is deemed base or overbase, how does that  
25 affect what I receive for my milk production?

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1 that handlers must pay by class. Correct?

2 A. That's correct.

3 Q. And in detail that's based on solids, not  
4 fat, received by the handler, butterfat received by the  
5 handler, in the case of fluid plants, a little extra for  
6 the fluid carrier. Correct?

7 A. Yes, the prices are applied to the amount  
8 of milk that the -- by class that the handler processes.

9 Q. Okay. And all of the money in all of the  
10 classes of milk, including the revenue from fluid  
11 carrier, all of it goes into a pool of money which is  
12 then divvied out to farmers. Correct?

13 A. That's correct.

14 Q. Okay. And in order to divvy the money  
15 out to farmers, one thing you need to do is to make sure  
16 quota holders get their guaranteed \$1.70 and that's the  
17 quota price per pound times 8.7 pounds. Correct?

18 A. Are you talking about, speaking of how  
19 the \$1.70 is arrived at?

20 Q. The \$1.70 is the hundredweight equivalent  
21 at standardized milk for whatever the legislature did  
22 and...

23 A. Actually it's based on 19-and-a-half  
24 cents a pound for solids, not fat only.

25 Q. Right. And multiplied by 8.7 is roughly

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1       \$1.70?

2                   A.     That's correct.

3                   Q.     Okay.  So after all of this money is  
4 gathered and put in a pot you need to reserve \$1.70 a  
5 hundredweight standardized milk for quota holders.  So  
6 you multiply the quota of non-fat pounds times \$1.70 and  
7 put that aside for a minute.

8                   A.     That's correct.

9                   Q.     And you take all the money and divvy it  
10 up amongst all the solids, not fat pounds for all the  
11 milk that's pooled in California, and that in essence is  
12 what the overbase and base price are now.  Correct?

13                  A.     That's correct.

14                  Q.     And you add back the \$1.70 to the quota  
15 holders?

16                  A.     That's correct.

17                  Q.     So all producers marketwide share pro  
18 rata revenue and Class 4-A, 4-B, III, II, and I.  
19 Correct?

20                  A.     That's correct.

21                  Q.     Okay.  Now when a handler accounts to the  
22 pool, sort of like the Federal system but the accounting  
23 is a little different, the accounting to or from the  
24 fund, the settlement fund, is simply the difference  
25 between the handlers classified obligation and the

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1 producers entitlement for a mixture of quota and non-  
2 quota milk. Correct?

3 A. That's correct.

4 Q. And sometimes the handler pays in and  
5 sometimes if the classified use value is less than the  
6 producer's entitlement to their share of the pool, the  
7 handler draws out so the producer can get paid the  
8 amount?

9 A. That's correct.

10 Q. Okay. And in the case the handler draws  
11 from the pool, the class -- in that case his classified  
12 value is less than the aggregate quota and the overbase  
13 draw of the producer so money is drawn out. What does  
14 the Department do to assure that the producers get the  
15 classified value of that handler in addition to the pool  
16 draw. Is there an audit system that assures that both  
17 of those payments are made?

18 A. Yes, we have an audit program.

19 Q. Okay. And let's say for example that  
20 some California milk happens to be pooled somewhere in  
21 the Federal Order system but stays in California. Does  
22 it matter to CDFA pool auditors and regulators if some  
23 of the payments that went directly to producers that  
24 count against the handlers classified price obligation  
25 that some of that revenue happened to come from a

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1 Federal Order pool?

2 A. I'm not sure I understand exactly what  
3 your question is.

4 Q. Okay. Let me try to give an example.  
5 Without identifying the mix, let's say that a handler's  
6 classified price obligation for a month is \$12. Are you  
7 with me so far?

8 A. Yes, I am.

9 Q. Whatever the mix there's probably a lot  
10 of cheese in there. And let's say that all of his  
11 producers, mostly overbase, their entitlement is 12.50.

12 A. Okay.

13 Q. Right. So that handler would draw 50  
14 cents from the pool.

15 A. That's correct.

16 Q. The California pool. Right?

17 A. Right. The California pool.

18 Q. The California pool. Let's say that some  
19 of that milk was also associated with a Federal Order  
20 pool so that the handler drew 50 cents from a Federal  
21 Order pool. Now in your auditing process you want to  
22 make sure that the handler pays \$12 out of his own  
23 pocket plus the 50 cents received from the California  
24 pool. Correct?

25 A. Yes, we make sure that the producer is  
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1 paid his minimum pricing.

2 Q. Which is 12.50?

3 A. Correct.

4 Q. And 50 cents comes from your pool and \$12  
5 would come from the handler. My question to you is, it  
6 doesn't matter to you does it whether 50 cents of that  
7 \$12 came from a Federal Order pool source. As long as  
8 the handler actually forks over \$12 from whatever source  
9 he might get it. Are you able to answer that question?

10 A. Well, I'm not sure because the milk from  
11 my understanding of being here today...

12 \*\*\*

13 ADMINISTRATIVE LAW JUDGE: Mr. Horton, please  
14 speak right into the mic.

15 MR. HORTON: Yes. What we're speaking here  
16 today is that this milk that is being pooled in the  
17 Upper Midwest is cooperative milk and we do not get into  
18 the payments to individual members of a cooperative.

19 \*\*\*

20 BY MR. BESHORE:

21 Q. Okay. And the aggregate you don't get  
22 into whether the cooperative is paid \$12 in the  
23 aggregate to its members or not?

24 A. That's correct.

25 Q. Okay. So you actually don't do that part

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1 of the accounting. You make the 50 cents available from  
2 the pool and then it's really none of your business what  
3 happens to any of the revenues after that.

4 A. Not to their members.

5 Q. Okay. So whatever that draw is it  
6 doesn't matter if it's -- for California enforcement  
7 purposes. It doesn't matter if monies drawn from a  
8 Federal pool are distributed to California farmers  
9 providing whatever competitive benefit that might in  
10 California, or distributed to farmers in the Midwest,  
11 you don't follow that money as part of your program?

12 A. No, we don't.

13 Q. Okay. If it were a proprietary handler  
14 however you would follow that money?

15 A. If it was a proprietary handler we would  
16 make sure that the producer was paid the minimum price  
17 and also their contract price.

18 Q. Okay. So the \$12 portion of my example  
19 you would actually -- you would look to make sure that  
20 the \$12 had been paid?

21 A. That's correct.

22 Q. Okay.

23 \*\*\*

24 MR. BESHORE: Thanks. That's all I have.

25 MR. HORTON: Thank you.

1 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
2 Vetne. Mr. Berde?

3 MR. BERDE: On Page 2, second paragraph...

4 ADMINISTRATIVE LAW JUDGE: Can you -- I think  
5 if you'll just tip it down...

6 MR. BERDE: Yes. Okay.

7 ADMINISTRATIVE LAW JUDGE: ...it will pick you  
8 up fine.

9 \*\*\*

10 BY MR. BERDE:

11 Q. On Page 2, the second full paragraph,  
12 last sentence in which you state, "Milk shipped directly  
13 out of state by a producer, including a cooperative  
14 acting for their member, is not pooled and not accounted  
15 for in the California Pooling System." Do you see that?

16 A. Page 2?

17 Q. I'm looking, well, maybe it's Page --  
18 yes, Page 2, the middle paragraph.

19 A. Here it is.

20 Q. Testimony of Robert Horton I'm looking  
21 at, and the...

22 A. Okay. I'm with you.

23 Q. You've got me? -- Okay. -- now with  
24 respect to that milk there is no what has been referred  
25 to as double dipping is there? In other words, there is

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1 no Pool Draw at all with respect to that milk?

2 A. Yes, if the milk is shipped directly out  
3 of state by a producer, including a co-op...

4 Q. Yes.

5 A. ...it is not pooled in California.

6 Q. Okay. Now let's take the circumstance of  
7 a producer whose relationship to base, overbase, over  
8 quota is such that he holds no California marketing  
9 rights let's call them for a general term. Is there a  
10 producer whose relationship between production and over  
11 quota, overbase is such that such a producer would have  
12 no draw from the -- between the Uniform price and the  
13 surplus price?

14 A. Well, the producer doesn't get a draw  
15 from the pool.

16 Q. Well, let's call the producer a co-op  
17 with respect to that milk. Who gets the, well, a  
18 producer ultimately realizes the draw doesn't he?

19 A. They would in their price that they were  
20 paid.

21 Q. Yes, well, I'm talking about the  
22 circumstance. Is there a circumstance where a  
23 producer's production would not result in any Pool Draw?

24 A. If the milk was utilized in a higher  
25 usage product, such as Class I, there would probably be

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1 a payment into the pool.

2 Q. Let's suppose all of it is going for  
3 manufacturing and that producer owns no quota or base.  
4 Would such a producer be entitled to anything out of the  
5 pool?

6 A. It would depend on where he ships his  
7 milk. If it was going for -- if it's going through a  
8 pool source and it's being used in Class 4-B cheese then  
9 that milk is drawing out of the pool even if he has no  
10 quota.

11 Q. Yes, and the Pool Draw in that case goes  
12 to the plant does it not?

13 A. That's correct.

14 Q. Okay. And if the -- you would consider  
15 the co-op the same as a plant in that circumstance would  
16 you not?

17 A. For pool settlement purposes...

18 Q. Yes.

19 A. ...yes.

20 Q. Yes. Very good. Thank you.

21 \*\*\*

22 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
23 Berde. Any other questions for the California  
24 witnesses? Yes, Mr. Beshore.

25 \*\*\*

1 BY MR. BESHORE:

2 Q. Just one other question, Mr. Horton.  
3 Milk entering California, is that pooled?

4 A. We account for milk coming in from other  
5 sources. The handler receiving the milk accounts for  
6 the usage and the receipts of that milk.

7 Q. Is the milk pooled?

8 A. That whole subject is subject to  
9 litigation right now.

10 Q. Okay. Okay. So the 74 million pounds of  
11 milk in April 2001 entering California reflected on  
12 Table 4-B of Exhibit 13 is handled in the manner that  
13 you just testified to I take it.

14 A. That's correct.

15 Q. Okay. And if I understood your answer,  
16 the handler, you require the handler to account for the  
17 milk. At what price might I ask?

18 A. The handler is charged how the milk was  
19 used and there's a credit to the handler on the pool  
20 obligation at a plant level not to exceed the quota price  
21 and not to fall below the overbase price.

22 Q. So it's an individual handler pool on  
23 that milk between the quota price and the overbase price  
24 value?

25 A. Yes, depending on the individual

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1 handler's credit it would depend on where the milk went.

2 Q. Okay. Thank you.

3 \*\*\*

4 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
5 Beshore. Any further question? Yes, Mr. Tosi.

6 MR. TOSI: I just have one quick question. Do  
7 you have any direct knowledge of California producers  
8 who are pooled on the Upper Midwest Order at the same  
9 time being pooled on the California State Program  
10 receiving two payments? One minimum payment from the  
11 State and then one that comes from being pooled on the  
12 Upper Midwest?

13 MR. HORTON: I have no direct knowledge.

14 MR. KRUG: And I don't either.

15 MR. TOSI: Thank you.

16 ADMINISTRATIVE LAW JUDGE: Mr. Cooper?

17 \*\*\*

18 BY MR. COOPER:

19 Q. Yes, a couple of questions. When we're  
20 talking about quota milk here it's not like a particular  
21 portion of a producer's milk is designated quota milk or  
22 non-quota milk is it? This is just a payment method.  
23 So if he's got three truckloads of milk sitting in his  
24 farm you can't say the first truck is the quota truck  
25 and the other two are non-quota. Am I correct?

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1 A. Yes, you're correct.

2 Q. So when we talk about only non-quota milk  
3 being attached to a Federal Order or a quota milk being  
4 attached we're I guess dealing in meaningless terms  
5 because we can't determine which truckload of milk is  
6 quota and which is non-quota.

7 A. That's correct.

8 Q. Okay. Secondly as I understand it the  
9 producer owns the quota. Is that correct?

10 A. Yes, the producer owns the quota.

11 Q. Now how about if the producer is a member  
12 of the co-op. Does the co-op own the quota or does  
13 producer member of the co-op owns it?

14 A. The producer retains title to the quota.  
15 It is as I testified is assigned to the cooperative.

16 Q. So there's no legal requirement on the  
17 co-op to pay more to a producer who owns a lot of quota  
18 versus a producer who owns very little quota although  
19 the guy might quit the co-op obviously.

20 A. I'm not sure how the individual co-ops  
21 pay their members.

22 Q. Okay. But there's no requirement under  
23 your program that they pay more to the producer who has  
24 more quota?

25 A. No, there's no requirement.



1 the Hearing at this point? Good, you'll be here for  
2 awhile. Excellent. Thank you. I propose we take a  
3 break at this time. Mr. English, would that be  
4 acceptable? It's almost 3:10, let's be back here at  
5 3:25.

6 \*\*\*

7 [Off the record]

8 [On the record]

9 \*\*\*

10 ADMINISTRATIVE LAW JUDGE: This record resumes  
11 at 3:26. Mr. English.

12 MR. ENGLISH: Thank you, Your Honor. My next  
13 witness is Mr. Carl Conover, he has a prepared statement  
14 and a series of exhibits.

15 ADMINISTRATIVE LAW JUDGE: Thank you. Mr.  
16 Conover, would you identify yourself spelling your names  
17 please?

18 MR. CONOVER: My name is Carl Conover, C-a-r-l  
19 C-o-n-o-v-e-r. I reside in Shoals, Indiana and I'm here  
20 to testify on behalf of the proponents of Proposal #1.

21 ADMINISTRATIVE LAW JUDGE: Would you stand and  
22 raise your right hand?

23 \*\*\*

24 [Witness sworn]

25 \*\*\*

1 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
2 be seated. Mr. English, you may proceed.

3 MR. ENGLISH: Thank you, Your Honor. Mr.  
4 Conover has a statement but also has a number of  
5 exhibits, which have been distributed with a clip, but  
6 if we could go through and mark them I'd appreciate it,  
7 Your Honor.

8 ADMINISTRATIVE LAW JUDGE: Your Honor.

9 MR. ENGLISH: I think the next one was twenty-  
10 seven. Is that correct?

11 COURT REPORTER: Yes.

12 MR. ENGLISH: Exhibit 27, the first two-page  
13 document in the clipped document is a curriculum vitae  
14 for Mr. Conover.

15 ADMINISTRATIVE LAW JUDGE: Yes.

16 MR. ENGLISH: The next one-page document in  
17 the clip is labeled Alternative Proposed Language to  
18 Proposal #1, and I'd ask that to be labeled Exhibit 28.

19 ADMINISTRATIVE LAW JUDGE: Yes, it will be.

20 MR. ENGLISH: The next document is a multipage  
21 document, it is five pages labeled Producer Milk on  
22 Pacific Northwest, Arizona, Las Vegas, and Western  
23 Federal Orders. I'd like that to be marked as twenty-  
24 nine.

25 ADMINISTRATIVE LAW JUDGE: Yes, it will be.

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1 that fashion if you wish, I'll allow you to do that. It  
2 doesn't seem to me to be necessary, but is it just so  
3 that the others in the room will be familiar with his  
4 background?

5 MR. ENGLISH: No, I think most of the people  
6 in the room are familiar. I mean, obviously my request  
7 is based upon -- and I think he was a little insulted at  
8 lunch when I pointed out that this is over 50 years now  
9 of his participating in Federal Milk Orders. He said it  
10 was the first time someone had, you know, used that  
11 number. But the fact of the matter is that Mr. Conover  
12 has been involved both as an employee of USDA at the  
13 Market Administrator's Office eventually at USDA as the  
14 Chief of the Order Enforcement Branch. And then  
15 subsequent to his time at USDA he has been designated,  
16 he has qualified at Federal Market Order Hearings as an  
17 expert witness. And I would ask that Mr. Conover be  
18 designated as an expert witness for the purposes of  
19 these proceedings.

20 ADMINISTRATIVE LAW JUDGE: Is there any  
21 objection or would anyone like to voir dire the witness?

22 MR. VETNE: I'd like to stipulate. He's an  
23 expert witness.

24 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
25 Vetne. Is there any objection to my accepting Mr.

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1 Conover as an expert for the purpose stated? There  
2 being no objection, I do accept Mr. Conover as an expert  
3 in this field.

4 MR. BERDE: Can I make...

5 ADMINISTRATIVE LAW JUDGE: Mr. Berde?

6 MR. BERDE: Yes, I'd like to stipulate that  
7 he's been a thorn in our side.

8 ADMINISTRATIVE LAW JUDGE: The record will  
9 also show.

10 MR. ENGLISH: Well, then we will dispense with  
11 the reading of that and I thank you, Your Honor, I sort  
12 of thank Mr. Berde, and I do thank Mr. Vetne. Mr.  
13 Conover can then proceed with the reading of his  
14 statement.

15 \*\*\*

16 CARL CONOVER,  
17 having first been duly sworn, according to the law,  
18 testified as follows:

19 MR. CONOVER: The Agricultural Marketing  
20 Agreement Act authorizes the adjustment of minimum Order  
21 prices to reflect the location value of milk. Location  
22 Adjustments were for many years a reasonable effective  
23 tool in attracting milk where needed and at times in  
24 discouraging milk from being associated with the market  
25 when not needed. Such adjustments were for the most

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1 part based on the mileage from a basing point  
2 (reflecting the areas fluid needs) to where the milk was  
3 received. The rate, which was primarily to reflect  
4 transportation costs, varied from one area to another  
5 until the 1960s when 1.5 cents per ten-mile increments  
6 was used for most markets. In the use of zone pricing  
7 and adjustments in many areas for increasing  
8 transportation costs introduced a lack of uniformity as  
9 to the rate. Diverted milk was at times priced at the  
10 point from which diverted, but this provision was  
11 eliminated when it became obvious that it encouraged the  
12 shifting of milk from one area pool to another for  
13 purposes not compatible with the purposes of the  
14 Agricultural Marketing Agreement Act. With the advent  
15 of Federal Order Reform in 2000, a different pricing  
16 system was promulgated. Order prices reflected local  
17 supply and demand conditions and not distance from an  
18 arbitrary pricing point. Diverted milk can be received  
19 miles from the marketing area, can now be priced at the  
20 same price as milk at the same location of the milk at  
21 the plant from which milk was diverted. A situation not  
22 dissimilar from that that created problems many years  
23 ago. During the rule making process of Federal Order  
24 Reform USDA considered and rejected the idea of complete  
25 open pooling, where milk from anywhere can be pooled in

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1 any market. The reason given was that there is no  
2 assurance that the milk will be made available when  
3 needed in the market for fluid use. Assuring an  
4 adequate supply of milk for fluid use has been cited  
5 many times as the primary purpose of the Order program.  
6 This purpose is of dubious import in markets with twenty  
7 or less percentage of fluid use, which probably explains  
8 why there is the next thing to open market pooling in  
9 Order 30 and other Orders. Uniform treatment of  
10 producers is a statutory requirement, equitable  
11 treatment is surely under the canopy of uniform  
12 treatment. Equitable treatment includes equal sharing  
13 of the pool proceeds among all pool producers, but  
14 certainly would not require equal treatment for  
15 producers who are sharing in another pool. Indeed as  
16 show by the earlier testimony, the pooling of the same  
17 milk on Order 30 and the California marketwide pool has  
18 resulted in non-uniform distributions from the pool to  
19 those groups of producers, which are pooling the same  
20 milk price. Without adjusting for location the average  
21 difference between the Order 30 Uniform Price and the  
22 California Overbase Price for Order 30 Pool Draw has  
23 been \$1.06 per hundredweight (\$11.10 overbase plus 84-  
24 and-a-half cents Order Pool Draw, less \$10.88-and-a-half  
25 cents Order 30 Uniform Price.) Hence there is a

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1 substantial need for Order language to exclude the milk  
2 of a producer whose milk is subject to pooling under any  
3 other pool. Such provisions have existed with respect  
4 to pooling on more than one Federal Order for 30 years.  
5 Federal Order provisions have always, unless there was  
6 an oversight, been tailored to prevent producers from  
7 using the same milk to share in the proceeds of more  
8 than one Order pool. Indeed if the same milk was listed  
9 on more than one report for more than one Order, USDA  
10 auditors would disqualify the milk to the extent  
11 necessary to prevent double pooling. An examination of  
12 the California Department of Food and Agriculture data,  
13 and my knowledge of the milk receipts in the Western  
14 United States, reveals that almost all of the milk moved  
15 from California to non-California plants can be  
16 accounted for as being received in Oregon, Nevada, and  
17 Arizona. This means that almost all of the California  
18 milk pooled on Order 30 is not physically received in  
19 the Upper Midwest Marketing Area but instead is being  
20 received at California plants and is eligible for  
21 pooling through California's marketwide system.  
22 Regardless our proposal, especially as modified, is  
23 designed to limit Order 30 of only that milk which is  
24 pooled on a marketwide pool, Federal or State. If milk  
25 from Western Montana, Western New York, and

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1 Pennsylvania, if it adopts marketwide pooling, or  
2 California is not priced and included in a marketwide  
3 pool...

4 \*\*\*

5 [Off the record]

6 [On the record]

7 \*\*\*

8 MR. CONOVER: ...data on Exhibit 13, Page 10,  
9 Table 4-B, production leaving California farms and  
10 received by non-California plants ranges from 21-and-a-  
11 half to 28-and-a-half million pounds per month. I  
12 understand that this quantity of milk does not include  
13 bulk milk shipped to Hawaii as that milk is first  
14 received at a California plant standardized and then  
15 transported to Hawaii. Even though this milk is  
16 eventually packaged in Hawaii, under California rules  
17 since the milk is first received at a California plant  
18 it is not treated as production leaving California.  
19 Production leaving California does not include milk  
20 produced on California -- Excuse me. -- let me start  
21 that sentence over, I inserted not in there. Production  
22 leaving California does include milk produced on  
23 California dairy ranches in far Northern California and  
24 pooled under the Pacific Northwest Order #124.  
25 Discussions with significant Oregon handler receiving

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1 milk from six to eight dairy farmers located in Northern  
2 California reveals that at least 90 percent of the milk  
3 from those eight dairy farmers is physically received in  
4 Oregon facilities. This accounts for at least 5.3  
5 million pounds of California production per month. 71.7  
6 millions pounds annually times the 90 percent divided by  
7 12 months.

8 MR. ENGLISH: And that's Exhibit 29.

9 MR. CONOVER: Exhibit 29, 2000 Pacific  
10 Northwest Producer Milk, this volume of milk has  
11 historically been associated with Oregon...

12 MR. ENGLISH: It's Exhibit 29.

13 MR. CONOVER: ...and it's titled 1990 Pacific  
14 Northwest Producer Milk. In addition historically  
15 California milk has and continues to be delivered to a  
16 plant in Las Vegas, Nevada. Because that plant as a  
17 result of Federal legislation went from fully regulated  
18 status to non-regulated status on October 1, 1999. We  
19 have Federal Order market statistics, which reveal that  
20 that plant received, and to our knowledge continues to  
21 receive, approximately ten million pounds of milk  
22 directly from California farms. In flesh months this  
23 number may be as high as 14 million pounds. I need an  
24 exhibit. Would you...

25 MR. ENGLISH: Exhibits 30 and 31.

1                   MR. CONOVER: All right. There is also a  
2 rather large producer handler located in Arizona  
3 receiving significant quantities of California milk  
4 directly from California ranches. While we do not know  
5 the exact size of this operation, industry estimates  
6 place it as seven to 12 million pounds per month with  
7 most estimates ranging from ten to 12 million pounds.  
8 As has been widely reported in the trade media in late  
9 1999, another Arizona handler developed milk supplies  
10 from California and Idaho in order to provide milk to  
11 their plant. This would account for the fact that from  
12 1999 to 2000 the average monthly quantities of  
13 California milk pooled on the Las Vegas/Arizona Order  
14 increased from 4.2 to 7.2 million pounds. While not all  
15 of that California milk is being received in Arizona  
16 facilities, a portion according to industry sources is  
17 being physically received by an Arizona handler. There  
18 has been a slight increase in the California milk  
19 received at plants located outside California. Three  
20 million pounds per month increase from 1998 to 2000, and  
21 an additional increase of 2.8 million pounds per month  
22 from 2000 to 2001 as can be seen from the above data.  
23 However very little milk is actually leaving California  
24 farms and available for delivery outside of Southern  
25 Oregon, Las Vegas, or Central Arizona. On the low end,

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1 I have accounted for 22.3 million pounds of California  
2 milk received in those areas, 5.3 million in Oregon, ten  
3 million in Las Vegas, and seven million in Arizona. It  
4 is not unreasonable to conclude that another four  
5 million pounds plus are being received by handlers in  
6 Arizona. This leaves from zero to at most five million  
7 pounds unaccounted for March 2001, the month when the  
8 largest quantity of California milk was moved from  
9 California ranches to non-California plants. However  
10 Federal Market Administrator data establishes that in  
11 addition to the milk not pooled because it is associated  
12 with the producer handler in Arizona, or the handler  
13 located in Las Vegas, Nevada, 13 million pounds of  
14 California milk are pooled on the three Western Orders.  
15 36 million pounds are pooled on the Central Order 32  
16 April data and May estimate of 50 million pounds, and  
17 280 million pounds were pooled on Order 30. I conclude  
18 that almost all of the 50 and the 280 million pounds  
19 were pooled on those two Federal Orders and at the same  
20 times was received at California plants, priced under  
21 the California stabilization plans, and included and did  
22 participate in the California Pool Price Calculations  
23 and the Pool Benefit. The solution is not all that  
24 complicated since Federal Orders have dealt with this  
25 problem with respect to multiple Federal Orders for

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1 years. The handler on Order 30 should not be permitted  
2 to pool milk as diverted milk if that diverted milk is  
3 priced and pooled under a Federal Order or a State Order  
4 with pricing and pooling of milk returns on a marketwide  
5 basis. That...

6 MR. ENGLISH: Exhibit 28.

7 ADMINISTRATIVE LAW JUDGE: Exhibit 28.

8 MR. CONOVER: ...shows our modified language  
9 that is designed to achieve this objective. That  
10 completes my prepared statement.

11 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
12 Conover. Mr. English?

13 \*\*\*

14 BY MR. ENGLISH:

15 Q. Let's just turn it for a moment to  
16 Exhibits 29, 30, and 31, Mr. Conover. Twenty-nine is  
17 the five pages, three pages from 2000 and two pages from  
18 1990, and you understand that that is from the Internet,  
19 the statistics of State and County production for Order  
20 124, 131, and 135, similar to the material put in the  
21 record for Order 32 and Order 30. Correct?

22 A. Yes, I understand that.

23 Q. And then the Exhibits 30 and 31 are the  
24 1999 and '98 Annual Statistical Data for Federal Milk  
25 Orders for 131, and 134, and 137, and 139, and again

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1 that's available on the Internet. Correct?

2 A. Yes.

3 Q. You indicated in your testimony that the  
4 data from Orders 131, and 134, and 137, and 139 for '98  
5 and '99 lead you to a conclusion that the plant in  
6 Clarke County that went from regulated status in  
7 September of '99 to fully unregulated status in October  
8 of 1999, that that data indicates perhaps a minimum of  
9 ten million and a maximum of 14 million pounds of  
10 California milk. Correct?

11 A. Yes.

12 Q. Is that data then found on the State and  
13 Production Data in Exhibits 30 and 31 that show in '98,  
14 May and December, and May of '99, California milk being  
15 pooled on the old Great Basin Order, but in December of  
16 1999 there is zero California milk being pooled on that  
17 Order?

18 A. Yes, that's what it shows.

19 Q. And similarly if you compare data for the  
20 quantity of milk being pooled by pool plants, subject to  
21 a caveat here in a second, that you also can come to  
22 that conclusion. Correct?

23 A. Yes.

24 Q. Is it your understanding that for the  
25 three months of September, October, and November of 1999

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1 another operation that had been regulated as a fully  
2 regulated pool plant under 139 went to partially  
3 regulated status for those three months only?

4 A. Yes.

5 Q. And that data then is revealed only, not  
6 in the partially regulated data, but is revealed only in  
7 the Order 139 data for Class I milk from outside the  
8 marketing area?

9 A. Yes.

10 Q. Exhibit 28, which is the Alternative  
11 Language, has two options, an Option 1 and an Option 2.  
12 Before you get to a distinction between Option 1 and  
13 Option 2, could you tell me a couple of the reasons why  
14 you thought it was necessary to look at alternative  
15 language for these proposals?

16 A. When I was approached to work on this  
17 project here it seemed to me that the problem was to  
18 treat with the milk that was being pooled under two  
19 different marketwide pools and not necessarily with the  
20 producers who produced that milk. And the original  
21 Proposal 1, in my view anyway, was the language would  
22 have excluded a producer from participating in a pool if  
23 any of his milk was included in the marketwide pool.  
24 The language I have come up with here I think zeroes in  
25 on the problem more.

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1           Q.    Is that a -- it's by way of saying that  
2           so far the testimony you've heard today has been how we  
3           ought to treat this milk that is pooled on a statewide  
4           pool with marketwide pooling like another Federal Order  
5           and we already have language dealing with this for a  
6           Federal Order.  Correct?

7           A.    Yes.

8           Q.    And as is noted in the Federal Order  
9           Reform process and it was, you know, answered in a  
10          question by Mr. Halverson, the issue is how to account  
11          for the same milk.  Correct?

12          A.    The same milk is what we're concerned  
13          with, yes.

14          Q.    That is by way of saying that if a  
15          producer in California or anywhere else wants to be  
16          associated with the Order 30 pool, if they qualify, they  
17          can still qualify, they just have to choose which pool  
18          they're going to be pooled on.  Correct?

19          A.    Yes.

20          Q.    In your experience from your days at  
21          USDA, would this be a difficult provision to administer?  
22          Administer in terms of auditing to make sure that once a  
23          provision like this is adopted that someone is not  
24          nonetheless pooling twice.

25          A.    There's authority under the Agricultural  
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1 Marketing Agreement Act for the auditors from the Market  
2 Administrator's Office to get access to almost any  
3 record that exists, and surely this wouldn't be a  
4 difficult auditing problem to determine whether a  
5 producer's milk was being pooled under another Order be  
6 it State or be it Federal.

7 Q. In a way we shortened -- Option 2 was one  
8 of the first option we came up with, you and I, and we  
9 shortened that to Option 1. Correct?

10 A. Yes.

11 Q. Option 2 has as its genesis, does it not,  
12 identical language that already appears in the Federal  
13 Milk Orders?

14 A. Yes.

15 Q. And where is that identical language  
16 found in some Federal Milk Orders as it's found in  
17 Option 2?

18 A. I believe it's in the Compensatory  
19 Payment Provisions.

20 Q. So that would be in 1000.76. Correct?

21 A. To the best of my knowledge that's it but  
22 I...

23 Q. Okay. In particular that would be the  
24 language imposed under the authority of a State  
25 government to any marketwide pooling if it's heard.

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1 Correct?

2 A. Yes.

3 Q. So to the extent that there have been  
4 questions asked at this Hearing about what is that, the  
5 Department of Agriculture has already determined what  
6 that is for their own -- for Federal regulation  
7 purposes. Correct?

8 A. They've already identified it with that  
9 language, yes.

10 Q. The purpose of Option 1 was to shorten up  
11 the language notwithstanding the existence of the  
12 language in Option 2 that is identical to the language  
13 in 1000.76. Correct?

14 A. Yes.

15 Q. But as far as we're concerned, that is  
16 the Proponent's Proposal 1, either option would suffice,  
17 it would...

18 A. They both should achieve the same end.

19 Q. Okay.

20 \*\*\*

21 ADMINISTRATIVE LAW JUDGE: Mr. English, I just  
22 want to be clear. Option 1 is that that was published  
23 in the Federal Register?

24 MR. CONOVER: No.

25 MR. ENGLISH: No, I'm looking at Exhibit 28.

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1 ADMINISTRATIVE LAW JUDGE: All right.

2 MR. ENGLISH: Exhibit 28 has an Option 1 and  
3 an Option 2.

4 ADMINISTRATIVE LAW JUDGE: All right. Thank  
5 you.

6 MR. ENGLISH: So thank you for the  
7 clarification. For the purposes that we have been  
8 discussing as we're talking about alternative languages  
9 to Proposal #1, and our Exhibit 28 has an Option 1 and  
10 an Option 2.

11 ADMINISTRATIVE LAW JUDGE: Thank you.

12 \*\*\*

13 BY MR. ENGLISH:

14 Q. In your testimony, Mr. Conover, you  
15 referenced a time in the past when there were some  
16 problems that were not dissimilar. Could you please  
17 tell us some more about that?

18 A. Well, I didn't exactly say the problems  
19 were not dissimilar, I said the pricing of the milk was  
20 similar to what we have now and that did create  
21 problems. And I was referring to back in the '70s when  
22 there was a lot of milking shifting between markets. It  
23 was referred to as pool loading then and the pricing  
24 made it convenient and profitable to do that as well as  
25 the purpose then seemed to be more to deliberately

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1 changing the blend price in certain markets.

2 Q. Are you aware from your time at the USDA  
3 that it was about this time that provisions were put in  
4 the Federal Orders to prevent the pooling of the same  
5 milk on multiple Orders?

6 A. There were some provisions in Orders even  
7 before that to prevent the pooling, and what I was  
8 referring to was not multiple pooling but the moving of  
9 milk from one pool to another.

10 Q. You have however stated in your  
11 testimony, Page 3, that it is not our intent to create a  
12 trade barrier, otherwise limit the movement or pooling  
13 of milk, which is not obtained pooling benefit  
14 elsewhere.

15 A. Sure.

16 Q. And so the ultimate proposal issue for  
17 proponents of Proposal #1 is this multiple pooling that  
18 is excluded under Federal Orders. Correct?

19 A. That's right.

20 \*\*\*

21 MR. ENGLISH: I have no further questions of  
22 the witness at this time. He is available for cross  
23 examination and I would move the admission of his  
24 Exhibits 27, 28, 29, 30, and 31.

25 ADMINISTRATIVE LAW JUDGE: Thank you. Is

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1 price?

2 A. Well, having it equalized among all  
3 handlers is a statutory requirement.

4 Q. It is a statutory requirement?

5 A. Yes.

6 Q. Yes, well, how does it fill the purpose  
7 of attracting adequate supply for fluid use?

8 A. Well, any producer that provides milk  
9 into a marketwide -- to a fluid use, a higher class use  
10 benefits the entire market.

11 Q. But it is that -- now the producer  
12 essentially is not the one that's going to ship the milk  
13 to fluid use if he's hauling to a supply plant. The  
14 supply plant is the one and it's the handler that's  
15 going to have to see to it that he ships that milk for  
16 fluid use.

17 A. Yes, sir.

18 Q. Is that not correct?

19 A. Yes, and they do have qualifying  
20 provisions in Orders for that purpose...

21 Q. And the...

22 A. ...for the supply plants.

23 Q. ...shipping percentages.

24 A. Shipping percentages, yes. Yes.

25 Q. Does the Orders control the price that

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1 that handler charges the fluid plant?

2 A. No, the Orders if the plant is operated  
3 by a cooperative it does require that at least the  
4 minimum price was paid to that cooperative.

5 Q. But...

6 A. As the operator of that plant.

7 Q. That's right. So then evidently the  
8 fluid plant is at the mercy of paying whatever price he  
9 has to pay in order to receive that milk from the supply  
10 plant. Is that not correct?

11 A. He has to pay him a price high enough to  
12 attract it, yes.

13 Q. That's right. And not necessarily  
14 limited, just only the Class I price?

15 A. No, as a matter of fact, over Order  
16 prices have been prevalent for many years.

17 Q. And so that does provide for room for  
18 unfair trade practices within the Order system. Is that  
19 not correct?

20 A. I can't characterize it as that.

21 Q. Okay. Thank you, Carl.

22 \*\*\*

23 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
24 Lamers. Who else would like to cross examine Mr.  
25 Conover? Mr. Beshore?

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BY MR. BESHORE:

Q. Carl, you note on Page 2 of your testimony that the Secretary very explicitly in the final Decision for Federal Order Reform rejected the concept of open pooling.

A. Yes.

Q. Okay.

A. Yes.

Q. But you go on, and I might say on the flip side, adopted the necessary corollary of that that there should be performance requirements for participation in all the Federal Order pools. Would you agree that's the -- if you're not going to have open pooling you're going to have performance requirements.

A. You've got to have a method of attracting milk to the fluid use.

Q. Okay. Now that being the case, wondering what your comment is that the purposes of dubious import of markets with twenty or less percent fluid use, are you saying that in low utilization markets there should not be performance requirements?

A. No, I'm saying that if you're judging by whether there's adequate milk produced for fluid uses, if you're only using 15 percent of the entire milk

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1 that's there in Class I, it would be awful hard to say,  
2 well, I've got to do something to encourage the  
3 production of milk because there's not enough here to  
4 meet the demands for Class I. It seemed to me it's a  
5 different problem attracting that milk to the plants  
6 that need it.

7 Q. But what attracts the necessary milk to  
8 the fluid plants regardless of the utilization in the  
9 Order is are the performance requirements in the Order.  
10 Isn't that the way the system works?

11 A. Yes.

12 Q. Okay. And if -- so you would agree then  
13 that there ought to be performance requirements in Order  
14 30 for milk to participate in the pool.

15 A. Yes.

16 Q. Now you go onto say on Order...

17 A. And I believe there are some there, it's  
18 10 percent has to be received at fluid plants, pool  
19 plants.

20 Q. Okay. And if, you know, if milk -- if 10  
21 percent of a volume of milk from the State of California  
22 or from the State of Montana was delivered to pool  
23 plants in Order 30, well, let's stick with the State of  
24 California, is it your testimony that it should  
25 nevertheless not participate in the Order 30 pool? You

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1 can answer and Chip can -- Mr. English was nodding his  
2 head vociferously in the negative there I will note.

3 \*\*\*

4 MR. ENGLISH: It is so ridiculous compared to  
5 what he said in his testimony.

6 MR. CONOVER: Well, I think that's afield from  
7 what I said, I agree on that, but I...

8 \*\*\*

9 BY MR. BESHORE:

10 Q. Well, isn't it your testimony...

11 A. Well, I know why. I know the background  
12 as to why they allow cooperatives and handlers to  
13 qualify on the basis of the total milk that they make  
14 available to the fluid plants and not requiring certain  
15 milk to be moved from distant points in that same -- in  
16 any portion.

17 Q. A portion.

18 A. You should move the milk that is most  
19 readily available near...

20 Q. Right.

21 A. ...the places that it's needed.

22 Q. But I guess my question is, wouldn't your  
23 -- if your proposal was adopted, wouldn't it have the  
24 necessary effect of disqualifying from the pool milk  
25 that performed for that market simply because it was

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1 also part of a State regulatory program?

2 A. It...

3 Q. Isn't that what it would do?

4 A. It would eliminate double dipping or  
5 pooling the milk under more than one Order.

6 Q. It would disqualify the milk from the  
7 Federal Order pool even if it performed if it was also  
8 part of how you define a State pool?

9 A. No, well, performed is on -- it would if  
10 it was still priced under the Order, the distant Order  
11 or the marketwide pool, even though it was moved  
12 directly from the farms into Order 30 plants, which I  
13 don't think is the case. That's conjecture.

14 Q. But we're not talking about what has  
15 happened in the past, we're talking about what would  
16 happen in the future if one of these proposals were  
17 adopted and your proposal would in fact, Option 1 or  
18 Option 2, disqualify from pooling that milk if it  
19 participated in the State Order even if it performed.  
20 Correct?

21 A. Absolutely.

22 Q. Okay. And if -- taking it outside of  
23 California, if milk was produced in any other state that  
24 had a state regulatory program that meets your language,  
25 and it performed for the market in Order 30, it would

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1 nevertheless be disqualified for participation in the  
2 pool. Isn't that correct?

3 A. If it were priced under the provisions of  
4 a marketwide pool, it would be banned from prohibiting  
5 in Order 30 just like milk that comes in from Order 33.  
6 It wouldn't be allowed to participate in Order 30 either  
7 if it were priced under that Order.

8 Q. Okay. So when you make the statement in  
9 the second paragraph of Page 2 that the pooling of milk  
10 on Order 30 in California has resulted in non-uniform  
11 distributions from the pool to those groups of  
12 producers, which pool are you talking about?

13 A. I can talk about either one. From what  
14 the testimony that I heard was that nobody seems to have  
15 knowledge that that money is being distributed in  
16 California.

17 Q. Now you're not, well, you're talking  
18 about...

19 A. So let's assume that it's being  
20 distributed or in the hands of the entity that is taking  
21 that draw from the pool. Now if there members are  
22 getting the blend price plus the \$2,000,000 that came  
23 from California in a month, then those producers are  
24 certainly getting more than the other producers and that  
25 is lack of uniformity.

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1 Q. Now I think you're talking about what the  
2 cooperative pays its producers there. Correct?

3 A. I'm talking about what happened to the  
4 money if it didn't go to California.

5 Q. No, you're talking about what the  
6 cooperative is paying its producers are you not?

7 A. Yes.

8 Q. And the Act doesn't have anything, it  
9 makes it clear that it's got nothing to do with that.  
10 Isn't that correct?

11 A. Well, not quite but...

12 Q. Pretty nearly.

13 A. Pretty nearly, yes.

14 Q. Okay. So we don't need to have anything  
15 to do with that in this Hearing either do we?

16 A. I think giving the money to the  
17 cooperative is the same as giving it to the producers.  
18 That's the position that the government has taken for  
19 years...

20 Q. Okay.

21 A. ...on that particular point.

22 Q. Okay. So let's talk about...

23 A. So as a group they enjoyed more benefits  
24 from that pool than the other producers in the pool.

25 Q. From which pull

1           A.    Well, Order 30.  If the money all stayed  
2 here and it wasn't distributed or paid to, which it was,  
3 to the person diverting the California milk.

4           Q.    Well, the Order 30 producers, regardless  
5 of where they're located, received the same distribution  
6 from the Order 30 pool as all other producers.  Isn't  
7 that correct?

8           A.    No, not if they...

9           Q.    They received...

10          A.    Not if they got the additional money,  
11 where did it come from?  Didn't it come from the pool?

12          Q.    Not from the Order 30 pool did it?

13          A.    Well, I thought it did.  That's what I  
14 heard everybody complaining about.  Complaining is maybe  
15 not the right word.  They said there was a pool draw of  
16 \$2,000,000.

17          Q.    Well, you say there's been non-uniform  
18 distributions from the pool...

19          A.    Okay.

20          Q.    ...to certain groups of producers and I'm  
21 wondering which pool, singular, you're talking about.

22          A.    Let's stick with Order 30.

23          Q.    And to which producers did Mr. Kebers  
24 distribute non-uniform amounts?

25          A.    Whoever he paid the \$2,000,000 to, which  
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1 was the draw on the California milk. I don't know, but  
2 whoever he did that's who got that extra money.

3 Q. So you're saying that it was non-uniform  
4 distribution because some handlers, such as Mr. Tonak,  
5 had producers in California and other handlers didn't?

6 A. If he drew the money.

7 Q. Well, he filed the report then he drew  
8 the money. Isn't that correct?

9 A. I have to assume.

10 Q. That's the way it works. Right?

11 A. Yes.

12 Q. And Mr. Kebers isn't authorized to see  
13 that the money goes to anybody but the guy who files the  
14 report. Correct? Who pools the milk?

15 A. That's true.

16 Q. Okay. Now is your -- does your  
17 definition -- would your language with respect to  
18 defining a State marketwide pooling plan, is it intended  
19 to encompass state plans which pool only a portion of  
20 amounts over and above Federal Order minimum prices?

21 A. No.

22 Q. So that type of state marketwide pool  
23 would not be included within the ban under your  
24 language?

25 A. No.

1 Q. Where does the language say that?

2 A. Well, I guess my meaning of a marketwide  
3 equalization pool...

4 Q. Is?

5 A. ...would not encompass compacts.

6 Q. Okay. Would it encompass state non-  
7 compact state regulations, which distribute portions of  
8 state mandated payments to groups of producers in the  
9 state?

10 A. I guess if all they were distributing was  
11 that dollars over and above the Federal Order price, I  
12 don't see a duplication there.

13 Q. Okay. Now if equity is -- is equity the  
14 primary issue that you see here?

15 A. I think it is.

16 Q. Okay. And the equity is that a producer  
17 who's getting a Class I return from one market shouldn't  
18 also get a class I return from the Federal Order market.  
19 Right?

20 A. True.

21 Q. Okay. So what about that producer? But  
22 you don't have any problem with the system where a  
23 producer delivers his milk five days of the week to an  
24 unregulated Class I or a state regulated individual  
25 handler pooled Class I plant, and collects the full

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1 Class I price, and pools his milk the other two days of  
2 the week on a Federal Order.

3 A. We're not pooling the same milk then.

4 Q. Okay. So there's no equity problem  
5 there?

6 A. None that we are addressing here. That I  
7 am addressing anyway.

8 Q. Okay. But there is an equity issue there  
9 is there not?

10 A. I'm not ready to say there is.

11 Q. Okay. Let's talk about the Idaho milk on  
12 Order 30. I take it you have no problem with that  
13 pooling?

14 A. To my knowledge the Idaho milk is not  
15 priced under a State operated marketwide pool.

16 Q. Okay. And, therefore, in terms of equity  
17 there's no equity issue as you see it with respect to  
18 the Idaho producers drawing down the blend in Order 30?

19 A. I have to go with the concept that the  
20 intent of the Act was that milk from any place, if it  
21 qualified, should be not prohibited from being pooled in  
22 the market. And the exception I'm drawing is based upon  
23 the equity of pooling it in more than one market.

24 Q. Okay. Well...

25 A. And that isn't a problem with the Idaho

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1 milk.

2 Q. But isn't there an equity problem if the  
3 present regulations allow that milk, which is not  
4 located in a manner to reasonably serve the Order 30  
5 Class I market to allow that milk to share the same  
6 blend price as the milk that is available for the Class  
7 I market?

8 A. I'm not going to take a position just  
9 because milk is located in "X" state that it shouldn't  
10 be allowed to be pooled because I think the Act is very  
11 clear on that. If you're trying to exclude it because  
12 it's in Idaho I think there are problems with that  
13 concept.

14 Q. Shouldn't the milk need to, whether it be  
15 in Idaho or any other distant state, wouldn't you say  
16 that it ought to have some reasonable performance  
17 requirements to be available for the fluid sales which  
18 it's sharing the blend proceeds from?

19 A. I think the Secretary has dealt with  
20 that, one, in allowing cooperatives and handlers to  
21 serve the market with the closest milk to make it a most  
22 economical transportation. And two, the requirement  
23 that that milk be produced under conditions that make it  
24 available to serve the fluid market in the market for  
25 qualified Grade A producers for the market that it's

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1 pooled in.

2 Q. Regardless of whether it is ever  
3 delivered to market or not?

4 A. Well, I stick with that statement.

5 Q. Is it your testimony as I think Mr.  
6 Gulden testified earlier that the disqualification on  
7 state regulated milk would apply regardless of the  
8 extent of the benefit on the state milk, one penny or a  
9 dollar, it doesn't make any difference?

10 A. I can't remember whether he testified to  
11 that or not, but I think the fact that it was priced and  
12 equalized in the state is all that would be the  
13 criteria, not the amount of dollars that it impacted.

14 Q. By the way, would you disqualify from  
15 Federal Order pooling milk in a state such as I think  
16 occurred in the State of Vermont a few years ago were  
17 producers in the state were simply -- all producers in  
18 the state were provided a payment per hundredweight of  
19 production by the State government? Would that be a  
20 form of marketwide pooling that would disqualify that  
21 milk from Federal Order pooling as far as you're  
22 concerned?

23 A. I wouldn't think so. That isn't  
24 marketwide pooling in my idea anyway.

25 Q. Okay. Thank you.

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ADMINISTRATIVE LAW JUDGE: Thank you, Mr. Beshore. Additional questions, Mr. Lamers?

\*\*\*

BY MR. LAMERS:

Q. Carl, to try and clear things up here with your unequal distribution or relative to the pool monies. Is it not true that there are no pool monies paid directly to producers, they are paid to handlers?

A. That's true.

Q. And as handlers all handlers pay their producers. Is that not true? Or they won't get the...

A. There might be cooperatives where the money is paid to a cooperative that is not serving and a handler and it can distribute it to the producers. So...

Q. Though there might be the in between man in other words, yes.

A. There might be but that's...

Q. Yes, yes.

A. ...not normal practice.

Q. All right. And is it not true then that cooperatives are not obligated to pay the blend price to their producers, they can pay any price they want?

A. They can distribute the money, the

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1 statute says they can distribute the money among their  
2 producers in accordance with their contract with the  
3 producers providing they do not sell milk to handlers at  
4 less than the prices established under the Order.

5 Q. Provider they don't sell milk to other  
6 handlers under that order, yes. -- Okay. -- that's all I  
7 need. Thank you very much, Mr. Carl.

8 \*\*\*

9 ADMINISTRATIVE LAW JUDGE: Other questions for  
10 Mr. Conover? Any redirect exam, Mr. English?

11 \*\*\*

12 BY MR. ENGLISH:

13 Q. You were asked a number of questions by  
14 Mr. Beshore about performs and maybe you were passing  
15 each other in the night or maybe I was passing something  
16 in the night. But as we have drafted Exhibit 28 with  
17 the Options 1 and 2, if milk that would otherwise  
18 qualify for California pooling is actually physically  
19 received direct from the farm in Order 30, it could  
20 still qualify and be pooled. Correct?

21 A. The milk was not priced under California?

22 Q. That's the way we heard the testimony  
23 today did we not?

24 A. If it was not subject to pricing under  
25 California it would still be pooled, yes.

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1 tomorrow morning. But other than that I have no further  
2 witnesses. I do have, if this is the right time, and I  
3 will have to get the document here in a moment, some  
4 additional documents that I would like to take official  
5 notice of.

6 ADMINISTRATIVE LAW JUDGE: All right. Thank  
7 you. Shall you be known as the proponent of the  
8 proposal in Exhibit -- or the representative of the  
9 proponents of the proposal in Exhibit 28?

10 MR. ENGLISH: Yes, and I think you also heard  
11 that some of the other witnesses who originally proposed  
12 Proposal 1 have endorsed it and indeed Mr. Conover  
13 appeared on their behalf.

14 ADMINISTRATIVE LAW JUDGE: Thank you. And do  
15 you want to mark those exhibits now?

16 MR. ENGLISH: We could do that, Your Honor. I  
17 have what I've prepared is a list of requests for  
18 official notice, some of which as it's turned out we can  
19 delete because they've become exhibits because the  
20 witnesses showed up from California were Order 32. Some  
21 which can be deleted because they were admitted into  
22 evidence from Mr. Conover, so I could probably just  
23 quickly change the document, but otherwise I have a list  
24 of documents I'd like to take official notice of.

25 ADMINISTRATIVE LAW JUDGE: All right. There's  
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1 probably no harm in your asking that official notice be  
2 taken of those documents. You could read into the  
3 record those that you believe have already been supplied  
4 by other means.

5 MR. ENGLISH: The ones that have already been  
6 supplied by other means are again the Exhibits 30 and 31  
7 for Mr. Conover, Exhibit 9 that was submitted as a part  
8 of Mr. Vander Linden in Order 32, Exhibits 10, 11, and  
9 12, which were the stabilization plans for Southern  
10 California, Northern California, and the pooling plan  
11 for California. In addition, Your Honor, since I'm on  
12 California for a moment, I have with me my personal copy  
13 that people are certainly welcome to look at, but I  
14 believe that it would be appropriate since there have  
15 been some questions about changing the regulation and  
16 much of California's program is actually codified.  
17 Unlike the Federal Order program, a lot of the  
18 California system exists in the code. For instance the  
19 classified pricing exists in the code. There is  
20 something called the stabilization and marketing of  
21 market milk found at Deering's California Code, Food and  
22 Agricultural Code Sections, 61801 through 62403,  
23 including the 2001 Pocket Supplement Issued December  
24 2000, and I'd request official notice of that. There is  
25 the Milk Producers Security Trust Fund found at

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1 Deering's California Code, Food and Agricultural Code,  
2 Sections 62501 through 62667, including the 2001 Pocket  
3 Supplement Issued December 2000, and I'd request  
4 official. There is finally the Gonzalves, spelled  
5 G-o-n-z-a-l-v-e-s, Milk Pooling Act as amended, found at  
6 Deering's California Code, Food and Agricultural Code,  
7 Sections 62701 through 62756, including a 2001 Pocket  
8 Supplement Issued December of 2000 and I would ask  
9 official notice be taken of that. The remaining  
10 documents, Your Honor, are documents that are familiar  
11 to a number of the people in this room, although some  
12 may be a little older, and they are United States  
13 Department of Agriculture, Agricultural Marketing  
14 Service Materials. The first is known as the proposed  
15 final rule, Federal Order Reform found at 64 Fed. Reg.  
16 16026 through 16296 dated April 2, 1999. The second is  
17 the final for Federal Order Reform found at 64 Fed. Reg.  
18 70868 through 70912, December 17, 1999. The Final Rule  
19 had a correction, Federal Order Reform issued at 64 Fed.  
20 Reg. 73386 through 73387 found December 30, 1999. For  
21 historical purposes I'd also like to take notice, and I  
22 have copies since it is a little older, of 7 C.F.R. Part  
23 1068, Section 1068.11. So that is the old Minnesota  
24 actually dairy land provisions revised as of January 1,  
25 1973. A Decision on proposed...

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1 \*\*\*

2 [Off the record]

3 [On the record]

4 \*\*\*

5 MR. ENGLISH: ...to.

6 MR. COOPER: What was his name?

7 MR. ENGLISH: A Decision on Proposed  
8 Amendments to Marketing Agreements and Orders, Milk in  
9 the Minneapolis - St. Paul, and Certain Other Marketing  
10 Areas, found at 41 Fed. Reg. 12436 through 12479  
11 published on March 25, 1976. A Decision on Proposed  
12 Amendments to Mark the Agreements and to Orders, Milk in  
13 the Chicago Regional, and Certain Other Marketing Areas,  
14 found at 39 Fed. Reg. 8202 through 8292, March 4, 1974.  
15 And finally because at one time some Federal Orders had  
16 provisions not dissimilar in result from the California  
17 quota and overbase program, 7 CFR Parts 1004, 1007,  
18 1030, 1068, and 1024 effective as of January 1, 1989.  
19 And that's important because Order 124 changed on  
20 February 1 of '89 so it is the language of Order 124 as  
21 it existed on January 1, 1989. I would ask official  
22 notice be taken of all those materials and I do have  
23 copies for other people so they can get a full list of  
24 what I've asked for.

25 ADMINISTRATIVE LAW JUDGE: All right. And are  
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1 you going to make that list the next exhibit then?

2 MR. ENGLISH: That would be appropriate, Your  
3 Honor.

4 ADMINISTRATIVE LAW JUDGE: That would be  
5 Exhibit 32.

6 MR. ENGLISH: So I guess I'd move admission of  
7 thirty-two and ask for the official notice of the  
8 documents that I have requested, Your Honor.

9 ADMINISTRATIVE LAW JUDGE: All right. Thank  
10 you. Is there any objection to the admission into  
11 evidence of Exhibit 32? Mr. Beshore?

12 MR. BESHORE: I think all of the materials  
13 are, you know, qualify for official note but I just  
14 wonder if Mr. English might honor the record with some  
15 indication of the pertinence of, you know, the Order 68  
16 provisions in January of '73. For instance some of the  
17 older materials.

18 MR. ENGLISH: I certainly don't need to give  
19 away all my arguments before I make them in Brief.

20 MR. BESHORE: Well, no, I think that's exactly  
21 my point.

22 MR. ENGLISH: Well, you know, they're there.  
23 That's fine, I don't think we've hidden the ball at all,  
24 Marv. The fact of the matter is that in '72 and '73  
25 certain provisions were adopted to ensure that there

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1 wasn't multiple pooling of milk on Federal Orders and  
2 the rationale for doing that and the fact that it was  
3 done in the '70s I think is highly relevant to this  
4 proceeding especially since Order 30 is the melding of  
5 30 and 68. And so what happened with Order 68 and Order  
6 30 in the mid '70s with respect to the pooling of milk  
7 and decisions made by the Department, and the fact that  
8 you can go back to there and see what the language was  
9 and compare it to what we're asking for now I think is  
10 highly relevant. So I'll tell you what my arguments are  
11 going to be. And I already told you as to "H," which is  
12 the provisions I think that I at least heard before  
13 coming here that there were some arguments that somehow  
14 overbase or non-quota milk from California should be  
15 treated differently, and the fact of the matter is we  
16 have had provisions like that. For instance in Order  
17 124 and we did not have an exception in Federal Orders  
18 that said, unless that milk is pooled on Order 124, in  
19 which case it can be double pooled and that's the reason  
20 for the request.

21 ADMINISTRATIVE LAW JUDGE: Is there any  
22 objection to our taking official notice of anything  
23 contained in Exhibit 32? All right. Exhibit 32 is  
24 received into evidence. It is a request that the  
25 Secretary take official notice of the contents thereof.

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1 As indicated by Mr. English a number of the items have  
2 already been provided and official notice need not be  
3 taken. Decisions on these issues will be made at a  
4 later stage of the proceeding. In the meantime Exhibit  
5 32 is admitted into evidence. The Secretary of the  
6 Wisconsin Department of Agriculture is available now to  
7 testify. Is there any objection to our receiving that  
8 testimony at this time? -- All right. -- would you come  
9 forward and...

10 UNIDENTIFIED SPEAKER: I recommend a stretch  
11 or break.

12 ADMINISTRATIVE LAW JUDGE: That would be good.  
13 Let's see. It's now 4:30, let's reconvene at 4:40.

14 \*\*\*

15 [Off the record]

16 [On the record]

17 \*\*\*

18 ADMINISTRATIVE LAW JUDGE: We're back on  
19 record at 4:42. To my right are seated Secretary  
20 Harsdorf and Mr. Hughes. Knowing that these microphones  
21 are rather sensitive, you do need to talk right into it.  
22 Secretary Harsdorf, would you please introduce yourself?

23 MR. HARSDORF: I'm Jim Harsdorf, Secretary of  
24 the Wisconsin Department of Ag, Trade, and Consumer  
25 Protection.

1 ADMINISTRATIVE LAW JUDGE: All right. Thank  
2 you. And your full name is James E. Harsdorf?

3 MR. HARSDORF: That is correct.

4 ADMINISTRATIVE LAW JUDGE: And would you spell  
5 Harsdorf for the record please?

6 MR. HARSDORF: H-a-r-s-d-o-r-f.

7 ADMINISTRATIVE LAW JUDGE: All right. And the  
8 department of which you preside is the Wisconsin  
9 Department of Agriculture, Trade, and Consumer  
10 Protection?

11 MR. HARSDORF: That is correct.

12 ADMINISTRATIVE LAW JUDGE: All right. And  
13 does it have an acronym?

14 MR. HARSDORF: DATCP, D-A-T-C-P.

15 ADMINISTRATIVE LAW JUDGE: Very good. And,  
16 Mr. Hughes, would you identify yourself please?

17 MR. HUGHES: Yes. Thank you. I'm Will  
18 Hughes, that's H-u-g-h-e-s. I am a Director of Value  
19 Added Ag Development at the same department as Secretary  
20 Harsdorf.

21 ADMINISTRATIVE LAW JUDGE: All right. And  
22 it's my understanding that both of you will testify  
23 jointly. Is that correct?

24 MR. HARSDORF: I will give the testimony and  
25 Will Hughes will be able to be available for answering

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1 questions.

2 ADMINISTRATIVE LAW JUDGE: Excellent. Would  
3 each of you stand and raise your right hands please?

4 \*\*\*

5 [Witnesses sworn]

6 \*\*\*

7 ADMINISTRATIVE LAW JUDGE: Thank you. Both  
8 have answered affirmatively. Mr. Secretary, you may  
9 begin.

10 \*\*\*

11 JAMES E. HARSDORF,  
12 having first been duly sworn, according to the law,  
13 testified as follows:

14 MR. HARSDORF: I am Jim Harsdorf, Secretary of  
15 the Wisconsin Department of Ag, Trade, and Consumer  
16 Protection. I am testifying on behalf of both the  
17 Wisconsin Department of Agriculture, Trade, and Consumer  
18 Protection and the Minnesota Department of Agriculture.  
19 Our agencies represent our dairy farmer's interests and  
20 our State's interest in Federal Milk Marketing Order  
21 issues. We often work jointly because our interests are  
22 generally the same in these matters. The purpose of  
23 testifying today is to ensure that Wisconsin's 19,000  
24 dairy farmers and Minnesota's 7,400 dairy farmers  
25 receive fair treatment under Federal milk pricing

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1 regulations generally and by USDA's decision making  
2 regarding the proposals offered at this Hearing. Both  
3 our agencies work to reform Federal milk marketing  
4 Orders so that they work more effectively and more  
5 equitably for dairy farmers. Dairy farmers expect us to  
6 be at the table in helping to remove the unfavorable  
7 treatment they receive under Federal Orders. The  
8 Federal Order Reforms enacted in January 2000 had  
9 several outcomes that worsened the economic position of  
10 dairy farmers in the Upper Midwest Order. Among the  
11 impacts of Federal Order Reform has been the increased  
12 pooling of California milk in Upper Midwest Milk  
13 Marketing Order. The increased volumes of California  
14 milk is diluting the Class I utilization rates and  
15 lowering the Class I benefit for dairy farmers in  
16 Minnesota and Wisconsin whose milk is pooled in the  
17 Upper Midwest Order. The Upper Midwest Class I benefit  
18 to dairy farmers are already among the lowest in the  
19 Federal Order system. Market forces are not driving  
20 this outcome, it is the artificiality of the regulations  
21 that allow California milk to be pooled here while at the  
22 same time the same milk is pooled there. As earlier  
23 testimony in Exhibit 22 and 23 by Neil Gulden of AMPI  
24 shows, the 1.324 billion pounds of California milk  
25 caused Upper Midwest dairy farmers to lose \$11.4 million

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1 in pool revenue between October 2000 through May 2001.  
2 The monthly increases in pooled milk volumes from  
3 California have increased steadily month to month as  
4 handlers have discovered how to advantage themselves of  
5 the benefits of pooling milk. This means that  
6 California milk gains from being pooled in its own  
7 State's Milk Marketing Order plus the Upper Midwest  
8 Order, a result which is patently unfair and income  
9 lowering to Wisconsin and Minnesota dairy farmers. It  
10 also means that an inherent flaw in Federal Order  
11 regulation and resulting artificial economics are  
12 driving this outcome rather than market economics. The  
13 ability of handlers to pool the same milk in two  
14 regulated systems should be prohibited. Therefore, our  
15 agency's position is to support Proposal 1 with the  
16 modifications suggested by the proponents at this  
17 Hearing. The USDA should adopt Proposal 1 because it  
18 would exclude a dairy farmer's milk from being pooled in  
19 the Upper Midwest Order if that farmers same milk is  
20 already pooled in a State Order or another Federal  
21 Order. For USDA to continue to allow cooperative  
22 handlers to abuse Federal Order regulations through  
23 drawing pool benefits on the same milk is plainly wrong.  
24 Regarding the Upper Midwest Order, the only outcome is  
25 to harm dairy farmers in Minnesota and Wisconsin while

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1 benefiting the individual cooperatives that can work the  
2 regulations to their own advantage. Proposal 2 would  
3 grandfather milk from California that has already  
4 satisfied the Upper Midwest pool qualifications.  
5 Proposal 2 should be rejected. Grandfathering in the  
6 milk from California that was previously qualified for  
7 pooling in the Upper Midwest Order is wrong because the  
8 milk should not have been allowed pooling status in the  
9 first place. And now that a substantial of milk per  
10 month, approximately 250 million pounds, is being pooled  
11 in the Upper Midwest, it is causing significant economic  
12 harm to dairy farmers in this region. These wrongs  
13 should not be allowed by government to continue once  
14 they are identified. Proposal 3 simply creates another  
15 complex mechanism potentially to bring the same already  
16 regulated, overbase milk from the California State Order  
17 system into the Upper Midwest Order pool. California  
18 milk is regulated in a market pool which includes both  
19 quota and non-quota milk. Milk in that system provides  
20 pooling from all milk classifications and regulatory  
21 benefits for its farmers. California dairy farmers have  
22 a voice in how the California system is designed and how  
23 the California's Orders, Class I, and other pool  
24 benefits are distributed between quota and non-quota  
25 milk. Because they choose in California to operate

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1 their State Order with quotas should not allow them to  
2 unleash non-quota milk to be pooled on the Upper Midwest  
3 Order at the expense of dairy farmers in Minnesota and  
4 Wisconsin. Non-quota milk is still part of California's  
5 regulated system. It derives some benefits from that  
6 system, and, therefore, that same milk should not be  
7 allowed to be pooled also in a Federal Order for added  
8 pool benefits. Proposal 4 unnecessarily establishes  
9 additional regulations and barriers to the movements of  
10 milk in the Upper Midwest Order, which may allow some  
11 handlers to qualify milk for pooling in both State's  
12 Orders including California's State Order and the Upper  
13 Midwest Order. Proposal 4 also establishes non-standard  
14 rules on milk diversions that could serve as a precedent  
15 for adoption later in other Federal Orders. A provision  
16 like this could be used in other Orders to restrict more  
17 open pooling. The recent Federal Order Reforms moved  
18 toward a more simplified and market oriented approach  
19 across Federal Orders regarding pooling standards and  
20 generally a more market oriented approach to  
21 administering Federal Orders. We believe it is the best  
22 for Federal Orders to allow market forces to work and to  
23 eliminate regulations that work against the market  
24 working. The primary restrictions should be to prohibit  
25 the pooling of the same milk in two Federal Orders or in

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1 a State Order and a Federal Order at the same time.  
2 This concludes my testimony on behalf of the Wisconsin  
3 Department of Ag, Trade, and Consumer Protection and the  
4 Minnesota Department of Agriculture. We encourage the  
5 USDA to treat our dairy farmers fairly in this  
6 proceeding by adopting Proposal 1 and rejecting  
7 Proposals 2 through 4. Thank you.

8 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
9 Secretary. Cross examination questions. Mr. English,  
10 you may begin.

11 \*\*\*

12 BY MR. ENGLISH:

13 Q. Thank you, Mr. Secretary. Mr. Hughes,  
14 since you're answering I think on cross examination,  
15 would you address the question that I think has been  
16 addressed by other witnesses about the emergency nature  
17 of this proceeding.

18 A. Yes, Chip, you can ask Secretary Harsdorf  
19 questions as well.

20 Q. Well -- Okay.

21 A. But...

22 Q. I was sort of directed not to.

23 A. ...in preparing for the Hearing, and I  
24 don't think all the people at the Hearing including us,  
25 Secretary Harsdorf and myself, realized the extent that

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1 there's been a month to month increase in kind of recent  
2 months as Curt testified in his testimony earlier. That  
3 the volume has reached the level that is has and is  
4 having the impact that it is having in lowering Producer  
5 Price Differentials from what Curt calculated from 11 to  
6 16 cents a hundredweight, which is very significant and  
7 I think warrants getting this loophole in the Federal  
8 Order regulations shut.

9

\*\*\*

10 ADMINISTRATIVE LAW JUDGE: Other cross  
11 examination questions? Mr. Beshore?

12

\*\*\*

13 BY MR. BESHORE:

14

15 Q. This is for either you, Mr. Harsdorf or  
16 Mr. Hughes. Your direct testimony did not comment upon  
17 the pooling without performance of the Idaho milk on the  
18 Upper Midwest Order and I'm wondering, do you agree with  
19 the earlier witnesses that pooling that milk on a  
20 hundredweight for hundredweight basis has the same  
21 impact upon Upper Midwest dairy farmers in Minnesota and  
22 Wisconsin as does the California milk?

22

23 A. From an economic standpoint as long as  
24 that milk is coming in from non-regulated and it's not  
25 pooled in the Idaho Order, I don't know the Order  
number, it would have the same impact but it would have

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1 not the same driver behind it. And that's the fact that  
2 we're trying to eliminate and prohibit double pooling.  
3 And so if it were to come in in an open pooling  
4 environment, yes, it would have impacts similar if the  
5 amounts or quantities of milk were similar, it would  
6 have similar impacts on the producer differential.

7 Q. Okay. So you don't see any problem with  
8 -- you don't have any problem with exporting those pool  
9 dollars to Idaho producers but you've got a concern with  
10 exporting them to...

11 A. Well...

12 Q. ...California producers?

13 A. I think if you move the Order system  
14 towards less restrictive pooling because no one is going  
15 without milk that I've heard testimony towards today,  
16 that performance standards in the reform system seem to  
17 be working and there's no reason to move towards tighter  
18 restrictions in our opinion.

19 Q. Except with respect to the California  
20 milk?

21 A. Yes, or other Federal Orders or other  
22 State Orders that have marketwide pooling where they're  
23 getting double benefits or benefiting from two  
24 regulatory systems.

25

\*\*\*



1 if the price in Federal Order pools is lowered by  
2 greater amounts because of milk being associated with  
3 those Orders from states outside the historical  
4 procurement area, that's not a problem as far as you're  
5 concerned?

6 A. Not if everybody is treated equitably in  
7 the system and there is no unfair advantage created such  
8 as double pooling.

9 Q. Okay. Thank you.

10 \*\*\*

11 ADMINISTRATIVE LAW JUDGE: Mr. Berde, do you  
12 have cross examination questions?

13 \*\*\*

14 BY MR. BERDE:

15 Q. I was pondering it. The question is  
16 addressed to either one of you gentlemen. Are you  
17 familiar with the term milk shed?

18 A. Yes.

19 Q. And are you aware that in constructing a  
20 Federal Milk Marketing Order one of the considerations  
21 that the Secretary considers is to define both the area  
22 of competition among handlers to establish, a geographic  
23 limit or marketing area, and also to consider the  
24 geographic limits of the milk shed in order to define  
25 who a producer is -- And I use the term producer in

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1 quotes to distinguish from a dairy farmer. -- who should  
2 be considered as entitled to participate in the revenues  
3 of that, of the monies generated by that marketing and  
4 by the handlers in that marketing area. Are you aware  
5 that that is a consideration? In other words, the  
6 definition of a milk shed.

7 A. Yes.

8 Q. Would you consider California -- the  
9 first question, California, as constituting a milk shed  
10 for the Upper Midwest Order?

11 A. No, I think the reason for California  
12 milk being pooled in the Upper Midwest because there is  
13 not the prohibition that's proposed in Proposal #1 to  
14 stop it. It's not economics that's driving that  
15 pooling, it's not the definition of a milk shed per se  
16 that's driving that, it's because there's an opportunity  
17 there to double pool and get the benefits from that  
18 double pooling.

19 Q. Well, then let me...

20 A. And...

21 Q. ...put the question to you with respect  
22 to Idaho. Would you consider Idaho a milk shed for the  
23 Upper Midwest Order?

24 A. I don't think that it's its regular milk  
25 shed, no.

1 Q. So how do you justify pooling, continuing  
2 to pool milk from Idaho and rejecting California?

3 \*\*\*

4 MR. HARSDORF: Because it's not double pooled.

5 \*\*\*

6 BY MR. BERDE:

7 Q. Well, let's suppose that whoever is  
8 handling the pooling of that California milk,  
9 cooperative, broker, whatever, marketing agent, does not  
10 distribute that milk pooled out of the Upper Midwest  
11 Order back to those California producers. So that we  
12 can eliminate the business about the producers double  
13 dipping. Let's suppose instead it goes to the Upper  
14 Midwest Order producers to enhance their price.

15 A. If it comes about through double dipping  
16 it seems to be an inappropriate method to generate  
17 revenues out of a regulatory system...

18 Q. Who's...

19 A. ...regardless of who the beneficiary is  
20 and...

21 Q. Who's doing the dipping...

22 A. ...it creates inequities.

23 Q. I'm sorry.

24 A. It creates inequities.

25 Q. But not to the injury or the Upper

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1 Midwest producers necessarily.

2 A. For that handler that's generating the  
3 revenues regardless of where they go it could create  
4 discrepancies between payments received by Producer A  
5 within the Upper Midwest Order and Producer B.

6 Q. Well, there in disparity...

7 A. And we wouldn't want that to happen...

8 Q. Yes, and disparity...

9 A. ...unless the market dictated it.

10 Q. Disparities in terms of return to  
11 producers in this large Upper Midwest Order from one end  
12 to the other is not unheard of is it?

13 \*\*\*

14 MR. HARSDORF: That's correct.

15 \*\*\*

16 BY MR. BERDE:

17 Q. I mean, disparities exist all over the  
18 place every month.

19 A. But they're probably driven more on a  
20 market basis. I think what's frustrating about what we  
21 see before us is people being able to use double pooling  
22 to be able to generate dollars that maybe not everybody  
23 could access, and then being able to do what with those  
24 resources. Decide either to utilize it to create harm  
25 in competition with some other entity or locality and

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1 drive them out of the market place, and it's based on  
2 government regulation, it's not based on market forces.

3 Q. Well, government regulation not  
4 necessarily -- that is it's not necessarily the  
5 Secretary's regulation of the California Order, it's  
6 based upon provisions in the Upper Midwest Order that  
7 permits that pooling. Isn't that correct?

8 A. Correct.

9 Q. And that can be corrected in a number of  
10 ways can't it?

11 A. I would hope it would be corrected.

12 Q. Very well. Do you see any difference in  
13 terms of impact of the Upper Midwest producers between  
14 having the Upper Midwest market flooded with Idaho milk  
15 in terms of impact I'm talking, as compared to the  
16 California milk?

17 A. Well, we have addressed that...

18 Q. Yes.

19 A. ...question before.

20 Q. Well...

21 \*\*\*

22 MR. HUGHES: No sense going down the same  
23 road.

24 \*\*\*

25 BY MR. BERDE:

1 Q. Well, do I get from you the response that  
2 there is really no difference in terms of impact?

3 A. If you're talking from a pure quantity  
4 standpoint?

5 Q. Yes.

6 A. No.

7 Q. Pure dollar impact on the Upper Midwest  
8 producer.

9 A. But the driver is very different.

10 Q. Well, forget the driver for a moment and  
11 let's...

12 A. The driver is what the Hearing's about.

13 Q. ...focus on the impact.

14 A. Well, the driver is what the Hearing is  
15 about. The impacts are a consequence.

16 Q. But the impact is the same is it not?

17 \*\*\*

18 MR. ENGLISH: That's now the third or fourth  
19 time.

20 MR. BERDE: Well, I'm trying to get an  
21 answer....

22 ADMINISTRATIVE LAW JUDGE: I...

23 MR. BERDE: Is it yes or not?

24 MR. ENGLISH: He's answered repeatedly.

25 ADMINISTRATIVE LAW JUDGE: Just a moment.

1 MR. BERDE: Okay.

2 ADMINISTRATIVE LAW JUDGE: Mr. English, I know  
3 it's been asked and answered but I would like the  
4 witnesses not to evade the question but to answer with  
5 regard to the impact.

6 MR. HUGHES: Theoretically if you have the  
7 same quantity coming in from anywhere into the Upper  
8 Midwest Order, and it's adding to the pool from what it  
9 otherwise would be, and adding no additional Class I  
10 sales...

11 MR. BERDE: Yes.

12 MR. HUGHES: ...it will have a similar impact.

13 MR. BERDE: Thank you.

14 MR. HUGHES: The same producer delivery or  
15 Producer Price Differential impact.

16 MR. BERDE: Thank you.

17 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
18 Berde. Mr. Lamers?

19 \*\*\*

20 BY MR. LAMERS:

21 Q. Mr. Secretary, or Will, or whomever. You  
22 were concerned about the fairness of the Federal Orders,  
23 the double dipping, and so on and so forth. It has been  
24 a fact for many years under Federal Orders that handlers  
25 are the people receiving the monies out of the pool and

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1 paying monies to the pool. And do you have a situation  
2 for example if we want to talk about Idaho milk and we  
3 get away from California where the Idaho milk has got to  
4 be qualified through a handler under Order 30. And then  
5 that would then bring dollars back to producers in Idaho  
6 out of the pool. And the Idaho handlers will then pay a  
7 qualifying charge back to the Order 30 handlers for the  
8 privilege of taking that money out of the Order 30 pools  
9 and being qualified under thirty. And would you think  
10 that this is fair treatment of the regulations?

11 A. It is off the track of the Hearing, but I  
12 think to answer your question I think that's normal  
13 business practices.

14 Q. Normal business practices that one  
15 handler would charge another for being pooled in order  
16 to get money out of pools?

17 A. Yes.

18 \*\*\*

19 MR. LAMERS: Thank you.

20 ADMINISTRATIVE LAW JUDGE: Any other  
21 examination of these witnesses? Mr. Beshore?

22 \*\*\*

23 BY MR. BESHORE:

24 Q. I'm sorry. There was one other question  
25 I forgot from my earlier opportunity. I'm representing,  
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1 Mr. Harsdorf, Dairy Farmers of America, which is a  
2 proponent of Proposal 4 which you address in your  
3 statement, and you make the comment that Proposal 4  
4 establishes non-standard rules on milk diversions. I'm  
5 wondering what it is about Proposal 4 or what is non-  
6 standard about the, you know, the requirements in  
7 Proposal 4 that would essentially establish the same  
8 performance requirements for milk inside milk in various  
9 states.

10 A. I'm going to answer that, Marv, if that's  
11 okay with you.

12 Q. Sure.

13 A. The Federal Order Reform created, as Carl  
14 Conover testified, a more open pooling system not a  
15 totally open pooling system. And, yes, the performance  
16 requirements, or shipping requirements, whatever you  
17 want to call them may vary somewhat between Order and  
18 Order, but they were synchronized in the reform probably  
19 from the most open pooling in the Upper Midwest Order  
20 and the other low utilization Orders as Carl testified  
21 to. But to go backwards and set stiffer shipping  
22 requirements as Proposal #4 seems to do, it's my  
23 understanding it's to do, is to add restrictiveness to  
24 moving milk between Orders when we believe the system  
25 should be more open to moving milk between Orders

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1       whether it's pooling, diverted milk, or whatever. As  
2       long as you don't have the same milk being pooled in two  
3       Orders at the same time.

4               Q.    Well, do you disagree with the  
5       proposition in Proposal 4 that milk in Idaho should  
6       perform in the same fashion as the milk in Wisconsin to  
7       be pooled on Order 30. Do you disagree with that?

8               A.    No.

9               Q.    Okay. So if that's what Proposal 4 does,  
10       I take it you would endorse it?

11              A.    Well, I guess the issue is that we just  
12       have come through Federal Order Reforms, we've been  
13       operating since January of 2000 under those, and we  
14       haven't heard of any problems in the Upper Midwest of  
15       handlers, Class I handlers, getting an adequate supply  
16       of milk. As the new Federal Order system has been  
17       designed, whether you're talking the Market Order  
18       territory, the shipping requirements that are there now,  
19       or what have you. In that I'm talking in Order 30 and  
20       that's what your proposal is addressing is Order #30.

21              Q.    No, I...

22              A.    And as Secretary Harsdorf testified, we  
23       see if the whole Order system marches back towards  
24       increasing shipping requirements here and there in this  
25       Order to deal with this little issue and that little

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1 issue we're going to end up with another hodgepodge of  
2 artificial restrictions on moving milk...

3 Q. Okay.

4 A. ...and then you have Orders driving milk  
5 movement more than economics and...

6 Q. So...

7 A. ...that's what we oppose.

8 Q. Well, what is it about economics, about  
9 market orientation that drive milk in Idaho to be pooled  
10 on Order 30 without serving the Order 30 market at the  
11 present time? What's market oriented about that?

12 A. Well, as you know, Marv, the Order  
13 utilization rates are different and there's an incentive  
14 to pool milk from Idaho perhaps.

15 Q. So you're saying the regulatory system of  
16 pool utilizations...

17 A. But to add...

18 Q. ...provides the incentive and I...

19 A. But to add restrictions for that pooling  
20 doesn't speak to -- it doesn't add market oriented  
21 economics to the system.

22 Q. So we...

23 A. And that's what we fear from proposals  
24 like Proposal #4 is to move us backwards rather than  
25 forward.



1 questions as being basically argument, not seeking to  
2 elicit facts but basically a soapbox for Mr. Beshore to  
3 characterize his client's proposal. And of course these  
4 witnesses can't get into the mind of either DFA or the  
5 folks in Idaho. We're going nowhere other than making  
6 argument which should be saved for Brief.

7 MR. BESHORE: Well, I would call to Mr.  
8 Vetne's attention and Your Honor's that the testimony  
9 did challenge Order 4 as establishing non-standard rules  
10 and backward steps as the witnesses have stated and I  
11 think I'm entitled to probe those comments.

12 ADMINISTRATIVE LAW JUDGE: I agree with you,  
13 Mr. Beshore. Mr. Vetne, I understand that if we don't  
14 somewhat confine the examination here we'll never finish  
15 the core issues. So I'm also concerned about the time,  
16 but I do not believe Mr. Beshore's questions are out of  
17 line.

18 MR. VETNE: Okay. And let me add one more  
19 objection to the last question. And that is reference  
20 to a provision in Order 1, which Mr. Beshore  
21 characterized as being identical. That is what it is,  
22 you know, it's part of the law, it's there, we don't  
23 have to test these witnesses on their awareness or  
24 memory of what's contained in Order 1. Number two, I'm  
25 familiar with that language and it's not identical, and

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1 number three, it has never been explained and justified  
2 in any proceeding like this, and it came through the  
3 reform process but it wasn't explained there either. So  
4 this is new, this is the first time this kind of  
5 proposal is actually seeing the light of day in some  
6 debate. Thank you.

7 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
8 Vetne. Mr. Beshore, do you recall where you were?

9 MR. BESHORE: No, but actually I have no  
10 further questions for the witnesses.

11 ADMINISTRATIVE LAW JUDGE: All right.  
12 Excellent timing. Thank you. Is there any other cross  
13 examination of either of these witnesses? Yes, Mr.  
14 Tosi?

15 \*\*\*

16 BY MR. TOSI:

17 Q. Yes, thank you, Mr. Secretary and Mr.  
18 Hughes. I just want to make sure that I understand your  
19 position crystal clear. What you find distasteful about  
20 the current pooling situation of California milk on the  
21 Upper Midwest is the fact that it has an impact on  
22 lowering the Producer Price Differential for producers  
23 historically associated with the Upper Midwest Order?

24 A. That is correct.

25 Q. And that on principle what Mr. Hughes

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1 characterizes as the driver is the notion that there is  
2 double pooling on the same milk at the same time?

3 A. That's correct.

4 Q. Okay. Would there be -- and now I'd like  
5 to ask a couple of questions about a relationship now  
6 between having a performance standard that helps us  
7 decide which producers and which milk can come and sit  
8 down at the table in the Upper Midwest and share in that  
9 revenue distribution and when it shouldn't be, or when  
10 that shouldn't happen, or which producers should not and  
11 be part of the Upper Midwest pool. -- Okay. -- and your  
12 written testimony here is very concerned about fairness  
13 in the Federal Order program and it's pretty obvious  
14 that your convictions are strong on this double pooling.  
15 But with the issue of Idaho milk being pooled on the  
16 Upper Midwest Order, would there be a point at which  
17 with Idaho milk being pooled in enough quantity on the  
18 Upper Midwest pool where it's impact on the Producer  
19 Price Differential on the Upper Midwest would be such  
20 that you reach a point and say, well, you know, that  
21 milk really is not part of this milk shed, it's not  
22 available to service the Class I needs of the market and  
23 the Federal Order program would need to address that  
24 because we don't think that's fair.

25 A. Well, personally from our perspective  
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1 we'd rather not have Idaho milk.

2 \*\*\*

3 MR. HUGHES: I think at some point if milk is  
4 getting pooled all over the place and it's driven by  
5 transportation distribution economics on the raw milk  
6 side or the product side I think you have to look at how  
7 you define milk sheds from time to time. I don't think  
8 we're quite there yet to have to do that but at some  
9 point we may need to do that.

10 MR. TOSI: Okay. Thank you.

11 ADMINISTRATIVE LAW JUDGE: Thank you. Is  
12 there anything further that either of you would like to  
13 say before I ask you to step down?

14 MR. HUGHES: No.

15 ADMINISTRATIVE LAW JUDGE: All right.

16 MR. HUGHES: Thank you.

17 ADMINISTRATIVE LAW JUDGE: Thank you so much  
18 for being here. I appreciate it. Let's go off record  
19 for about two minutes.

20 \*\*\*

21 [Off the record]

22 [On the record]

23 \*\*\*

24 ADMINISTRATIVE LAW JUDGE: We're back on  
25 record at 5:17. I would presume that the next order of  
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1 proceeding would be the proponent of Proposal 2. Who  
2 represents those proponents? If you would come to a  
3 microphone and I identify yourself and tell me what your  
4 wishes are with regard to the schedule. We can continue  
5 to proceed now or any alternatives that you have I'd be  
6 interested to hear.

7 MR. HAHN: My name is James Hahn, H-a-h-n. I  
8 represent Land O'Lakes and I would like to read a brief  
9 statement.

10 ADMINISTRATIVE LAW JUDGE: All right. Would  
11 the statement be testimony? Would you like to come  
12 forward and testify...

13 MR. HAHN: Please.

14 ADMINISTRATIVE LAW JUDGE: ...and be sworn? --  
15 All right. -- please come forward. Now that statement  
16 we will mark as Exhibit 33. Is that correct, Court  
17 Reporter?

18 COURT REPORTER: It should be thirty-four.

19 ADMINISTRATIVE LAW JUDGE: Thirty-four? You  
20 have the Secretary's statement as thirty-three?

21 COURT REPORTER: Yes.

22 ADMINISTRATIVE LAW JUDGE: All right. The  
23 Secretary's statement is thirty-three. I have not yet  
24 taken that into evidence have I?

25 COURT REPORTER: No.

1 ADMINISTRATIVE LAW JUDGE: All right. With  
2 regard to Exhibit 33, which is Mr. Secretary's  
3 statement, is there any objection to that being admitted  
4 into evidence?

5 MR. COOPER: Your Honor?

6 ADMINISTRATIVE LAW JUDGE: Mr. Cooper?

7 MR. COOPER: We usually don't -- yes, only  
8 just from a technical standpoint. We've got a  
9 transcript version and we've got a typed version, I  
10 mean, he read statement so to the extent there may be  
11 discrepancies between them that's why we normally don't  
12 take the testimony and just take the exhibits in. But I  
13 don't have any specific objection just...

14 ADMINISTRATIVE LAW JUDGE: All right. What  
15 our practice has been previously is we have not marked  
16 as exhibits the statements but we've provided them to  
17 the Court Reporter. I'm not sure for what purpose,  
18 perhaps just a clarification of the record.

19 MR. COOPER: Yes.

20 ADMINISTRATIVE LAW JUDGE: I think in that  
21 case in order to treat all the statements equally we  
22 will not mark the Secretary's statement as Exhibit 33  
23 but it will just be provided for the Court Reporter's  
24 benefit.

25 MR. COOPER: I think that's probably the best  
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1 way to go, Your Honor.

2 ADMINISTRATIVE LAW JUDGE: All right.

3 MR. COOPER: And that way we can keep the way  
4 we're going here and...

5 ADMINISTRATIVE LAW JUDGE: Very good.

6 MR. COOPER: ...not clutter with too much  
7 material that's duplication.

8 UNIDENTIFIED SPEAKER: The same with Mr.  
9 Hahn's statement?

10 ADMINISTRATIVE LAW JUDGE: That would be  
11 correct unless there's some chart or table that he  
12 cannot speak into the record. -- All right. -- so we  
13 will also not mark your statement as an exhibit then  
14 unless there is anything that you cannot relate in your  
15 testimony.

16 MR. HAHN: No, that would be fine.

17 ADMINISTRATIVE LAW JUDGE: All right. Very  
18 good. -- All right. -- would you again identify yourself  
19 because you were not very close to the microphone in the  
20 back.

21 MR. HAHN: My name is James Hahn, H-a-h-n, I  
22 am employed by Land O'Lakes at 4001 Lexington Avenue,  
23 North, Arden Hills, Minnesota.

24 ADMINISTRATIVE LAW JUDGE: Thank you. Would  
25 you stand and raise your right hand?

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1 \*\*\*

2 [Witness sworn]

3 \*\*\*

4 ADMINISTRATIVE LAW JUDGE: Thank you, you may  
5 be seated.

6 MR. HAHN: Thank you.

7 ADMINISTRATIVE LAW JUDGE: And you may  
8 proceed.

9 \*\*\*

10 JAMES HAHN,

11 having first been duly sworn, according to the law,  
12 testified as follows:

13 MR. HAHN: Land O'Lakes, Inc. Continues to  
14 support the Federal Order program and promotes the  
15 concept of efficient and orderly marketing. LOL also  
16 believes pooling should be based on performance and is  
17 not in favor of restricting access to pooling to benefit  
18 a select few. Fewer restrictions provide for market  
19 efficiencies resulting in the least cost to serving the  
20 fluid market. The USDA is to be commended in the  
21 adoption of the Class I pricing surface as a result of  
22 Federal Order Reform. This one change has allowed for  
23 more liberalized pooling, which is a means of gaining  
24 access to Class I proceeds on a wider basis, but access  
25 can only be gained through performance. Participants

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1 must be willing to serve the market or in other words to  
2 perform. The net impact of Federal Order Reform has  
3 been positive for Upper Midwest producers. Class I  
4 utilization has increased from 14-and-a-half percent in  
5 January 2000 to 20.7 percent in May 2001. This  
6 evolutionary process benefits local producers whose milk  
7 is pooled on other Orders as well as producers whose  
8 milk remains pooled on Order 30. The Orders will  
9 equilibrate. Utilization will tend to come together as  
10 the needs of the various Orders are met based on  
11 performance provisions. Milk of producers should  
12 continue to be allowed to move freely to meet market  
13 conditions. Upper Midwest organizations must be willing  
14 to share local utilization if they expect to share in  
15 Class I proceeds and other areas or risk the loss of  
16 credibility. Proponents of proposal #1 are seeking to  
17 restrict the pooling of milk produced in California on  
18 the basis that it is sharing in a marketwide pool.  
19 California does not have a marketwide pool. Proceeds  
20 from fluid and soft use are paid to producers on the  
21 basis of quota equity and not distributed marketwide.  
22 Overbase or non-quota milk is priced based on  
23 manufacturing values. Only recently did California  
24 institute a number of \$1.70 per hundredweight based on  
25 19-and-a-half cents per pound of solids non-fat on the

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1 skim side to limit the spread between quota and overbase  
2 milk. Furthermore, adoption of this proposal would  
3 prohibit Federal Order pooling of milk regulated under a  
4 State Order with bona fide marketwide pooling. The  
5 North Dakota State Order and Pennsylvania Milk Marketing  
6 Board currently are considering changing their  
7 provisions to incorporate marketwide pooling. Other  
8 pricing programs such as the Northeast Compact and  
9 various over order pricing agencies such as Upper  
10 Midwest Marketing Agency would appear to be threatened  
11 should this proposal be adopted. The PMMB Class I State  
12 Mandated Price is \$1.65 per hundredweight, yet the  
13 challenge of double dipping goes unheard. The very  
14 nature of the marketing system in place in old Order 68  
15 promotes the type of pooling practices being questioned  
16 at this Hearing. Premium levels fall short of  
17 procurement costs, producer premiums paid by LOL to its  
18 members serving the Minneapolis market have averaged  
19 \$1.81 per hundredweight for the first five months of  
20 this year. This is an increase of 47 cents per  
21 hundredweight compared to the same period of 2000. The  
22 additional premiums are due to Federal Order pooling on  
23 adjoining Orders, which obviously benefits all local  
24 producers. However, premiums announced by UMMA averaged  
25 \$1.27 per hundredweight for 2000 compared to \$1.12 per

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1 hundredweight for 2001...

2 \*\*\*

3 [Off the record]

4 [On the record]

5 \*\*\*

6 MR. HAHN: ...who effectively retain the  
7 entire announced premium. This system promotes a  
8 distant set up to ship to fluid handlers beyond the  
9 minimum performance level of 10 percent or an incentive  
10 to attach additional volumes of producer milk to  
11 subsidize the costs or losses of serving the fluid  
12 market. The real issue facing this industry is not  
13 California milk. The impact of pooling reserve supplies  
14 is similar whether that reserve is located in Pine  
15 Island, Minnesota, Melrose, Minnesota, or Orland,  
16 California. Regardless of location, the performance  
17 criteria must be met to provide for pooling eligibility.  
18 The subsidy received relating to shipping costs is  
19 comparable. The solution to this dilemma is not  
20 artificial restrictions but to address performance  
21 requirements. Increasing shipping percentages to serve  
22 the fluid market will provide all the equity that is  
23 necessary. Those handlers shipping a minimum  
24 requirement will be forced to either ship twice as much  
25 volume or reduce the volume of milk pooled. Producers

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1 should be indifferent as to where that reserve supply is  
2 located since the impact is the same. It is LOL's  
3 contention that they have the right to pool milk based  
4 on performance. The address of the producer should be  
5 irrelevant. As for double dipping, now the pooling  
6 proceeds is paid to LOL members in California. Pooling  
7 revenue is used to subsidize the losses of serving the  
8 fluid market. Premiums paid to Orland members were 85  
9 cents per hundredweight and 77 cents per hundredweight  
10 in August and September '99 respectively based on cheese  
11 yield. These months immediately preceded pooling on the  
12 Upper Midwest Order. Premiums for comparable months of  
13 2000 were 51 cents per hundredweight and 72 cents per  
14 hundredweight when approximately 68 percent of the milk  
15 on that particular payroll was pooled. Proponents of  
16 Proposal #1 would suggest that the Market Administrator  
17 recognize the existence of the California State Order  
18 for purposes of excluding producer milk. However, in  
19 the event a fluid plant located in California has route  
20 distribution in a Federal Order Marketing Area, Federal  
21 Order provisions dictate the use of Federal Order  
22 pricing for purposes of compensatory payments rather  
23 than the California regulated Class I price. For  
24 purposes of industry accommodation, LOL is willing to  
25 withdraw support for Proposal #2. However, LOL strongly

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1 supports the premise that overbase milk be eligible for  
2 pooling in the Upper Midwest Order. Additionally LOL  
3 contends that overbase pooling and restricting of the  
4 pooling of quota milk embodies the principles set forth  
5 by proponents of Proposal #1. And if I could make one  
6 other comment?

7 ADMINISTRATIVE LAW JUDGE: You may.

8 MR. HAHN: In addressing questions relating to  
9 Mr. Cooper earlier, the producer payroll report at  
10 Orland lists each month the volume of quota milk  
11 assigned at the milk of each producer that is paid by  
12 LOL and we can very easily define the volume of quota  
13 milk and non-quota milk to each producer. That is not  
14 an issue. And that concludes my statement. Thank you.

15 ADMINISTRATIVE LAW JUDGE: Thank you. Cross  
16 examination of Mr. Hahn? Yes, Mr. English?

17 \*\*\*

18 BY MR. ENGLISH:

19 Q. Mr. Hahn, before you were employed by  
20 Land O'Lakes you worked for a number of years for the  
21 Market Administrator's Office in Order 30

22 A. That is correct.

23 Q. Okay. Were you ever employed by the  
24 California Department of Food and Agriculture?

25 A. No, I was not.

1           Q.    Have you attended California Department  
2 of Food and Agriculture Hearings regarding their pooling  
3 and pricing program?

4           A.    No, I have not.

5           Q.    Were you here earlier today to hear the  
6 testimony of the witnesses from the California  
7 Department of Food and Agriculture?

8           A.    Yes, I was.

9           Q.    Did you hear the statement from Mr.  
10 Horton that the pooling system provides the sharing  
11 among producers the value from all milk uses?

12          A.    Yes, I did.

13          Q.    But does that not conflict with your  
14 statement that overbase milk is priced based on  
15 manufacturing values?

16          A.    I don't believe that it does.  In my  
17 opinion there is not a marketwide pool of the revenues  
18 in California, it's a two-tiered system and the Class I  
19 and soft product revenues are paid primarily to the  
20 quota holders.

21          Q.    Are you aware of two-tier systems that  
22 have existed in the past in Federal Orders?

23          A.    Not really, no.  I'm not very familiar  
24 with those.

25          Q.    If there were such two-tier systems that

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1       existed in Federal Orders at the same time there were  
2       provisions preventing the double pooling of milk and  
3       there was no exception for the milk that was basically  
4       in the second tier Federal Orders, wouldn't that tend to  
5       mean that the Federal Order milk still couldn't double  
6       pool?

7                A.    Milk that was regulated by Federal  
8       Orders.  That is correct.

9                Q.    Regardless of whether it had a two-tier  
10       price.  Correct?

11               A.    Right.  We're talking about multiple  
12       Federal Orders I assume?

13               Q.    Yes.

14               A.    Right.  That's correct.

15               Q.    Is there a difference then between that  
16       two-tier pricing in Federal Orders that assuming for a  
17       moment it existed in the past and the state system?

18               A.    Well, I think there's a great deal of  
19       differences.  As Mr. Conover suggested it's a difference  
20       of statute.

21               Q.    You testified that none of the money --  
22       Let's see now.  -- you pool -- approximately how much  
23       milk does Land O'Lakes pool on the Upper Midwest Order  
24       from California?

25               A.    That's proprietary information.

1           Q.    Would it be fair to say that it's a  
2           significant portion of the portion that is -- Without an  
3           exact number, sir. -- is it a significant portion of  
4           what is being pooled on Order 30?

5           A.    No.

6           Q.    You say none of the pooling proceeds is  
7           paid to Land O'Lake members in California. You imply,  
8           but never quite say. Are all the dollars being paid  
9           then to dairy farmers of Land O'Lakes in the Upper  
10          Midwest?

11          A.    Not at all. I stated very emphatically  
12          that the revenues received from pooling are used to  
13          subsidize the losses used to service the fluid market.

14          Q.    Where?

15          A.    Where?

16          Q.    Yes, the losses in the fluid market  
17          where?

18          A.    In Woodbury, Minnesota. The Dean plant  
19          at Woodbury.

20          Q.    And is 100 percent of it going for the  
21          purpose of compensating for losses for serving a plant  
22          at Woodbury?

23          A.    And at Thief River Falls. The Thief  
24          River Falls plant is also a customer of LOL and that's  
25          also a Dean plant that we service.

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1 Q. Was it also pooled on California?

2 A. It was regulated by the California  
3 marketing program, yes.

4 Q. But in other words for clarity of this  
5 record, it was included and participated in the pool  
6 of...

7 A. Yes.

8 Q. ...California?

9 A. I would make a distinction because only  
10 about 6 percent of that milk is quota milk and so very  
11 little of that milk drew quota value. And so it's  
12 really a, you know, a differentiation of the word  
13 pooling.

14 Q. And again you said...

15 A. That's being pooled by the State of  
16 California.

17 Q. And again you said you were able to  
18 differentiate quota from overbase milk but were you here  
19 earlier today for the testimony of the CFDA that said  
20 you can't differentiate quota in overbase milk?

21 A. Well, they are making distributions to  
22 Land O'Lakes based on quota held by its members and that  
23 corresponds with the payroll information that we have on  
24 our database.

25 Q. But to the extent that you have a

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1 proposal that would allow the pooling of -- I take it if  
2 6 percent of the milk was quota that means that the rest  
3 was overbase. So that means everything else is going to  
4 get to be pooled under your Proposal #3. Correct?

5 A. If it met the performance requirements.

6 Q. But it's true that if it met the  
7 performance requirements it could be pooled on Order 30?

8 A. That is correct.

9 Q. Okay. You heard the testimony of the  
10 witnesses for the California Department of Food and  
11 Agriculture that you can't segregate the milk as a quota  
12 in overbase milk. If you had three tankers of milk, you  
13 wouldn't know which one of those was quota and you  
14 wouldn't know which overbase. Correct?

15 A. I don't think it's necessary to segregate  
16 the milk, it's a matter of simple subtraction in terms  
17 of what is the total volume of milk and how much of it  
18 holds quota value.

19 Q. I'm confused by your statement that in  
20 the event a fluid plant located in California has a  
21 route disposition in a Federal Marketing Order, Federal  
22 Order provisions dictate the use of Federal Order  
23 pricing for purposes of compensatory payments. It seems  
24 to imply that somehow that doesn't acknowledge the  
25 existence of the California State Order. Is that what

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1       you're trying to say?

2                   A.    Not at all.  Not at all.  What I'm trying  
3       to say is the fact that you have a partially regulated  
4       distributing plant located in California that is making  
5       route sales in a Federal Marketing Area.  When the  
6       Market Administrator determines a compensatory payment  
7       applicable to that plant, the Market Administrator is  
8       going to use Federal Order pricing, not the California  
9       mandated pricing that that plant is regulated by.  And  
10      so there is no incentive for that plant to reduce the  
11      Class I price under the Federal Order system to compete  
12      for sales in a Federal Order because the Market  
13      Administrator is going to use the Federal Order pricing  
14      not the California State Pricing Program.

15                  Q.    How does that relate to this question of  
16      the California pool allowing, in this instance without a  
17      change in the regulation, basically drawing money from  
18      two different pools?

19                  A.    Well, the point in including that in my  
20      testimony was merely that we're talking here in the  
21      Upper Midwest market we're talking about Federal  
22      regulations and the Market Administrator has Federal  
23      regulations to abide by, not the California statutes.  
24      I'm not trying to evade your question, I'm not sure I  
25      understand what the question is.

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1 Q. Well, isn't the point that USDA has  
2 already adopted provisions in 1000.76 that recognize the  
3 existence of a marketwide pooling program like  
4 California's?

5 A. I'm not sure that they do. I don't...

6 Q. Okay. I didn't think you did. Thank  
7 you.

8 A. I don't know.

9 \*\*\*

10 ADMINISTRATIVE LAW JUDGE: Yes, Mr. Vetne?

11 \*\*\*

12 BY MR. VETNE:

13 Q. Mr. Hahn, good afternoon.

14 A. Good afternoon.

15 Q. The milk that you've testified to that is  
16 pooled by LOL in Order 30 but stays in California, to  
17 what kind of plant, plant or plants, is that milk  
18 delivered or diverted to within the State of California?

19 A. To a cheese processing plant.

20 Q. Only to a cheese processing plant?

21 A. Yes.

22 Q. Okay. And for that milk when it stays in  
23 California, if the Class 4-B price is less than the  
24 overbase price LOL receives a payment even on overbase  
25 milk from the California pool. Is that correct?

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1           A.    I believe that's correct.

2           Q.    With respect to I guess it's Altadena in  
3 California that has just route distribution in the Upper  
4 Midwest?

5           A.    Yes.

6           Q.    A distributing plant that's partially  
7 regulated.  When the Market Administrator looks at the  
8 Federal Order price to determine a compensatory payment  
9 for Altadena, is it not true that one of the regulatory  
10 options Altadena may and probably does avail itself of  
11 is to demonstrate to the Market Administrator that it  
12 has paid at least as much for milk as the Federal Order  
13 would require if it were fully pooled?

14          A.    I would believe that's one of their  
15 options, yes.

16          Q.    Okay.

17          A.    And the key point there is, is what the  
18 Federal Order would require based on the Federal Order  
19 pricing, not the California pricing.

20          Q.    Right.  But less us -- if Altadena, in  
21 complying with State Order pricing, paid for it's Class  
22 I and Class II and its plant blend equaled or exceeded,  
23 the plant blend under the State Order, equaled or  
24 exceeded Federal Order obligations, it would because of  
25 compliance with the State Order also have no additional

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1           compensatory payment obligation under the Federal Order?

2                   A.    Yes, I would expect that the Market  
3 Administrator would take a look at what would be the  
4 total blended value paid to those producers on the value  
5 of milk that was distributed to the marketing area and  
6 make a determination of whether that exceeded the Order  
7 obligation.   That's correct.

8                   Q.    Distributed in the market...

9                   A.    Was equal to or exceeded.

10                  Q.    Okay.  Are you aware that when what's  
11 called the Wichita Plan is applied that the Market  
12 Administrator looks not just at the value of milk  
13 distributed in the marketing area, but the value of milk  
14 in all uses at the partially regulated plant?

15                  A.    I believe that's correct, yes.

16                  Q.    Okay.

17                  A.    I'm not as familiar with it as you are.

18                  Q.    I'm learning still.  Do you know whether  
19 Altadena, well, Altadena supplied at all by Land  
20 O'Lakes?

21                  A.    No.

22                  Q.    Are your...

23                  A.    Not yet.

24                  Q.    If Federal Order milk from Land O'Lakes -  
25 - Not Federal Order milk.  -- if a California producer

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1 Midwest Marketing Agency.

2 Q. And what does UMMA do?

3 A. UMMA is an agency of Capper-Volsted  
4 Cooperatives that meet either by teleconference or in  
5 person on a fairly regular basis and determine supply  
6 and demand conditions in the market place and set an  
7 agency price, which is acknowledged by all members.

8 Q. And another question, Jim. On Page 1 of  
9 your testimony, you talk about access to a market being  
10 gained by performance. And the term performance under  
11 Federal Order language is well known is it not?

12 A. I believe it is.

13 Q. And with respect to that California milk,  
14 what would you consider performance with respect to the  
15 marketing of that -- not the marketing, but the pooling  
16 of that milk in the Upper Midwest?

17 A. The same level of performance is required  
18 by any other milk that any other handler in the Upper  
19 Midwest is pooling and that's a 10 percent requirement  
20 to be delivered to a distributing plant on a monthly  
21 basis.

22 Q. And it's because of the existence of  
23 those pooling or we'll call them localing requirements  
24 that that milk is able to be pooled in the Upper  
25 Midwest. Is that correct? That is the one time

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1 association plus the delivery requirements of the Order.

2 A. Well, irregardless of whether the  
3 shipping requirements are high or low it's the pooling  
4 standards that are being met and that's what's allowing  
5 that milk to be pooled. That's correct.

6 Q. Very good. Thank you.

7 \*\*\*

8 ADMINISTRATIVE LAW JUDGE: Yes, Mr. Beshore.

9 \*\*\*

10 BY MR. BESHORE:

11 Q. Two things. Mr. Hahn, you were asked  
12 whether you were employed by the Market Administrator  
13 prior to working for Land O'Lakes. I think you said...

14 A. You noticed I didn't say I worked there I  
15 was employed by.

16 Q. Okay. Well, I wonder if you would just  
17 have the -- provide for the record the benefit of giving  
18 us your background there in a little more detail. Just,  
19 you know, how long were you there and what positions did  
20 you hold during your tenure?

21 A. I was hired in 1972 as an auditor in  
22 Appleton, Wisconsin, the Chicago Regional Market. In  
23 January of 1974 I was transferred to the Chicago office  
24 and I served in a variety of capacities. Primarily in  
25 data processing in the early years and then in a variety

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1 of administrative roles, including the Assistant Market  
2 Administrator for seven years and the Acting Market  
3 Administrator for three. And that included the Chicago  
4 Regional Market and the Indiana Market.

5 Q. Okay.

6 A. And I left there June of 2000.

7 Q. Okay. During the -- did you have  
8 occasion in the course of those duties with the Market  
9 Administrator to visit with producers and officials in  
10 California from time to time in recent years about the  
11 Federal Order program and the State Order program out  
12 there?

13 A. As a member of the Basic Formula Price  
14 Committee under Federal Order Reform I spent a great  
15 deal of time in California studying that system to  
16 determine whether or not there are some things that  
17 California was doing that could accommodate what needed  
18 to be done on the Federal Order system.

19 Q. Okay. So your comments with respect to  
20 the California program and its operations are not made  
21 without the benefit of that experience.

22 A. That's true.

23 Q. Okay. Now I had one question with  
24 respect to Federal regulations and your experience with  
25 them over those years. Are you aware of any other

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1 provisions other than Proposal 1 and Federal Order  
2 regulations which would disqualify from pooling on  
3 Federal Orders milk which otherwise meets the  
4 performance requirements of the Orders?

5 A. I suppose in the past there's such  
6 programs as the Louisville Plan, B-6, "S" Plans, those  
7 types of things. There's also currently plans in the  
8 Appalachian and the Southeast Markets relative producers  
9 not being able to pool in the producers out of the area  
10 that are drawing transportation credits, not being able  
11 to pool in the long months in excess of two months I  
12 believe or something. So there are some Federal Order  
13 provisions that do restrict the pooling of individual  
14 producers or the pooling of milk of individual  
15 producers.

16 Q. Well, on the Louisville Plan it would be  
17 on a seasonal basis?

18 A. Correct.

19 Q. Okay. Or in the base excess plans  
20 perhaps on a, you know, on a seasonal basis in some  
21 fashion?

22 A. That's correct.

23 Q. Okay. But none of those provisions would  
24 disqualify permanently and without qualification milk  
25 from pool which performs from pooling under a Federal

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1 Order in the manner that Proposal 1 would?

2 A. That's correct.

3 Q. Okay.

4 A. Yes.

5 Q. Thank you.

6 \*\*\*

7 ADMINISTRATIVE LAW JUDGE: Any further cross  
8 examination of Mr. Hahn? Mr. Tosi?

9 \*\*\*

10 BY MR. TOSI:

11 Q. Hello, Jim. One question. In your last  
12 paragraph of your written statement, you said that  
13 you're willing to withdraw Proposal 2 for the purposes  
14 of industry accommodation.

15 A. That's correct.

16 Q. Are you in fact abandoning the proposal  
17 at this time?

18 A. Yes, I am.

19 Q. Thank you.

20 A. I, you know, I think we need to come to  
21 closure on this and, you know, I don't think that  
22 there's anything to be accomplished by pursuing that  
23 proposal.

24 Q. Okay. Thank you.

25 \*\*\*

1 ADMINISTRATIVE LAW JUDGE: Mr. Cooper?

2 \*\*\*

3 BY MR. COOPER:

4 Q. Yes. Jim, are you still in favor or  
5 Proposal 3?

6 A. Yes, I am.

7 Q. Okay. I have one or two other questions  
8 here. The Land O'Lakes...

9 \*\*\*

10 ADMINISTRATIVE LAW JUDGE: Mr. Cooper, would  
11 you move the mic a little closer to you.

12 \*\*\*

13 BY MR. COOPER:

14 Q. I'm sorry. The Land O'Lakes milk that  
15 originates from producers in California and has received  
16 a draw under both the California program and Order 30,  
17 has any of that milk been delivered physically to pool  
18 plants in Order 30?

19 A. Yes, it has.

20 Q. Aside from the one day shipment for a  
21 producer?

22 A. If it has those would be very minimal  
23 amounts. So the answer is primarily to establish a  
24 producer's qualification that would be the limiting  
25 factor.

1           Q.    So aside from that most of that milk has  
2 remained in plants in California.  Is that right?

3           A.    That's correct.

4           Q.    Now I believe the California  
5 representatives testified that under their program the  
6 rights to quota belong to the cooperative rather than  
7 the members of the cooperative.  Is that correct?

8           A.    I didn't hear that testimony in that way.  
9 I thought they said that the quota belonged to the  
10 producer.

11          Q.    And then I believe we questioned them on  
12 whether the quota under their system goes to the  
13 cooperative that the producer is a member of or to the  
14 producer himself?

15          A.    Merely for purposes of the Pool Draw.  
16 But...

17          Q.    So is there any -- and I believe they  
18 also said that there was no requirement that the  
19 cooperative pay the producer holding the quota based  
20 upon the amount of quota he holds.

21          A.    That's my recollection.  My recollection  
22 of the testimony.  That's correct.

23          Q.    Okay.  I'm not trying to get, you know,  
24 the phraseology exact here.  But so to the extent that  
25 you keep track of how much quota milk or how much quota

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1 your individual members from California have, there is  
2 no requirement in law that producers be paid in that  
3 manner?

4 A. I believe that's correct. However, we do  
5 pay our producers based on their quota and volume.

6 Q. But that's a voluntary decision upon your  
7 co-op or perhaps by economic necessity but not by the  
8 basis of any California State law?

9 A. I believe that's correct.

10 Q. Thank you.

11 A. Yes, if I could make one other statement.  
12 Land O'Lakes has been pooling California milk on the  
13 Upper Midwest Order since I believe October of 1999.  
14 And based on that I don't believe there's any condition  
15 that exists relating to an emergency decision in this  
16 case.

17 \*\*\*

18 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
19 Hahn. You may step down.

20 MR. HAHN: Thank you.

21 ADMINISTRATIVE LAW JUDGE: Mr. Hahn, before  
22 you do that, does that complete also your presentation  
23 as a representative of the proponents of Proposal #3?

24 MR. HAHN: Yes, it does.

25 ADMINISTRATIVE LAW JUDGE: All right. Thank  
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1 you. Then I believe we are ready for the representative  
2 who represents the proponents of Proposal #4. Who would  
3 that be?

4 MR. ENGLISH: Proposal 4 is an advance by  
5 Dairy Farmers of America, Your Honor, and I think it  
6 would be a good procedure to start with that tomorrow  
7 morning. Mr. Hollon has extensive lengthy testimony  
8 that will be offered in support of Proposal 4.

9 ADMINISTRATIVE LAW JUDGE: All right. Let me  
10 ask. Who of those present wanted to testify yet today  
11 who would not be available tomorrow or would find it  
12 inconvenient to testify tomorrow. And, therefore, you'd  
13 like to go forward out of order at this time? Or  
14 perhaps it's in order, perhaps it's in support of  
15 Proposal 1 or Proposal 3. Yes? Would you approach a  
16 microphone please?

17 MR. HARDIN: My name is Pete Hardin. I edit  
18 and publish an industry publication, "The Milkweed",  
19 and I would like to testify in regard to an issue that  
20 relates to Proposals 1 through 6.

21 ADMINISTRATIVE LAW JUDGE: All right. Sir,  
22 approximately how long would your testimony be do you  
23 believe?

24 MR. HARDIN: Ten minutes.

25 ADMINISTRATIVE LAW JUDGE: Great. I think  
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1 that would be great to take now. Does anyone need a  
2 break before we address that testimony? -- All right. --  
3 come forward please, sir. Let's go off record while he  
4 gathers his...

5 \*\*\*

6 [Off the record]

7 [On the record]

8 \*\*\*

9 MR. LAMERS: Yes, Your Honor.

10 ADMINISTRATIVE LAW JUDGE: Mr. Lamers?

11 MR. LAMERS: I simply wanted to submit as an  
12 exhibit a reply to the Department of Agriculture's  
13 Exhibit #5 that they had chosen to bring into the  
14 record.

15 ADMINISTRATIVE LAW JUDGE: All right. And had  
16 you previously sent a response...

17 MR. LAMERS: To the Department.

18 ADMINISTRATIVE LAW JUDGE: ...to the  
19 Department?

20 MR. LAMERS: Yes, I did but they are bringing  
21 that reply into the record of this Hearing and so I  
22 would like to submit three copies of my reply to be of  
23 equal, or unless you want to just take official notice.

24 ADMINISTRATIVE LAW JUDGE: All right. What is  
25 the date of the letter to you from the Department and

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1       what is the date of your letter that you would like now  
2       to have marked as an exhibit?

3               MR. LAMERS:  The letter from the Department  
4       was dated June 5, and my reply to them was June 9.

5               ADMINISTRATIVE LAW JUDGE:  That's June 9 of  
6       2001?

7               MR. LAMERS:  Of 2001.  That's correct.

8               ADMINISTRATIVE LAW JUDGE:  All right.  Mr.  
9       Cooper, is there any objection to Mr. Lamers' June 9,  
10       2001 letter being made an exhibit in this proceeding?

11              MR. COOPER:  Well, we've already received the  
12       letter to him as Exhibit 5, so I have no objection if he  
13       would want to put this in to -- not necessarily for the  
14       truth of what's in there but the fact that he made these  
15       representations to the Department.

16              ADMINISTRATIVE LAW JUDGE:  Certainly.  Yes.  
17       Mr. Lamers, you may approach the Court Reporter and have  
18       your June 9, 2001 letter marked as an exhibit.  And I  
19       believe that would be Exhibit 33.  Is that correct? --  
20       All right.  -- if you'd have those marked as Exhibit 33.  
21       And you've given the Court Reporter three copies?

22              MR. LAMERS:  Yes, I have.

23              ADMINISTRATIVE LAW JUDGE:  All right.  Thank  
24       you, Mr. Lamers.  Is there any objection to Exhibit 33  
25       being admitted into evidence?  That's Mr. Lamers'

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1 response to the Department's exhibit. There being no  
2 objection, Exhibit 33 is hereby admitted into evidence.  
3 Was there anyone else in addition to the witness who is  
4 about to testify who wants to be heard yet this evening  
5 before we adjourn? -- All right. -- it appears that you  
6 will be our last witness of the day. Would you again  
7 state your name and spell both names please?

8 MR. HARDIN: My name is Peter Hardin. Peter,  
9 P-e-t-e-r, Hardin, H-a-r-d-i-n.

10 ADMINISTRATIVE LAW JUDGE: All right. And  
11 I'll ask you again to tell me who you represent after  
12 you've been sworn in. If you'd stand and raise your  
13 right hand?

14 \*\*\*

15 {Witness sworn}

16 \*\*\*

17 ADMINISTRATIVE LAW JUDGE: Thank you. You may  
18 be seated. And tell me again what your work is and who  
19 you represent?

20 MR. HARDIN: I edit and publish a monthly  
21 dairy economics report titled, "The Milkweed." I  
22 represent myself as a concerned person in the dairy  
23 industry. "The Milkweed" is a monthly report with  
24 approximately 7,000 subscribers. I have been editing  
25 and publishing the paper for 22 years.

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1 ADMINISTRATIVE LAW JUDGE: All right. Thank  
2 you. You may proceed.

3 \*\*\*

4 PETER HARDIN,  
5 having first been duly sworn, according to the law,  
6 testified as follows:

7 MR. HARDIN: Okay. The prepared remarks are  
8 going to be cut in half because the first half  
9 constitutes an analysis of the impact of the pooling of  
10 California milk, which squares exactly with the  
11 testimony Mr. Gulden presented, an estimated \$11,000,000  
12 drawn from the Upper Midwest revenue pool from October  
13 of 2000 through May 2001. I will pass on that emphasis  
14 because it would be redundant of Mr. -- exactly  
15 redundant of Mr. Gulden's testimony. My testimony will  
16 focus on a general issue that relates to all six  
17 proposals discussed at this Hearing, as well as USDA's  
18 current administration of the program. In my opinion,  
19 however, the problem of long distance pooling is a  
20 national problem, not a regional problem, and I think  
21 USDA would better serve the industry by holding a  
22 national Hearing on pooling issues not in a series of  
23 regional Hearings. Having established the economic harm  
24 to Upper Midwest producers from the pooling of  
25 California milk, I'll now shift to the key emphasis of

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1 my testimony. I would like to submit as an exhibit to  
2 the Hearing record, and I've given three copies to the  
3 clerk -- do you wish a copy? An exhibit?

4 ADMINISTRATIVE LAW JUDGE: Do you have an  
5 extra?

6 MR. HARDIN: Yes.

7 ADMINISTRATIVE LAW JUDGE: Thank you.

8 MR. HARDIN: Okay. The document I am  
9 submitting as an exhibit is a document from the files of  
10 the United States Department of Justice. This document  
11 is the 1977 Consent Decree between Mid-America Dairymen,  
12 Inc. And the U.S. Department of Justice.

13 MR. BESHORE: Your Honor, before we go any  
14 further I would like to object to the receipt of the  
15 document in the record. It's surely...

16 ADMINISTRATIVE LAW JUDGE: Mr. Beshore, just a  
17 moment. Let's find out what number it's been given.  
18 Has the Court Reporter marked this one?

19 COURT REPORTER: I have not yet.

20 ADMINISTRATIVE LAW JUDGE: Not yet? -- All  
21 right. -- let's give it the next number. What will that  
22 be?

23 COURT REPORTER: Thirty-four.

24 ADMINISTRATIVE LAW JUDGE: All right.

25 UNIDENTIFIED SPEAKER: What we're marking is  
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1 just the Final Judgment, Your Honor?

2 ADMINISTRATIVE LAW JUDGE: Yes, the document  
3 that's being marked is entitled Final Judgment. Now you  
4 characterized it as a Consent Decree. Is that correct,  
5 Mr. Hardin?

6 MR. HARDIN: Yes.

7 ADMINISTRATIVE LAW JUDGE: But it is actually  
8 the judgment of a United States District Judge?

9 MR. HARDIN: Yes.

10 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
11 Beshore, you may proceed with your objection?

12 MR. BESHORE: Well, my objection is that the  
13 document which purports to be a 24-year-old judgment of  
14 the United States District Court of the Western District  
15 of Missouri in an unrelated proceeding has no pertinence  
16 to this proceeding. And Mr. Hardin's attempt to  
17 litigate or apparent attempt, or desire to, you know,  
18 litigate this Decree in this forum is quite  
19 inappropriate and should not consume our time. And  
20 Judge Oliver should rest in peace in any event.

21 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
22 Beshore. Mr. Berde?

23 MR. BERDE: Your Honor, I would join in that  
24 objection, Your Honor, referring to the record and it  
25 has no relevance to the proceeding.

1                   ADMINISTRATIVE LAW JUDGE: All right. Are  
2 there any other objections to the admission into  
3 evidence of this Final Judgment? How do you respond to  
4 the objections, Mr. Hardin?

5                   MR. HARDIN: I view that this is a highly  
6 relevant document for the purposes of this proceeding.  
7 The successor cooperative of Mid-America Dairymen is  
8 Dairy Farmers of America, Mr. Beshore's client. Certain  
9 portions of the 24-year-old Consent Decree remain in  
10 affect. DFA succeeded Mid-American Dairymen and is  
11 legally obliged to comply with the Consent Decree.  
12 While I am no lawyer, in my prepared testimony I propose  
13 the following question or challenge to USDA personnel  
14 who will review the Hearing record, and that challenge  
15 is, is DFA's pooling of California milk on Order 30 a  
16 violation of the 1977 Consent Decree, Part 4, Paragraph  
17 C.

18                   MR. BESHORE: Your Honor, I think the  
19 admissibility of the testimony and the evidence falls on  
20 the basis of Mr. Hardin's statement. The Department has  
21 not convened this proceeding, it does not have any  
22 jurisdiction in this proceeding to construe or enforce  
23 this Consent Decree to the extent that it could  
24 conceivably have anything to do with what's going on  
25 with this Hearing. And that's the desire of the witness

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1 to attempt to construe it and enforce it or ask the  
2 Department to in this proceeding. It's wholly  
3 inappropriate and irrelevant.

4 MR. HARDIN: May I just very briefly respond?

5 ADMINISTRATIVE LAW JUDGE: Just a moment. Let  
6 me first hear from Mr. Cooper.

7 MR. COOPER: Yes, I'd also agree that this  
8 document should not be received. Because as Mr. Hardin  
9 indicates and Mr. Beshore has indicated, this has to do  
10 with whether DFA is or is not in violation of a Consent  
11 Order because they have pooled milk from California on  
12 Order 30. We've already heard testimony that Land  
13 O'Lakes has pooled milk from California on Order 30.  
14 And regardless of whether DFA is also doing so, and  
15 regardless of whether DFA is violating the law or not  
16 violating the law by doing so, the fact remains that  
17 milk is being pooled by parties other than DFA. And,  
18 therefore, this is a question as to whether the Order  
19 needs to be amended is still open.

20 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
21 Hardin, your response?

22 MR. HARDIN: Other parties pooling milk,  
23 California milk, on Order 30 include correctly Land  
24 O'Lakes and also to a lesser extent, National Farmers  
25 Organization. Part 3 of the Consent Decree specifies

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1 that firms in active concert with the successor of Mid-  
2 American Dairymen, DFA, are also obliged to follow the  
3 guidelines of the Consent Decree, and Land O'Lakes  
4 through its joint venture of the purchase of the  
5 Melrose, Wisconsin cheese plant, or joint venture  
6 ownership with DFA is in active concert. And it is  
7 generally believed that National Farmers Organization,  
8 another pooler of California milk on the Midwest Order,  
9 is also in active concert with DFA. So the Consent  
10 Decree extends to other organizations pooling milk in  
11 the Upper Midwest, not just the successor cooperative of  
12 the Mid-American Dairymen. I contend it is a relevant  
13 document and that USDA, there's more than just the Act,  
14 the 1937 Act as amended, that USDA is obliged to follow.  
15 Other basis of precepts of Federal law must be also  
16 followed. For example, if a processor paid producers  
17 with counterfeit currency that would a violation of  
18 Treasury Department laws but USDA could not countenance  
19 that violation in a Milk Order co-op.

20 ADMINISTRATIVE LAW JUDGE: Mr. Hardin, thank  
21 you, and I appreciate your reasoning, but I do find that  
22 this Order is beyond the scope of the focus of this  
23 Hearing. It will remain part of the record as an  
24 exhibit that you have proposed be admitted into  
25 evidence, but I decline to receive it into evidence.

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1 But as indicated it has been marked and it will remain  
2 part of the record.

3 MR. HARDIN: Thank you.

4 ADMINISTRATIVE LAW JUDGE: Go ahead, Mr.  
5 Hardin.

6 MR. HARDIN: Thank you.

7 MR. BERDE: Well, Your Honor, I have a...

8 ADMINISTRATIVE LAW JUDGE: Yes, Mr. Berde,  
9 would you approach the microphone?

10 MR. BERDE: Yes, Your Honor. Having just  
11 rapidly perused the proposed testimony, which is  
12 addressed essentially to the Consent Judgment and to a  
13 particular provision known as the Pool Loading  
14 Provision, it is apparent that Mr. Hardin's conception  
15 of what that Consent Judgment prohibits is simply way  
16 off base. And for that reason I would suggest that his  
17 testimony should not be heard. Now let me enlarge on  
18 that. Mr. Hardin apparently assumes that the Consent  
19 Judgment which puts a restriction on the pooling of milk  
20 in remote Orders and it goes on to say, "For the  
21 purpose, for the predatory purpose of injuring other  
22 producers, thereby prohibits the cooperatives associated  
23 with Mid-America, or who have merged with Mid-America,  
24 from engaging in the pooling of milk on remote Orders."  
25 Which is simply not the case. The purpose, that whole

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1 concept of the Pool Loading Provision and the origin of  
2 it arose out of circumstances in which the pooling  
3 entity was pooling milk at a loss for the purpose of  
4 injuring competing producer groups. That is simply not  
5 the case with the pooling provisions that we are dealing  
6 with. These are provisions which are under the primary  
7 jurisdiction of the Secretary of Agriculture, which any  
8 pooling entity, any handler, is lawfully permitted to  
9 use to enhance his own economic benefit. Hence Mr.  
10 Hardin is simply misinformed and misconstrues the  
11 purpose of that provision, and hence, his testimony  
12 could add nothing to this record.

13 ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
14 Berde. Mr. Lamers?

15 MR. LAMERS: Thank you, Your Honor. Mr.  
16 Hardin, I'm first of all interested in Sydney's comment  
17 where handlers, or producers, or cooperatives would try  
18 to enhance their own economic benefit. Speaking back to  
19 the previous testimony in this Hearing and, Mr. Hardin,  
20 yes. The Secretary under terms common to all Orders in  
21 608(c)(7)(e), the Secretary is obliged to prohibit  
22 unfair trade methods of competition and unfair trade  
23 practices in the handling thereof in the writing of his  
24 Orders. And I would suspect that if you handled that on  
25 Brief your argument would be -- is well taken. And

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1       thank you very much.

2                   ADMINISTRATIVE LAW JUDGE: Thank you, Mr.  
3 Lamers. Mr. Hardin, you indicated that your testimony  
4 would concern these six proposals. Now I appreciate  
5 that you've provided copies of your proposed testimony  
6 to the Court Reporter and others here. Can you fashion  
7 your testimony without following what you've got written  
8 out to these six proposals?

9                   MR. HARDIN: Yes, very simply, whichever  
10 proposal USDA settles upon in its review of the Hearing  
11 record, there are other bodies of law which USDA must  
12 observe above and beyond the 1937 Act as amended. And,  
13 therefore, my concerns about the Consent Decree and its  
14 relevance to certain marketing organizations, that  
15 carries through regardless of which, you know, any of  
16 the six proposals USDA may ultimately settle upon.

17                   ADMINISTRATIVE LAW JUDGE: Thank you. Mr.  
18 Hardin, do you feel that you've been able to express  
19 what you came here to assert?

20                   MR. HARDIN: Yes, I do.

21                   ADMINISTRATIVE LAW JUDGE: All right. Thank  
22 you. Cross...

23                   MR. HARDIN: Thank you.

24                   ADMINISTRATIVE LAW JUDGE: You're welcome.  
25 Cross examination of Mr. Hardin? -- All right. -- there

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1 being none, thank you, Mr. Hardin.

2 MR. HARDIN: Thank you.

3 ADMINISTRATIVE LAW JUDGE: You may step down.  
4 Now, Mr. Beshore, what time do you want to convene in  
5 the morning?

6 MR. BESHORE: Well, that's at Your Honor's  
7 pleasure but I think nine o'clock is fine.

8 ADMINISTRATIVE LAW JUDGE: All right. Is  
9 there any objection to that?

10 MR. ENGLISH: No objection. I think that  
11 there is one witness who was flying in late tonight and  
12 needed to testify and made arrangements with the USDA  
13 about that.

14 ADMINISTRATIVE LAW JUDGE: All right.

15 MR. ENGLISH: About testifying early tomorrow  
16 morning, maybe at 9:00 a.m. So I expect it to be a  
17 brief witness but...

18 MR. COOPER: Your Honor, could we get some  
19 sort of an idea of how many people are still to testify  
20 so we get a better idea of what we're looking at  
21 tomorrow?

22 ADMINISTRATIVE LAW JUDGE: All right. First  
23 let...

24 MR. ENGLISH: Yes, they may help decide  
25 whether we start at 8:00 or 9:00.

1 ADMINISTRATIVE LAW JUDGE: All right. First  
2 let me hear from Mr. Vetne.

3 MR. VETNE: Yes, I also was going to suggest  
4 looking to see whether we should start at 8:00. Our  
5 witness, which is going to be responsive to Proposal 4  
6 has to be on a plane shortly after noon. I think it  
7 will work but, Elvin, are you going to be long winded?

8 MR. HOLLON: No.

9 MR. ENGLISH: His lawyer said he was. His  
10 lawyer just said he was going to be.

11 ADMINISTRATIVE LAW JUDGE: All right.

12 MR. ENGLISH: Suppose he is going to be long  
13 winded could we look at the testimony overnight or is  
14 that something you'd rather not do?

15 ADMINISTRATIVE LAW JUDGE: Mr. Berde, if you  
16 want...

17 MR. BERDE: I have one short witness. It  
18 won't take long.

19 ADMINISTRATIVE LAW JUDGE: All right. Let me  
20 hear from each of the representatives as to the  
21 approximate time of direct examination of all of your  
22 witnesses, approximate. Now I realize cross examination  
23 can sometimes be twice as long as direct.

24 MR. ENGLISH: I have two, I would expect the  
25 direct to be no more than 30 to 35 minutes.

1 ADMINISTRATIVE LAW JUDGE: All right. Mr.  
2 Beshore, your...

3 \*\*\*

4 [Off the record]

5 [On the record]

6 \*\*\*

7 MR. ENGLISH: ...a second very short witness  
8 but Mr. Hollon's the primary witness.

9 ADMINISTRATIVE LAW JUDGE: All right. And,  
10 Mr. Berde, you have one witness for tomorrow?

11 MR. BERDE: I'd say about 15 minutes, no more.

12 ADMINISTRATIVE LAW JUDGE: About 15 minutes  
13 for that witness?

14 MR. BERDE: For direct.

15 ADMINISTRATIVE LAW JUDGE: And, Mr. Tosi,  
16 who's coming in that needs to testify at 9:00?

17 MR. ENGLISH: I included him.

18 ADMINISTRATIVE LAW JUDGE: That's part of your  
19 two people tomorrow, Mr. English?

20 MR. TOSI: Your Honor...

21 MR. BESHORE: My witness would be about ten  
22 minutes, Your Honor.

23 ADMINISTRATIVE LAW JUDGE: All right. Thank  
24 you.

25 MR. UMHOEFER: Your Honor, I'll have a brief  
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1 statement tomorrow, five minutes.

2 ADMINISTRATIVE LAW JUDGE: All right. And  
3 your name again?

4 MR. UMHOEFER: John Umhoefer.

5 ADMINISTRATIVE LAW JUDGE: And spell that for  
6 me?

7 MR. UMHOEFER: U-m-h-o-e-f-e-r.

8 ADMINISTRATIVE LAW JUDGE: I don't see any  
9 reason to come at 8:00. It sounds to me like we can do  
10 just fine if we convene at 9:00. So I'll see you all  
11 back here at nine o'clock tomorrow morning. Thank you.  
12

## 1 CERTIFICATE OF REPORTER, TRANSCRIBER AND PROOFREADER

2  
3 IN RE: UPPER MIDWEST MILK MARKETING ORDER4  
5 HELD AT: BLOOMINGTON, MINNESOTA6  
7 DATE: Tuesday, June 26, 20018  
9 We, the undersigned, do hereby certify that the  
10 foregoing pages, numbered 1 through 309, inclusive, are  
11 the true, accurate and complete transcript prepared from  
12 the reporting by the reporter in attendance at the above  
13 identified hearing, in accordance with applicable  
14 provisions of the current USDA contract, and have  
15 verified the accuracy of the transcript by (1) comparing  
16 the typewritten transcript against the reporting or  
17 recording accomplished at the hearings, and (2)  
18 comparing the final proofed typewritten transcript  
19 against the reporting or recording accomplished at the  
20 hearing.21  
22 Date:23  
24 \_\_\_\_\_  
25 Amy M. McLain-Berry, Transcriber  
26 York Stenographic Services, Inc.

27 Date:

28  
29 \_\_\_\_\_  
30 Sarah Mowrer, Proofreader  
31 York Stenographic Services, Inc.

32 Date:

33  
34 \_\_\_\_\_  
35 S.M. Peterson, Reporter  
36 York Stenographic Services, Inc.

37