UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re:)   [AO]
)   Docket No. 15-0071
)
      Milk in California   )
_____)

VOLUME IX

TRANSCRIPT OF PROCEEDINGS

October 2, 2015

Myra A. Pish, CSR No. 11613
397072

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7

8   BEFORE U.S. ADMINISTRATIVE LAW JUDGE
                      JILL S. CLIFTON
9
                  Friday, October 2, 2015
10
                        9:00 a.m.
11

12   Clovis Veterans Memorial District
                      808 4th Street
13   Clovis, California 93613

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16   TRANSCRIPT OF PROCEEDINGS

17   VOLUME 9

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23   Reported by:

24   Myra A. Pish CSR
     Certificate No. 11613
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1   APPEARANCES:

2   U.S. DEPARTMENT OF   Office of the General Counsel
     AGRICULTURE: BY: BRIAN HILL, ESQ.
3   LAUREN BECKER, ESQ.

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     U.S. DEPARTMENT OF   WILLIAM RICHMOND, Dairy
5   AGRICULTURE: Product Marketing Specialist
                              LAUREL MAY, Marketing Specialist
6   MEREDITH FRISIUS, Marketing Specialist

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     CALIFORNIA DAIRIES,   Law Offices of Marvin Beshore
8   INC., DAIRY FARMERS   BY: MARVIN BESHORE, ESQ.
     OF AMERICA, INC.,   Hanson Bridgett, San Francisco
9   LAND O'LAKES, INC.:   BY: JOHN VLAHOS, ESQ.
                                   MEGAN OLIVER THOMPSON, ESQ.
10
     DAIRY INSTITUTE OF   Davis Wright Tremaine
11   CALIFORNIA: BY: CHIP ENGLISH, ESQ.
                                   ASHLEY VULIN, ESQ.
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     LEPRINO FOODS: SUE TAYLOR, Vice-President
13   Dairy Economics and Policy

14   DEAN FOODS COMPANY: ROB BLAUFUSS

15
     HILMAR CHEESE   JOHN VETNE
16   COMPANY: JAMES DEJONG

17
     CALIFORNIA PRODUCER   Stoel Rives
18   HANDLERS ASSOCIATION: BY: NICOLE HANCOCK, ESQ

19
     SELECT MILK PRODUCERS: MILTNER LAW FIRM, INC.
20   BY: RYAN MILTNER, ESQ.

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FRIDAY, OCTOBER 2, 2015 - - MORNING SESSION

2 JUDGE CLIFTON: We're back on record on October 2, 2015,

3 9:00 a.m. on Friday. My name is Jill Clifton, I'm the United

4 States Administrative Law Judge who is assigned to take in

5 evidence at this milk hearing. This is Day 9 of our hearing.

6 The docket number as contained in the Hearing Clerk's

7 Office in the United States Department of Agriculture is, in

8 brackets, [AO], and then the docket number is 15-0071. The

9 transcript pages of today will be numbered in sequence to those

10 of yesterday.

11 I would like to take appearances of those

12 participating, beginning first with other employees of the

13 United States Department of Agriculture. I am one such

14 employee. I would like the others to line up, please, at the

15 podium and please, again, include the spelling of your name.

16 MS. MAY: Laurel May, L-A-U-R-E-L, M-A-Y, with USDA AMS

17 Dairy Program.

18 MR. RICHMOND: Good morning, William Richmond,

19 R-I-C-H-M-O-N-D, USDA and AMS and Dairy Programs. Good

20 morning.

21 MS. FRISIUS: Meredith Frisius, M-E-R-E-D-I-T-H,

22 F-R-I-S-I-U-S, with USDA Dairy Programs.

23 MR. CARMAN: Good morning, Clifford Carman, C-A-R-M-A-N,

24 Assistant to the Deputy Administrator, Dairy Programs.

25 MR. NIERMAN: Good morning, Jason Nierman, N-I-E-R-M-A-N,

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1 Assistant Market Administrator for Federal Order 5, on detail

 2 with AMS Dairy Programs.

 3   MR. SCHAEFER: Henry Schaefer, H-E-N-R-Y, S-C-H-A-E-F-E-R.

 4 I am with the Upper Midwest Milk Marketing Area, Federal Order

 5 30, on detail to AMS Dairy Programs.

 6   MS. BECKER: Good morning, Lauren Becker, B-E-C-K-E-R, USDA

 7 Office of the General Counsel.

 8   MR. HILL: Brian Hill, B-R-I-A-N, H-I-L-L Office of the

 9 General Counsel.

10   JUDGE CLIFTON: And now we'll have proponent's teams,

11 beginning with those for Proposal Number 1.

12   MR. BESHORE: Good morning, Marvin Beshore, M-A-R-V-I-N,

13 B-E-S-H-O-R-E. Counsel for the proponents of Proposal

14 Number 1.

15   MR. VLAHOS: John Vlahos, Hanson Bridgett, J-O-H-N

16 V-L-A-H-O-S, Hanson, H-A-N-S-O-N. B-R-I-D-G-E-T-T, co-counsel

17 for the proponents of Proposal Number 1.

18   MS. OLIVER THOMPSON: Good morning, Megan Oliver Thompson,

19 Megan is M-E-G-A-N. I'm also with the Law Firm of Hanson

20 Bridgett and co-counsel for the proponents of Proposal

21 Number 1.

22   MR. SCHAD: Good morning, Dennis Schad, S-C-H-A-D,

23 Land O'Lakes.

24   MR. ERBA: Eric Erba, California Dairy, Inc., E-R-I-C,

25 E-R-B-A.

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1   MR. WEGNER: Thomas Wegner, T-H-O-M-A-S, W-E-G-N-E-R,

2 Land O'Lakes.

3   MR. HOLLON: Elvin Hollon, Dairy Farmers of America.

4   JUDGE CLIFTON: And Mr. Hollon, your last name, please.

5   MR. HOLLON: H-O-L-L-O-N.

6   MR. ENGLISH: Good morning, your Honor. Chip English

7 C-H-I-P, E-N-G-L-I-S-H, Davis Wright Tremaine, on behalf of the

8 Dairy Institute of California, proponents of Proposal Number 2.

9   MR. SCHIEK: Good morning, William Schiek, S-C-H-I-E-K.

10 I'm an Economist with the Dairy Institute of California.

11   MS. KALDOR: Good morning, Rachel Kaldor, R-A-C-H-E-L,

12 K-A-L-D-O-R, Executive Director of Dairy Institute of

13 California.

14   MR. BLAUFUSS: Good morning, Rob Blaufuss, B-L-A-U-F-U-S-S,

15 Dean Foods Company.

16   MR. DEJONG: James Dejong, J-A-M-E-S, D-E-J-O-N-G, with

17 Hilmar Cheese, a dairy farm manufacturer of cheese, whey, and

18 milk powder products.

19   MR. VETNE: John Vetne, V-E-T-N-E, representative for

20 Hilmar Cheese.

21   JUDGE CLIFTON: And now I'd like those who also have been

22 or expect to be participating -- I'm sorry, Ms. Hancock.

23   MS. HANCOCK: Nicole Hancock, H-A-N-C-O-C-K, with Stoel

24 Rives, S-T-O-E-L, R-I-V-E-S, representing the California

25 Producer Handlers Association and Ponderosa Dairy.

1   JUDGE CLIFTON: Now I'd like those who may not be aligned

        2 with a particular proposal, but either have been or will be

        3 participating to identify themselves, please.

        4   MR. MILTNER: Good morning, Ryan Miltner, M-I-L-T-N-E-R,

        5 counsel for Select Milk Producers, Inc.

        6   JUDGE CLIFTON: And I know of two people testifying, they

        7 were identified yesterday. Is there anyone else here who would

        8 like to testify today? All right. I see no one identifying

        9 himself at this time, but we'll ask again later.

       10   I would like now to address some preliminary matters.

       11   As you know, next week we return to the Liberty Room

       12 and we'll have a normal Monday through Friday schedule, except

       13 Friday. On Friday we'll stop early Friday. Is the 9th of

       14 October 2015. We will go off record no later than 12 noon on

       15 October 9th. When we leave the Liberty Room on October 9th, we

       16 will not resume the hearing until the 14th of October, at 9:00

       17 in the morning, that's a Wednesday. That week will be a

       18 three-day week -- Wednesday, Thursday, Friday, all in the

       19 Liberty Room. My other preliminary announcement is with regard

       20 to exhibits.

       21   If I have rejected an exhibit, it goes onto the website

       22 in the same timely fashion as if I had accepted it. And if I

       23 have rejected an exhibit -- I have only done one so far -- I

       24 expect that rejection to be temporary, I'm just waiting for

       25 some additional foundation so that I understand the document.

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1 I don't have any quarrel with its authenticity, but I find that

2 its relevance will be more clear to all of us if we have some

3 more testimony about it, so that's the reason I rejected it.

4   Mr. English?

5   MR. ENGLISH: Chip English. And just for clarity, as we're

6 discussing these kinds of things, your Honor, there is also one

7 exhibit, Number 30, that I never offered, therefore, you didn't

8 have the opportunity to reject it, and so I assume it will be

9 similarly going up since it's sort of shown up. But I -- it

10 doesn't matter to me, I just thought the record could be clear

11 about what's happening to it, and we did not offer it yet

12 because we did not have a witness who recognized it. That was

13 the Chicago economist power point presentation that Mr. Hollon

14 did not recognize.

15   JUDGE CLIFTON: Let's decide what we think about that. I

16 was thinking that things would go on the website when they have

17 either been accepted or rejected, not when they have been

18 identified, but I'm flexible on that.

19   MR. ENGLISH: And I'm indifferent. I just didn't want it

20 to be -- I'm fine with not doing that, the only question it

21 seems to me that if you are looking at the website and you see

22 sequentially, and then you see a number 30, and there's -- or

23 you don't see a 30, you will see 29, 31, there might be some

24 mystery for those who aren't attending. But I don't have a few

25 other than that.

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1   JUDGE CLIFTON: But another view that I just thought of,

 2   and hadn't thought of before, is that people who can see the

 3   transcript and see references to that exhibit, will want to

 4   look at it. I would. So I think you are right, I think our

 5   best course is to put them all on the website if they have been

 6   identified and have been referred to in the transcript. So

 7   I'll see what other people think about that.

 8   MR. BESHORE: Marvin Beshore. The only concern I would

 9   have would be that the website also reflect whether they have

10   been accepted or rejected or what their status is, so that way

11   when somebody's looking at it they know what's going on.

12   MR. ENGLISH: I think that's entirely fair and if I could

13   identify, not offer, or whatever -- whatever makes sense, I

14   think that that obviously clarity, I have no disagreement with

15   counsel for cooperatives. Clarity in the record should be

16   there. So listing it shouldn't, somebody shouldn't be misled

17   into thinking it has been admitted, so we need to designate it

18   in some way as not yet offered or something.

19   MR. VETNE: John Vetne. I agree with all the exhibits that

20   have been identified ought to be on the website. It may be --

21   it may be difficult, logistically difficult or tedious to

22   indicate for each exhibit what's been offered or accepted. I

23   suggest an easier alternative is simply in the caption of the

24   exhibits, these are the exhibits that have been offered, and

25   some may not have been received, or something like that, so

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that the reader knows that just because you see an exhibit, it

may or may not have been accepted as in evidence. Thank you.

JUDGE CLIFTON: I don't want to make it more difficult for

the posting on the website, so I'm going to leave that part

entirely up to AMS and its coordination with the part of USDA

that puts these things on the website, however it's most

convenient for you is fine. If it ends up most convenient is

just the exhibits are there, all 30 of them or whatever, no

explanation, that's fine with me. People can see them if they

are -- if they are not reading the transcript and don't know

the status of them, I don't think any real harm is done. If

they get to the point they are writing the briefs, of course,

they should find out which ones are in evidence and which ones

are not, but by then it could be that they are all in evidence

for all I know.

If in coordination with the part of USDA that puts them

on the website, you decide you do want to categorize them, then

I would say there are three categories; one is accepted, one is

rejected, and one is identified. All right.

Now, let's continue on with preliminary matters. And

at this time I would recognize someone from USDA to identify

all preliminary matters.

MS. MAY: Good morning -- Laurel May.

As always, welcome. It is a beautiful morning out

there. I was thinking as I was driving over here that it would

1 be a great day for harvesting black-eyed peas because you have

2 a little bit of dew out there, no shatter.

3   Anyway, as always, if you would like to testify today

4 and you have time to do so, please notify Meredith, who will

5 put your name down and make sure that you get a chance to do

6 that.

7   If you would like to ask questions of any witness, you

8 may do so, just approach the microphone and let the Judge know

9 that you would like to ask questions.

10   We are broadcasting a live audio feed but it is not

11 being recorded by us. If you would like to tune into it at

12 home, it is tinyurl.com/camilkhearing.

13   The court reporter is recording an official transcript

14 which will be available approximately two weeks after the end

15 of each hearing week, and the exhibits, like we were just

16 mentioning, are numbered in order of presentation. So copies

17 of those will be available on our website, and there are some

18 still copies available in the back of the room if there are

19 some that you have missed.

20   We do have refreshments in the back that have been

21 provided, and you are welcome to enjoy those.

22   Today, as Judge Clifton mentioned, we are going to be

23 breaking down this room and leaving, so you will need to take

24 your things home with you. And then we'll be returning to the

25 Liberty Room on Monday.

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1   At the end of the day yesterday, Mr. Wegner was

2 testifying. And today, I believe, that USDA would like to

3 begin with Cliff Carman, who is going to provide a USDA

4 response to Ms. Taylor's data questions, and then I believe

5 Dr. Erba is next up for testimony.

6   JUDGE CLIFTON: Thank you. Are there other preliminary

7 matters?

8   MR. ENGLISH: Good morning. Chip English. I guess this is

9 the end of the week. I would ask, going back to sort of the

10 awkwardness issue about CDFA, I would ask the Department where,

11 in this case, the Department of Agriculture of USDA -- where we

12 are with respect to timing and what may or may not happen with

13 CDFA data. And again, I understand fully that this is not in

14 any way, shape, or form, a problem created by, or, and I know

15 just the opposite, that USDA has done everything it can to

16 resolve this issue. So this is more of a sort of where are we,

17 where are we going, because I do think that it really would be

18 useful to find some way to get the CDFA data in, especially as

19 we're moving forward with substantive witnesses, so I would

20 like a report on that.

21   MR. RICHMOND: Bill Richmond, USDA. Unfortunately, we

22 aren't able to provide any kind of update at this time.

23   MR. ENGLISH: I thank you. Again, this is one of those

24 places where industry -- and this is actually, I think USDA as

25 well, we're all sort of on the same page of trying to get this

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resolved, and I know you are doing everything you can. And

thank you.

Again, I think my -- I'm just saying, we're in

agreement. We're just trying to figure out where we are. I

understand you don't have a report, but it's -- at some point,

I think the hearing record is going to get a little messy.

MR. BESHORE: At some point we're going to be at a point of

no return with respect to dealing with this and I guess I'm a

little concerned about that. But do we expect to have some

report maybe like next week from AMS on this further?

MR. RICHMOND: Bill Richmond, USDA. Absolutely. We can --

we'll keep you apprised of any additional information that we

obtain.

MR. BESHORE: And I'm not sure where left this, but at one

point AMS was going to request that official notice be taken in

some fashion if we were unable to have a CDFA witness. Is that

still the plan?

MR. RICHMOND: At this point, I don't think we have

decided.

MR. BESHORE: Okay.

JUDGE CLIFTON: Mr. Beshore, why is it that AMS Dairy

Programs has a better avenue to get a CDFA witness than you?

MR. BESHORE: It's our understanding that there was, and

is, I assume, an agreement of some nature between the agencies,

we haven't seen it, but, in fact, I know, it's been stated

1   publicly that there was an agreement of cooperation of some

 2   nature between USDA and AMS and CDFA with respect to this

 3   proceeding, so I think that's the answer to your question.

 4   Which is not to say that we have not, that is, the,

 5   Mr. English's clients and my clients, made extensive efforts to

 6   communicate with, and see if we could appeal to, and prevail

 7   upon CDFA to be a non-partisan participant in the process.

 8   JUDGE CLIFTON: And is that still a possibility?

 9   MR. BESHORE: I'm looking to the persons who personally

10   made the appeal and getting shrugs. We -- it is still a

11   possibility of some sort, I think, but can't say any more than

12   that.

13   JUDGE CLIFTON: Okay. I can appreciate, Mr. Beshore, you

14   not wanting to add any extra work if CDFA is already working

15   with AMS, of course you would not duplicate their request, I do

16   understand that.

17   MS. HANCOCK: Nicole Hancock. We, on behalf of the

18   Producer Handlers Association, made a formal request to CDFA

19   for certain data, and the letter response that we received back

20   is that they wouldn't be providing any response to the parties,

21   but they would respond to the USDA.

22   So they have told us to go through the USDA. I think

23   after that point in time, maybe that USDA has not been

24   successful in obtaining the same information. But nonetheless,

25   CDFA has directed us to go through the USDA to obtain the data.

1   MR. RICHMOND: Bill Richmond. I wish I could provide

2 additional clarification and explanation at this point, but I'm

3 just not able to.

4   MR. ENGLISH: And, believe me, your Honor, Mr. Richmond, if

5 I may -- look, we know that. We get that. And we understand

6 it. And we're going to just -- we're not getting any farther

7 today, I'm not going to labor it, and we have got to get some

8 resolution of this, and I don't know how to do that. But, you

9 know, I think that as you have heard, everybody on our side --

10 and I realize that you as well on your side of the aisle --

11 speaking for Mr. Carman, that when he used that term yesterday

12 for the Judge -- but I don't want to belabor it any longer, I

13 just wanted to raise it up and try to get resolution.

14   JUDGE CLIFTON: That phrase "point of no return" is

15 frightening.

16   MR. BESHORE: Well, all I meant by that is at some point in

17 the proceeding we just have to decide how we're going to handle

18 CDFA data. And if there is no possibility of a CDFA witness,

19 we're going to have to say, okay, here are the data

20 compilations, publications of CDFA, and they were requesting

21 that official notice be taken of them, and they be identified

22 fully and completely and made part of the hearing record.

23 That's sort of what I had in mind about a point of no return.

24   MR. ENGLISH: And Chip English. And I agree, and I think,

25 again, we know what the ideal is. The ideal is to get a CDFA

1   witness. But if we're getting to that point where that's not

 2   going to happen, what we need, I think, is an exhibit, an

 3   exhibit number such as the next exhibit is 41 -- well, I maybe

 4   I'm talking to somebody else -- but an exhibit number with all

 5   of those attached so that then for testimony purposes, people

 6   with can do as we have with Exhibit 9 and say, will you look at

 7   Table 5 of Exhibit 41, and that's going to make the testimony

 8   of Proponents 1 and Proponents 2, and people who are opposed,

 9   much easier to understand going through the transcript, rather

10   than say, I would like to take, I want to look at the official

11   noticed document labeled X. That's -- that ultimately is sort

12   of, I think, where we're we are.

13   But that doesn't -- but that doesn't change the fact

14   that the ideal situation is to have an, and I absolutely agree

15   with Mr. Beshore, a neutral witness from CDFA. We're not

16   looking for CDFA to show up and give any other testimony.

17   MR. BESHORE: I agree, and I agree with Mr. English's

18   comments.

19   JUDGE CLIFTON: Mr. Richmond?

20   MR. RICHMOND: Bill Richmond. I understand and appreciate

21   gentlemen's request. Can we plan to perhaps revisit the issue

22   early next week, and if we have any kind of update we will be

23   more than happy to provide one?

24   JUDGE CLIFTON: Very good. All right. Are there any other

25   preliminary matters? I see none.

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 1        We have a new document, and I assume that the

 2   statistics that are about to be presented by Carman will be

 3   Exhibit 41; is that correct?

 4      MS. FRISIUS:  Correct.

 5      JUDGE CLIFTON:  That will be Exhibit 41.  I would ask that

 6   they be distributed now.

 7           (Thereafter, Exhibit Number 41 was marked

 8            for identification.)

 9      JUDGE CLIFTON:  Is there anyone who wants a copy of

10   Exhibit 41 who did not get one?  All right.  Is everyone

11   equipped with 41?  Good.

12           Mr. Carman, you remain sworn.  Would you again, state

13   and spell your name?

14      MR. CARMAN:  Clifford Carman, C-A-R-M-A-N.

15      JUDGE CLIFTON:  Who, for Office of General Counsel, will

16   proceed?

17      MS. BECKER:  Lauren Becker for USDA.

18      JUDGE CLIFTON:  Thank you.  You may proceed.

19                   DIRECT EXAMINATION

20   BY MS. BECKER:

21      Q.  Good morning, Mr. Carman.

22      A.  Good morning.

23      Q.  Can you tell us why you are taking the stand this

24   morning?

25      A.  We were requested to provide some additional
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information about the preliminary impact analysis that was done

for the proposals in this proceeding.

Q. Okay. And will you summarize for us what the first

question was that you will be responding to?

A. Those are requests, as I understand it, for the

baseline numbers that were used in the analysis for wholesale

product prices.

Q. Okay. Your Honor, I would like to introduce what's

been marked as Exhibit 41.

JUDGE CLIFTON: Does anyone want to question the witness

before determining whether you have any objection? No one

does. Is there any objection to the admission into evidence of

Exhibit 41? There is none. Exhibit 41 is admitted into

evidence.

(Thereafter, Exhibit Number 41 was

received into evidence.)

BY MS. BECKER:

Q. Mr. Carman, will you describe what that table shows?

A. This sheet is Table 35 taken from, it's published on

page 84 of USDA's Long-Term Projections published in February

of 2015. The particular pieces of information that were asked

for are the prices on the bottom of the table. They lay out

the cheese, butter, nonfat dry milk, and dry whey prices that

the model solves for in terms of equilibrium prices for the

years indicated, except for 2013, which is an actual number,

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1 the model solving 2014 through 2024.

2 Q. Can you go ahead and summarize for us, please, the

3 second question that you will be responding to?

4 A. My understanding was that Ms. Taylor was trying to

5 verify the numbers in our baseline relative to the results

6 which she was seeing for different proposals. I would point

7 out that reviewing the model for the regional part of the model

8 for California, we added one cent to the butter price, and one

9 cent to the cheese price in these formulas for the baseline in

10 California.

11 If you will remember, California has a 26 to the 25th

12 calculation on the CME butter price. Our prices are reported

13 to be what we consider the National Dairy Product Mandatory

14 Reporting Prices, and a historical review from 2003 through

15 2014, shows a price difference between those two series of

16 approximately one cent.

17 And in the case of cheese, we also added one cent.

18 California uses a block cheese price at the CME, we use a

19 weighted-average of butter -- pardon me -- of blocks and

20 barrels reported to us in that mandatory reporting program.

21 And again, that's approximately a one-cent difference. We did

22 not make any adjustments in nonfat dry milk and dry whey.

23 Q. Okay. Mr. Carman, are you available for further

24 questions?

25 A. Yes. I intend to be at all sessions of the hearing.

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1   JUDGE CLIFTON: All right. Good. Who would like to begin

2   questions of Mr. Carman with regard to what we have got so far

3   today?

4   CROSS-EXAMINATION

5   BY MR. ENGLISH:

6   Q. Chip English. First, thank you very much.

7   Second, we don't have questions at this time, what we

8   need to do, of course, now, is go run those numbers. It may

9   raise questions -- it may or may not raise questions in the

10 future. But, you know, for now, that answers the questions

11 that Ms. Taylor asked. Thank you.

12   CROSS-EXAMINATION

13 BY MR. BESHORE:

14   Q. Marvin Beshore. Good morning, Mr. Carman.

15   A. Good morning.

16   Q. I need you to take me through the one penny difference

17 in prices. Tell me what -- what prices, what product prices,

18 the penny was added to or subtracted from and why that was

19 done.

20   A. We compared the California butter price that they use,

21 which is the CME over the 26 to the 25th of each month,

22 compared to the reported prices that we are estimating, which

23 are the National Dairy Product Prices Mandatory Reporting.

24   Q. Can I just stop you right there. You compared the CDFA

25 calculated CME price?

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1   A. For the month.

2   Q. With or without the adjuster -- FOB adjuster?

3   A. Without.

4   Q. Okay. And you found -- then -- okay. So continue.

5   A. We found approximately a one cent difference, i.e. the

6   prices that we use are one cent lower than what the CME adjust

7   price for that time period is. I will admit that we are using

8   weighted average prices of exchanges, while the CME is a spot

9   price, there's no weighting to that over that time period, but

10   we found the one cent difference, so we're trying to duplicate

11   the California current pricing structure in creating a

12   baseline. So we felt we needed to adjust that price by one

13   cent.

14   Q. Okay. And the adjustments were made to -- how many

15   commodity prices were adjusted one cent, and which ones?

16   A. The butter price and the cheese price.

17   Q. Okay. Both of them one cent?

18   A. Yes.

19   Q. Now, I think you said your prices were weighted average

20   exchanges. By that, do I understand you to mean by that they

21   were weighted average of actual transaction prices?

22   A. Yes.

23   Q. Thank you. Thank you very much, Mr. Carman.

24   JUDGE CLIFTON: Are there other questions for Mr. Carman

25   now with regard to the testimony so far this morning? All

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1 right. I expect to see you again Mr. Carman. You may step

2 down.

3   MR. CARMAN: I hope not.

4   JUDGE CLIFTON: Is there anything preliminary to Dr. Erba

5 taking the stand? There is not. Dr. Erba, you may come

6 forward.

7   MR. VLAHOS: John Vlahos on behalf of the cooperative

8 proponents, Proposal Number 1.

9   JUDGE CLIFTON: I'll swear him in. Did you want to

10 distribute any documents?

11   MR. VLAHOS: Yes. I'm going to. I was going to do the

12 preliminary first and then distribute the documents, if that's

13 okay.

14   JUDGE CLIFTON: All right. That's certainly fine with me.

15 I'll swear you in, Dr. Erba. Would you raise your right hand?

16   Do you solemnly swear or affirm under penalty of

17 perjury that the evidence you will present will be the truth?

18   DR. ERBA: I do.

19   JUDGE CLIFTON: Please state and spell your name.

20   DR. ERBA: Eric Erba, E-R-I-C, E-R-B-A.

21   JUDGE CLIFTON: Mr. Vlahos, you may proceed.

22   DIRECT-EXAMINATION

23 BY MR. VLAHOS:

24   Q. Dr. Erba, by whom are you employed?

25   A. California Dairies, Inc.

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1   Q. And what is your position with California Dairies,

2 Inc.?

3   A. Senior Vice President and Chief Strategy Officer.

4   Q. What is your business address?

5   A. 2000 North Plaza, P-L-A-Z-A, Drive, in Visalia,

6 California, V-I-S-A-L-I-A.

7   Q. And you're appearing today to support the Proposal

8 Number 1 put forward by the cooperatives?

9   A. That is correct.

10   JUDGE CLIFTON: Let me stop you there. Until we finish

11 distributing the documents, let's stop questioning so that

12 people can pay attention to the testimony.

13   Now, right now I won't deal with marking them or the

14 like, but I just want to see if there's anyone who did not

15 receive two different documents who wants them. Two different

16 documents. One is marked Cooperatives' Exhibit 4 down at the

17 bottom, and then the other has exhibits. All right.

18   I would like to go back to Dr. Erba's testimony. So he

19 had mentioned his work with California Dairies, and I would

20 like you to go back to just after that, if you will,

21 Mr. Vlahos.

22   MR. VLAHOS: I'm not sure what -- just after that?

23   JUDGE CLIFTON: Yes, please.

24   MR. VLAHOS: I think I asked for his business address?

25   JUDGE CLIFTON: Yes, would you start there?

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BY MR. VLAHOS:

Q. And you did give your business address?

A. Yes, we are still at 2000 North Plaza Drive, P-L-A-Z-A
in Visalia, California, V-I-S-A-L-I-A.

Q. Your Honor, may we have the document that's been
distributed and called Cooperatives' Exhibit number 4, marked
as the next in order for identification? I believe it is 42?

JUDGE CLIFTON: Ms. Frisius, would this be Exhibit 42, the
one that says Cooperatives' Exhibit 4 down at the bottom?

MS. FRISIUS: It would be.

JUDGE CLIFTON: All right. I'd ask everyone to mark that
as Exhibit 42. 42.

        (Thereafter, Exhibit Number 42 was marked

            for identification.)

MR. VLAHOS: And we would like to have marked for
identification the next document, the exhibits of Dr. Erba as
Exhibit 43 for identification.

JUDGE CLIFTON: And I have marked mine as Exhibit 43,
exhibits of Dr. Eric Erba.

        (Thereafter, Exhibit Number 43 was marked

            for identification.)

MR. VLAHOS: Your Honor, as has happened sometimes in these
proceedings before, there has been an inadvertent error in that
some of the sections referred to that's contained in the
Cooperatives' proposal under the Series 1050 or 1050. Some

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other sub number, should have been 1051. 1051. And we will

ask that in every instance in which in Exhibit number 42 that

has occurred, that we be allowed to interline so that it reads

1051. whatever subsection it is. I have already alerted

Ms. Frisius to that and told her that we would provide her with

a document that makes those changes, and interlineated.

JUDGE CLIFTON: So you don't want to go through and

identify them now page by page?

MR. VLAHOS: Well, I can, your Honor, and I hope I haven't

missed any. And if I have, I'll rectify it later. But the

first one that I have is on page 22, it is the second line

under the heading Continuation of Quota Program Under a

CA-FMMO.

JUDGE CLIFTON: Wait, I expected you to be more specific.

You want us to strike the numbers after the section symbol,

that are 1050.17(a), and instead, write 1051.17(a)?

MR. VLAHOS: Exactly.

JUDGE CLIFTON: Okay.

MR. VLAHOS: Next we would go to page 26.

DR. ERBA: You skipped page 25.

MR. VLAHOS: Pardon?

DR. ERBA: Page 25 also has some issues.

MR. VLAHOS: Oh, I have it marked, too, somewhere. Yes.

DR. ERBA: First paragraph off the bottom, starting with,

"As a practical matter."

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1   MR. VLAHOS: Thank you, Dr. Erba. On page 25, your Honor,

2   the paragraph that begins near the bottom of the page, "As a

3   practical matter," in that sentence, the reference to

4   Section 1050.61 should be stricken and should be changed to

5   Section 1051.61.

6   And the next line, the number there, Section 1050.62

7   should be stricken and changed to Section 1051.62.

8   Then on page 26, the third line from the top of the

9   page, the reference here in words, Section 1050.30, the numbers

10 should be stricken, and inserted instead, 1051.30.

11   Two lines below that, the section number,

12 Section 1050.31, that number should be stricken and changed to

13 Section 1051.31.

14   Then at the bottom of the page, paragraph, the last

15 paragraph which begins with the section number Section 1050.61,

16 that should be stricken and changed to 1051.61.

17   Three lines down in the parens there's a section

18 reference to Section 1050.60, that should be stricken and

19 changed to Section 1051.60.

20   Two lines below that, in the sentence that begins "As

21 specified," the section that appears there, Section 1050.62,

22 should be stricken, and in its place there should be inserted

23 Section 1051.62.

24   Turning to page 27, in the first full paragraph, four

25 lines down, the reference to Section 1050.71, should be

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stricken, and substituted in its stead, Section 1051.71.

Three lines below that, there appears Section 1050.72, that should be stricken, and in its place, Section 1051.72 should be substituted.

I believe that's all, your Honor. And if it turns out that I have missed one, I will supplement what I asked for on the directions.

JUDGE CLIFTON: Excellent. That's very helpful. I'm glad you did it on record so it is perfectly clear, and that way the record copy was created during the proceeding. So if you find anymore, we'll address them on the record.

MR. VLAHOS: Fine, your Honor.

JUDGE CLIFTON: Thank you so much.

BY MR. VLAHOS:

Q. Dr. Erba, were you requested to prepare testimony reflecting the California quota system and the interface between that system and a California Federal Milk Marketing Order, should such an order be adopted?

A. Yes, I was.

Q. Okay. Let's start out with some preliminaries. Would you detail for us your educational background?

A. Sure. I have a Bachelor's of Science degree in Animal Science from University of California, Davis, and that was received in 1988. I have a Master's degree in Animal Science from UC Davis, University of California, Davis, received in

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1 1990. And then I have a Ph.D. in Agricultural Economics from

2 Cornell University, received in 1997.

3   Q. Could you also detail for us your professional

4 employment background?

5   A. Certainly. I started with the California Department of

6 Food and Agriculture in 1997, just after I finished up at

7 Cornell. Employed by the Dairy Marketing Branch as an

8 Agriculture Economist and, in fact, Dairy Economist. And I

9 worked in that position for eight years. I spent two years as

10 the Assistant Director at the Division of Animal Health, also

11 at the Department of Food and Agriculture -- California

12 Department of Food and Agriculture. Then I was employed by

13 California Dairies starting in September of 2006.

14   Q. Could you detail for us your responsibilities and

15 duties during your term at the California Department of Food

16 and Agriculture?

17   A. As I said, I was a Dairy Economist with Department of

18 Food and Agriculture, and so I worked with the, within the

19 Dairy Marketing Branch to assist the Division Director, as well

20 as the Secretary, to implement and administrate the dairy

21 marketing, dairy marketing in California.

22   Q. And what are your duties and responsibilities with your

23 current employer?

24   A. I'm a part of one of the managing team for the

25 cooperative, the executive team, and assist with the management

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1 of the cooperative, as well as some of the strategic thinking

2 plans that are being developed for California dairies. I

3 oversee the field staff and oversee the Milk Quality Program.

4 I do, on occasion, quantitative analysis and policy development

5 and analysis for, not only dairy, but the cooperative itself.

6 And I have also been a bit of a historian.

7 Q. Thank you very much, Dr. Erba. You indicated in answer

8 to my question, that you have prepared testimony. Is that

9 Exhibit 42?

10 A. That is Exhibit 42.

11 Q. Now, Dr. Erba, you have been here enough to realize

12 that both of us earn point if we speak slowly and clearly and

13 particularly when you are reading, so with that -- and I'll

14 probably violate that, too, by the way, especially if you can,

15 adhere to that admonition.

16 With that, your Honor, I would request permission for

17 Dr. Erba to deliver his prepared testimony.

18 JUDGE CLIFTON: Thank you, Mr. Vlahos. Dr. Erba, you may

19 do so.

20 DR. ERBA: Thank you. I was alarmed to hear you describe

21 Mr. Wegner as being so articulate, because I know he's a lot

22 better than I am. I'm going to try to follow suit, but don't

23 hold me to his standard, if you would, please.

24 MR. VLAHOS: Excuse me one second. For the benefit of

25 court reporter, when you are reading your testimony, if there's

1 a heading, read the heading and indicate that it is a heading,

2 and when there are things in parentheses, so indicate that they

3 are in parentheses.

4   DR. ERBA: I will try.

5 Introduction

6   Good morning. My name is Eric Erba and I hold the

7 position of Senior Vice President and Chief Strategy Officer

8 for California Dairies, Inc., whom I'm representing here today.

9 I have worked for California Dairies since September 2006.

10 Prior to that, I worked for the California Department of Food

11 and Agriculture for ten years, with eight of the ten years

12 employed as a Dairy Economist for the Dairy Marketing Branch.

13 California Dairies is a full-service milk processing

14 cooperative owned by 390 producer-members located throughout

15 California, and collectively producing 18 billion pounds of

16 milk per year, or 45 percent of the milk produced in

17 California. Our producer members have invested over five

18 hundred million in large processing plants at six locations.

19   JUDGE CLIFTON: Let me stop you. That's five hundred

20 million what?

21   DR. ERBA: Dollars, sorry.

22   JUDGE CLIFTON: Thank you.

23   DR. ERBA: Should I start that sentence again?

24   JUDGE CLIFTON: Please.

25   DR. ERBA: Our producer-members have invested over $500

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1   million in large processing plants at six locations, which will

2   produce about 385 million pounds of butter and 785 million

3   pounds of powdered milk products in 2015.

4   I will be describing the history, structure, and

5   importance of the California quota program, and how we propose

6   that the quota program be incorporated into the California

7   Federal Order as specified in the proposal submitted by the

8   three California cooperatives.

9   Introduction to the California Quota Program

10   California maintains a two-tiered milk pricing program

11   for producers where ownership of a financial instrument (also

12   recognized as an asset) termed "quota" entitles a producer to

13   an incrementally higher milk price that is paid on the amount

14   of milk covered by quota ownership. Conversely, milk

15   production that is not covered by quota is subject to a lower

16   regulated price -- milk price -- this is termed the "overbase"

17   price. The concept of a tiered pricing system was developed in

18   the late 1960's as California State Milk Marketing Order -- as

19   the California State Milk Marketing Order -- was attempting to

20   address a producer milk price equity issue.

21   In an economic sense, quota fits the description --

22   sorry -- quota fits the definition of an economic rent. That

23   is, it represents an excess payment above that required to

24   induce or provide production, or a payment for the services of

25   an economic resource which is not necessary as an incentive for

1 its production. Furthermore, quota is an asset that was

2 created by a regulatory agency with the intent of constructing

3 an official privilege over national opportunities, a secondary

4 descriptor of economic rents.

5   Quota payments to producers are an important component

6 of revenues to many California dairy operators. In fact,

7 paramount to any consideration of a California Federal Milk

8 Marketing Order, (FMMO) was the assurance that the quota

9 program would not in any way be diminished or affected.

10 Congress recognized this, and in the 2014 Farm Bill language

11 dealing with the promulgation of an FMMO in California,

12 directed that the marketing order provisions allow for the

13 continuation of the quota program in California.

14   The 2014 Farm Bill (Section 1410(d)) references the

15 1996 Farm Bill (Section 143(2)),

16   "Upon the petition and approval of California

17   dairy producers in the manner provided in the

18   Section 8c of Agricultural Adjustment Act

19   (7U.S.C.608c), reenacted with the amendments by

20   the Agricultural Marketing Agreement Act of 1937.

21   The Secretary shall designate the State of

22   California as a separate Federal Milk Marketing

23   Order. The order covering California shall have

24   the right to reblend and distribute order receipts

25   to recognize quota value."

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1   Quota has an extensive history and has had a

2   significant role in the California industry for over 45 years,

3   and was integral part of the Milk Pooling Plan when it was

4   introduced in 1969. The program has been modified since its

5   creation, but the foundation of the program has remained intact

6   since its introduction. Under the Pooling Plan, producers were

7   no longer paid directly in accordance with a class utilization

8   of the handler that received the producers milk. Instead,

9   producers were paid on the basis of his or her allocated quota

10 base and overbase at prices which reflected --

11   JUDGE CLIFTON: Let me ask you to read that sentence again,

12 if you will.

13   DR. ERBA: I inserted a word that's not typed.

14   JUDGE CLIFTON: True. Now, maybe that's on purpose, maybe

15 there is base and overbase, but if not, what -- you just tell

16 me what is true here.

17   DR. ERBA: What I said, not what I wrote is correct.

18   JUDGE CLIFTON: Okay. This is important.

19   DR. ERBA: I will read it again for you.

20   JUDGE CLIFTON: Yeah, and you may want to explain it, too.

21   DR. ERBA: I do explain it later on.

22   JUDGE CLIFTON: Okay. Good. Thank you.

23   DR. ERBA: Instead, producers were paid on the basis of his

24 or her allocated quota, base, and overbase at prices which

25 reflect the poolwide utilization of all classes.

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1   Is that okay?

2   JUDGE CLIFTON: Perfect.

3   DR. ERBA: Okay. Great.

4   Pool quota was established for each producer by milk

5 fat and solids-not-fat on an average daily based on historic

6 production at Class 1 usage. Any production in excess of a

7 signed quota constituted overbase production. Periodically,

8 the California Department of Food and Agriculture (CDFA) has

9 issued additional quota to producers, but none since 1992.

10 CDFA has issued about 2.2 million pounds of quota solids not

11 fat on a daily basis (about 66.2 million pounds of solids not

12 fat monthly).

13   Quota enjoys a special status in that its existence is

14 protected by state law. The importance of maintaining

15 stability with a quota program was recognized by the California

16 State legislature. In fact, Code Section 62712 of the Food and

17 Agricultural Code, specifically states that all pool quota must

18 be recognized and shall not be diminished in any way as long as

19 the Milk Pooling plan is in effect. Thus, quota cannot be

20 eliminated by eliminating -- can only be eliminated by

21 eliminating the entire Milk Pooling program.

22   The proposal submitted by California Dairies, Inc.

23 Dairies Farmers of America, and Land O'Lakes ("the

24 Cooperatives") recognizes the history of quota, the financial

25 investment made by dairy producers in quota, and the federal

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1 directive to recognize the value of California quota. Thus,

2 the Cooperatives propose the quota program be left intact

3 without significant modifications and continue to be

4 administered by CDFA through a Memorandum of Understanding with

5 the United States Department of Agriculture.

6 Before Quota - An overview of the California Dairy Industry

7   The milk marketing laws passed in the 1930's,

8 especially the Young Act of 1935, helped to regulate the

9 minimum price, the minimum price paid for milk by processors to

10 producers by establishing classified milk prices. Class 1

11 utilization, which was used for beverage milks, beverage

12 products, usually commanded the highest price. Progressively

13 lower prices applied to milk devoted to the manufacturing

14 classes of milk.

15   However, establishing minimum prices did not address

16 the concerns of equitable prices among producers or composition

17 of similar milk. Plants processed an array of products, and

18 consequently, class utilization among plants varied. In

19 addition, processing plants were well on their way to becoming

20 "specialized" by processing fewer products. Some plants

21 processed 100 percent of the milk received as Class 1 products,

22 but other plants tended to specialize in manufactured products,

23 producing little or no milk as Class 1 products.

24   JUDGE CLIFTON: Let me interject here, for court reporter,

25 all of these references to Class 1 thus far have an Arabic 1

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1 because we're talking about California's Class 1. And you may

2 continue, Dr. Erba.

3   DR. ERBA: Should I say that every time I see an Arabic 1,

4 say Arabic 1?

5   JUDGE CLIFTON: I think because every time you have seen

6 it, said it so far, it's always been Arabic. Let's just assume

7 that it will be Arabic unless you alert us that there's a

8 change, that you are taking about a Roman numeral instead.

9   DR. ERBA: Okay. I can do that.

10   JUDGE CLIFTON: Thank you.

11   DR. ERBA: Where would you like me to restart?

12   JUDGE CLIFTON: No, no, you are good. Oh, where?

13   DR. ERBA: Where?

14   JUDGE CLIFTON: Not would you but -- where would you. Yes.

15 Start, please, with the phrase "these characterizations."

16   DR. ERBA: Yes.

17   These characterizations represented the extremes, and

18 it was more typical to find plants with moderate Class 1

19 utilizations. Nonetheless, a producer shipping to a plant with

20 all Class 1 utilization fared well financially, while

21 neighboring producers -- while a neighboring producer selling

22 milk of like quota to a plant with low Class 1 utilization,

23 typically received a considerably lower price.

24   In the late 1950's and early 1960's, disparate prices

25 among producers in the same region were a source of frustration

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and led to destructive marketing practices. Clearly, a producer's financial welfare was impacted by his or her ability to secure a contract with a handler with high Class 1 utilization. This placed producers in a weak position to bargain with handlers, and many would agree to excessive haul charges or make other concessions to obtain or retain the coveted sales to Class 1 handlers. The lack of long-term commitments between producers, between producer and handler, added to the instability of the milk market. Most contracts were subject to cancellation by either party upon 30-days' notice.

It was difficult for producers to obtain new contracts, especially with plants that maintained high Class 1 utilization year round. Not surprisingly, the loss of a contract to an individual producer was a severe economic blow. Producers often accepted contracts with handlers that gave the handler the permission to divert milk shipments to manufacturing facilities. Besides receiving a significantly lower milk price, producers were also expected to pay for the additional cost of hauling their milk to the designated plant. An alternative was to locate another fluid milk plant that was accepting milk, but this did not eliminate the high cost of shipping the milk from the dairy to a distant plant. The uncertainty of obtaining or continuing favorable contracts restricted many producers' future planning horizon and

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1 financing capability.

2   During the early and mid-1960's, several events

3 combined to place even more pressure on producers. Some dairy

4 processors began to alter the traditional framework of milk

5 production, of the milk production sector by acquiring herds

6 and supplying their own processing facilities with milk,

7 thereby reducing the number and volume of Class 1 contracts

8 available to existing producers.

9   Producers realized the necessity of developing a system

10 that would bring relief to their problems and provide a more

11 equitable allocation of the revenues generated from Class 1

12 milk sales. Producers and producer organizations concluded

13 that such a system would have -- could be brought only through

14 legislation and introduced a number of Milk Pooling bills in

15 the California Legislature. These early efforts to establish a

16 revenue distribution program were not successful because the

17 producer community could not agree on the basic concepts of the

18 program.

19   In 1967, the Legislature passed the Gonsalves Milk

20 Pooling Act and it was signed by the governor --

21   MR. VLAHOS: Excuse me, Dr. Erba, for the reporter, would

22 you spell that Gonsalves?

23   DR. ERBA: Oh, I thought you were going to have me spell

24 milk.

25   MR. VLAHOS: I could do that.

1   DR. ERBA: I'm just trying to add a little levity here,

2 Mr. Vlahos. Gonsalves, G-O-N-S-A-L-V-E-S.

3   MR. VLAHOS: Thank you.

4   DR. ERBA: I'm going to start that sentence again.

5   In 1967, the Legislature passed the Gonsalves Milk

6 Pooling Act, and it was signed by the Governor into law on

7 November 8th, 1967. This act required the California State

8 Secretary of Agriculture to formulate a a Pooling Plan via the

9 public hearing process. The Pooling Plan became active in

10 November of 1968, after an affirmative vote of eligible milk

11 producers. Developing mechanics of a pool price calculation

12 delayed implementation until July 1969. The pool area covers

13 the entire state.

14 Production Base and Pool Quota

15   During the preliminary stages of formulating a plan,

16 basic milk production data were gathered to establish two

17 benchmarks for each eligible producer -- a production base and

18 pool quota. A producer's history was based on his or her milk

19 production ("production base") and a producer's Class 1 usage

20 during July 1966 through December 1966 or the 1967 calendar

21 year became the benchmark to establish a producer's quota.

22 Production base and pool quota were established for each

23 producer by milk fat and solids not fat on average daily basis.

24 Pool quota was established at 110 percent of Class 1 usage, and

25 the amount by which production base exceeded pool quota was

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1 designated "base".

2 BY MR. VLAHOS:

3   Q. Excuse me, Dr. Erba, just one little interruption

4 there. When you said that the pool quota was established at

5 110 percent of Class 1 usage, am I correct that the Class 1

6 usage you are referring to was the base period in which the

7 producer opted for, either the July 1996 through December 1966

8 or the 1967 calendar year?

9   A. You said July 1996, and that would not be correct.

10   Q. If I did say that, I meant 1966.

11   A. Yes, 1966. Yes, you are right. You are correct.

12   Q. Please proceed.

13   A. Okay.

14   With the implementation of the Pooling Plan, producers

15 were no longer paid directly in accordance with class

16 utilization of the contracting handler. Instead, producers

17 were paid on the basis of their allocated quota, base, and

18 overbase at prices which reflect the poolwide utilization of

19 all classes. The monthly quota and base quantities were

20 computed for each producer to the extent he or she produced

21 these quantities. The maximum monthly quantity of quota was

22 determined by the current quota allocation. The maximum

23 monthly quantity of base was the difference between production

24 base and quota. Any production in excess of a total of these

25 two figures, constituted the overbase production.

1 Pool Value, Pool Prices, and Pool Obligations

2   Under the California regulatory structure, each handler

3 submits to the Pooling Branch a monthly report detailing the

4 amounts of milk purchased from producers and other handlers,

5 and the amounts used in their various classes, which is then

6 used to determine each handler's pool obligation. The total

7 value of each class is determined by multiplying the class

8 utilization by its appropriate class price as announced by

9 CDFA. Summing these respective amounts across all pool

10 handlers results in the pool value.

11   The Department prepares and mails the statement for

12 each handler on or before the 28th of each month, showing the

13 gross amount the handler owes each producer. The statement

14 itemizes the handler's class utilization and the gross amount

15 the handler is directed to pay producers for their quota, base,

16 and overbase milk. ("Pool prices"). The statement does not

17 include authorized deductions the handler may claim, for

18 example, milk hauling cost. If the total value of milk used is

19 greater than the amount the handler owes the producers for

20 their milk, the handler pays the difference into the pool

21 equalization fund. On the other hand, if the amount owed

22 producers is more than the value of the milk used, the handler

23 draws the difference from the pool via the pool equalization

24 fund.

25 /////

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Determining Pool Prices 1969 - 1994

Minimum prices for milk purchases are announced by CDFA each month. Prices are determined according to how the milk was used, meaning that milk was made into cheese might have a different price than milk that was made into butter or into ice cream. Typically, although not always, classified prices follow a typical and descending scale. In other words, the price for Class 1 (fluid milks) carries a higher price than Class 2 (yogurt, cottage cheese), which carries a higher price to Class 3 (ice cream and frozen dairy desserts), which carries a higher price than class 4 (butter, milk powders, and cheese).

The Pooling Plans specified that the highest value of milk was allocated to the quota pool first, then to the base pool, and then finally to the overbase pool, in descending order of class value. The amount of component in each pool, i.e., quota, base, and overbase, was determined by pounds available. Once pounds of components were determined, they were multiplied by the applicable class component prices to determine revenue contained in each pool. Pool revenue was divided by pool pounds -- I'm sorry -- pool revenue divided by pool pounds provided the pool price per pound. The order of priority for fulfillment was quota fat/solids not fat, base fat/solids not fat and overbase fat/solids not fat. Thus, the Class 1 pounds of fat were used to offset the quota fat obligation. If the Class 1 fat pounds were insufficient to

offset the obligation, then Class 2 fat pounds were used, and

so on, until the quota fat needs were met. The same process

was repeated for quota solids not fat, base fat and base solids

not fat. All remaining milk sales revenue was assigned to the

overbase pool.

Determining Pool Prices After 1994.

By the late 1980's, overbase milk production had

increased considerably in relation to quota milk production.

There was also the growing concern among producers about low

milk prices. The California dairy industry generally

recognized that there was room for some milk price enhancement

for Classes 1, 2, and 3. However, because of the methods in

place for distributing milk sales revenues from the pool, the

difficulty of increasing prices for those classes was that

nearly all of the price increase would be funneled into higher

quota milk prices without materially affecting overbase prices.

Following a directive from the California legislature,

CDFA appointed a committee of dairy producers in 1991 to

conduct listening sessions throughout the state to receive

comments and input on the milk pricing regulatory system. The

stated goal of the committee was to strengthen the Milk Pooling

and quota systems. During industry listening sessions held

throughout the state, the committee concluded that overbase

producers became uneasy when the spread between the quota price

and the overbase price became too high. For example, a

difference of $2 dollars per hundredweight or more.

Q.   Dr. Erba, that last phrase was in parentheses?

A.   Yes. I'm sorry. I shall start that sentence over.

During industry listening sessions held throughout the state, the committee concluded that overbase producers became uneasy when the spread between the quota price and the over price became too high.

JUDGE CLIFTON: I'm sorry, when the spread between the quota price and --

DR. ERBA: The overbase price became too high (for example, a difference of $2 per hundredweight, or more). Conversely, the quota producers were similarly troubled when the spread got too small or even became inverted. Several producers who testified at the listening sessions, proposed some type of "known" spread between quota and overbase prices. Some proposed a floor and ceiling concept, where the spread could fluctuate within a predetermined range, while others proposed a fixed spread. The committee favored the differential concept as a way of strengthening the quota system. The committee engaged in considerable discussion before settling on the fixed $1.70 per hundredweight (for milk testing 3.5 percent fat and 8.7 percent solids not fat). At $1.70 per hundredweight level, the committee felt they could reasonably conclude that the overbase milk would not subsidize the quota milk, and the quota owner would receive a reasonable return for his investment.

1 This also represented the approximate average spread between

2 the quota and overbase prices for the prior five years.

3   The committee submitted a formal report to the

4 California Legislature that addressed several items, including

5 the recommendation from the committee to implement a fixed

6 differential between the quota price and the overbase price of

7 $1.70 per hundredweight. Rather than implement the change

8 using the regulatory public hearing process, the fixed

9 differential was written into the California Food and

10 Agricultural Code, i.e., state law. Consequently, as of

11 January 1, 1994, Chapter 3.5 of the California Food and

12 Agricultural Code established the quota premium paid to

13 producers who own quota at 19 and a half cents per pound of

14 solids not fat.

15   Do you want me to read that differently?

16   JUDGE CLIFTON: No, that was perfect.

17   DR. ERBA: 19 and a half cents per pound for Southern

18 California counties without regional quota adjusters (RQA's are

19 discussed in the next section) and at 19 and a half cents per

20 pound solids not fat, minus the assigned RQA for all other

21 California counties.

22 BY MR. VLAHOS:

23   Q. Dr. Erba, let me interrupt just for a moment. That

24 figure of 19 and a half cents per pound solids not fat, does

25 that calculate to a hundredweight basis at the 3.58.7

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1 standardization to $1.70 per hundredweight?

2   A. Yes, at standardized milk testing, 3.5 percent butter

3 fat and 8.7 percent solids not fat, the 19 and a half cents a

4 pound, solids not fat calculates out to a $1.70 per

5 hundredweight.

6   Q. Please continue.

7   A. I have lost my place.

8   Q. Starting with the sentence that says "the quota premium

9 is discounted," I think that's where you were.

10   A. Yes.

11   The quota premium is discounted in all other counties

12 of the state by the assigned RQA. The move to a fixed

13 differential also changed the allocation of quota value by

14 component in that all of the price differential above the

15 overbase price was assigned to solids not fat, i.e., the price

16 of quota fat was set equal to the price of overbase fat.

17 Finally, Chapter 3.5 of the California Food and Agricultural

18 Code also provided that the fixed differential would remain

19 operative until the Secretary certifies that producers had

20 voted, via a referendum, to suspend the operation of the

21 chapter. At that point, the fixed differential would be

22 suspended and the quota of milk price calculation would revert

23 to the methods used prior to 1994.

24   JUDGE CLIFTON: I'm going to stop you there. We're at the

25 top of page 10, we have only read the top two lines. I would

1   like to take a 15-minute break. So it's about 10:21. Please

2   be back and ready to go at 10:36.

3   (Whereupon, a break was taken.)

4   JUDGE CLIFTON: Back on record at 10:40. We're going back

5   to Dr. Erba's testimony. We're at the top of page 10, and

6   Mr. Vlahos, you may proceed.

7   BY MR. VLAHOS:

8   Q. All right. Dr. Erba, will you continue your testimony?

9   A. Quota premium payments are deducted from total pool

10 revenues and average between $12.5 million and $13 million per

11 month, depending on days in month and eligible production

12 marketed. RQA's -- and that is regional quota adjusters -- by

13 construction, are a deduction in quota payments out of the pool

14 and consequently, RQA's actually return revenue to the pool.

15 After the appropriate deductions to the quota premium are taken

16 via RQA's, the quota premium are paid out of the pool amounts

17 to monthly cost of about 37 cents per hundredweight on all

18 pooled Grade A milk marketed in California.

19   Producer prices are paid on the basis of pounds of fat

20 and pounds of solids not fat. The producer fat price per pound

21 is equivalent for both quota and not quota milk, a result of

22 adding Chapter 3.5 to the Food and Agricultural Code in 1994.

23 Consequently, the producer fat price for quota and not quota

24 milk is basically a weighted average of the individual per

25 pound fat prices that were determined for each of the five

1795

classes of milk. Prior to the computation of the weighted

average, small pool adjustments, such as plant gains, maybe

made.

The calculation of quota and non-quota solids not fat

prices is only slightly more involved than the calculation of

quota and non-quota fat prices. After the quota premium is

determined and set aside, and pool adjustments for

transportation allowances are made, an average of the remaining

solids not fat revenues is computed, weighted by pounds

associated with each class of milk. This becomes the overbase

or base price per pound of solids not fat. The quota price for

solids not fat is determined by adding the 19 and a half cents

to the overbase or base solids not fat price per pound.

Adjustments to Quota Value

When pooling was instituted in 1969, location

differentials were established to encourage the movement of

quota milk to Class 1 plants. Location differentials were

added to or deducted from quota payments to producers, and were

determined by the location of the plant that first received the

milk. Location differentials applied only to the hundredweight

milk equivalent of quota. In following the traditional

movement of milk from supply areas to deficit areas, the higher

hauling cost tended to be offset by a more favorable

differential. Conversely, if milk was needed locally for Class

1 usage, a lower location differential tended to be offset by a

1   lower haul cost.

2   Over time, overbase milk became a larger and larger

3   share of the milk produced by individual producers.

4   Consequently, location differentials based solely on quota milk

5   were no longer able to ensure that an adequate -- that adequate

6   milk supplies were made available to Class 1 plants. In June

7   1983, location differentials were replaced by transportation

8   allowances and RQA's. Transportation allowances partially

9   compensate producers for the cost of hauling milk from a

10   producer's ranch to qualified plants. Those allowances apply

11   to all market milk moving from dairy farms to processing plants

12   which process more than 50 percent of the production into

13   Class 1, Class 2, and/or Class 3 products. In addition,

14   cooperative members receive transportation allowances on

15   shipments to their plant if the plant is located in a deficit

16   area, and if the plant supplies 40 percent of its receipts to

17   Class 1 usage.

18   Q. Dr. Erba, excuse me for interrupting, but in your

19   testimony you just read, you referred to a phrase of market

20   milk. That may not be a familiar term to others here, so could

21   you tell us what market milk means in the California context?

22   A. It's a little bit vague in the terms of what market

23   milk actually is, but it is essentially Grade A milk, although

24   not specifically Grade A milk. There are other things that may

25   be Grade A milk that are not market milk, but Grade A milk is

1 certainly -- market milk is certainly Grade A milk.

2   Q. Thank you, doctor. Sorry for interrupting. Proceed.

3   A. The purpose of RQA's is less transparent because they

4 do not provide any direct incentive to move milk to Class 1

5 plants. They were developed to address equity issues arriving

6 out of the elimination of location differentials, and are

7 deducted from the quota payments to producers. RQA's are

8 determined by geographical location of the producer's dairy

9 farm (currently accomplished by designating RQA's by county of

10 dairy farm location) and apply to the hundredweight milk

11 equivalent of quota produced at 3.5 percent butterfat and 8.7

12 percent solids not fat. Presently, these range from zero cents

13 per hundredweight for dairy farms located in Southern

14 California counties, to a minus 27 cents per hundredweight for

15 dairy farms located in Fresno, Kings, and Tulare counties (see

16 map at Exhibit 4.A hereto).

17   Q. Dr. Erba, since you have indicated to see the map, why

18 don't we turn to Exhibit 43, which are the exhibits to your

19 testimony, in, to Exhibit 4.A which is the map, and let's wait

20 a second so people can find it. Just from glancing around, it

21 looks like everybody's got it, so can you describe what Exhibit

22 4.A shows?

23   A. Certainly. It is a color-coded map of California by

24 county, and the colors correspond to the different RQA areas.

25 For example, along the north coast, which is shown, at least on

1798

1 my copy, in gold are there color copies or not?

2   Q. Yeah, there are.

3   A. Great. The north coast, which is in gold, those

4 counties have an RQA of minus five cents per hundredweight.

5 The largest geographic area is basically the North Sacramento

6 Valley in most of Northern California, the RQA in that green

7 shaded area is 11 cents per hundredweight. The red area, which

8 is the South Valley, the three counties that make up the South

9 Valley, shown in red, 27 cents per hundredweight deduction.

10 The counties designated in blue include San Luis Obispo, Kern,

11 and I think it is Santa Barbara, although I can't quite read

12 it -- Santa Barbara -- 20 and one-half cents per hundredweight,

13 and all remaining counties which largely are Southern

14 California and eastern counties, including Mono and Inyo, zero

15 cents per hundredweight for a deduction.

16   Q. Thank you. Let's return to your text on page 12.

17   JUDGE CLIFTON: Before he does, Dr. Erba, just so it's

18 perfectly clear, all the categories are a minus, reflecting

19 that there's something deducted, except for the white areas; is

20 that correct?

21   DR. ERBA: That is correct.

22   JUDGE CLIFTON: All right.

23   DR. ERBA: There were no pluses.

24 Producer-Handlers and Exempt Quota

25   A producer-distributor (PD; also called a

1 producer-handler) is characterized by simultaneous ownership of

2 both the milk production and milk processing facilities. In

3 California, there are two types of PD's. Fully exempt PD's

4 (Option 66 PD's), do not account to the pool for any other

5 Class 1 production, but there are significant restrictions on

6 production and sales.

7   I have a list of five bullet points.

8   - The entity must own both the milk production and milk

9   processing facilities;

10   - The own-farm production must average less than five

11   hundred gallons per day for a 12-month period;

12   - Sales must average less than five hundred gallons per

13   day for a 12-month period;

14   - The entity may not receive more than 25 percent of

15   total fluid milk sales from sources other than its

16   own dairy farm;

17   And the last point, last restriction;

18   - The entity must have retail sales for his or her own

19   account of not less than 50 percent of total

20   Class 1 sales.

21   Historically, very few Class 1 processors have

22 qualified for this designation, and the amount of milk

23 processed by fully exempt PD's has represented far less than

24 one percent of a Class 1 milk in the state.

25   The second type of PD, the option exempt PD, (Option 70

PD's) does not qualify for full exemption, but have common

ownership of production and processing enterprises. The option

exempt PD's have no restrictions on retail sales or outside

purchases, and are subject to pool obligations, at least in

part -- they do not account to the pool for the Class 1

production that is covered by exempt quota owned by the PD, but

they do account to the pool for all other production.

There are four option exempt PD's operating in

California and their combined Class 1 exemptions are 57,914

pounds per day. That equates to about five percent of the

Class 1 milk produced in the state. There is no opportunity to

establish additional option exempt PD's without a change in

state law. Furthermore, the option -- excuse me -- the exempt

quota owned by the PD's is not transferrable without a loss of

the exemption. In other words, exempt quota converts to

"regular" quota if it is transferred to another production

entity.

Prior to January 1, 1978, the option exempt PD's could

deduct their original pool quota from their Class 1

obligations. Any purchased quota could not be deducted and was

treated like quota owned by a producer. In 1994, the option

exempt PD's were allowed to include the quota they had

purchased after January 1st, 1978, and before March 1st, 1995,

toward their Class 1 obligations. All four operating exempt --

all four operating option exempt PD's qualify -- should say for

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1 -- a further daily deduction of 150 pounds of fat and 375

2 pounds of solids not fat from Class 1 pool obligation because

3 none have transferred production base and pool quota after

4 February 9th, 1977.

5   By construct, exempt quota establishes an economic

6 benefit beyond the value of standard quota. Standard quota

7 entitles the owner to a higher price that is established at 19

8 and a half cents per pound of solids not fat per day. Exempt

9 quota waives the obligation of the owner to account to the pool

10 for the equivalent amount of Class 1 production. The

11 additional benefit of exempt quota is then, the difference

12 between the announced Class 1 price and the announced RQA

13 adjusted quota price for the same month. From January 1970 to

14 December 2014, the additional value to exempt quota owners

15 averaged about 58 cents per hundredweight in Southern

16 California (RQA of zero dollars per hundredweight).

17   JUDGE CLIFTON: Shall we have these record copies marked on

18 page 13 with the insertion of the word "for"?

19   MR. VLAHOS: Yes, that would be a good idea, your Honor.

20   JUDGE CLIFTON: All right. So I'm going to ask that the

21 record copies be changed, page 13, in the middle of the page,

22 the sentence will read with the word "for" inserted -- "all

23 four operating option exempt PD's qualify for a further daily

24 deduction of 150 pounds fat", and so on.

25   MR. VLAHOS: Thank you, your Honor.

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1   DR. ERBA:

2   Producer Responsibility

3   Although producers have gained considerable

4   independence, they are still charged with responsible

5   performance standards. Quota payments apply to only milk

6   produced on a dairy farm located in California. A producer

7   must produce milk of the required quality standards or lose

8   quota entitlement as a consequence. For each day milk is

9   rejected for not meeting the quality standards specified in the

10 contract, the monthly quota eligibility is reduced by one day's

11 quota amount. Rejected milk is still eligible to be accounted

12 for in the base pool.

13   A producer may not have quota and simply hold it

14 without producer milk. Failure to ship milk to a pool handler

15 for a period of 60 days shall result in the forfeiture of all

16 production base and pool quota. A proportionate of monthly

17 entitlement will be lost for any milk shipped directly to a

18 nonpool plant.

19 Allocating New Quota

20   One of the declared purposes of the Gonsalves Milk

21 Pooling Act is to equalize gradually the distribution of

22 Class 1 and Class 2 utilization among California producers.

23 Allocation of new quota based on Class 1 and Class 2 quota, was

24 a necessary provision instrumental in obtaining this goal.

25 Class 1 and Class 2 sales for the most recent 12-month period,

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1 September through August, is compared to that of a previous

2 highest identical 12-month period to determine the amount of

3 increase necessary. The resulting amount is made available for

4 new for allocation as new quota. New quota allocation to

5 existing producers is made effective January 1st, following the

6 12-month period, during which the available new quota is

7 determined.

8   Prior to 1985, the amount of new quota --

9 MR. MR. VLAHOS:

10   Q. Excuse me, Dr. Erba, it is prior to January 1, 1985?

11   A. Yes.

12   Q. Yes. Sorry. Go ahead.

13   A. Prior to January 1, 1985, the amount of new quota to be

14 allocated was determined by comparing Class 1 and Class 2 sales

15 for the most recent September through August period to the of

16 the preceding period. The increase was then adjusted to for

17 the estimated Class 1 and Class 2 requirements for the seceding

18 year, less such estimates made the prior year, and further

19 adjusted by -- further adjusted to add standby requirements.

20   After January 1st, 1985, the amount of new quota to be

21 allocated was determined by comparing Class 1 and Class 2 sales

22 to the highest 12-month period (September through August) on

23 record, which was 1991 to 1990 -- sorry -- 1990 to 1991. The

24 new quota became available in January of --

25   JUDGE CLIFTON: Start that again, please.

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1   MR. VLAHOS: Start at the beginning of the sentence,

2 Dr. Erba, the last new quota.

3   DR. ERBA: Yes.

4   The last new quota became available in January 1992,

5 and 80 percent of it was issued to existing producers. Because

6 there were few new producers during that time, it took over

7 four years to distribute the remaining 20 percent of the new

8 quota.

9   Prior to 1979, when new quota was issued, 40 percent of

10 the new quota available was allocated to producers holding

11 unequalized production base and pool quota. Unequalized meant

12 that the quota held by the producer was below 95 percent of the

13 production base. The allocation was based on a formula that

14 gave a higher percentage of new quota to those producers having

15 low quota in relation to a production base. No quota could be

16 allocated to an unequalized producer that would be in excess of

17 that needed to bring quota to the equalized level. Any such

18 excess quota was reallocated to the qualified producers still

19 below the equalization point.

20   The unequalized quota are those allocated to new

21 producer entrants after the start of the pooling program. All

22 of the original issue of production base and pool quota was

23 brought to equalization effective January 1st, 1978, as

24 directed by --

25   JUDGE CLIFTON: Read that date again, please.

1   DR. ERBA: January 1st.

2   JUDGE CLIFTON: One more time.

3   DR. ERBA: July 1st -- how'd I get June -- July 1st,

4 1978 -- thank you for correcting me -- as directed by statutory

5 requirement amended. This one-time direct issue of quota was

6 not conditioned on any increase in Class 1 or Class 2 sales.

7   After 1979, 40 percent of available quota was allocated

8 to equalize producers (those producers whose quota is 95

9 percent or more of production base) prorated according to the

10 quota held by each, 40 percent is allocated to unequalized

11 producers.

12   20 percent of the new quota available is allocated to

13 qualifying new producer applicants who do not have production

14 base and pool quota. In order to apply for this allocation, a

15 new producer must have been in continuous production for one

16 year, and on the date of application, must be shipping market

17 grade milk to a pool handler. Available quota is allocated to

18 these producers on a priority basis, first priority being

19 determined on the basis of the date the application was

20 received. Ties are broken by the longest period in continuous

21 commercial production, and further ties are decided on the

22 basis of the longest period in market grade production. In

23 addition, any quota that was -- any quota that has been

24 forfeited after April 30th, 1981, is allocated on a continuing

25 basis to qualifying new processors.

1 Allocations to New Producers

2   The amount of quota to be allocated to new producers is

3 based on the daily average of fat and solids not fat produced

4 during the most recent three-month period from September

5 through November, a maximum of 150 pounds of fat, and 375

6 pounds of solids not fat can be considered. Allocation is made

7 at either 95 percent of the qualifying production of each

8 component, or 60 pounds of fat and 150 pounds of solids not

9 fat, whichever is less. If a producer enters at the equalized

10 95 percent level, he or sh, is given the qualifying production

11 as production base, and only qualifies for further quota

12 allocation as an existing equalized producer. If the producer

13 enters at less than the 95 percent level, the production base

14 is granted at 111 percent of the quota allocated.

15   After holding this initial allocation for a minimum of

16 one year, a new producer qualifies as an existing producer to

17 participate in future -- in future allocation of new quota. In

18 the subsequent allocations, the qualifying period of production

19 will be used in determining the amount of quota received.

20 Additional production base will be allocated equal to 111

21 percent of the additional quota, until the producer eventually

22 has quota equal to 95 percent of the qualifying period

23 production. At that point, the qualifying period production

24 will be assigned as production base.

25   Prior to January 1st, 1977, the maximum allocated new

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producers as production base was the average daily production

during the 12-month period preceding the application, or 90

percent of the average production base of all existing

producer, which ever was less. The maximum quota that was

allocated was 20 percent to the allocated production base, or

the lowest percentage of pool quota to production base of all

existing producers, whichever is -- whichever was less.

Transferability of Production Base and Pool Quota

Subject to certain restrictions, production bases and

pool quotas are transferrable. The restrictions are imposed to

prevent quota from becoming a commodity for speculation. For

example, a quota owner must be a market milk (Grade A) producer

that ships to a pool plant at least once every 60 days. Also,

a quota owner who buys quota may not sell any quota for two

years, and a quota owner who sells quota, may not buy any quota

for two years. A producer may sell to another producer in the

pool area, or change locations within the pool area and carry

the quota to the new location. Quota that moves from one dairy

location to another may be subject to a different RQA. All

transfers must be approved by the Secretary of Agriculture

before the transfer can be made effective and all quota

transfers are made effective on the first day of the month.

The published average price per pound of quota solids

not fat (without the inclusion of cows) reflects the true value

of the quota sold. Although the price is expressed in terms of

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1 quota solids not fat, the transaction carries with it the

2 related production base solids not fat, production base fat,

3 and quota fat.

4   Pool quota has been transferred among producers

5 continuously since quota was introduced in 1969. (See Exhibit

6 4.B hereto).

7   Q. We'll do it at the end of --we'll do the exhibit at the

8 end of that paragraph.

9   A. Okay.

10   In the first year alone, 342 producers sold at least

11 some quota, 624 producers bought some quota, and 273

12 transactions disbursed 100 percent of a producer's quota. In

13 addition, 51,176 pounds of quota fat and 127,504 pounds of

14 quote solids not fat were transferred. Since 1969, there has

15 been an average of 10 quota sellers and 13 quota buyers every

16 month.

17   Q. Now that you have finished, that would be an

18 appropriate time to turn to the table that's on Exhibit 4.B,

19 and that is a document of some 16 pages, I believe. We'll wait

20 for a minute while everybody gets a chance to turn to that

21 section of the exhibit. And that's Table 4.B of Exhibit 43. I

22 think people have gotten it now.

23   Dr. Erba could you explain what the this document

24 depicts?

25   A. There are several columns and I'll go through and

1809

1 explain what is contained in each column.

2   The first column is the dates, and it's, in fact, the

3 first entry says 1969, 08, that would be August, 1969. And it

4 is a continual monthly recounting of all the transactions since

5 August 1969 through August 2015.

6   The second column you see a number of sellers with

7 quota transactions.

8   The third column is number of buyers for quota

9 transactions.

10   The fourth column recounts the number of sales at 100

11 percent, meaning the entire -- producer's entire amount of

12 quota was distributed or disbursed.

13   The next three columns are covered under a single

14 heading, sales without cows, and has individual columns below

15 that, a low, average, and high, and these are the prices

16 ranging from low to high, with an average in the middle of the

17 price per pound of quota solids not fat since August 1969. And

18 again, these are sales without cows, meaning that the,

19 basically there was a paper transaction.

20   The next three columns which are also under a single

21 heading, says sales with cows. Those would be transactions of

22 quota transfers that included the cows. Again, would be a

23 three separate subheadings of low, average, and high prices.

24   The next two columns after that are under a single

25 heading that says total production based fat transferred as one

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1   of the subheadings, and total quota fat transferred is the

 2   other one.

 3   And then the last two columns also under a single

 4   heading of total. The subheadings are production base solids

 5   not fat transferred; and the final column, total quota solids

 6   not fat transferred.

 7   Q. Dr. Erba, you had earlier testified that the pooling

 8   plant went into effect in July of 1969; is that correct?

 9   A. That's correct.

10   Q. So the very next month, August 1969, people began

11   purchasing and selling quota; is that correct?

12   A. That is correct.

13   Q. Thank you. Let's return then, to page somewhere --

14   page 18.

15   A. Quota transactions continue to occur nearly every

16   month, underscoring the importance and prevalence of quota to

17   the California dairy industry. While transacted monthly sales

18   volumes range widely (for example, from a minimum of 0 pounds

19   of quota fat and solids not fat, to a maximum of 13,345 pounds

20   of quota fat, and 99,574 pounds of quota solids not fat) on

21   average 2,668 pounds of quota fat, 6,603 pounds of quota solids

22   not fat, are transferred each month. Over the 552 month

23   period, which commences with August 1969, the average price for

24   quota sold was $370 per pound of quota solids not fat. Since

25   the introduction of quota, the price has ranged from $236 to

1   $570 per pound of quota solids not fat. (See "Average Selling

2   Price for Quota" chart below).

3   Q. Stop right there. The chart below actually appears

4   after the text, under the heading Fiduciary Review Board, and

5   that chart is actually on the next page, page 19; is that

6   correct?

7   A. That's correct.

8   Q. And it is sort of out of order, but you had to do that

9   because of the formatting of the text?

10   A. I couldn't get the, unless I made the chart very small,

11 couldn't get it to fit in that text area.

12   Q. Okay. So let's skip to page 19 now, to that -- that

13 chart. And does that chart in the general, what it does is

14 depict in sort of a visual way, the information that's

15 contained in Table 4.B in Exhibit 43?

16   A. That's correct.

17   Q. Okay. Let's turn, now go back to page 18 and continue

18 with your testimony.

19   A. For the most recent 12-month period, quota has sold for

20 an average of $525 per pound of quota solids not fat, thus, at

21 current market prices, the total value of the 66.2 million

22 pounds of quota solids not fat owned by California dairy

23 producers is $1.2 billion.

24   JUDGE CLIFTON: I'm wondering, Dr. Erba, shall we amend

25 this page to include those words "not fat"? The way you read

1 the sentence, you said "quota solids not fat".

2 DR. ERBA: Yes, I think that would be appropriate.

3 JUDGE CLIFTON: All right. So I'm going to ask that the two

4 record copies include two words that aren't there, the two

5 words are "not fat". So looking at page 18, the line that's

6 just above the heading called Producer Review Board, that line

7 will read, "of the 66.2 million pounds of quota solids" and

8 then here is where we insert two words, "not fat". And then

9 the sentence continues, "owned by California dairy producers is

10 $1.2 billion."

11 Would that be consistent with what you said to us,

12 Dr. Erba.

13 DR. ERBA: Yes.

14 JUDGE CLIFTON: All right. Good.

15 DR. ERBA: Shall I proceed?

16 JUDGE CLIFTON: You may.

17 DR. ERBA: Okay.

18 Producer Review Board

19 The Gonsalves Milk Pooling Act required the Director of

20 CDFA to appoint a Producer Review Board consisting of twelve

21 producer members. The function of this board is to hear

22 appeals of producers seeking hardship relief due to conditions

23 beyond their control and make recommendations to the Director

24 to either approve, disapprove, or modify the request. An

25 example might be a producer who purchased quota and was

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1 subsequently impacted by fire or flood and forced to liquidate

2 his assets (including quota), thus violating the prohibition of

3 selling quota before two full years of quota ownership.

4   The Board, since 1978, consisting of twelve producer

5 members and one public member, also gives counsel, assistance

6 and recommendations on administrative matters and problem areas

7 of the pooling program. Since its formation, it has made

8 numerous recommendations on producer appeals and administrative

9 issues.

10 BY MR. VLAHOS:

11   Q. We can now skip the chart on the bottom of page 19,

12 which you have already explained, and go to page 20.

13   A. Verification of Records

14   Personnel within the Milk Pooling Branch perform

15 comprehensive audits of the records of handlers to determine

16 their compliance with the reporting and payment procedures

17 required by the Milk Stabilization and Marketing Plans and the

18 Pooling Plan. Monetary adjustments are made to a handler's

19 account to correct discrepancies revealed by the audit, with

20 such adjustments being reflected in the quota price

21 calculation. The payments to producers are also monitored to

22 ensure that payments are made in the correct amount and at the

23 proper intervals and that no unauthorized deductions are made.

24 Quota Ownership

25   At least some quota is owned by more than half of the

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1 dairy producers in California. Conversely, about 42 percent of

  2 California dairy farms own no quota. However, the percentage

  3 of dairies that own no quota has increased considerably in the

  4 last 20 years. (See Table 1 below).

  5   Q. We'll take a look at that table when we get to it in

  6 the next page, Dr. Erba.

  7   A. Very well.

  8   In 1995, the distribution of quota ownership was

  9 relatively uniform across all six categories. However, as the

 10 industry changed in terms of annual milk production (increased

 11 by 57 percent) and number of Grade A dairies (decreased by 35

 12 percent) the distribution of quota ownership has changed as

 13 well. The most striking change is the percentage of California

 14 dairy farms with no quota. Most of the other categories have

 15 not changed much in the last 20 years.

 16   Q. Now, Dr. Erba, we're at the top of page 21 at the table

 17 labeled Table 1. Would you please explain what that table

 18 depicts?

 19   A. Sure. This would be the percentage of dairy farms

 20 ranked by quota ownership as of January of each year listed,

 21 which starts in 1995 and ends in 2015. The quota ownership

 22 categories are 0 percent quota, or no quota owned; 1 percent to

 23 20 percent; 21 percent to 40 percent; 41 percent to 60 percent;

 24 61 percent to 80 percent. And then the last category is those

 25 producers who own over 80 percent of the milk production

1 covered by a quota.

2   There are several rows that follow that data. One is,

3 the first one is number of dairy farms, which is the number of

4 Grade A farms, again, as of January of the year indicated. And

5 then the corresponding number of dairy farms with quota is the

6 following row after that.

7   Q. Both the total number of dairy farms and the number of

8 dairy farms with quota have decreased from 1995 as opposed to

9 2015; is that correct?

10   A. That is correct.

11   Q. You may proceed.

12   A. Okay.

13   Milk production in California over the past 35 years

14 has become more concentrated within the counties that make up

15 the Central Valley (see Table 2 at Exhibit 4.C hereto).

16   Q. You may proceed, we'll get to that table.

17   A. Okay.

18   From 1980 to 2015 (estimated) milk production increases

19 in the Central California counties has ranged from 230 percent

20 to 1,211 percent. At the same time, milk production decreased

21 in the counties representing Southern California and the North

22 Coast (minus one percent to minus 53 percent).

23   Q. This would be an appropriate time to take a look at

24 Table 2 at Exhibit 4.C, we'll give some time for people to

25 locate that. It's right after that 16 pages of quoted

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1   transactions.

2   JUDGE CLIFTON: So we're going to Exhibit 43.

3   MR. VLAHOS: That's correct, your Honor. Exhibit 43. And

4   it's the document at the bottom in the right hand corner that

5   says Exhibit 4.C.

6   BY MR. VLAHOS:

7   Q. I think everybody has probably got it now, Dr. Erba, so

8   would you please continue and explain what that document which

9   is entitled Table 2 Annual Milk Production by County Thousand

10   Times Represents -- although that sort of tells you what it

11   represents.

12   A. Yeah, you just took my thunder from me. It's annual --

13   Q. I'll give it back to you.

14   A. Annual milk production -- I appreciate that, thank you.

15   Annual milk production by selected counties, they are

16   not all the counties, and they are listed, counties are listed

17   in alphabetical order. And there are ten counties and there's

18   a reason for the ten counties which will be revealed in the

19   next table, which I will get to. These are in five-year

20   increments starting in 1980 and going to 2015, and 2015 is an

21   estimated number.

22   The last column in the table represents the percentage

23   change from 1980 to 2015 for the milk production in each one of

24   those ten counties. And then toward the bottom of the table

25   there is a comparison to total milk production for the state,

1   and they have those ten counties compare. And those ten

2   counties represent between 85 and 1980, 85 percent of the milk

3   produced in California, all the way up to 92 percent of the

4   milk produced in California in 2015.

5   Q. Okay. Let's return to your text then, on page 21. You

6   are in the -- we're in the middle that bottom paragraph

7   starting with the sentence "as the geographic footprint".

8   A. Yes.

9   JUDGE CLIFTON: Now, before he goes on, I want to relate

10 the words on page 21 to the table now that I'm looking at both

11 of them.

12   So of your ten counties on Exhibit 4.C they are listed

13 in alphabetical order.

14   DR. ERBA: Correct.

15   JUDGE CLIFTON: And in your text on page 21 you break them

16 into three geographic areas. You've got a representation from

17 Central California, you have got a representation from Southern

18 California, and a representation from the North Coast. Is it

19 easy for you to tell me which counties go into those geographic

20 areas or do you do it later?

21   DR. ERBA: I can tell you right now. It is probably best

22 that I do that now.

23   JUDGE CLIFTON: All right. Great.

24   DR. CLIFTON: So Sonoma County would be the county that

25 represents the North Coast. There are two counties that

1 represent Southern California. The first is San Bernardino and

2 the second county representing Southern California is

3 Riverside. The remaining seven counties would be Central

4 California counties.

5   JUDGE CLIFTON: Excellent. Thank you very much.

6   DR. ERBA: You're welcome.

7   As the geographic footprint of milk production (shrank

8 even as California's milk production increased) quota tended to

9 follow dairies as they relocated to the Central Valley,

10 particularly from Southern California. This is evident in

11 Table 3 (see Exhibit 4.D hereto) --

12   Q. We will do that, Dr. Erba, when you finish this

13 testimony in the next page.

14   A. Very good.

15   -- which shows that from 1980 to 2015, quota holdings

16 increased for all Central Valley counties listed but decreased

17 for the counties representing Southern California and the North

18 Coast. Thus, quota has tended to become more concentrated in a

19 small number of counties, most of them located in the Central

20 Valley. In fact, the top ten counties for quota holdings

21 account for over 92 percent of all quota allocated (see Table 3

22 at Exhibit 4.D hereto).

23   Q. Let us then turn to Exhibit 4.D, that's a one-page

24 exhibit with the heading, Table 3, Pounds of Quota SNF,

25 Holdings by County (as of January of the listed year).

1819

1   Tell us what this table depicts.

2   A.   Table 3 was constructed similarly to Table 2 in that we

3   have the same representation for the columns for the dates 1980

4   through, or for 2015 in five-year increments. The counties

5   match up identically and the counties were selected as the top

6   ten quota holding counties starting in 1980, and then keeping

7   those counties the same as the years progressed to see what the

8   trend would have, or what the trend was for quota holdings

9   among those same ten counties over time.

10   The total quota held among all counties, not just these

11 ten, is represented as one of the entries, as are the sum of

12 the top ten county quota holders for the top ten counties, and

13 then the percentage of quota holders of those top ten counties

14 compared to total quota holders.

15   Q.   So if I read this correctly, for example, the total

16 quota held by these top ten counties is in the last, second to

17 the last column, excuse me, with 2015 at the head of it, that

18 would be 2,215,998, and that is in the -- excuse me, that's

19 the --

20   A.   That's the total for all counties.

21   Q.   Excuse me, just opposite. That's the total for all

22 counties, the top ten counties of that number had 2,046,422

23 pounds, correct?

24   A.   That is correct.

25   Q.   Okay. Now let's return back to page 22, and you may

                              1820

1 continue your testimony.

2   A.   Thank you.

3 Continuation of Quota Program Under a CA-FMMO

4   The proposal from the Cooperatives describes several

5 operative definitions that are necessary to carry out the

6 administration of the quota program. These are found in

7 Section 1051.17(a) through (d).

8   "CDFA" refers to the California Department of Food and

9 Agriculture, which is the agency of the State of California

10 responsible for the administration of the California dairy

11 producer milk quota program as established in the California

12 Food and Agricultural Code.

13   "Quota premium" means the value established pursuant to

14 the California Food and Agricultural Code -- how do I read

15 that?

16   JUDGE CLIFTON: Sections.

17   DR. ERBA: Sections 62715 --

18   JUDGE CLIFTON: No.

19   MR. VLAHOS: 750. Read it again.

20   DR. ERBA: Sections 62750 et seq. "Quota premium" and

21 "quota premium value" mean the value per pound of nonfat solids

22 which, and include adjustments by applicable RQA's.

23   "Quota nonfat solids" means the pounds of nonfat solids

24 of a producer as determined and reported by CDFA, which qualify

25 for the quota premium. "Non-quota milk" means pool milk not

1821

1 eligible for the quota premium.

2   While the California dairy industry's State Milk

3 Marketing Order is unique in many respects, the California Food

4 and Agricultural Code contains language that anticipates that

5 the state order may be replaced by an FMMO, eventually, and

6 specifies how to reconcile the two orders.

7   From Section 62726 of the California Food and

8 Agricultural Code, the following discussion is found:

9   "Notwithstanding other laws to the contrary, in the

10 event a milk marketing order under the jurisdiction of the

11 United States Department of Agriculture or other appropriate

12 federal agency is created by referendum or under the applicable

13 laws and procedures relating thereto in the state or in any

14 geographical area within the state, the provisions of this

15 chapter, or any part thereof, which is in conflict with such

16 Federal Order or which is unnecessary or is a duplication

17 thereof, shall be suspended in the geographical area covered by

18 and during the existence of such Federal Order.

19   The director shall take such steps and procedures as

20 are necessary to wind up and conclude the administration and

21 enforcement of the provisions of this chapter, or any part

22 thereof, prior to this suspension date."

23   In effect, if an FMMO is approved by a referendum of

24 California producers, those aspects of the California State

25 Statutes that are in conflict with the FMMO, or are duplicative

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1 of the FMMO, shall be suspended. Clearly, the quota program is

2 not duplicative of any aspect of an FMMO.

3   The California quota program is regarded as a valuable

4 investment option by California dairy producers. Producers who

5 have decided to invest more money in their dairy enterprises

6 may, for example, increase cow numbers, remodel their

7 facilities, buy more land for crop production, or buy quota

8 which entitles owners to a higher milk price.

9   As I mentioned earlier in my testimony, quota payments

10 to producers are an important source of revenues for many

11 California dairy operators, and preservation of the quota

12 program to the greatest extent possible is an objective of the

13 Cooperatives proposal. The objective is consistent with the

14 Congressional language found in the 2014 Farm Bill language

15 dealing with the promulgation of an FMMO in California,

16 specifically Section 1410(d) of the 2014 Farm Bill references

17 the 1996 Farm Bill (143(2)) and states:

18   " Upon petition and approval of California dairy

19 producers in the manner provided in Section 8(c) of the

20 Agricultural Adjustment Act (7 U.S.C.608c) reenacted with

21 amendments by the Agricultural Marketing Agreement Act of 1937,

22 the Secretary shall designate the State of California as a

23 separate Federal Milk Marketing Order.

24   The order covering California shall have the right to

25 reblend and distribute order receipts to recognize quota

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1   value."

2   MR. ENGLISH: Your Honor? Chip English. Before he reads

3   the next sentence and gets to other written testimony, I object

4   to the next sentence on the ground that contains a legal

5   conclusion.

6   JUDGE CLIFTON: Thank you.

7   MR. VLAHOS: In answer to that, we have a, the witness has

8   his understanding of the law and he's entitled to testify to

9   it.

10   JUDGE CLIFTON: The objection is noted. The witness may

11   continue.

12   DR. ERBA: In language from Congress makes it clear that

13   the quota program should have at right to exist within the

14   framework of an FMMO.

15   JUDGE CLIFTON: And, Mr. English, how would you suggest

16   that sentence would read to be consistent with the legislation

17   as you understand it?

18   MR. ENGLISH: Your Honor, I think the legislation speaks

19   for itself, we're going to have a statutory construction

20   argument. The language in the statute is recognized quota

21   value, it does not say right to exist, it doesn't say

22   incorporate, so I think that that's our objection, the right to

23   exist is different from recognized quota value.

24   JUDGE CLIFTON: Thank you.

25   MR. VLAHOS: And the witness is not attempting to quote the

statute. He is giving his understanding as an Economist and as

the official a dairy cooperative in California, his

understanding of what the statute is.

He obviously is not -- we're going to have an argument

for sure, very vehemently I'm sure about what the statute

means, but this witness is entitled to testimony as to his view

of the statute.

JUDGE CLIFTON: Yes, and Mr. English is entitled to object.

MR. VLAHOS: He sure is, and I know he will take every

opportunity to do so. It doesn't mean he's right, though.

JUDGE CLIFTON: And I received both of those as

constructive and helpful.

Thank you, Mr. Vlahos. Begin again, not to rub it in,

but just to read the sentence again.

MR. ENGLISH: Do I get to object again?

JUDGE CLIFTON: Beginning with the words "the language".

DR. ERBA: Your Honor, I, too, am trying to be helpful,

just for the record.

The language from Congress makes it clear that the

quota program should have the right to exist within the

framework of an FMMO. The Cooperatives' proposal recognizes

the importance and sensitivity of maintaining the quota program

virtually intact within the California FMMO. Recall from

earlier discussions, that over half of California dairy

producers own at least some quota, and the total market value

1825

1 of all quota owned is nearly $1.2 billion. Thus, we propose

2 that the continuation of the quota program be made possible

3 through a joint effort with CDFA and USDA via a Memorandum of

4 Understanding (MOU). Joint administrative apparatuses have

5 been established previously between USDA and State agricultural

6 agencies. USDA maintains MOU's with CDFA for data collection

7 and dissemination. For example, an MOU exhibits between

8 USDA-National Agricultural Statistics Service, CDFA at the

9 California Agricultural Commissioners and Sealers Association

10 to collect and share agricultural statistics for California

11 counties. Furthermore, USDA has had established written

12 agreements with the states of New York and New Jersey to

13 jointly administer coterminously the rules and orders for milk

14 marketing areas in New York and New Jersey (see Exhibits 4.E

15 and 4.F hereto, respectively).

16   Q. Excuse me one moment. Those are rather long documents,

17 your Honor, and I don't intend to go into them. But in

18 general, would you agree that 4.E is an agreement between the

19 US Secretary of Agriculture in the New York Commissioner of

20 Agriculture, and that 4.F is an agreement between the Office of

21 the Milk Director Industry, Industry Director of New Jersey and

22 the US Secretary of Agriculture?

23   A. Yes, I believe those are accurate descriptions.

24   Q. Now proceed.

25   A. The purpose of the agreements is captured succinctly in

1826

1   the New Jersey agreement:

 2   "The procedure outlined (in this document) is hereby

 3   adopted by the Secretary of Agriculture of the United States

 4   and the Director of the Office of Milk Industry, State of New

 5   Jersey, as the framework within which the parties hereto will

 6   cooperate with each other in connection with milk orders

 7   applicable to the handling of milk in marketing areas located

 8   in the State of New Jersey."

 9   The expectation is that the MOU for CDFA and USDA would

10   pursue a similar degree of cooperation and understanding. In

11   effect, the CA-FMMO does not disturb the quota program.

12   Instead, the Cooperatives' proposal, under the Cooperatives'

13   proposal, the quota program becomes embedded within the CA-FMMO

14   with full information transfer between the two governmental

15   agencies. Each month CDFA will communicate to CA-FMMO Market

16   Administrator (MA) all financial calculations relative to the

17   net cost to the pool of quota payments. The MA would then take

18   all steps to assure that quota values are deducted from pool

19   revenues and paid to producers properly. Also, the MA would

20   remit any necessary information regarding quota payments back

21   to CDFA to allow ongoing administration of the quota program.

22   Thus, the proposal leaves all jurisdiction over quota

23   administration, calculations, recordkeeping and regulatory

24   changes to CDFA. As such, the laws, regulations, and policies

25   in operation at the time of adoption of a CA-FMMO would remain

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unchanged. There are no provisions in the Cooperatives'
proposal that would alter quota payments. The quota premium of
19 and a half cents per pound of quota solids not fat is
maintained, as are the applicable RQA's.

As a practical matter of providing the MA with the
information specified in Section 1051.61 and 1051.62, CDFA
would have to determine, obtain, and/or verify each month:

- The active California dairy producers;
- The amounts of quota owned by each producer after
  reviewing and applying quota transactions that
  occurred as of the 15th day of the prior month;
- Location of each producer (to verify applicable RQA);
- Number of days of eligible production; and
- Individual producer quota payment after taking into
  consideration applicable RQA's and eligible
  production for the month.

According to the handler reporting requirements
contained in Section 1051.30 of the Cooperatives' proposal,
pool handlers shall report to the MA as of the 9th day after
the end of the prior month, the pounds of milk, butterfat,
protein, and other nonfat solids contained in producer milk.

Q. Stop right there.

JUDGE CLIFTON: Can you hear him as easily as you could in
the back? So we may have to change. Let's go off record.

(Whereupon a break was taken.)

1   MR. VLAHOS: Back on the record, I guess. At the end --

2   JUDGE CLIFTON: Yes, back on the record.

3   MR. VLAHOS: Regain my composure.

4   BY MR. VLAHOS:

5   Q. When you stopped your testimony there was a footnote at

6   that point. I would like you to read a footnote and explain

7   it, why the footnote is there which identifies a certain

8   change.

9   A. Yes. There's a footnote on the bottom of page 26, and

10 it says:

11   The dates referenced for reporting information to the

12 MA have changed from the proposal submitted in February of

13 2015. Three days has been added to each deadline to

14 accommodate actual accounting practices for milk receipts and

15 utilization.

16   Q. And actually, for the record, we'll represent that that

17 was also a change from the Cooperatives' proposal as contained

18 in the Notice of Hearing. Three days were added to each of

19 those deadlines. Why was that done, Dr. Erba?

20   A. Well, after we talked to the staff at the three coops

21 involved in the proposal, Proposal 1, the accounting staff, and

22 the finance groups, they said they did not think they could

23 consistently hit those deadlines as specified in our original

24 proposal, and that the addition of three days would give them a

25 little more flexibility to hit those reporting deadlines

1829

1 consistently.

2   Q. So we can call this footnote cutting slack for them,

3 right?

4   A. I think that's probably an accurate statement, yes.

5   Q. Okay. Please continue.

6   A. Section 1051.31(a) and (a.1) also allow the MA the

7 flexibility to acquire additional producer information as

8 deemed necessary by the MA, including information pertaining to

9 producer degraded milk for the month. This producer data is to

10 be shared with CDFA along with the applicable class prices

11 (announced by the fifth day after the end of the month). The

12 intention is that before the 14th day after the end of the

13 prior month, CDFA can term and report to the MA of the CA-FMMO

14 the applicable individual producer quota payments. At the same

15 time, CDFA shall report to the MA the quota pounds associated

16 with the milk supply received by each handler, which will be

17 used to determine possible payments into (or draws from) the

18 producer-settlement fund. To be clear, only information is

19 exchanged between the two regulatory agencies; no money will

20 move between CDFA and the MA.

21   Section 2051.61 provides detailed steps describing how

22 the MA shall determine producer component prices for pound of

23 butterfat, protein, and other solids. After combining all

24 values into a single milk sale revenue pool and making the

25 necessary adjustments to that revenue pool (described in

1830

Section 1051.60), the MA shall deduct from the revenue pool an amount equivalent to the quota premium as reported to the MA and by CDFA prior to calculating any milk component prices. As specified in Section 1051.62, the MA shall announce publicly, the applicable quota premiums for solids not fat to be paid to quota holders on eligible milk production and the statistically uniform price for non-quota milk, as well as other relevant prices by the 14th day after the end of the prior month.

The producer-settlement fund is established and used by the MA as a repository for all payments made by handlers and the fund from which payments are made within the Federal Order. Payments due any handler shall be offset by the payments owed by the handler. Payments into the fund by handlers shall follow the steps provided in Section 1051.71 and reflect announced minimum prices and utilization of the components of milk. If any payments are due by a handler, they are to be received no later than the 16th day after the end of the prior month. The procedural steps for payments due handlers from the producer-settlement fund are specified in Section 1051.72. Payments from the producer-settlement fund reflect monies due producers based on each handlers producer payroll, which closely follows procedures followed in other FMMO's. One significant difference for the California FMMO, is if the additional value resulting from a handler receiving milk covered by quota is credited to the handler from the

1831

1 producer-settlement fund. This allows handlers to pay

2 appropriate amounts for all milk received no matter how the

3 milk is used and no matter if the milk is covered by a quota.

4 Payments from the producer-settlement fund, if any, shall be

5 made by the 16th day after the end of the prior month.

6   Q. Does that conclude your prepared testimony, Dr. Erba?

7   A. It does.

8   Q. And that also concludes, your Honor, my direct

9 examination of Dr. Erba. At this time, I would move for

10 admission into evidence of Exhibit 42 with the corrections that

11 have been noted on the record, of the Code 1050 references have

12 been all changed to 5051 references. And with those changes,

13 and I'll assure your Honor, if you so direct, that Meredith

14 does have those changes in the official copy. And with that, I

15 would like to move admission into evidence of Exhibit 42.

16   JUDGE CLIFTON: I have two additional changes that I would

17 ask you, Mr. Vlahos, and you, Dr. Erba if you would like to

18 have me make, and have Ms. Frisius make also on the record

19 copies.

20   The first one is on page 26, and I am looking at a line

21 that is about eight lines from the top.

22   MR. VLAHOS: Starting "degraded milk for the month"?

23   JUDGE CLIFTON: Yes, that line starts that way. Yes.

24   Now, the way Dr. Erba told us the sentence that begins

25 with "this producer data" he said, "this producer data is to be

1832

shared with CDFA along with the applicable class prices," and
if both of you mean that, I would like for us to insert on the
record copies, the word "with".

MR. VLAHOS: I enthusiastically support that.

DR. ERBA: As do I.

JUDGE CLIFTON: All right. So I'm going to ask Ms. Frisius
to make that change on page 26, eighth line down, you are
inserting one word, the word "with", following "CDFA along."

And the other is also a change to conform with what the
reader told us, and it's just a typographical error on page 24,
going from the bottom, moving up about seven lines, there is a
word there that the -- that the reader told us is
"coterminously" and that made sense to me, and it's just typed
wrong. It has an "N" that doesn't belong there. And I would
suggest that we'll just have the record copy have a little
slash through the "N." And does that meet with your approval?

MR. VLAHOS: Agreed, your Honor.

DR. VLAHOS: As do I.

JUDGE CLIFTON: All right. Is there anyone who wants to
ask any questions of the witness before determining whether you
have an objection to the admission of Exhibit 42 into evidence?

MS. FRISIUS: Did we want to do the corrections on page 13
and 18 that were mentioned during the testimony?

JUDGE CLIFTON: Let's see, 13?

MS. FRISIUS: We added the word "for."

1   JUDGE CLIFTON: Yes, that's in. Correct. Oh, not

2 officially, is it? I wrote it on my copy, but yes, thank you

3 so much.

4   Yes, please go to page 13, and about in the middle of

5 the page, the sentence reads, "all four operating option exempt

6 PD's qualify for a further daily deduction." And so that is

7 how it was read by Dr. Erba, "qualify for," and he pointed out

8 that we should correct that, so I'm asking that the record copy

9 be marked accordingly.

10   MS. FRISIUS: The next one is on page 18, same situation.

11   MR. VLAHOS: Just above producer review board heading?

12   JUDGE CLIFTON: All right. So we're adding the two words

13 "nonfat" so the record copies will read, "quota solids not

14 fat." Good.

15   MR. VLAHOS: Your Honor, if I may, just another question or

16 two.

17   JUDGE CLIFTON: You may.

18 BY MR. VLAHOS:

19   Q. Dr. Erba, in Tables 2 and 3, and those are the tables

20 within the text. You prepared those tables?

21   A. Yes.

22   Q. Where did -- what was the source of your information?

23   A. The information on each of those tables came from the

24 Department of -- California Department of Food and Agriculture.

25   Q. Thank you. That concludes my direct testimony, your

1834

1   Honor.

2   JUDGE CLIFTON: All right. Is there any objection --

3   MR. VLAHOS: Dr. Erba's direct testimony.

4   JUDGE CLIFTON: That is an important correction. Is there,

5   is there any objection of the admission into evidence of

6   Exhibit 42?

7   MR. VLAHOS: Yes. I withdraw my objection.

8   JUDGE CLIFTON: There never was one.

9   MR. VLAHOS: No, I know.

10   JUDGE CLIFTON: All right. Exhibit 42 is admitted into

11 evidence. Vlahos?

12   (Thereafter, Exhibit Number 42 was

13   received into evidence.)

14   MR. VLAHOS: Yes. Mr. English has kindly pointed out to me

15 that in my haste to sit down again, I forgot to move for

16 admission of Exhibit 43, which I now so move.

17   JUDGE CLIFTON: Does anyone want to ask any questions of

18 the witness before you determine whether you have any

19 objections to the admission into evidence of Exhibit 43? There

20 is no one. Is there any objection to the admission into

21 evidence of Exhibit 43? There is none. Exhibit 43 is admitted

22 into evidence.

23   (Thereafter, Exhibit Number 43 was

24   received into evidence.)

25   MR. VLAHOS: Thank you, your Honor.

1   JUDGE CLIFTON: It is it is 11:55. This is amazingly

         2 complex.

         3   Dr. Erba, I thank you for this presentation. I think

         4 it's extremely valuable. I wish I could say I understood it.

         5 I tried very hard. It is extremely complicated. I know most

         6 of the people in this room had to get their heads around it to

         7 some extent already, but I suggest that perhaps

         8 cross-examination should be after lunch. Is everyone in

         9 agreement?

        10   MR. ENGLISH: I agree. It's very complex stuff, and I

        11 think cross-examination will be more efficient if we had maybe

        12 an extra 15 minutes, so an hour and 30. And I think the

        13 witness and the court reporter might need the break as well.

        14 So I propose an hour and 30 minutes today.

        15   JUDGE CLIFTON: All right. Good. I like the idea.

        16   I have an idea that I want you all to think about, and

        17 you don't have to give me an answer today, but I want you to

        18 think about it. You will remember I mentioned as a preliminary

        19 matter, that there is one organization that is recording the

        20 audio feed and making it available to its members on a website.

        21 And I thought that was an excellent thing, in that we won't

        22 have the transcript immediately, and this opportunity to listen

        23 to some of the testimony again would be valuable.

        24   The idea that I want you to think about is that that

        25 website is Agribusiness Publications. And we would all be

1 welcome to use it. Anyone would be welcome to access the

2 information there.

3   The gentleman whose been here with us for part of the

4 hearing, he's not in the room right now, who is the owner,

5 publisher, is Tom Van Nortwick. What he would like to do to

6 make it even more helpful and useful, is he would like to post

7 on that same website copies of the exhibits.

8   Now, the easiest way for him to upload them to the

9 website is if he had a PDF of them. Many of those that we have

10 marked on by putting an exhibit number on them or making

11 corrections to them, don't look like what you might have

12 available to convert to a PDF. I don't -- we could perhaps

13 just gather for his use, a hard copy that's been corrected and

14 let him scan them and put them up. Perhaps we -- perhaps we

15 don't want that. The main thing is, we don't want any exhibit

16 posted anywhere that's not a hundred percent accurate. So

17 that's number one concern.

18   I'm not asking for any response now. I want you to

19 think about it. I'm very grateful that the audio feed would be

20 available for people who aren't listening between 9:00 and 5:00

21 Pacific who might want to hear some of the testimony and might

22 not want to wait for the transcript.

23   So like I said, I'm not asking for a response right

24 now. I do want you to talk about it and think about it, and

25 see what you would prefer, what you would suggest. All right.

1837

1   Is there anything further before we break for lunch?

2   12:00 now. Please be back and ready to go at 1:30.

3   (Whereupon the lunch recess was taken.)

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FRIDAY, OCTOBER 2, 2015 - - AFTERNOON SESSION

2   JUDGE CLIFTON: All right. We're back on record at 1:34.

3 Who would like to begin cross-examination of Dr. Erba?

4   CROSS-EXAMINATION

5 BY MS. HANCOCK:

6   Q. Nicole Hancock for California Producer Handlers

7 Association.

8   Good afternoon, Dr. Erba.

9   A. Good afternoon.

10   Q. Do you still have Exhibit 42 in front of you?

11   A. Yes, I do.

12   Q. If you can turn to, you wrote it so you probably know

13 what it says, on page 22 of Exhibit 42 you talk about Section

14 62726 of the California Food and Agricultural Code.

15   A. Yes.

16   Q. And it goes on, your discussion goes on to page 23.

17 And you summed it up by saying, "If an FMMO is approved by a

18 referendum of California producers, those aspects of the

19 California state statutes that are in conflict with the FMMO or

20 a duplicate of the FMMO, shall be suspended." Is that right?

21   A. That's correct.

22   Q. Okay. And then clearly the quota program is not

23 duplicative of any aspect of the FMMO, and so that's how you

24 preserve the quota program as it is written in the California

25 Agricultural, the California Food and Agricultural Code?

1   A.   Yes, that would be our position.

2   Q.   Okay. And as you know, the California Producer

3 Handlers Association holds exempt quota that's also discussed

4 in the California Food and Agricultural Code. You are aware of

5 that?

6   A.   Yes.

7   Q.   And the reason that as the Cooperatives' proposal has

8 drafted Proposal Number 1, the reason that that proposal does

9 not preserve the exempt quota that the California Producer

10 Handlers currently hold under the state order system, is

11 because of the producer handler definition that you have within

12 Proposal Number 1. Is that your understanding?

13   A.   I don't know if it was quite that way. I would say

14 that our proposal just simply didn't address exempt quota, and

15 I don't know that we necessarily linked it to the federal

16 definition of producer handler, we just didn't address how

17 exempt quota might be preserved.

18   Q.   Okay. So you are just silent on the treatment for the

19 current California Producer Handlers Association's treatment of

20 exempt quota. Right?

21   A.   Right.

22   Q.   But it is your understanding that at least as written

23 right now, that your Proposal Number 1 would not allow for that

24 exempt quota to be carried forward?

25   A.   Right. There's no mechanism in what we would propose

1 that would do that.

2   Q. And similar, there's no, similarly, there's no

3 mechanism for the treatment of quota in Proposal Number 1

4 either, right?

5   A. I'm not sure what you mean with that one.

6   Q. Well, in the proposal for the federal regulatory

7 language, the Cooperatives have not proposed any quota

8 language.

9   A. I guess sort of yes. Looking, I guess explain that

10 one. We haven't, what we have entertained, what we've proposed

11 is a working relationship between CDFA and USDA, so that the

12 quota remains at the, in the jurisdiction of CDFA, and not

13 necessarily is found in our proposed language for the Federal

14 Order for California, so there has to be a working relationship

15 between the two agencies to make sure that the quota program is

16 preserved as we have proposed.

17   Q. Okay. So but what you are talking about right now is

18 just the administration of how it would be calculated; is that

19 right?

20   A. Yes. Yes. We'll just leave it at yes.

21   Q. Okay. And maybe I'm -- I might be making this more

22 complicated. I'm just trying to kind of lay the background for

23 the rest of our discussion. So in laying that background, I

24 just want to make clear that there's some -- let me say it

25 differently. Under the Cooperatives' proposal, you proposed a

1841

1 definition for producer-handler that's different than how it is

2 currently defined in the California state order system?

3   A. That is correct.

4   Q. Okay. And because it's different, it would be in

5 conflict with what's in the state order system?

6   A. Seemingly, yes.

7   Q. Okay. Or potentially could be?

8   A. Yes.

9   Q. Unless we fixed it somewhere along the way?

10   A. Correct.

11   Q. Okay. And in your testimony you described quota as an

12 asset or a financial instrument for your members, your producer

13 members?

14   A. Yes.

15   Q. And I think you said that there is -- there is two

16 aspects to the value. There's a value in the pool treatment,

17 and then also the asset sale value. Is that -- is that a fair

18 characterization of how you describe those values?

19   A. I don't recall breaking it into two pieces. The

20 descriptor as I presented it, entitles the holder to a higher

21 price for milk. I don't recall that I made that necessary to a

22 sale value, but obviously it is an asset that can be sold. So

23 if that's what you mean, then yes.

24   Q. And I'm referring back to the chart where you had, in

25 Exhibit 43, I think it was 1.B or 1.C.

1842

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1   A. The long table?

2   Q. The table that was showing the trading values.

3   A. Yes.

4   Q. Okay. So there is the value in holding quota because

5   you receive the higher price from the pool, that's one part of

6   it.

7   A. Yes.

8   Q. And then the other part of it is the value that you

9   hold as a tradable asset that you can freely exchange it, you

10 can sell the quota.

11   A. Okay. I understand what you are saying now. So yes.

12 Correct.

13   Q. So two different types of value that that quota holds

14 for your members?

15   A. Right.

16   Q. Okay. And do you understand how exempt quota works

17 under the California state order system currently?

18   A. I think I tried to articulate that, although maybe I

19 did not succeed, but yes.

20   Q. I thought you did a great job. I thought you saved me

21 a lot of work, so I appreciated that.

22   But there is the same, I think you described it as an

23 economic benefit for exempt quota beyond that of the regular

24 quota.

25   A. Correct.

Q. Can you describe for me what you meant when you said "an economic benefit beyond the regular quota?"

A. The exempt quota has all the characteristics of standard or regular quota, in that it holds the 19 and a half cents per pound advantage, per pound solids not fat per day, advantage over for -- well, I screwed this up. It has the same application as a 19 and a half cent per pound of quota per day, as your regular or standard quota.

The exempt quota -- so it would -- exempt quota can default to regular quota, so it still has that value, even if your members were to sell it, which has happened. It still takes on that quota value. It has the additional value of the holder not having to report to the pool those Class 1 sales covered by that quota. So that's the additional benefit that I talked about.

Q. So that additional economic benefit to the exempt quota would be the same attributes as regular quota, so you have a tradable value if you ever sell it?

A. Correct.

Q. And then if you treat it as it is regular quota, you would receive the higher quota price.

A. Right.

Q. But if you, the added benefit is it if you treat it as exempt, you don't receive that higher quota price, you just don't, you get whatever price you are able to negotiate with

1844

1 your end customer without regard to the pool. Is that what

2 your understanding of how it works?

3   A. For the exempt quota?

4   Q. For the exempt quota.

5   A. No, I would not say that. I would say that it's -- it

6 waives the obligation for the reporting of those Class 1 sales

7 to the pool and actually comes out as a, I believe a credit,

8 and you report it and you get credited back. So you basically

9 don't have to pay the Class 1 price for that milk that was

10 produced as a Class 1 product. That's the exemption part of

11 it. I'm not sure if that's what you had in mind or not, but

12 that's my understanding.

13   Q. So if I can simplify the numbers. Let's say you own a

14 hundred, let's say you hold a hundred -- is it a hundred -- I

15 have lost the term.

16   A. How about just units.

17   Q. Units of exempt quota and you produce two hundred units

18 of Class 1. A hundred of the units would not be counted toward

19 the pool, but your second hundred would. Is that what you are

20 saying?

21   A. Right. So you would not have to report to the pool any

22 of that Class 1 sales that are covered by your exempt quota.

23   Q. And so the additional economic impact is that you get,

24 you don't have to count those towards your Class 1 sales, any

25 regular quota that you hold, you still get to keep and count

1845

1 that towards your pool?

2   A. Right. It isn't applied, the regular quota would not

3 apply to Class 1, just on the production side.

4   Q. And I think you described in here that as of March of

5 1995, producer-handlers, at that point, were capped at the

6 exact quota that they could receive.

7   A. As far as I know, that is the last date that, March

8 1995, the last date that exempt quota was allowed to be

9 counted. So you would basically change in -- exchange your

10 quota for exempt quota. And after that date, it was not

11 allowed.

12   Q. And if a producer-handler were to acquire quota after

13 that date, they would acquire that as regular quota?

14   A. Correct. That's my understanding.

15   Q. So producer quota -- excuse me, producer-handler could

16 own exempt quota and regular quota at the same time?

17   A. Correct.

18   Q. At least Option 70 producers?

19   A. Yes.

20   Q. Producer-handlers?

21   A. Yes.

22   Q. And just quick clarification on that. Are you aware of

23 any Option 66 producer-handlers?

24   A. When I worked for the Department from 1997 to 2004 when

25 I got out of the dairy side of things, there were two operating

1846

1 at that time. I don't know if either one of those continues to

2 exist.

3   Q. What year was that?

4   A. From '97 to 2004.

5   Q. And I'll represent to you that my four

6 producer-handlers that I represent are Option 70

7 producer-handlers.

8   A. Yes, I know.

9   Q. Okay. So for purposes of my discussion, that's the

10 part that I'm talking about, just so our record is clear.

11   A. Yes.

12   Q. And may I --

13   JUDGE CLIFTON: May I interject? I want Dr. Erba to be

14 specific about his use of the word "report". So if there is

15 exempt quota and there's no financial obligation as to that

16 exempt quota to the pool, does the person holding the exempt

17 quota still have to report it to someone and get the credit on

18 someone's books?

19   DR. ERBA: I believe that's how it works. It doesn't --

20 I'll go from memory here, and I was not intimately involved

21 with the reports that were filed, but my understanding is that

22 those sales, all sales are reported, and then there's a credit

23 back out for the milk that's the Class 1 sales covered by

24 exempt quota. Now, that may not be entirely right, maybe none

25 of it is reported, but I think that's the way it works.

1847

1   JUDGE CLIFTON: Thank you.

2   MS. HANCOCK: AND I think it is deducted from the pool.

3   DR. ERBA: Deducted. Okay.

4   BY MS. HANCOCK:

5   Q. You gave an overview of how location differentials, and

6   then later on transportation credits, operate in the pool in

7   California, or under the California order. Is it your

8   understanding that, or is what is your understanding of whether

9   the exempt quota holders are able to utilize any transportation

10   credits?

11   A. I think the word you are looking for is actually

12   transportation allowances. There's credits as well, but this

13   is an allowances issue. And as I understand it, they are not

14   eligible for transportation allowances. Exempt quota is not

15   eligible for transportation allowances.

16   Q. Did you conduct any kind of financial evaluation or

17   analysis of what the transportation allowances would be if

18   those exempt, if that exempt quota were treated as regular

19   quota and was then entitled to transportation allowances?

20   A. I did not but our counsel did, and we reviewed it. And

21   over all of the Option 70, the exempt producer-handlers, what

22   we calculated, of course, so this is going to be, require some

23   estimation and so far forth, but it is a very small effect on

24   the pool. So if the exempt quota piece were to go away and the

25   quota would still exist as regular quota, and now that milk be,

1848

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1 some of that milk be eligible for transportation allowances,

2 the cost on the pool was very small. I don't remember if it

3 was a plus or minus, but it is a very small number.

4   Q. You can turn to page 13 of Exhibit 42. And in your

5 document it says that, "a combined Class 1 exemption, there are

6 four," -- let me start at the beginning of the sentence.

7   "There are four option exempt PD's operating in

8 California, and their combined Class 1 exemptions are 57,914

9 pounds per day."

10   Do you see that?

11   A. Yes, I do.

12   Q. That would be what you -- where did you get that number

13 from?

14   A. I got it from Department of Food and Agriculture.

15   Q. Okay.

16   A. California Department of Food and Agriculture.

17   Q. And if you -- do you by chance have your phone up there

18 with you?

19   A. No, I purposely did not take it with me.

20   Q. Can I give you my phone to use for my calculator?

21   A. Do I have to give it back?

22   Q. You could answer all the e-mails, then.

23   So if there are 57,914 pounds of exemption, and you can

24 sell that quota at, I think, what is it, $525 is what you have

25 averaged for today's price?

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1   A.   Right.

2   Q.   Let's quantify that. Make sure that my math is

3   correct. So 57,914 multiplied by the $525, do you get

4   $28,829,850?

5   A.   No, I did not. Which means I probably hit the wrong

6   button here.

7   Q.   Or I did.

8   A.   I got $30,404,850.

9   Q.   I trust the Economist. And then let's compare that. I

10 wrote the number down, so hold onto that for one second. You

11 have on page 24 listed, that the market value of all of the

12 quota is 1.2 billion on page 24.

13   A.   Yes.

14   Q.   Exhibit 42.

15   A.   Yes.

16   Q.   So I took my incorrect number, but let's use your

17 number and divide that, what I'm ultimately trying to get is

18 the percentage of the exempt quota as compared to the total

19 quota pool.

20   A.   I have rounded slightly, but about two and a half

21 percent is what I get.

22   Q.   So just so the record's clear, the exempt quota under

23 these calculations, the exempt quota makes up about two and a

24 half percent of the total quota in the State of California

25 under the state order system?

1850

1   A.   Oh, I'm sorry, yes, that appears to be correct. It is

2   a small percentage.

3   Q.   Okay. And you have in here that it equates to about

4   five percent of the Class 1 milk produced in the state. Do you

5   know what the percentage is of the total pool?

6   A.   The exempt quota?

7   Q.   As compared to the total pool?

8   A.   Something a lot smaller than five percent, but no, I

9   have not calculated that.

10   Q.   Do you know what percentage the quota makes, the total

11 quota makes, of the total pool?

12   A.   I believe it is around the 22 to 25 percent range,

13 although I'm not totally certain of that.

14   Q.   And that's of the total pool, not of the Class 1 milk?

15   A.   I think that's right.

16   Q.   So other than the restriction for having to deliver

17 quota milk to the pool within a 60-day window, are there any

18 other restrictions on quota holders and their ability to

19 transfer or operate within the pool that you are aware of?

20   A.   Yes. And I went over those somewhere. Under producer

21 responsibility on page 14, "quota holders have to produce milk

22 on a dairy farm located in California, and they also must meet

23 certain quality standards, or the milk, even if covered by

24 quota, is not eligible to receive it." And that may be it

25 because the other one you already listed here.

1   Q.   Are there any requirements for maintaining ownership

2 within a family lineage?

3   A.   For regular quota?

4   Q.   For regular quota?

5   A.   No.

6   Q.   Any restrictions on sales other than selling to another

7 producer that you just described?

8   A.   Sale of quota, you mean?

9   Q.   Sale of regular quota?

10   A.   Well, there are the restrictions about, have you bought

11 or sold any within a two-year period on both sides of the

12 transaction, but other than that, I don't think so.

13   Q.   So the restrictions for exempt quota are more severe

14 on, the restrictions against transfer, are more severe for

15 exempt quota than for regular quota?

16   A.   Right. So if you -- if the -- if any of the four

17 producer-handlers, the option exempt producer-handlers, were to

18 attempt to sell their exempt quota, it would lose its exempt

19 status.

20   Q.   On page 24 you have a statement that says, "the

21 Cooperatives' proposal recognizes the importance and

22 sensitivity of maintaining the quota program virtually intact

23 within the California Federal Milk Marketing Order."

24   Do you see that?

25   A.   I do.

1852

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1   Q.   Would that include the treatment for exempt quota as

2 well?

3   A.   Well, as I said earlier, our proposal doesn't

4 specifically address exempt quota, but that is part of the

5 quota program as it exists today.

6   Q.   So assuming that you are presented with language from

7 the California Producer Handlers Association that would

8 preserve the exempt quota as it exists today under the

9 California system without altering any other provisions within

10 the Cooperatives' proposal, would the Cooperatives be

11 supportive of that proposal?

12   A.   We certainly would like to see that language and we

13 would absolutely consider it, although I can't give you a

14 definitive statement until I at least see the language, but

15 excepting unintended consequences of trying to preserve the

16 exempt quota, we would absolutely consider adopting that

17 language, or at least working with you to develop that

18 language.

19   Q.   Thank you.   I have no further questions.

20   DIRECT EXAMINATION

21 BY MR. VLAHOS:

22   Q.   John Vlahos, your Honor.

23   Just a couple of points of clarification.   On the issue

24 of transfer, I just want to make sure the record is clear.   An

25 exempt quota holder is not restricted in any way from selling

1   his or her quota, they just lose the exemption; is that

2   correct?

3   A. I think generally your statement is correct, and of

4   course you would have to sell it to an eligible buyer, you

5   couldn't just sell it to anybody on the street, but yes.

6   Q. Okay. The other thing Ms. Hancock asked you if there

7   was anything in the coops' proposal that dealt with quota, and

8   I just want to call your attention to Section 1051.17 of the

9   coop proposal as contained in the Notice of Hearing.

10   May I show the witness, your Honor, that section?

11   JUDGE CLIFTON: You may.

12 BY MR. VLAHOS:

13   Q. That's actually -- the coop proposal does have

14   references to the quota; is that correct?

15   A. Yes.

16   Q. Can you just briefly describe what, they speak for

17   themselves, but briefly describe how it does so.

18   A. Sure. It's just a -- from the -- from what it says, a

19   definitional section of the proposal, the language proposed

20   that addresses items such as quota premium, quota nonfat

21   solids, and non-quota milk.

22   Q. Does it also deal with the CDFA having some role in

23   this?

24   A. It defines that CDFA would be the administrator of the

25   California quota program.

1854

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1   Q. Thank you.

2   CROSS-EXAMINATION

3 BY MR. ENGLISH:

4   Q. Chip English. Good afternoon, Dr. Erba.

5   A. Good afternoon.

6   Q. So let me first, just for efficiency purposes, if

7 possible, ask, are you -- is this your one time on the witness

8 stand or are you going to be here on other subjects, to your

9 knowledge?

10   A. I don't know. I'm looking at my counsel and they are

11 throwing their hands up in the air as if they don't know

12 either.

13   Q. So to your knowledge, this may be the one time that you

14 are on the witness stand?

15   A. This maybe the one time.

16   Q. Okay. Thank you. So let me maybe actually reverse

17 myself and start at a different place than I might have, but

18 since Ms. Hancock asked you some questions, let me go to some

19 of those materials and ask about some of the linkage.

20   With respect to the quota, do you understand that under

21 the Cooperatives' proposal, out-of-state milk that is received

22 at a plant in California, that today receives whatever it

23 receives as a price, would instead, on a regulatory basis, the

24 handler would receive a credit at the overbase price for that

25 milk?

                              1855

1   A. I believe that's correct.

2   Q. Okay. And that out-of-state milk, under California

3 law, cannot own quota, correct?

4   A. Yes, you have to be a dairy farm producing milk in

5 California to own quota.

6   Q. So if you are a dairy farm in Arizona and you ship to a

7 Southern California facility, I'm sorry, yes, a dairy farm, you

8 ship to a Southern California fluid milk plant, you cannot own

9 quota, correct?

10   A. Not on that Arizona.

11   Q. On that Arizona volume?

12   A. Right.

13   Q. So on page 24, when Ms. Hancock read the sentence to

14 you, you say the Cooperatives' proposal recognizes the

15 importance and sensitivity of maintaining the quota program

16 virtually intact within the California Federal Milk Marketing

17 Order. In fact, you are effectively expanding it to include

18 out-of-state milk that ends up being pooled on the California

19 order, correct?

20   A. Well, I don't see it that way. Maybe the words of that

21 sentence aren't exactly correct, although I kind of think they

22 are. Basically, what it says is the quota program stays as it

23 is, as it is today, which would be that California dairy farms

24 are the only potential owners of quota, and we're not expanding

25 it beyond that.

1856

1   Q. Well, except that today, that out-of-state milk that is

2   received by a California pool distributing plant is effectively

3   held harmless on the quota value, correct?

4   A. Correct.

5   Q. Okay. And the change is that instead, the handler

6   receiving that milk will get a credit at the lower overbase

7   price. Correct?

8   A. I could see, correct, I see where you are going with

9   this, but I suppose maybe it is just a difference in how you

10   view it. I don't see that as an expansion of the quota

11   program. There may be some changes in how milk is priced to

12   pool, but I don't see quota being expanded by this.

13   Q. Doesn't it effectively mathematically enhance the value

14   of quota?

15   A. By -- can you finish the thought? By?

16   Q. So milk that presently washes out of the system because

17   it is out-of-state milk, and after the Hillside Dairy case it

18   is treated effectively as if it is just not there in terms of

19   accounting purposes. By including the milk in the volume but

20   now giving it a credit at the overbase price, doesn't that

21   increase the value of quota?

22   A. I don't think it increases the value of quota.

23   Q. Does it increase the value of the -- I'm sorry, does it

24   increase the quota price? All other things being equal, does

25   that by itself increase the quota price?

1857

1   MR. VLAHOS: Objection, maybe it's more a request for

2   clarification than an objection.

3   Mr. English, if I may ask, when you say the quota

4   price, do you mean the price at which quota is sold from a

5   seller to a buyer?

6   BY MR. ENGLISH:

7   Q. No, I meant the milk price. I'm not speaking, and I'm

8   not speaking about what quota transfers for, although one could

9   argue that that might change, I'm not there. I'm talking about

10 in a given month, today, in October of 2015, when that milk

11 that comes in from out-of-state to a California pool

12 distributing plant receives a credit, at the end plant blend,

13 correct? That's effectively what happens when it goes to a

14 pool distributing plant, correct?

15   A. Out-of-state milk?

16   Q. Goes to a California pool distributing plant. The

17 California, effectively on accounting mechanism, gives that a

18 credit at the end plant blend, correct?

19   A. That I'm not sure of. I would not have said that, but

20 you maybe right on that one. I'm not sure about that.

21   Q. Assuming I'm right and the credit is effectively at the

22 end plant blend, if instead for the same month, the credit

23 becomes the overbase price, and assume that prices are in

24 normal relationship so that one is the highest price, we don't

25 have any inversions, with that credit now at the overbase

1858

1 price, doesn't that mean that the overall value of what is left

2 over to be distributed for quota has increased?

3   A.   I think the value of the pool increases and all pool

4 prices would increase, but quota price would not increase

5 independent of the overbase price or the base price.

6   Q.   But the credit that's been permitted to the handler is

7 at the overbase price, and so it is now going to pay more into

8 the pool, or pay more to account for that quota value, isn't

9 it?

10   A.   I guess I'm just simply not following you.

11   Q.   Okay. We'll try it a different way.

12   The in-state fluid milk processor, let's assume for a

13 moment that it receives one hundred percent of its milk from

14 out-of-state. And let's assume a much more simple pool where

15 you only have basically two Class 1 handlers, and both are the

16 same size. Under today's scenario, that processor which

17 obtains a hundred percent -- hypothetical processor receiving a

18 hundred percent of its supply of out-of-state milk has no

19 obligation to the California pool, correct?

20   A.   I believe that's correct.

21   Q.   If your proposal is adopted, the credit that instead,

22 that handler now will have a pool obligation identical, they

23 have got same Class 1 utilization, will have identical pool

24 obligation to the handler that receives a hundred percent of

25 its milk in-state, correct?

1   A. Correct.

2   Q. And it will receive a credit for the milk that is

3 received from out-of-state at the overbase price, correct?

4   A. Correct.

5   Q. That difference is brand new money for the California

6 pool, correct?

7   A. Yes.

8   Q. Okay. And because you deduct the quota value before

9 you calculate the value of the pool, that larger pool value

10 will be first proportionately distributed to California dairy

11 farmers with quota, correct?

12   A. Correct.

13   Q. Thank you. Now, let's take a different example.

14 Hypothetically, actually, let me first take you to when you do

15 your calculation of the producers who don't own quota. Is

16 that, is that calculation based upon California producers

17 shipping to California plants or does it include California

18 milk that is received at plants outside of California?

19   A. Are you talking about Table 1 on page 21?

20   Q. Yes.

21   A. I have already forgotten your question. Could you

22 re-ask the question, please?

23   Q. Yes. For the line that is number of dairy farms --

24   A. Yes.

25   Q. -- is that a number of dairy farms, all dairy farms

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located in California with Grade A milk, or is that number of

dairy farms in California shipping to California plants?

A. It's on the same report that gives the information from

which this table was generated and it doesn't specify. It just

says California dairy farms on it, and it doesn't tell what

those dairy farms are. I think it is simply California dairy

farms with Grade A permits.

Q. Okay. So in that case, if a California farm has been

selling say to a plant in Arizona for more than 60 days, by

definition from your discussion in your testimony, it no longer

qualifies, it hasn't qualified its quota, correct?

A. If it -- yes. If it owns any quota, which it may not,

it would not have maintained its eligibility to continue to

hold that quota, but that doesn't mean it is not a Grade A

facility.

Q. I understand that. We understand that Grade A is a

different designation for this purpose, correct?

A. Yes.

JUDGE CLIFTON: So Mr. English, your hypothetical has the

farm selling all of its milk out-of-state?

MR. ENGLISH: Yes, thank you, your Honor.

BY MR. ENGLISH:

Q. So selling all of its milk to an Arizona plant, day in

day out, for more than 60 days, and it has Grade A status so

we're not talking about any non-Grade A issue.

1   It either didn't own quota, or if it did own quota, it

2 hasn't qualified as quota at that point, correct?

3   A. That's why I interpreted that, yes.

4   Q. Okay. So now if that producer today ships to an

5 Arizona facility, and that Arizona facility is today regulated

6 on the Arizona Federal Order, but if your proposal was adopted,

7 and I think there was some testimony about this from

8 Mr. Hollon, it is instead regulated on the California Federal

9 Order. That plant's milk, whether it's received from Arizona

10 or California, non-quota milk, because that's what it was, will

11 be all credited at the overbase price, correct?

12   A. I'm not sure about that. I mean, we have performance

13 standards in there that would dictate which plants are and

14 aren't pooled on the California order, but I'm not sure how

15 that meshes with your question.

16   Q. Okay. So -- and I know you are not, at least that's

17 why I asked the question earlier if you are coming up again and

18 which witness you are and all of that. And I know you didn't

19 talk about the pooling provisions and I'm not trying to overlap

20 them here. But assume for a moment that such a facility would

21 meet the performance standards of the California Federal Order

22 under Section 7. And today it is regulated under Arizona, but

23 because of the new California Federal Order, will instead be

24 regulated on California. Do you understand that so far?

25   A. Yes.

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1 Q. Okay. That plant today, let's say it receives milk

2 from two dairy farmers, one farmer from Arizona and one farmer

3 from California who owns no quota. Today, that handler

4 accounts to the Arizona Federal Order pool and its producers

5 are paid the Federal Order blend price in Arizona, correct?

6 A. Okay. Yes, I guess.

7 Q. And if my hypothetical is correct and instead, the

8 plant after adoption of the California Federal Order, meets the

9 performance standards under Section 7 and is regulated under

10 the California Order, the credit for the handler will instead

11 be on those two producers, the overbase price for the milk,

12 correct?

13 A. I believe that would be correct.

14 Q. And the California pool will, therefore, gain the

15 difference between the credit on the overbase price and the

16 minimum price for the milk at the plant blend, at the plant

17 values, correct?

18 A. Would the gain include a loss?

19 Q. If the prices are a normal relationship and it is a

20 pool distributing plant Class 1, isn't that new revenues for

21 the California pool?

22 A. Sorry, didn't link in Class 1 part. Yes.

23 Q. Now, I asked the question earlier of Mr. Wegner, and

24 I'll ask the same of you, are you a witness to whom I should

25 discuss 1000.76, partially regulated, or is there a witness I

1   should discuss that issue with?

2   A. I'm pretty sure that's not me.

3   Q. I wouldn't call that a leading question, but it

4   certainly had a leading answer. Okay.

5   So that section was really designed to tie in with

6   Ms. Hancock's section, so I will change subjects now.

7   JUDGE CLIFTON: So, Mr. English, I think I understood, but

8   what you are saying is if, if as a result of Proposal Number 1

9   there's more value in the pool, that's going to help quota

10   holders? Is that your question?

11   MR. ENGLISH: I think it was -- it's more than that. It's,

12   in essence, that out-of-state milk is going to be treated

13   different differentially than it is today, and that

14   differential treatment inures to the benefit of in-state dairy

15   farmers.

16   DR. ERBA: You know, if you had said that, we could have

17   been done with this section 20 minutes ago.

18   MR. ENGLISH: Would you agree with that?

19   DR. ERBA: I think that wasn't --

20   MR. ENGLISH: You would agree with that?

21   DR. ERBA: I think that's an accurate description.

22   MR. ENGLISH: Fine. Sometimes you got to lead to explain

23   it. Thank you, your Honor, for explaining it.

24   JUDGE CLIFTON: Together we are making progress.

25   BY MR. ENGLISH:

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1   Q. So let's talk about the history here a little bit more

2   of what happened and why. And turning to page 4, it maybe

3   simplify it a little bit for me, in essence, what California

4   had prior to the adoption of the Gonsalves Milk Pooling Act,

5   was classified pricing without pooling; is that correct?

6   A. That is correct.

7   Q. Okay. And as with the history of federal orders, you

8   can have classified pricing, but without pooling, that created

9   economic incentives that you have described as destructive

10   competition, correct?

11   A. I think I called it destructive marketing practices,

12   but I think it encompasses the same things.

13   Q. All right. Now, when you say on page 5, the second to

14   the last paragraph, that "early efforts to establish a revenue

15   distribution program were not successful because the producer

16   community could not agree on the basic concepts of the

17   program," by revenue distribution program, you effectively mean

18   pooling, correct?

19   A. That's right.

20   Q. Okay. And when you say "the producers could not agree

21   on basic concepts of the program" that's because those

22   producers who had contracts for Class 1 that they thought were

23   secure, didn't want to give up the value of that Class 1 milk,

24   correct?

25   A. Well, since I wasn't born when this was all happening,

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1 I would say that from the history, that, yes, that is exactly

2 what the problem was.

3 Q. And so effectively, the negotiation -- yes, thank you

4 for pointing out that you are younger than I am.

5 A. I know there was some question about that.

6 Q. You wanted to clarify that?

7 A. Yes, I did.

8 Q. So effectively, the Gonsalves Milk Pooling Act was the

9 compromise that brought those people with the Class 1 contract,

10 those dairy farmers with the Class 1 contracts, to the table

11 and agreeing to pool it, correct?

12 A. That is correct.

13 Q. And so that is why, once it was adopted, there was a

14 fairly direct tie between quota being issued and Class 1,

15 correct?

16 A. Right.

17 Q. Okay. Thank you. So turning to page 6, and I had a

18 couple questions that literally are just trying to, in my mind,

19 clear things up, because I may have been alive, but I wasn't in

20 California practicing milk law at the time.

21 The producers had the choice, I think it was the

22 producers choice between taking July 1966 through December '66

23 for the '67 calendar year?

24 A. Yes, I believe that's correct.

25 Q. And was that effectively a choice that would give them

1866

1 the higher of whichever those two were?

2   A. Yes, I think that's correct.

3   Q. A rational, a rational dairy farmer would have chosen

4 the higher of those two numbers, correct?

5   A. I think so, yes.

6   Q. And then the pool was established at 110 percent of the

7 Class 1 usage. Now, was the 110 percent of the Class 1 usage

8 as of the 1967 or was it 110 percent of whatever those

9 producers picked and they added them all together, and then you

10 multiplied that by 110 percent?

11   A. Well, you said pool, and not pool quota, and I'm pretty

12 sure that's what you meant, pool quota. I believe it is what

13 -- now that I have corrected you, I've forgot what I was going

14 to say exactly, but yes, I believe it was the 110 percent of

15 whichever those numbers they picked from those two periods.

16   Q. So, in essence, it really it was more than 110 percent

17 of Class 1, wasn't it? If you, if everybody picked the higher

18 of their volumes between July of '66 and December of '66 or the

19 calendar '67, wouldn't that almost sort of the sum of those

20 numbers, picking the higher of, be greater than the actual

21 Class 1?

22   A. Seemingly, yes.

23   Q. Okay. And in which case, the 110 percent would

24 actually be, when you multiply all of that, it is probably more

25 than 110 percent, correct?

1   A. I think so. But I have to assume that the people at

2 the time knew what they were doing. Seems funny we look back

3 on it now, but obviously it worked at that time.

4   Q. Now, on page 10 -- and I just got lost -- you are

5 talking about the RQA's. And you say in the middle of that

6 first full paragraph on page 10, "the RQA's actually return

7 revenue to the pool."

8   And when you say it returns revenue to the pool, which

9 pool do you mean, the quota pool or the total pool?

10   A. Total pool.

11   Q. Okay. So is that byway of saying when you take the

12 $1.70, but if a producer is in the minus 27 cent zone for all

13 of its quota value, for all its quota pounds, that 27 cents

14 gets put back into the pool?

15   A. Well, they actually never get it.

16   Q. Sorry?

17   A. They never get it. It is -- when they get paid out,

18 they don't get paid $1.70 and then put money back in, they just

19 don't get the full $1.70.

20   Q. For accounting mechanism, they would initially get

21 accounted for $1.70 and subtract 27 cents, that adds to the

22 overall pool?

23   A. Right. So if you were take all the RQA's and set them

24 at zero, the entire pool value would go down, which means the

25 quota price and the overbase price and the base price would all

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1 go down.

2   Q. Okay. And you talk about, on page 11, that location

3 differentials based solely on quota milk were no longer able to

4 ensure that adequate supplies, milk supplies, were made

5 available to Class 1 plants.

6   How could all that link to the RQA's?

7   A. The location differentials were a precursor to the

8 RQA's, and location differentials were either deducted from or

9 added to quota payments, depending on where that quota milk was

10 shipped. So when, as I said in that paragraph, as overbase

11 became a larger share and quota milk was no longer able to

12 ensure adequate supplies, they got rid of the location

13 differentials and replaced it with transportation allowances

14 and regional quota adjusters.

15   Q. But as you say, the RQA's do not provide direct

16 incentive to move milk to Class 1 plants?

17   A. That's correct. The transportation allowances provide

18 some of that incentive. The RQA's, I think you can look at

19 this, I don't know if this is exactly correct, but I would look

20 at it and say the folks who are in areas that were furthest

21 away from those plants, were accustomed to getting a location,

22 a negative location differential, and when those went away,

23 they replaced them with RQA's, which were just an automatic

24 ding depending on where you were located, regardless of whether

25 that milk actually went to that plant or not.

1   Q. You said it was an automatic ding, it doesn't actually

2   have an economic impact of whether or not you were going to

3   move the milk?

4   A. Right. That's why it becomes even more difficult to

5   explain its existence, but it's kind of like we're used to

6   getting a ding, so we just put in something -- the system put

7   in something that replaced the ding essentially at the quota

8   price, depending on location of the farm.

9   Q. So on that, along that line for a moment, turning to

10 page 14, at the top under Producer Responsibility, you say,

11 "although producers have gained considerable independence, they

12 are still charged with responsible performance standards."

13   Now, when you use the phrase "performance standards" on

14 page 14, how do you use that term?

15 A. Performance standards is, are you, as a quota holder,

16 and a dairyman with quota, are you doing anything that would

17 service the market? That would be the performance standard I

18 was talking about.

19 Q. Okay. Now, do you understand that the term performance

20 standards has a very specific meaning under Federal Milk

21 Marketing Orders?

22 A. I understand that to be the case, yes.

23 Q. And that in Federal Milk Marketing Orders it normally

24 means supplying the Class 1 market directly or indirectly. Do

25 you understand that?

1   A.   Yes.

2   Q.   Okay. Now, the producer, in order to maintain quota as

3   we discussed a little while ago, must ship milk to a pool

4   handler at least once every 60 days, correct?

5   A.   Correct.

6   Q.   But a pool handler is much broader than a pool

7   distributing plant, a fluid milk processor, correct?

8   A.   Correct.

9   Q.   So there isn't actually, in the California system, a

10   performance standard to ship the Class 1 processors as we

11   understand that term in Federal orders, is there?

12   A.   It's not equivalent, that is for certain. But there is

13   a performance standard such that the shipment every 60 days to

14   a pool handler, and that a pool handler in this case is a plant

15   that has direct, or derived Class 1 or mandatory Class 2

16   utilization, so it is a very low threshold.

17   Q.   What do you mean by direct or derived?

18   A.   So you ship to a plant that actually is producing a

19   Class 1 product, or a plant that diverted to another plant that

20   is producing Class 1 or mandatory Class 2 product.

21   Q.   Which is a little similar to the Federal Orders?

22   A.   It is a little similar, but it is a very low threshold.

23   There's no volume --

24   Q.   No volume at all.

25   A.   -- no volume associated with this. It could be

1 literally a bucket full of milk every 60 days.

 2   JUDGE CLIFTON: Well, we got to fix that.

 3 BY MR. ENGLISH:

 4   Q. I agree, your Honor.

 5   So turning back to quota, and you have a nice

 6 discussion of the changes over time, and the opportunity to

 7 gain quota, but when I look at Exhibit 43, I'm sorry, I don't

 8 have Exhibit 43, I apologize. Just one second. You did have a

 9 lot of material here.

10   A. Thank you?

11   Q. I didn't say what the quality of it was.

12   A. That was not very nice.

13   Q. It wasn't also -- it was a neutral statement, Dr. Erba.

14   A. Shall we ask --

15   Q. Oh, it is excellent material.

16   A. Oh, I wanted to ask the Judge if she wanted to weigh in

17 on your neutrality.

18   Q. Under Exhibit 43, Exhibit 4.D, if you go to the total

19 quota Exhibit 43, Exhibit 4.D, well table, Table 3. Table 3.

20 I believe at the bottom it is labeled Table 3 in your very

21 excellent material.

22   A. Are you trying to make up for your earlier comments?

23   Q. Absolutely.

24   A. Okay.

25   Q. Is it working?

1   A. Very much so.

2   Q. In 1995, the total quota is 2,215,945 pounds, correct?

3   A. Correct.

4   Q. And it goes up and down a little bit. And in 2015, it

5 is 2,215,988, correct?

6   A. Yes.

7   Q. Which is basically 43 pounds more in 20 years, correct?

8   A. Sure. I have done the math, but it looks about right,

9 yes.

10   Q. So, and I do appreciate all the history, but all that

11 history being there, nonetheless from 1995 to 2015, there's no

12 statistically meaningful difference between the quota that was

13 in 1995 and that in 2015, correct?

14   A. I think that's an accurate statement, yes.

15   Q. Now, would that be because Class 1 and Class 2 have not

16 increased as a total volume within the California system?

17   A. Yes, that's correct. And that's something covered in

18 my testimony earlier, that the comparison now for issuing new

19 quota is linked to the highest period, which would have been

20 1990, 1991, and has not exceeded that level since that time.

21   Q. On page 21, actually, let me divert, so to speak, for a

22 second.

23   And look at Exhibit 43, your 16-page Exhibit 4.D does

24 not have a, I don't believe it has a separate table number.

25   A. No, it does not.

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1   Q. Okay. What is the significance, if any, when I, when I

2   look at the sales without cows as opposed to the sales with

3   cows? Do you have a quick explanation as to why the value

4   would be lower for sales with cows than sales without cows?

5   A. Well, most of the sales recently have not included

6   cows, which you see as you go through the exhibit itself, that

7   they rapidly grow smaller and you very rarely see a transaction

8   that would include cows.

9   Q. And I accept that, I guess I looked at the first five

10   or six pages, and I hadn't gotten so far.

11   A. Right. But I believe what it is is if you buy the cow

12   with the quota, the cow price and the quota price somehow are

13   figured together where there's some slight discount to the

14   quota price is how I would determine. If you want to buy the

15   quota separately from the cows, it's a higher price.

16   Q. As an Economist, would you then look at the sales

17   without cows as being sort of a more representative value since

18   it is delinked?

19   A. Yes, I would say that. And again, most of the sales

20   have occurred recently without cows.

21   Q. Is there a particular reason quota has tended to follow

22   dairies as they relocate in the Central Valley, as opposed to

23   being sold without the cows?

24   A. Yeah, I think so. I think what you could say is that

25   the folks that own, the producers that own quota see the value

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1 of quota, and it does provide a good and stable return on their

2 investment if they bought it. If they were just granted it,

3 even better. I mean, that return on their very small

4 investment. So it does not surprise me that the quota moves as

5 dairy farmers move, although you will get the occasional

6 producer who, for one reason or another just decides to sell

7 part of their quota or all of their quota. But I think for the

8 most part, they recognize it as being a good investment and

9 provides a good return to them.

10   Q. So just a couple questions. You referred to --

11   A. Are we done with this exhibit?

12   Q. Yes, we are. Thank you.

13   You have discussed both the California statute and the

14 language from the 2014 Farm Bill. And you reached some

15 conclusions, I objected, and your attorney persisted, and

16 that's fine.

17   I'd just like to ask you to note, because you actually

18 said it a couple of times, the California provision has

19 additional language after recognize, and it says, "not in any

20 way diminished," "quota value shall not in any way be

21 diminished", correct?

22   A. I'm sorry, is there a place I should be looking here?

23   Q. Well, you could look at page 2, where you say, "in

24 fact, paramount to any consideration of the California Federal

25 Milk Marketing Order, FMMO, was the assurance that the quota

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1 program would not in any way be diminished." And you, I think

2 in another place, have actually quoted from the statute, and

3 maybe that's back on --

4   A. Middle of page 3? Are you talking about the

5 California?

6   Q. Yes.

7   A. Yes, middle of page 3.

8   Q. "Shall not be diminished. Recognized and shall not be

9 diminished." Correct?

10   A. Yes.

11   Q. Okay. The language "shall not be diminished" is not in

12 the Congressional Enactment, is it?

13   A. I don not believe that -- the only place I have seen it

14 is in the Food and Ag Code. Now --

15   JUDGE CLIFTON: If I could ask, so going back to

16 Ms. Hancock's concerns, does this particular code, Dr. Erba,

17 suggest to you that that term "shall not be diminished" would

18 also apply to the exempt quota?

19   DR. ERBA: It would be hard to say that it does not.

20   MR. ENGLISH: But my point, your Honor, again, is that that

21 language doesn't appear in the Congressional Act.

22   JUDGE CLIFTON: I know, but we were dealing with a

23 California statute here.

24   MR. ENGLISH: I understand.

25   DR. ERBA: Can I also add that diminished doesn't refer to

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1 value, it's amount. So if you have --

2   JUDGE CLIFTON: Oh, that is --

3   DR. ERBA: -- ten units, you still have ten units.

4   JUDGE CLIFTON: I see. So there's a -- so the amount, the

5 number of units of quota has remained constant throughout?

6 Well, except when new producers come on, they can get quota.

7   DR. ERBA: Not anymore. They have to -- it's in my

8 testimony, but there's a comparison done every year to see if

9 any shall be issued, and none has been issued since 1992. So

10 if you are on the waiting list, you are still on the waiting

11 list.

12   MR. ENGLISH: Your Honor, I merely point out that the

13 language he is got on page 3 says that "all pool quota must be

14 recognized and shall not be diminished." It doesn't parse it

15 the way he just did, but we can get into that, I am not trying

16 to get a legal fight, I just wanted to point out the language

17 "shall not be diminished" does not exist in the Federal Statute

18   JUDGE CLIFTON: Right. But it's an important word here.

19   MR. ENGLISH: I agree, and it's missing from the

20 Congressional Enactment. And, your Honor, and I know

21 Mr. Vlahos, if you want to have a quick conversation with me

22 about this, but this witness has discussed some issues and not

23 others. For instance, the issues with respect to pricing and

24 things like that, and on the one hand, counsel could say that

25 it is beyond the scope of direct for me to go ask questions

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1 about that. On the other hand, I would then, under 801(a)

2 rule, Federal Rule of Evidence, be entitled to put in

3 statements made. And out of fairness, I thought I would ask

4 the witness the questions about that, rather than simply in our

5 case-in-chief, inserting those.

6   And so if that's okay with Mr. Vlahos to go in that

7 direction, that's how I propose to proceed.

8   MR. VLAHOS: Mr. English, for me to say whether it is okay

9 or not okay, I really have to kind of understand it. So would

10 you mind articulating again, because I don't quite follow it.

11   MR. ENGLISH: As with witnesses before, CDI and Dr. Erba

12 have provided testimony and post-hearing briefs to CDFA about a

13 number of the issues that are identical to the issues in this

14 proceeding. Those are party admissions under 801(a) and they

15 are, therefore, admissible regardless of whether I

16 cross-examine this witness.

17   What I propose doing, is rather than simply putting

18 them in my case-in-chief and then forcing Dr. Erba to come back

19 or otherwise, I propose asking him those questions now and

20 giving him an opportunity to explain or respond even as

21 Mr. Beshore had Mr. Wegner do yesterday, rather than having

22 been off the stand, and three weeks from now as part of our

23 case-in-chief, say here's all the statements from Dr. Erba.

24 That's what we propose to do.

25   JUDGE CLIFTON: So let me ask you this, Mr. English. The

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1 reason you didn't just go ahead and do it, is that when you

2 were dealing with Mr. Wegner, the subject matter was the same.

3   MR. ENGLISH: Well, he had already, Mr. Beshore had opened

4 the door by asking questions about competitive situations. I

5 would, I immediately say that Dr. Erba has not done that in

6 this testimony, so I'm trying to be -- instead of simply going

7 into it, I'm pointing out that this is different in that

8 respect. And I could have simply sat down and asked no further

9 questions, and three weeks from now come up, and under Federal

10 Rule of Evidence 801, simply put the statements in the record.

11   I'm trying not to do it that way, precisely because

12 that strikes me as a little bit by ambush. And so, you know,

13 here I am prepared to do it with the witness on the stand.

14   MR. VLAHOS: Well, Heaven forbid that you ambush us. But

15 could we -- would we be able to see in advance what you propose

16 to show Dr. Erba?

17   MR. ENGLISH: Well, no, and you wouldn't see them in

18 advance if I simply put them in my case-in-chief, and it sort

19 of destroys the cross-examination, so no.

20   MR. VLAHOS: That was the point. Let Mr. Beshore and I

21 mull over this for a minute or two.

22   JUDGE CLIFTON: I think a break would be lovely. Let's

23 see, please be back and ready to go at 3:03. 3:03.

24   (Whereupon, a break was taken.)

25   JUDGE CLIFTON: Back on record at 3:06. Mr. Vlahos?

1   MR. VLAHOS: Yes. In our discussions during the break with

2 Mr. English, we have said it is okay to go ahead with this now.

3 That's not to say I may have objections to any exhibits or on

4 the testimony, but in terms of okay to go ahead with the

5 examination, I agree.

6   JUDGE CLIFTON: Thank you. And Mr. English, I very much

7 appreciate your method of acknowledging what rules are and

8 explaining why you are doing them, and giving people the

9 option, and in such a way that I had to rule on nothing.

10   Thank you.

11   MR. ENGLISH: A break helped too, your Honor, but yes,

12 thank you. And I thank Mr. Vlahos and Mr. Beshore.

13 BY MR. ENGLISH:

14   Q. Dr. Erba, this is not your first day at this hearing,

15 correct?

16   A. That is correct.

17   Q. Okay. And so you have already seen a little bit of

18 this where I ask questions about what people have said before?

19   A. I have seen that, plus some other things, yes.

20   Q. Are you sure your dairy farmers really want to do this?

21   One of your many job duties at CDI is to prepare

22 testimony and appear at CDFA hearings; is that correct?

23   A. I have done that, yes.

24   Q. And to offer post-hearing briefs; is that correct?

25   A. I have done that, too.

1   Q. Do you recall a hearing in the late fall of 2009 with

2 respect to Class 1, 2, 3, 4a and 4b pricing?

3   A. I do.

4   Q. And did CDI offer an alternative proposal at that

5 proceeding?

6   A. Well, if you've got documentation that says we did, we

7 probably did. Although I couldn't tell you exactly what it

8 was.

9   Q. All right. Do you recall over a number of proceedings,

10 making a statement either asking for a hearing in the

11 transcript, or in a post-hearing brief, along the following

12 lines:

13   "CDI's proposed changes are consistent with objectives

14 stated in previous hearings. The Class 4a formula should

15 reflect the most currently available cost-justified changes."

16   Is that a sentence, a statement with which you are

17 familiar?

18   A. Yes.

19   Q. And you agree with that?

20   A. Yes.

21   Q. Okay. "This applies to not only the manufacturing

22 allowances for butter and nonfat dry milk, but to the FOB price

23 adjuster for butter as well."

24   Do you remember making that statement?

25   A. Yes.

1   Q. Thank you.

          2   A. You're welcome.

          3   Q. It will go easier that way.

          4   Now, after that proceeding in 2009, and we have heard

          5   some testimony about the CDFA process. Did you, on behalf of

          6   CDI, a file a post-hearing brief?

          7   A. That's not a usual practice, but I may have.

          8   MR. ENGLISH: Your Honor, I have handed the witness, the

          9   court reporter, and yourself, and Ms. Vulin is now passing out

         10   copies of a two-page letter on California Dairies, Inc.,

         11   letterhead, dated November 11th, 2009, addressed to

         12   Mr. David Ikari -- we have heard his name before --

         13   I-K-A-R-I -- Chief of the Dairy Marketing Branch, RE:

         14   November 9th Class 1, 2, 3, 4a and 4b Hearing -- Post-Hearing

         15   Brief, purported to be signed by Dr. Erba.

         16   And I would like to ask for this document to be marked.

         17   JUDGE CLIFTON: Will this be Exhibit 44?

         18   MS. FRISIUS: It will be.

         19   JUDGE CLIFTON: It will be Exhibit 44. You may mark your

         20   copy as Exhibit 44.

         21   (Thereafter, Exhibit Number 44 was marked

         22   for identification.)

         23   MR. ENGLISH: And your Honor, we got this off the CDFA

         24   website. Dr. Erba, do you recognize this document?

         25   DR. ERBA: It looks familiar.

                                    1882

BY MR. ENGLISH:

   Q. Does that mean you wrote it?

   A. Yes, I did write this.

   Q. And you submitted this to CDFA after the hearing,

correct?

   A. Yes.

   Q. Could you read the paragraph that is the last paragraph

of the first page, carrying over of the next five lines of the

next page, please?

   A. The entire paragraph.

   Q. Yes, please.

   A. Sure.

       "Why not increase Class 4a and 4b prices? One panelist

asked for -- asked for an explanation as to why Class 4a and 4b

prices should not be increased to give producers more revenue.

Another question was asked as to why Class 4a and 4b prices

should not be raised to equal the Federal Class III and

Class IV prices. While the questions were not asked of me, I

would like to amplify the explanation provided in my testimony.

First, Class 4a and 4b are market-clearing classes of milk and

process 75 percent of the milk produced in California. The

products from these plants compete in national and

international markets where price is a dollar consideration for

buyers. The California dairy industry is wholly dependent on

continued operation of its manufacturing facilities. To burden

1883

1 these plants with higher minimum prices that cannot be

2 extracted from the market, even for a brief period, would have

3 potentially devastating consequences. From our own

4 perspective, higher minimum prices for Class 4a would put

5 California dairies at an immediate disadvantage in trying to

6 sell products domestically and internationally, leaving us no

7 option but to sell products at a loss. In addition, because

8 nearly all butter and powder processing facilities are owned by

9 producers, a Class 4a price increase only functions to

10 redistribute money inequitably among different producer

11 factions. Money would simply flow from the producers who have

12 made investments in processing facilities, to those producers

13 who have not.

14   Q. Thank you, sir. Your Honor, I move admission of

15 Exhibit 44.

16   JUDGE CLIFTON: Does anyone want to question the witness

17 before determining whether you have an objection? No one. Is

18 there any objection to the admission into evidence of

19 Exhibit 44? There is none. Exhibit 44 is admitted into

20 evidence.

21   (Thereafter, Exhibit Number 44 was

22   received into evidence.)

23 BY MR. ENGLISH:

24   Q. Dr. Erba, I don't want to belabor the record, but

25 there's other hearings, and you would agree that you made

1   similar statements, say for instance, back in 2007, as in the

2   2009 statement, correct? As your brief?

3   A. I think, correct, although there was a period where I

4   was not able to participate in hearings, and I'm not sure which

5   2007 you might be referencing, but if it has my name on it, it

6   is probably mine.

7   Q. I'm referring to September 26, 2007, and a statement

8   with your name on it.

9   A. Yes, that would have been past my ineligibility period.

10   Q. So let's -- since you said that, why don't we, for the

11   record, clear up what that means.

12   You were -- you had been an employee of CDFA before you

13   joined California Dairies, correct?

14   A. Correct.

15   Q. And so for some period of time after you joined CDI,

16   because of Rules of California or the agency, you were not

17   eligible to be the person participating in those proceedings;

18   is that correct?

19   A. That is correct.

20   Q. And that is what you meant by your eligibility period?

21   A. That's correct.

22   Q. Okay. Now, there's been a fair amount of testimony

23   with respect to the most recent proceeding held with CDFA, for

24   CDFA, in June of this year, correct?

25   A. Yes.

                              1885

1   Q. And did you participate at that proceeding?

 2   A. I did.

 3   Q. And you testified?

 4   A. I did.

 5   JUDGE CLIFTON: If you do not yet have a copy of this

 6   portion of a transcript, would you raise your right hand so one

 7   could be given you? It appears they have been distributed.

 8   Shall we mark this as Exhibit 45?

 9   (Thereafter, Exhibit Number 45 was marked

10   for identification.)

11   MR. ENGLISH: Yes, your Honor, I'll describe what it is,

12   please. This is a portion of the transcript with the cover

13   sheet, State of California Department of Food and Agriculture

14   Dairy Marketing Branch, Consolidated Public Hearing to Consider

15   Amendments to the Stabilization and Marketing Plans for Market

16   Milk for the Northern and Southern California Marketing Areas,

17   California Department of Food and Agriculture, Sacramento,

18   California, Dated: Wednesday, June 3rd, 2015.

19   And we have attached the pages of the entire testimony

20   of Dr. Erba from page 107 to page 123. And I would like you to

21   turn to page 110, Dr. Erba. And while I am most interested in

22   the lines 22 through 24, in fairness, why don't you read the

23   entire paragraph that starts on line 22 page 110 and runs

24   through line 7 of 111.

25   DR. ERBA: Line 7?

                                1886

1   MR. ENGLISH: Line 7 of 111.

2   DR. ERBA: "An acceptable level of price difference exists

3 for most of the classes of milk when comparing California milk

4 prices to Federal Order milk prices. The exception is Class

5 4b, and it is past time for the appropriate adjustment to

6 occur. We believe a modification to the method for valuing

7 whey in the Class 4b formula would not only restore equity in

8 what our manufactures pay for milk relative to comparable

9 manufacturers around the country, but would also generate much

10 needed additional revenue for dairy farmers who are facing some

11 of the lowest milk prices seen since 2010."

12 BY MR. ENGLISH:

13   Q. Thank you. Now, when you provided this testimony in

14 June of this year, the Cooperatives had already submitted their

15 proposal in February and the revised proposal in May, correct?

16   A. Yes.

17   Q. And by that I mean proposal to the USDA, correct?

18   A. Yes, that's correct.

19   Q. And at that time, and contemporaneously in June, your

20 testimony was that leaving aside Class 4b there was an

21 acceptable level of price difference with classes of milk when

22 comparing California milk and Federal milk, correct?

23   A. That had been the historical trend in California.

24   Q. Thank you very much, sir. That concludes my

25 cross-examination. I move the admission of Exhibit 45.

1   JUDGE CLIFTON: Does anyone want to ask questions of the

 2 witness before determining whether you object? No one. Is

 3 there any objection to the admission into evidence of

 4 Exhibit 45? There is not. Exhibit 45 is admitted into

 5 evidence.

 6   (Thereafter, Exhibit Number 45 was

 7   received into evidence.)

 8   MR. ENGLISH: Thank you, Dr. Erba.

 9   DR. ERBA: Thank you.

10   JUDGE CLIFTON: Who will next cross examine Dr. Erba?

11   CROSS-EXAMINATION

12 BY DR. SCHIEK:

13   Q. William Schiek, for the record.

14   Good afternoon, Dr. Erba.

15   A. Dr. Schiek.

16   Q. I just have a few clarification questions on the

17 testimony that you gave today.

18   A. Okay. Are you talking about Exhibit 42 testimony?

19   Q. Exhibit 42, that is the one.

20   A. Thank you.

21   Q. Just to make sure I understood what you were referring

22 to on page 3, starting, let's see, five lines down, you said,

23 or what was written here anyway, "any production in excess of a

24 signed quota constituted overbase production." Is that correct

25 or is it assigned quota and base?

                          1888

1   A. Quota and base. Did you see how much trouble I got

 2 into when I tried to add base a few moments before that.

 3   JUDGE CLIFTON: I know, but I think we should do this.

 4   DR. SCHIEK: I just wanted to make sure I was understanding

 5 it.

 6   JUDGE CLIFTON: I really do think we should do this. So

 7 I'm going to ask Ms. Frisius to pull out her Exhibit 42, and

 8 let's first go page 3. Let's go to page 3, and on that second

 9 line, should that be "quota, base, and overbase?"

10   THE WITNESS: Yes.

11   JUDGE CLIFTON: All right. And should it similarly be

12 shown where Dr. Schiek has just shown us, which is on line 5?

13   DR. ERBA: 5.

14   JUDGE CLIFTON: And if so, would you read that sentence for

15 us, Dr. Erba?

16   DR. ERBA: Sure.

17   "Any production in excess of assigned quota and base,

18 constituted overbase production."

19   JUDGE CLIFTON: All right. So I would ask that the record

20 copy show those additional two words in line five, as shown by

21 Dr. Erba. So "and base" will be inserted in between quota and

22 constituted. All right. Thank you. Dr. Schiek, back to you.

23 BY DR. SCHIEK:

24   Q. Okay. On page 8, under the section, Determining Pool

25 Prices after 1994, I guess I'm -- this is just a question. By

1889

the late 1980's, overbase milk production had increased

considerably in relation to quota production. What, I was just

wondering if you had a comment on what was driving that

increase in overbase production?

A. Well, that's a good question. I would suggest that the

introduction of the pool program in general for that 20-year

period, approximately 20-year period, was a big driver into

stabilizing prices and stabilized prices led to higher milk

production. If there was something in the '80's other than the

occasional bump up in prices that would have caused this, I

couldn't tell you without looking at some data. But I think

that's probably the underlying foundation for that increase.

Q. Do you think that perhaps the increase in support

price, CCC purchase prices, was a driver as well?

A. Well, in the late 1980's -- hmm -- don't know about

that. Maybe.

Q. Okay.

A. Seems awfully late to have an increase.

Q. You are correct. You are correct. Thank you.

Page 13, I think second paragraph, one, two, three,

four, five, lines down. You mentioned four operating exempt,

operating option exempt PD's, and I count five. So I want to

make sure that it's one or other, unless there's one that's

closed. But I have one in San Bernardino County, one in

San Diego County, one in LA County, and one in Fresno County,

1890

1   and one in Stanislaus County.

2   A.   One of the Southern California ones is not anymore.

3   Q.   Okay.

4   A.   And that --

5   Q.   That's new information for me, thank you.

6   A.   Yes.

7   Q.   Okay. Page 16. By the way, I want to unequivocally

8   say thank you for all this history on the quota program. I

9   very much appreciate it. I thought it was very helpful.

10   A.   You're welcome.

11   Q.   Page 16, that first paragraph at the top, you're

12   talking there about, I guess the last line of that paragraph,

13   "in addition, any quota that has been forfeited after

14   April 30th, 1981, is allocated on a continuing basis to

15   qualifying new producers." And I guess the question is, how --

16   based on your impression, does that happen very often? Does

17   quota get forfeited or is it usually sold before --

18   A.   It is usually sold. I can't -- I was there for, as I

19   indicated, eight years, and I never had an instance where it

20   was forfeited and I don't know that there are any recently.

21   Because of the value, I think it makes a whole lot more sense

22   to sell it before you forfeit it.

23   Q.   It would probably be a major oversight if someone

24   forfeited it?

25   A.   I would think so. I would think so.

                             1891

1   Q. Page 17, last paragraph, "published average price per

2 pound of quota solids not fat, without the inclusion of cows,

3 reflects the true value of the quota sold." And I'm -- I want

4 to make sure I understand what you are referring to here. Are

5 you referring to market value of the asset at that point in

6 time, or are you referring to the sort of intrinsic value in

7 use?

8   A. That would be the market value, the former of your

9 statements, and I'm trying to distinguish that from the cows

10 without quota, cows with quota.

11   Q. Okay.

12   A. Kind of like what we talked about with Mr. English

13 earlier.

14   Q. Okay. Thank you. Page 18, in this paragraph you talk

15 about first year alone, 342 producers sold at least some quota,

16 624 producers bought some quota, and 273 transactions disbursed

17 a hundred percent of producers quota, and then you talk about a

18 certain number of pounds were transferred.

19   I just want to make sure, is there a distinction

20 between transfers and sales of quota? Or -- I'm looking at

21 those two as the same, but am I wrong on that is?

22   A. No, that's -- no, you are correct.

23   Q. Okay. Just wanted to make sure. Page 19, and also you

24 might want to open up Exhibit 43. And I think it is -- well,

25 it is just the one that says Exhibit 4.B on the bottom, it is

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1 the quota transaction list.

2   A. Yes.

3   Q. Okay. So the first question is, are these average

4 prices, because you are graphing the average selling price per

5 quota, and then you have got, there's an average on this table

6 with a low and a high listed for with cows and without cows.

7 Is that average a simple average of all transactions or is it a

8 weighted average?

9   A. No, it is a simple average.

10   Q. Simple average?

11   A. Yeah.

12   Q. Okay. So that then the average selling price per quota

13 in the chart is, is that a combination of the with or without

14 cows or is it --

15   A. No, this is only without cows.

16   Q. So this is without?

17   A. Did not include the with cows, this is only without

18 cows.

19   Q. Okay. Looking at that chart again, and there's a lot

20 of movement in it, kind of starting back in the '70's, but I'm

21 more interested in the period say from the 90's forward.

22 There's a lot of gyrations here sometimes, and particularly

23 this drop in from the mid '90's down to the late '90's in the

24 selling price -- looks a little bit like my 401k does

25 sometimes. What drives that?

1893

1   A. Well, there's a number of things I would think, and I

2   wouldn't say they all combine together, but they are certainly

3   considerations. For one thing, what would be the milk price at

4   that time and what are the margins at that time. That would

5   affect it. What are the discussions in the industry, which is

6   probably as big an effect as anything as the continuation of

7   quota, shall we keep it, shall we not keep it.

8   There have been some committees appointed to looking at

9   this, and it seems like when those committees convene, the

10 price reacts. Sometimes positively, sometimes negatively. And

11 that would have an effect as well.

12   Q. Okay.

13   A. General health of the dairy industry would be another

14 aspect of that. Do I see future as a dairyman in the dairy

15 industry or do I not?

16   Q. So you had reported a little bit earlier, or actually,

17 maybe later in your testimony, but what when you entered this

18 statement earlier today, you talked about the provisions in the

19 mid-'90's I guess, where it allowed option exempt PD's to

20 exempt quota that they had purchased in a particular time

21 period. Could that have been a factor influencing the demand

22 for quota and driving prices maybe a little bit higher during

23 that period?

24   A. I won't say it's not, but it was a fairly short period

25 of time, and if there's any effect that you would see in this

1894

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1 graph, I think it would be fairly small. Some of these big ups

2 and downs are a period of a year or two, and I wouldn't think

3 that the amount of time involved with the additional exemption,

4 plus the volumes that we're talking about, I don't think they

5 would affect this very much.

6   Q. Okay. When you talk about producer margins as an

7 influence there, is that pretty much a function of funds that

8 producers have available for quota, and are you, is it your

9 contention that during times when margins are tight, dairymen

10 don't have the funds available to purchase more quota? And

11 after a period, maybe a good period, they have more money to

12 use to purchase quota?

13   A. In general, I think that's accurate. Although you --

14 you will find producers sometimes taking the opposite of what

15 you just said.

16   Q. It's a good time to sell quota, too.

17   A. Or a good time to buy it. If it happened to be low

18 price and there are people who are dairymen who are selling it,

19 maybe if I have the ability, it may be a good time to buy it.

20 So maybe the price is better than it would be a year from then

21 or a year earlier. So I think you get all kinds of -- as you

22 can see from that list on on Exhibit 4b, the transactions

23 happen every month, and there's a lot of them. I don't know

24 that you can make a general statement about what's causing all

25 that.

1895

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1   Q. Thank you. Moving on to, I would like you to look at

2   page 21 of your Exhibit 42. And just to make sure I understand

3   the percentages and what they refer to here, when you say

4   percentage in parentheses under the title of the table, it

5   says, "percent of quota relative to milk production." Is that,

6   I guess as I look at this, my understanding is that that's

7   total California milk production, is that right? Or is this

8   individual milk production or -- so when you say over quota,

9   for example, over 80 percent, and you have a figure under 1995

10   of 11 percent, that means -- does that mean 11 percent of all

11   the quota, 11 percent of -- what does the 11 percent number

12   stand for?

13   A. That's the percentage of dairy farms.

14   Q. Okay. So there are 11 percent of dairy farms that own

15   or have over 80 percent of their milk production covered by

16   quota?

17   A. Yes.

18   Q. Would that be the way --

19   A. I think that's an accurate description. It's a table

20   that's, it's important, it's generated by the Department of

21   Food and Agriculture every month. And these numbers, although

22   their table doesn't look quite like this since I condensed it

23   some, but this is a representation of what -- what that data

24   looks like.

25   Q. Okay. So I am comparing now, the numbers on this

1896

1 table, particularly the line that says number of dairy farms.

2 And Table 2 of Exhibit 43, which is Annual Milk Production by

3 County. And if I look at Annual Milk Production by County for

4 1995, which will be the same year for which you reported 2,161

5 dairy farms, I come up with a total milk production. I assume

6 that line, total milk production is total for the state?

7 A. Yes.

8 Q. Okay. So I come up with roughly 24.7 billion pounds,

9 is that accurate in 1995, with 2,161 dairy farms?

10 A. Where did 24 --

11 Q. 1995 Annual Milk Production by County, if you read down

12 there's total milk production it says, 24,671,402?

13 A. Yes.

14 Q. So you know, rounding that to a billion pounds, that

15 would be about 24.7 billion pounds.

16 A. I thought you said 24.4.

17 Q. 24.7?

18 A. Okay.

19 Q. And during that same year there were 2,161 dairy farms.

20 A. Yes.

21 Q. According to your table. Then looking ahead to 2015,

22 which you have an estimated production of 40.8 billion pounds

23 for that year.

24 A. Yes.

25 Q. Is that right? And the number of dairy farms, 1,407?

1897

1   A. Yes.

2   Q. And that number came from CDFA. Is that mid-year,

3 beginning of the year?

4   A. Which number?

5   Q. 1,407 dairy farms?

6   A. That's from January's, the January report for 2015.

7   Q. Okay. So is it a fair statement to say that even

8 though dairy farm numbers declined fairly substantially from

9 1995 to 2015, milk production still grew fairly substantially?

10   A. Yes.

11   Q. Okay.

12   A. Yes.

13   Q. That's all the questions I have. Thank you.

14   A. Thank you, Dr. Schiek.

15   CROSS-EXAMINATION

16 BY MR. VETNE:

17   Q. John Vetne, representative for Hilmar Cheese Company.

18 In your introductory remarks, before you started reading, you

19 referred to yourself as a bit of a historian. I liked that.

20   A. A bit of a historian, that's correct, by default.

21   Q. I just have a couple of things, not a couple, honestly

22 it's more than a couple. And I, too, loved your history of the

23 quota program.

24   When it was -- when the quota program was first

25 created -- I'm trying to dumb this down a little bit -- I'm

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1   going to publish a yellow-cover jacket book called Milk Pooling

2   for Dummies.

3   A. I'm sure it will be a big seller.

4   Q. When quota was first issued, the folks that were issued

5   quota were those that had existing contracts with Class 1 milk

6   dealers. Correct?

7   A. That's correct.

8   Q. And it was based on some portion, some representative

9   period, choose the better of their Class 1 share of the market,

10 correct?

11   A. Right.

12   Q. And prior to Milk Pooling, those producers were paid a

13 plant blend price because regulated classified prices were

14 regulated, but not market-wide pooling?

15   A. Yes, that's correct.

16   Q. And the quota that they were issued did not return to,

17 in the early stage of the Pooling Program, did not return to

18 the quota holders a Class 1 price, but rather something more

19 akin to a plant blend where they received a Class 1 revenue

20 plus some revenue from lower classes; is that right?

21   A. That's right.

22   Q. Okay. Do you know when it was first started in

23 relationship of that Class 1 plant blendish, initial quota,

24 whether the exempt quota and the regular quota had essentially

25 the same relationship in the Class 1?

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1   A. Oh boy, yeah, I don't really know that. I have not

2 heard that asked about before.

3   Q. Okay. Nevertheless, at some point as years passed

4 there was an expectation that more quota would be issued as

5 Class 1 sales and Class 2 sales increased; is that correct?

6   A. That is correct.

7   Q. That was the expectation?

8   A. Yes.

9   Q. And there was perhaps after that time, some minor

10 increase in Class 1 and 2 sales of milk produced in California,

11 correct?

12   A. That is correct.

13   Q. And when that happened some additional quota was, in

14 fact, issued?

15   A. That's correct.

16   Q. And there was some additional quota issued because

17 farmers requested it without a corresponding increase in

18 Class 1 and 2 sales, correct?

19   A. I think so, although that wasn't -- it was something I

20 covered in my testimony, there's a period where they were

21 equalized, and there was no corresponding increase in sales for

22 Class 1 and Class 2.

23   Q. And that would dilute the value of quota relative to

24 what percentage of Class 1 was represented in quota when it was

25 first issued?

1900

A.   Right. So the additional quota without the additional

sales offset, would have diluted it, yes.

Q.   Okay. Would it be fair to say that the current fixed

value of quota which we translate to $1.70 per hundredweight is

a further dilution compared to its value when the quota was

first issued?

A.   I don't know if I can say it was a dilution. You know,

the quota price was -- the quota versus the non-quota price

moved around before 1994. And the fixed value stopped that

from happening. So sometimes that quota value was quite large,

and sometimes it was quite small, perhaps even negative.

Q.   So, yeah, there was -- and happened actually more, in

years more recent than that, there has been some upside down

pricing, there was some upside down pricing where Class 1 may

have been the lowest, or one of the lowest classes?

A.   Certainly not the highest class, I know that. I

wouldn't say it was the lowest, but I know it wasn't the

highest.

Q.   And quota holders then, reacted with "that's not what

we expected."

A.   That's correct.

Q.   And where the price spread went the other way and the

quota price was really high, overbase producers would say, "we

didn't expect to receive this much less," would that be the

opposite side of the reaction?

1901

1   A. Yes. Yes. They did not expect that to happen.

2   Q. Okay. You had referred in your testimony, and this is

3 of interest to me, I have always heard of the words quota,

4 base, and overbase. And I have been trained since I first

5 heard those words in the mid-'90's when I attended the Dairy

6 Institute School on Milk Pricing in California, I was told that

7 there was no difference between base and overbase. Is it true

8 that there one time was?

9   A. Yes.

10   Q. Okay. So there were, in fact, three prices at one

11 time, higher quota, price; base representing the remainder of

12 production volume at the time quota was first created; and then

13 overbase, meaning production in excess of that volume.

14   A. Right, and they were paid, generally, in descending

15 order. So quota at the highest, when you filled up the

16 so-called quota buckets, you went to the base buckets which is,

17 actually was a fairly small bucket, filled that up with the

18 remaining value out of the pool, and the overbase took the

19 residual. So there were three separate prices that were

20 calculated.

21   Q. Okay. When there were three such separate prices, did

22 the relationship between quota and overbase function in a way

23 to discourage expansion in a way similar to the private base in

24 overbase plans that we have discussed at this hearing?

25   A. I do not think so. I would not make that

                            1902

1 characterization, no.

2 Q. Because the overbase, regulated overbase price was

3 probably higher than would discourage expansion?

4 A. I think you can look at the history and see that the

5 production increase California, despite having that quota based

6 and overbase pricing.

7 Q. Okay. I'm Mr. Schiek asked you some questions about

8 the things that drive values represented for transactions in

9 quota up and down over the years.

10 A. Yes.

11 Q. And to me, it seems like one of the most significant

12 driving factors would be interest rates return on investment.

13 Wouldn't that be the case?

14 A. That would be maybe one the factors. There is clearly

15 a, there's a value of money in there that may be a factor.

16 However, I don't think that is a big enormous factor. There

17 are other things, the ones that I mentioned to Dr. Schiek would

18 probably be the ones that are prevalent in my mind anyway. So

19 interest rates may have a place in this, but I wouldn't think a

20 huge place.

21 Q. Quota values are, more recently, are relatively high

22 compared to prior periods. And interest rates are pretty low

23 more recently compared to prior periods. So let me ask you

24 this, isn't the purchase of quota somewhat like the purchase of

25 an income stream through an annuity?

1903

1   A. Yes, I'd say that's accurate.

2   Q. Okay. And an income stream from an annuity, the

3 annuity would cost a lot more when interest rates are low, than

4 comparable stream of income when interest rates are high?

5   A. It could. Again, it could be a factor, but maybe a

6 confounding factor. So other things are happening at the same

7 time, these things are moving together, they are correlated but

8 maybe now there's no direct relationship.

9   Q. Do you know of anybody that studied the relationship

10 between quota prices and interest rates?

11   A. You know, I don't think I know anybody whose done that.

12   Q. Middle of page 10, word usage question. The sentence

13 that ends the second full paragraph on page 10, "prior to

14 computation of the weighted average small pool adjustment such

15 as plant gains may be made." Is your use of the term "plant

16 gains" synonymous with what Federal Market Administrators

17 previously referred to as overage?

18   A. I'm not sure.

19   Q. Not sure. Okay. In that case, just what is plant

20 gains mean for purposes of this testimony?

21   A. So there are adjustments made, and it has to do with

22 how things are being reported by the handlers. And part of

23 that would be what is determined by the Department of Food and

24 Agriculture as a plant gain or sometimes a loss, and that

25 comparison is something that they would do every month. So

1 that was something that has to do, is determined by the

2 Department of Food and Agriculture, and it's related to however

3 the, whatever the reports are that are being filed by the

4 handlers. Beyond that, I couldn't tell you exactly how it is

5 done.

6   Q. Okay. It may, plant gain my include adjustment there

7 for an obligation determined that was somehow left out of a

8 previous report?

9   A. It may be, I am not sure. That sounds like a logical

10 place for it to go, but I'm not sure that's the exact place

11 where I would look.

12   Q. In the section beginning at the bottom of the page,

13 "adjustments to quota value," you refer to location adjustments

14 or location differentials to move quota, quota milk to Class 1

15 plants. Were the location differentials in California similar

16 to the use in the federal system of the location differentials

17 when applied to producer milk, a different value from milk

18 delivered to different locations depending upon proximity or

19 distance to demand markets?

20   A. I have never actually seen these. I know that they are

21 pluses and minuses, it has to do with location of the receiving

22 plant, but other than that, I have never actually seen these.

23 They were out of the system by the time I got there. There's

24 another reference to age, I was in high school when these were

25 omitted. Deleted.

BARKLEY
Court Reporters

1   Q. This is the product of your historical inquiry, not

2   your life experience.

3   A. That's correct.

4   Q. Okay.

5   JUDGE CLIFTON: Dr. Erba, what year did you graduate from

6   high school?

7   DR. ERBA: Would you like to take a guess?

8   JUDGE CLIFTON: No.

9   DR. ERBA: 1983.

10   JUDGE CLIFTON: Oh my. So they held you back, right?

11   DR. ERBA: I think it's actually pretty advanced.

12   BY MR. VETNE:

13   Q. We talked about regional quota adjusters. The

14   application of regional quota adjusters is based on an economic

15   presumption that milk produced by farms located, let's say,

16   close to say Los Angeles, San Bernardino, for example, or

17   Riverside County, it is worth more there than milk in Tulare

18   County, for example.

19   A. Again, it was a little difficult to figure out how

20   exactly they were determined and applied, but I think in

21   general you are going down the right path. And again, but my

22   discussion earlier with Mr. English about replacement of the

23   location differentials had a flavor of that, too. They are

24   trying to preserve a historic action that occurred on the quota

25   price.

1906

BARKLEY
Court Reporters

1   Q. Okay. If I were somebody who was eligible to purchase

2   quota, my income stream is better if my farm's in San

3   Bernardino County or Riverside County because the quota

4   payments are higher, correct?

5   A. If you, yes, if you had quota and you were located down

6   there, you would have the highest possible value associated

7   with quota.

8   Q. On the other side of the decision-making equation is

9   the fact that it cost more to produce milk down there than it

10 does in Tulare County, correct?

11   A. I think that's generally true, but I wouldn't say it is

12 universally true. Every dairy has its different cost of

13 production.

14   Q. And average costs are higher in the south than they are

15 in the north, correct?

16   A. They typically are.

17   Q. Would the growth of portion of quota in Central

18 California, in your opinion, be attributed to aggregate

19 decision making that it's, even though it's a reduced value,

20 it's a better reduced value in the Central Valley than 19.5

21 cents a pound in Los Angeles. Do you understand what I mean?

22   A. Not exactly. I think I'm almost there, but try me

23 again, please.

24   Q. As an Economist you observe market behavior of many

25 participants, and although some may make irrational decisions,

1907

BARKLEY
Court Reporters

1 you assume that in the aggregate you can see a rational

2 pattern, correct?

3   A. Yes.

4   Q. So the growth of the portion of the pool that

5 represents quota residing with producers in the valley, could

6 you conclude that producers in the aggregate have decided it's

7 not worth it to own quota that produces only a little bit extra

8 in the RQA being down south?

9   MR. VLAHOS: Your Honor?

10   MR. VETNE: Am I being too obtuse? Okay.

11   MR. VLAHOS: Your Honor, there have been a lot of questions

12 of this witness asking what was in the mind of producers that

13 caused them to do something. And this witness doesn't, has

14 not, to my knowledge, surveyed all the producers, nor have they

15 phoned him or e-mailed him or anything. How can he answer what

16 motivated all these producers? There maybe economic guesses as

17 to why they do, but he certainly can't testify what their

18 reasons were.

19   JUDGE CLIFTON: Mr. Vetne?

20   MR. VETNE: I agree with Mr. Vlahos that he can't, you

21 can't guess or even foresee what happens in the mind of

22 individual farmers. But Economists can consider remarked

23 behavior and make rational conclusions about what motivates

24 aggregate market decisions. And that's my question.

25   JUDGE CLIFTON: If you want that kind of opinion, you will

1908

1   have to give him more specifics, which I don't think really you

 2   want to do.

 3   MR. VETNE: Okay. Based on that, I probably don't want to

 4   do it.

 5   BY MR. VETNE:

 6   Q. Are you familiar with -- with the publication entitled,

 7   "Report to the Secretary of Agriculture by the Federal Milk

 8   Order Study Committee," a committee headed by Dr. Nourse

 9   published in 1962?

10   A. Yes.

11   Q. Commonly referred to as the Nourse report?

12   A. Yes.

13   Q. Have you read that?

14   A. I actually have.

15   Q. Yes.

16   A. A long time ago.

17   Q. But it was while you were at Cornell, right?

18   A. That's correct.

19   Q. Would you characterize that report as a credible and

20   reliable source of information concerning the evolution and

21   history of Federal Milk Marketing Orders, the situation that

22   caused the creation of them, their operation at the time the

23   report was written? You're a historian, I'm asking about

24   credible source.

25   MR. VLAHOS: I would object to the question if the witness

                                 1909

1 is being asked that each and every thing, statement, conclusion

2 and opinion in that report is credible. If he's going to ask

3 the report is credible, I want to know what parts of the report

4 he's talking about, because some may be credible and some may

5 no longer be credible.

6   JUDGE CLIFTON: Mr. Vetne, a lot has changed since the

7 report was published. For what purpose do you want him to

8 acknowledge this as some sort of authority? Is there a portion

9 of it you want him to look at and see if he agrees with it?

10   MR. VETNE: Well, I do not want to go through that

11 exercise, your Honor. He said he's looked at it. The

12 Secretary of Agriculture, 8in various places has said they

13 looked at it. And I did not ask him about whether it continues

14 to -- a lot of time has passed. My question ended with at the

15 time it was published. And he's read it. I assume if there's

16 something in it that he thinks is not credible, which would be

17 my next question, he would have noticed it and brought, and

18 will bring it to my attention. But I'm looking particularly

19 at, we have gone through the history now, of California. This

20 is the first witness in detail that's discussed the history of

21 California.

22   This is the kind of resource that will provide us with

23 a comparative history of how things evolved in the Federal

24 system so we can compare that side to side.

25   JUDGE CLIFTON: Do you have it here?

1   MR. VETNE: I have it in my computer, and it is available

2 on Cornell and University of Wisconsin website. It is very

3 long. I can make it available and the URL available to

4 anybody, including the witness, if they want to look at it.

5   JUDGE CLIFTON: If it is very long, please pinpoint the

6 sections you want him to consider in giving you an answer to

7 your question.

8   MR. VETNE: I have no specific section.

9   JUDGE CLIFTON: Come on now, this is not helpful.

10   MR. VETNE: There is a long section, and Dr. Erba can help

11 me, there's a long section there in that report about the

12 disorder from the 1920's and '30's for which the Federal system

13 was created. There are sections in there about how the

14 government intervention dealt with that disorder, which

15 classified pricing, classified pooling, and how they worked in

16 1962. Probably 70 or 80 pages is devoted to that.

17   But, you know, if that authority is not credible to an

18 Economist who studied that publication as part of his studies

19 at Cornell, and this record can't reveal whether the Economist

20 believes it to be credible or not, we may have a problem.

21   JUDGE CLIFTON: I haven't let him respond to your question,

22 so don't be presuming what his response is going to be.

23   Mr. Beshore?

24   MR. BESHORE: Well, I just want to point out, Mr. Vetne

25 actually said that he's asking Mr. Dr. Erba to say what

1911

1 portions of that 1962, you know, 150-page publication he might

2 disagree with, for Pete's sake.

3   JUDGE CLIFTON: That's what I think for Pete's sake.

4   While we have got you stopped, Mr. Vetne, I believe, I

5 remember that Dr. Nourse's name is N-O-R-S-E; is that correct?

6   MR. VETNE: N-O-U-R-S-E.

7   JUDGE CLIFTON: Thank you, and --

8   MR. VETNE: Edwin J, I believe.

9   JUDGE CLIFTON: And you mentioned your study at the Gary

10 Institute. Would you spell Gary.

11   MR. VETNE: My study at the Dairy Institute.

12   JUDGE CLIFTON: Oh, you said Dairy Institute.

13   MR. VETNE: The Dairy Institute has offered courses in how

14 milk is priced in California, I, at one time, took advantage of

15 it.

16   JUDGE CLIFTON: All right. Good. That helps. You know,

17 we could go off record while Dr. Erba looks at the report.

18   MR. VETNE: Let me go on to another publication.

19   JUDGE CLIFTON: Good. Thank you.

20 BY MR. VETNE:

21   Q. Are you familiar with a publication, going back to

22 Cornell, entitled "The Evolution of Milk Pricing and Government

23 Intervention in Dairy Markets?"

24   A. Sounds like something I co-authored.

25   Q. Yes. You co-authored that with Andy Novakovic?

1   A.   That's correct.

2   Q.   N-O-V-A-K-O-V-I-C, the C is pronounced like an H but

3 CH. Okay.

4   And in that publication, somewhat like I have described

5 for the Nourse publication, you and Dr. Novakovic provided

6 historical description of dairy markets in the United States,

7 chaos of the '20's and the '30's, and the evolution of the

8 federal milk order system, correct?

9   A.   That is correct.

10   Q.   And in that -- in that publication, for which I have

11 been grateful ever since, you provided a definition of

12 disorderliness, and I'm going to read it to you -- or actually

13 I'll give it to you and ask you to read out loud, paragraph on

14 page 6 of that publication, which is also available online. I

15 didn't produce a copy here, but let me give this to you. Would

16 you read out loud, please, that paragraph?

17   A.   "Disorderliness, which refers to the lack of a

18 predictable, sustainable, and efficient flow of a product to a

19 specific market, ultimately led to the break down of dairy

20 markets." The whole thing?

21   Q.   Sure.

22   A.   Okay. "If fluid milk markets were to have orderly

23 supply, orderly production -- orderly supply, orderly

24 production was required which further depended on orderly

25 provisions for assembly and distribution. In addition, an

1913

1   orderly relationship between different markets in terms of

2   price and supply was required. Without State or Federal

3   governmental intervention, there was little chance of creating

4   orderly marketing beyond the local level. The 1933 Agricultura

5   Adjustment Act (AAA), sought to correct these failures in dairy

6   markets by including provisions for milk and dairy products."

7   Q.   That concludes the paragraph I asked you to read?

8   A.   Yes.

9   Q.   Okay.

10   JUDGE CLIFTON: Would you further identify the publication,

11   Dr. Erba?

12   DR. ERBA: Sure. The title of this is "The Evolution of

13   Milk Pricing and Government Intervention in Dairy Markets,"

14   authored by Eric M. Erba and Andrew M. Novakovic.

15   BY MR. VETNE:

16   Q.   Published in 1995?

17   A.   1995. Yes. February of 1995.

18   Q.   Okay. Thank you.

19   A.   My old friend.

20   Q.   Turning to the definition of disorderliness that was

21   used in this publication, is that a definition that you feel

22   continues to be applicable to disorderliness?

23   A.   I think it is helpful as a guide, although the way that

24   it appears in that document was more descriptive of, again,

25   what you have already pointed out, the history of the markets

1914

1   and how government got involved with them. I don't think it is

2   completely untrue today, but I wouldn't say that it is

3   completely true the way it is today, it was back then.

4   Q. Okay.

5   A. That's a very tight definition to me.

6   Q. Okay. Can you --

7   JUDGE CLIFTON: A very what definition?

8   DR. ERBA: Tight.

9   JUDGE CLIFTON: Tight. Yes. Succinct, is that what you

10   mean? What do you mean by tight?

11   DR. ERBA: I thought it was a good term to use, maybe not.

12   Tight meaning it is very structured in the way it is laid out.

13   And again, at the time it was, in the context it was discussed

14   in that publication, it was applicable to the time it was, at

15   the time of those markets and how they were functioning.

16   BY MR. VETNE:

17   Q. Let me see if I can interpret tight. By tight you mean

18   under inclusive?

19   A. No, I don't think I would say that.

20   Q. You wouldn't say that?

21   A. I like -- tight to me means, what I meant to mean, was

22   very structured.

23   Q. Is there a better definition, whether from a published

24   source, preferably if you have one, but you can make it up as

25   you go along on the witness stand, do you have a better

1915

1   definition for me?

2   A.   You know, I don't. And I have heard the term

3   disorderly marketing used quite a lot in the last few days, and

4   that seems to me everyone's got a different interpretation of

5   what that actually means today. And I think, I don't think if

6   you ask people in this room if that definition is correct and

7   accurate, I doubt you'd get a hundred percent agreement.

8   Q.   Okay. Thank you.

9   A.   Besides, I think Andy wrote that section.

10   Q.   Are you familiar with publication -- actually, two

11   publication in two parts by University of California Davis,

12   which resulted from a committee deliberation, but authored by

13   Bees Butler, called "Maintaining the Competitive Edge in

14   California's Dairy Industry?" Are you familiar with that?

15   A.   Yes, I read that about the time or shortly there after

16   it was published, but that was quite a few years ago, as I

17   recall.

18   Q.   Okay.

19   A.   But I am familiar, I've heard of it.

20   Q.   Okay. During the course of your employment with CDFA

21   or thereafter, has that publication been used to guide policy

22   and application of regulation of milk and dairy products in

23   California?

24   A.   I don't think so.

25   Q.   Okay. In 2007 there was something called the McKinsey

1916

1   report. Are you familiar with that?

2   A. Yes.

3   JUDGE CLIFTON: Spell it for us please, Mr. Vetne?

4   MR. VETNE: Mc, K-I-N-S-E-Y.

5   JUDGE CLIFTON: K-I-N what?

6   MR. VETNE: McKinsey report.

7   BY MR. VETNE:

8   Q. And that report was also the product of a study group

9   looking of dairy industry members, participants and

10   stakeholders, looking at the California dairy industry?

11   A. Yes. A consulting group was hired to put together

12   those two booklets that were turned out eventually.

13   Q. Okay. Do you know whether that publication has been

14   used as a guiding or instructive document for either CDFA

15   policy or participants appearing before CDFA?

16   A. In that broad description you just gave, I would say,

17   yes. The McKinsey report, although it's name hasn't been

18   mentioned all that much lately, was used quite a bit to

19   initiate discussions among industry participants.

20   Q. Okay.

21   JUDGE CLIFTON: I know we haven't gone terribly long, but I

22   need to move around a little, if we could. How about we take a

23   14-minute break and resume at 4:30? Okay. All right. Be back

24   ready to go at 4:30.

25   (Whereupon, a break was taken.)

                        1917

1   JUDGE CLIFTON: We're back on record. It is only 4:29, but

2 we may as well get started again.

3   Before Mr. Vetne resumes his cross-examination of

4 Dr. Erba, I wondered if anyone would like to comment on the

5 possibility of Agribusiness Publications uploading exhibits

6 prior to the time we actually have the official record copy on

7 the USDA website.

8   Would anyone like to comment on that prospect and the

9 difficulties entailed?

10   MR. BESHORE: Marvin Beshore. As long as they are the

11 official exhibits, I don't have any view on it one way or the

12 other. That's my comment. If they are the official exhibit

13 documents. I think that's up to the government whether they

14 wish to have them pre-published by a private party. I don't

15 have any opinion one way or the other.

16   JUDGE CLIFTON: Logistically I don't want them to leave

17 Meredith Frisius' hands before she turns them to court

18 reporter, and then scans them and makes the scans available to

19 AMS. At which point, they will promptly go on the USDA

20 website.

21   I don't want, in any way, to interfere with that

22 custodial relationship. Which means there isn't really a way

23 prior to them appearing on the AMS website, there's not really

24 a way to have the official copy available, in my opinion. Does

25 anyone else have a comment?

1918

1   MR. VAN NORTWICK: If it is in the public domain, does it

2 really need to be the official --

3   JUDGE CLIFTON: I'm sorry, come to the microphone, if you

4 would.

5   MR. VAN NORTWICK: My question would be that --

6   JUDGE CLIFTON: Go ahead and identify yourself, please.

7   MR. VAN NORTWICK: My name is Tom Van Nortwick with

8 Agribusiness Publications. From the media side, we don't,

9 we're not trying to purport the official, Mr. Beshore, copy,

10 we're just simply trying to facilitate the dissemination of

11 information to a larger base of people, especially dairy

12 producers.

13   If it is convenient for the people working through this

14 hearing that those would be available in their unofficial form,

15 then -- then we see no harm in that, as long as you do not see

16 a harm in that, your Honor.

17   But -- but my feeling is that we're not trying to be

18 the official cite. We're simply trying to help. As that

19 testimony is given, we recorded it, we're going to break it

20 down by individual giving the testimony in chronological order,

21 and even identify who crossed in chronological order, so that a

22 dairyman or anyone else could visit that location and hear the

23 tremendous testimony on quota today -- what a learning

24 experience for everybody -- and I doubt that there are very

25 many dairymen or others outside of this room that have ever

1919

heard that kind of dialogue. So we just think it needs to be
available and the exhibits go with it, unofficial, we're not
trying to be official, we're just trying to get information out
there from a media standpoint.

JUDGE CLIFTON: I love that you are doing it. I am
concerned because when you say the exhibits are in the domain,
public domain, because people have picked them up, well, yes,
true. But we work on them while we're here, and it does make a
difference, so I'm concerned about that. Mr. Hill?

MR. HILL: Brian Hill. Yes, our issue is to the issue that
you have cited. If someone has, is here and has, picks up
copies of the documents, you know, they are free to do whatever
they want to do with those documents. However, as the USDA
AMS, we have an interest in making sure that the documents are
complete and are properly put out into the public. And we
can't be affiliated, we don't think that we should be
affiliated with another party and putting those documents out
there prior to the time that we would otherwise do it through
the contractor that we have.

So I think that is our big issue. We don't feel that
we should be doing that. I think we should put them out at the
same time.

Now, once again, if they want to pick up documents and
do what they want to do with them, there's nothing stopping
them from doing so. If they want to call them unofficial

1 whatever, we can't do anything about it. Just like they are

2 making their videotape, audio taping this and presenting it to

3 the public. We can't do anything about that, but I don't think

4 we should be involved as AMS, in facilitating that and having

5 our name involved with that even in an unofficial role.

6   MR. VAN NORTWICK: We have no problem with that at all,

7 your Honor. And in fact, we would like to have on this

8 presentation that we'll give, let people know that this is

9 totally unofficial, we're just simply trying to provide a

10 public service to those that might not have been able to hear

11 at the time it was delivered or attend this hearing process.

12   JUDGE CLIFTON: Which I love. I think it is a service that

13 lots of people will make use of. I appreciate it.

14   MR. VAN NORTWICK: Thank you.

15   JUDGE CLIFTON: All right. Good. Now, let's go back to

16 the cross-examination by Mr. Vetne. You may proceed.

17 BY MR. VETNE:

18   Q. I just want to ask you about a couple of publications,

19 see if you are familiar. I pulled off the web, a 2010

20 publication called "Challenges and Opportunities for

21 California's Dairy Economy," published by the California Center

22 for Cooperatives' Development, assembled by Justin Ellerby,

23 Cooperative Specialist. Are you familiar with that

24 publication?

25   A. Actually, I'm not.

1921

1   Q. So if your name appears in the forward and

2 acknowledgements with gratitude, you wouldn't know why it

3 appears?

4   A. Well, I spoke to him, but I'm not one of the authors or

5 anything like that.

6   Q. No.

7   A. Okay. Fine. Yes.

8   Q. Familiar with the publication, that's what my question

9 to you? And then --

10   JUDGE CLIFTON: Why don't you show it to him, Mr. Vetne, I

11 think that might help.

12   MR. VETNE: What I've given the witness is the cover page

13 and the forward matter and the summary, not the entire 170

14 pages.

15   JUDGE CLIFTON: So your question is whether he's familiar

16 with the whole thing and including the 170 pages?

17   MR. VETNE: With that publication, that was my question,

18 yes. I haven't gone beyond that yet.

19   JUDGE CLIFTON: All right. You may retrieve your pages

20 that you showed him. What is that, about five or six pages?

21   MR. VETNE: Yes.

22   JUDGE CLIFTON: Okay.

23 BY MR. VETNE:

24   Q. That was my question, are you familiar with this

25 publication?

1922

1   A.   I remember talking to him. I don't know that I ever

2   saw the publication after it was put out. I know I never read

3   it.

4   Q.   That ends my questions. Okay.

5   A.   Okay.

6   Q.   There seems to be a proliferation of committees and

7   tasks force. There's something called a Dairy Future Task

8   Force in California. Are you familiar with that group?

9   A.   Yes.

10   Q.   Is that something that's ongoing?

11   A.   It was disbanded.

12   Q.   To sort of continue along the same line as Mr. English

13   earlier, I'm giving the witness a copy of an excerpt from a

14   transcript of a CDFA hearing of June 30, 2011. Mr. Dejong is

15   passing them out. Please give three first -- one to the

16   reporter, three to Ms. Frisius, one to the Judge, and then

17   everybody else.

18   JUDGE CLIFTON: Ms. Frisius, I believe we would be marking

19   this as 46. Is that what you have?

20   MS. FRISIUS: That's correct.

21   JUDGE CLIFTON: All right. This will be Exhibit 46. Is

22   there anyone who wants a copy of Exhibit 46 who does not have

23   one? Did that come out exactly right?

24   BY MR. VETNE:

25   Q.   Dr. Erba --

1923

1   MS. FRISIUS: Mr. Vetne, is this different than Exhibit 38

2 under the, introduced by Mr. English earlier?

3   MR. VETNE: Yes, because that's different testimony.

4   JUDGE CLIFTON: Good eye. Yes, they do have somewhat

5 different pages, but you are right, it is from the same

6 hearing. All right. So we can mark this as Exhibit 46, and

7 Mr. Vetne, you may proceed.

8   (Thereafter, Exhibit Number 46 was marked

9   for identification.)

10 BY MR. VETNE:

11   Q. Okay. You previously indicated remembering this

12 hearing and you remember being a witness at this CDFA hearing

13 for California Dairies at the time, correct?

14   A. Yes.

15   Q. And your testimony begins on page 9 of the excerpt of

16 this transcript that includes your testimony. Do you see that?

17   A. Yes, I do.

18   Q. Would you turn to numerical page 11, beginning of the

19 paragraph "we recognize" on line 10, and read to -- and read

20 till sentence ending on that page, so line 25.

21   A. Yes.

22   "We recognize that many of the factors that companies

23 consider before investing in new facilities or expanding

24 current facilities, will not be influenced by the Department's

25 decision. However, the results of this hearing do" -- I think

1 it is supposed to be determine but -- "determination whether or

2 not plan" -- plant, should be plant -- "margins are adequate to

3 ensure each plant's continued operation. The California dairy

4 industry is not far removed from a critical tipping point where

5 milk production outpaces processing capacity. While we have

6 not reached the crisis that we experienced in 2008, we do see

7 pockets of imbalance. Since the Spring of this year, we have

8 verified with processing facilities outside of California, that

9 some California milk is, in fact, moving out of California to

10 other states for processing. It seems clear that California

11 cannot afford to lose anymore of its processing capacity."

12   Q. Stop there, please. The statement and you verify

13 again, that the statement made in June of 2011 was accurate

14 when made? Correct?

15   A. I believe this is a reflection of my testimony given

16 at that hearing in 2011.

17   Q. And what, if anything, of significance in available

18 processing capacity has changed since 2011 when you gave this

19 testimony?

20   A. On processing capacity I really probably can't speak

21 all that fluently, other than what our own is at CDI, and we

22 haven't had any market changes in our processing capacity.

23 What has changed is how much milk is available to process.

24   Q. Meaning that milk is not growing at the rate it had

25 been prior to 2011?

1925

1   A. That's correct.

2   Q. Okay. On the next page, starting on line 12, that's

3 page 12 of the excerpt of the transcript of your testimony, and

4 line 12, sentence beginning "more recently" can you read to the

5 end of that paragraph?

6   A. Certainly.

7   "More recently, the Department has collected and

8 published information on the prices actually received by

9 cheddar cheese manufacturers and butter manufacturers in

10 California, so that a comparison to the average prices at the

11 Chicago Mercantile Exchange can be made. The results of these

12 comparisons are manifested in the pricing formulas as FOB price

13 adjusters. We fully support the regular review and updating

14 cheese and butter FOB price adjusters based on the most current

15 information available."

16   Q. Okay. Now, if you'd move on to the following page,

17 page 14, starting sentence beginning on line 14, "we make."

18   A. And then to the end of the paragraph?

19   Q. Please, yeah.

20   A. Okay.

21   "We make our proposal with full understanding that our

22 proposed manufacturing cost allowances will leave some of our

23 manufacturing plants uncovered. However, we think it is

24 appropriate that the manufacturing cost allowance be set so

25 that our largest and most efficient plants are covered. It is

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1 axiomatic that establishing manufacturing cost allowances that

2 do not cover the cost incurred by the largest and most

3 efficient plants has grave ramifications for processing

4 capacity in the state."

5   Q. Did -- well, that's the end of what I asked you to

6 read. What are the grave ramifications that you had in mind?

7   A. You have a manufacturing cost allowance that doesn't

8 match up with the average cost, manufacturing cost of those

9 larger facilities, which would suggest that not only those

10 facilities, but other facilities as well, be operating at a

11 loss.

12   Q. Meaning that the available capacity would be reduced

13 and new capacity would not be attracted, correct?

14   A. I don't know if it would be reduced, particularly

15 again, I'm going to speak from our cooperative point of view,

16 we do maintain plants in operation that aren't necessarily

17 profitable all the time, but it would not be particularly

18 attractive for certainly new plants.

19   Q. Okay. Let's read, go to the next page, page 15,

20 starting with line 14, might elaborate a little more about why

21 continue to operate a plant at a loss. Page, line 14 through

22 the end, please.

23   A. "Changes in the Class 4a manufacturing cost allowances

24 that do not allow the results of the Departments -- do not

25 follow the results of the Department's cost studies, that is to

1927

say, increasing them by less than what is justified reduces the

value of the investment in milk processing facilities made by

our member owners. It would also differentially benefit those

producers in California who do not have investments in butter

and nonfat dry milk processing facilities, and therefore, carry

no responsibility of cost in balancing and stabilizing the

states enormous milk supply."

Q. Thank you. By that conclusion in that paragraph, do

you mean that if allowances and price references are set in a

way so that you cannot recover your costs in the marketplace,

you operate a loss, your producers must share the burden alone

of that loss, and those costs are not borne by other producers

in the marketplace, even though they get the benefit of those

prices that are insufficient for your plant? Is that -- am I

restating that correctly?

A. I think for the most part that's what this paragraph

says.

Q. Thank you. I ask that Exhibit 46 be received.

JUDGE CLIFTON: Does anyone want to question Dr. Erba about

Exhibit 46 before determining whether you have any objections?

Is there any objection to Exhibit 46 being admitted into

evidence. There is none. Exhibit 46 is admitted into

evidence.

(Thereafter, Exhibit Number 46 was

received into evidence.)

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 1  BY MR. VETNE:

 2     Q.  Thank you.  Now following the hearing in June, CDI had

 3  the opportunity, and took it, to file a post hearing brief.

 4  Let me ask if you recognize it.

 5         I have handed the witness a copy of a letter brief

 6  dated July 11, 2011.

 7     JUDGE CLIFTON:  Would you like those to be distributed?

 8     MR. VETNE:  Yes, distributed marked as Exhibit 47.

 9         (Thereafter, Exhibit Number 47 was marked

10         for identification.)

11     JUDGE CLIFTON:  I have marked this document as Exhibit 47.

12  Anyone still need a copy, please raise your hand.  Appears

13  everyone who needs one has one.

14         Would you identify it further, Mr. Vetne, as to what we

15  will call it.

16     MR. VETNE:  Okay.  Exhibit 47 is a letter brief dated

17  July 11, 2011, submitted by California Dairies, Inc., to CDFA,

18  following the hearing of June 30, 2011, which was the subject

19  of the transcript from Exhibit 46.

20     JUDGE CLIFTON:  Excellent.  Thank you.

21  BY MR. VETNE:

22     Q.  Do you recognize this, Dr. Erba?

23     A.  I do, but it's quite a lot longer than I normally

24  write, so I'm surprised.

25     Q.  Yes.  And in your letter briefs you get a chance, you
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1929

1 get a chance to re-emphasize some things you said in your

2 testimony, and that's what you did here; is that correct?

3   A. That's correct.

4   Q. Okay. And then, you use the opportunity to vent a

5 little bit about some challenges that were raised at the first

6 time during the hearing?

7   A. Yes, I got a little carried away, didn't I?

8   Q. Okay. The pages of this are not numbered, but two,

9 three, the fourth page has a heading "Milk Shipped Out of

10 California."

11   A. Yes.

12   Q. There's a quote from your testimony concerning milk

13 shipped out-of-state, apparently on which you were challenged.

14 And then you elaborated factually and descriptive and

15 continuing with sentence beginning "I was asked." Can you read

16 "I was asked" to the end of that paragraph?

17   A. Certainly.

18   "I was asked to estimate the volume of milk that has

19 been moved out-of-state for processing, by the panel. I

20 contacted the processor outside of California that stated in

21 the month of June they had received 81 loads of milk and 12

22 loads of condensed milk from California. This was described as

23 distressed milk by the out-of-state processor, not milk that

24 was fulfilling a contract as a regular sale. I make this

25 distinction because some hearing participants appear to be

1930

confused about what milk is actually moving out-of-state and

for what reason. I believe these facts dispel the notion that

California processing capacity is more than adequate as claimed

by some hearing participants, and that California milk can

always find a home in-state."

Q. Thank you. That concludes what I asked you to read.

Correct?

A. Yes.

Q. And with reference the month of June there, in

California the month of June represents a month in which the

flush is over and the reduced production in summer heat stress

is starting?

A. Yes, it is starting, but it is clearly not the low

point the year.

Q. The low point would be July and August?

A. Probably more like September, maybe even October

sometimes.

Q. Okay. And there was reference here to distressed milk

and contract milk. Are you aware of milk that regularly flows

out of California for contract reasons?

A. Today? We don't sell any milk regularly out of -- I

can only speak from my company's point of view. We don't sell

any milk regularly out-of-state. We do sell, however, cream

and condensed out-of-state, pretty regularly.

Q. Okay. Are you able and willing to disclose who the

1931

1 processor you called was?

2   A. I can't even remember to be quite honest with you.

3   Q. That's even better. Okay. Thank you. I ask that

4 Exhibit 47 be received.

5   JUDGE CLIFTON: Does anyone wish to question the witness

6 about Exhibit 47 before determining whether you have

7 objections? There is no one. Is there any objection to the

8 admission into evidence of Exhibit 47? There is none. Exhibit

9 47 is admitted into evidence.

10   (Thereafter, Exhibit Number 47 was

11   received into evidence.)

12   JUDGE CLIFTON: It is time to begin the weekend. It's

13 4:57.

14   MR. VETNE: I can continue on Monday or I can wrap it up in

15 15 minutes, either way.

16   JUDGE CLIFTON: We want to go home.

17   MR. VETNE: Okay. That's good. Thank you.

18   JUDGE CLIFTON: Mr. Vetne, I truly appreciate what you have

19 brought to our attention so far, and you're still working, so I

20 thank you. I applaud all of you on how hard you have worked to

21 be prepared.

22   Mr. Hill, did you have something you wanted to to add

23 right now?

24   MR. HILL: Yes. Brian Hill. We do have a statement to

25 read on the record here. I think Mr. English is pleased, and

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 1   have not fallen on deaf ears.

 2          "CDFA" -- here's the statement -- "CDFA will be present

 3   on October 8th for the limited purpose of entering reports into

 4   the hearing record developed in response to requests from

 5   interested parties.  CDFA will only answer questions regarding

 6   the compilation of the data contained in these reports in order

 7   to remain neutral and avoid being associated with a particular

 8   proposal."

 9          And that is a statement passed along to AMS from CDFA.

10     JUDGE CLIFTON:  Excellent.  Thank you.  Mr. Hill, I'm going

11   to ask that you read that again when we're -- when we convene

12   on Monday as a preliminary matter, for you to read it again.

13   That's excellent.  So that's October 8th.

14     MR. HILL:  Thursday.

15     JUDGE CLIFTON:  Good.  It is Thursday.  All right.  Good.

16   Is there anything further before we go off record today?

17          Dr. Erba, were you already planning to be here Monday?

18     DR. ERBA:  It seems I might have some leverage here.  Yes,

19   yes, I was.

20     JUDGE CLIFTON:  Thank you.  All right.  That concludes our

21   record for today.  We go off record at 4:59.

22     (Whereupon, the evening recess was taken.)

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