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June 13, 2005

VIA FEDEX

Ms. Joyce Dawson
Attn: Office of Hearing Clerk
U.S. Department of Agriculture
Room 1081
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: **Comments and Exceptions to the Recommended Decision Jointly Submitted on Behalf of United Dairymen of Arizona, Shamrock Foods Company, Shamrock Farms Company and Dean Foods, Inc.**

Dear Ms. Dawson:

Enclosed for filing, please find an original, plus 4 copies of the Comments and Exceptions to the Recommended Decision filed on behalf of United Dairymen of Arizona, Shamrock Foods Company, Shamrock Farms Company and Dean Foods, Inc. I have also enclosed an additional copy for our records. Please date stamp the additional copy and return to me by U.S. mail.

Respectfully submitted,

Charles M. English, Jr.

CME/sf
Enclosure

cc: The Honorable Judge Marc Hillson
Charlene Deskins, Esq.
Jack Rower, Marketing Specialist
Gino Tosi, Marketing Specialist
Richard Cherry, Marketing Specialist
Benjamin Yale, Esq.
Kristine Reed, Esq.
Al Ricciardi, Esq.
Marvin Beshore, Esq.
Mike Brown

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In the Matter of:

ARIZONA-LAS VEGAS AND PACIFIC)	**DOCKET NOS. A0-368-832**
NORTHWEST MARKETING AREAS)	**A0-271-837, DA-03-04**

COMMENTS AND EXCEPTIONS TO THE RECOMMENDED DECISION

SUBMITTED JOINTLY BY

UNITED DAIRYMEN OF ARIZONA, SHAMROCK FOODS COMPANY, SHAMROCK FARMS COMPANY AND DEAN FOODS, INC.

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June 13, 2005

COMMENTS AND EXCEPTIONS TO THE RECOMMENDED DECISION SUBMITTED JOINTLY ON BEHALF OF UNITED DAIRYMEN OF ARIZONA, SHAMROCK FOODS COMPANY, SHAMROCK FARMS COMPANY AND DEAN FOODS, INC.

I. INTRODUCTION

These Comments and Exceptions are filed, pursuant to 7 C.F.R. §900.12(c), on behalf of United Dairymen of Arizona ("UDA"), Shamrock Foods Company, Shamrock Farms Company, and Dean Foods, Inc. We thank the Secretary and his staff for their patience and for engaging in this critical administrative rulemaking resulting, we trust, in the near future in the implementation of a Final Rule substantially similar to that proposed in the Recommended Decision. This has been a long and arduous process and we encourage immediate adoption of a rule limiting the size of exempt producer-handlers from milk regulation. We do not wish to belabor the Record and will not repeat the extensive Briefing submitted last August separately for UDA and Shamrock and Dean. However, the proposed findings and conclusions found in those Briefs in Chief may be of particular use to the Secretary in responding to what we expect will be strenuous, if non-responsive, exceptions filed by those wishing to retain the benefit of the existing regulatory loophole.

II. Comments

A. Recent Holdings by the United Supreme Court Undercut Ongoing Objections

The existing beneficiaries of regulatory largess resulting from the continuing producer-handler exemption from pricing and pooling regulations have attempted to raise what appear to be putative "takings," "due process," and "ultra vires" defenses to the otherwise universal effort by industry to urge the Secretary to adopt size limitations for exempt producer-handlers. In addition to all that has been already presented to the Secretary, the Secretary should note that in a

series of recent, together with older, established, U.S. Supreme Court cases, these inaccurate arguments against regulation have now been further discredited.

On May 23, 2005, a unanimous Court in *Lingle et al. v. Chevron U.S.A., Inc.*, 73 U.S.L.W. 4343 (May 23, 2005) rejected the "substantially advances" formula as a valid method of identifying compensable regulatory takings, severely limiting (if not outright reversing) the Supreme Court's earlier holding in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In *Lingle*, Hawaii adopted rules regulating the rents charged by oil companies to service station owners. The oil companies asserted that this regulation would result in no benefit to consumers and affected a regulatory taking of their property for the benefit of service station owners. "Today we correct course." *Lingle*, 73 U.S.L.W. at 4349. Upon rejection of the *Agins* "substantially advances" test, the Supreme Court expressly leaves open *only* four taking legal theories: a "physical" taking; a "total regulatory taking" under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (unlawful where regulations deprive owner of "*all* economically beneficial us[e]" of her property (emphasis in original); a land-use "exaction violating the standards set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); and the remainder governed by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (New York City Landmark Law depriving owner of historical building from improving or making significant modifications *not* a taking under the 5th Amendment).

The first three of these legal theories cannot be applied to milk marketing regulation – there is no physical taking or land-use exaction and the small portion of the milk price that ends up being shared in the pool cannot be said to be a "total regulatory taking" as defined in *Lucas*. The "particular circumstances" test articulated in *Penn Central, supra,* is also unavailing to these

opponents. That Court expressly noted the unlikely event of finding a taking resulting from government "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good."

The time is long past when Sarah Farms, or the other large producer-handlers, may be heard to complain (as they do for instance on their established website "keepmilkpriceslow.org") that adoption of the regulation will lead to "diversion" of their money. That objection as to milk marketing regulation was specifically and expressly rejected over 60 years ago in *Stark v. Wickard*, 321 U.S. 288 (1944) (dairy farmers unsuccessfully asserted that order "is unlawfully diverting funds that belong to them"). And the overarching equalization and marketing limitation principles of the Agricultural Marketing Agreements Act ("AMAA") expressly withstood a 5th Amendment "takings" challenge in *Mulford v. Smith,* 307 U.S. 38 (1939) (tobacco quotas imposed after tobacco seeds planted, but before tobacco actually sold to warehouses did not amount to unconstitutional retroactive taking). The "takings" claim, whether or not so denominated, is without merit.

Sarah Farms, through a purported expert and otherwise, also maintains that producer-handlers cannot be subject to full federal regulation because their handler operation does not "purchase" milk from its producer operation for processing.[1] In their Briefs in Chief, Shamrock and Dean and UDA contradicted this so-called argument with the U.S. Supreme Court's holding in *United States v. Rock Royal Co-op, Inc., et al.*, 307 U.S. 533, 580 (1939) (upholding milk marketing order against claim of unlawful delegation, discrimination and yet another unsuccessful property deprivation claim) that the term "purchased" as used in § 7 U.S.C. 608c(5)(A) and (C) means "acquired for marketing." In addition to *Rock-Royal* and its progeny

[1] We agree with the Secretary's conclusion that the producer-handler "exemption" from full minimum price obligation is not an exemption that means the producer-handlers are not subject to regulation in the first instance.

(most cited in the Brief in Chief), we also now have the June 6, 2003 U.S. Supreme Court decision in the "medical marijuana" case, *Gonzales v. Raich*, 73 U.S.L.W. 4407 (June 6, 2005) largely relying on *Wickard v. Filburn,* 317 U.S. 111 (1942)(the *Raich* Court refers to this case as *Wickard*, but as there are two cases involving Secretary Wickard cited in this Brief, it shall be referred to as *Filburn* herein).

At issue in both *Raich* and *Filburn* was the legal ability of the federal government to regulate home-grown and home-consumed products, marijuana grown and used for medicinal purposes and never sold in *Raich* and wheat grown over the government's marketing allotment but consumed wholly on the home farm where grown in *Filburn*. Six Justices (including Justice Scalia in his concurrence) expressly rely on *Filburn*.[2] Justice Scalia aptly for this proceeding pointed out "the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market . . . thus [carrying] with it the potential to disrupt Congress's price regulation by driving down prices in the market." *Filburn,* at 127-129 (Scalia, J. *concurring in the judgment* at 4417, fn 2).[3] So to must the Secretary find that the continued under-regulation of large commercial size producer-handlers carry with it the potential to disrupt Congress's price regulation of milk. *Filburn* as reinvigorated by *Raich* supports immediate full regulation of commercial size producer-handlers as requested by proponents.

Indeed at the time of *Filburn*, USDA exempted plantings below a specified bushel level, but this was an election "to exempt even smaller farms from regulation" by the Secretary only and "does not speak to his power to regulate all those whose aggregated production was significant." *Raich* 73 U.S.L.W. at 4412. This is no different from the Secretary's election until

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[2] The dissent (73 U.S.L.W. at 4421) calls *Filburn* the most far reaching example of Commerce Clause authority citing *Lopez* 514 U.S. 549, 560 (1995). Since 6 Justices expressly rely on *Filburn*, whether it is far reaching or not, it is obviously still very good law.

[3] The majority agreed with this formulation of *Filburn*, although not quite so eloquently. 73 U.S.L.W. 4412.

now to exempt producer-handlers because they have historically been small dairy farms without significant aggregated production. While obviously not addressing this issue, both the majority and dissent in *Raich* recognize the ability, in an economic regulatory setting, to exempt small entities until they begin to have (as they have here) an impact on the regulated market.

Raich is genuinely important in this context. Recent decisions by the Court in *Lopez, supra* and *Morrison*, 529 U.S. 598 (2000) had led some legal scholars to conclude that the Court was prepared to cut-back on the holding in *Filburn*. While such a limitation would not have been fatal to a determination by the Secretary to fully regulate producer-handlers, the Court's emphatic reliance on *Filburn* on June 6, 2005 is necessarily a rejection of most of the arguments mustered by those supporting the status-quo. The Secretary can and should recognize the reaffirmation of his full authority to regulate in order to protect the underlying program.

B. Other Legal Issues

1. Regulatory Flexibility and Small Business

a. We agree with the Secretary's conclusion (70 Fed. Reg. 19635 at 19636-19637 (April 13, 2005)) that in order to be a small business for this purpose the producer-handler must be a small business at the dairy farm. Another way to look at this issue is to conclude that since the entity claiming small business status asserts that it is a "producer-handler", it must be a small business as both a producer and a handler. It is logical to conclude that if an entity is to be a small business it must be a small business entirely not just one portion of it.

Moreover, as evidence in this Record showed, existing commercial handler operations (processors) can easily expect to be "small businesses" for handler definition purposes because

of the 500 employee threshold. As recognized by the Secretary (70 Fed. Reg. at 19637) 18 such small handler businesses are adversely affected by existing regulation because while small, they compete as regulated handlers against their so-called small exempt producer-handler brethren. The Secretary can and should conclude that even if these multi-million dollar entities are small businesses, the other small businesses adversely affected by the existing rules should not and must not have the Small Business Act used as a sword against the 468 small dairy farmers (70 Fed. Reg. at 19636) on the other side who look to the Secretary to fix this regulatory problem. Furthermore, the Secretary should most certainly expressly conclude, consistent with the Small Business provisions, that the rule proposed deals with the specific regulatory problem presented.

Without repeating ourselves, we also incorporate by reference here, all of Part X of Dean and Shamrock's Brief in Chief on this specific issue.

b. As to the Regulatory Flexibility Act's concern with new or unfamiliar forms or other documentary requirements, we also agree with the Secretary. There is no evidence that any new form will be required or that any change in regulation will add regulatory burdens not felt by others (including small businesses that are presently regulated) already. The Act is not designed to shield any particular entity from the effects of regulation. Moreover; again as referenced in *Raich* and *Filburn*, once these entities aggregate enough business to affect the regulatory program, there is no reason they cannot be fully regulated like everyone else.

2. The redistribution of wealth argument

The "unlawful diversion of our funds" argument, together with "related" argument that producer-handlers foster additional competition, simply ignore the intended purposes of the

AMAA and the regulations issued under the AMAA.[4] The complaint of the producer-handlers is nothing more than the complaint made by dairy farmers in the 1940's and soundly rejected in *Rock-Royal* (cited with approval in *Filburn* and thus reinvigorated in *Raich*).[5] If the complaint is valid, then all federal milk orders are invalid. If the complaint is valid, then Shamrock need not pay regulated prices on the milk acquired for marketing from its own or related farms. If the complaint is valid, then equalization pools are invalid. If the complaint is valid, then 70 years of milk regulatory law, both federal and state is invalid. And yet, the Courts have repeatedly and indeed recently upheld the validity of milk orders uniformly applied and their redistribution and equalization of payments policy. *See, e.g. Lamers Dairy, Inc. v. United States Department of Agriculture*, 379 F.3d 466 (7th Cir. 2004), *cert denied* 125 S. Ct. 278 (March 7, 2005), *rehearing denied* 125 S. Ct. 1592 (May 2, 2005). If those who wish to avoid regulation have an objection, it is with Congress, not the Secretary who is trying to carry out his mission. And Congress, as we well know has steadfastly retained and protected federal milk orders. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113 § 1000(a)(8) incorporating H.R. 3428 as Appendix H, 113 Stat. 1535-1536 and 113 Stat. 1501A-517 through 113 Stat. 1501A-518 (1999) (not codified).

C. Record Evidence Supports Proposal to Limit Producer-Handler Exemption

1. There is ample evidence to support the conclusion (70 Fed. Reg. at 19654) that the difference between the blend price and the Class I price is a reasonable approximation of the benefit accorded to exempt producer-handlers. Tr. 902-903 (Cryan). We expect that opponents will vehemently deny this and assert that the Secretary has not always wholly accepted this

[4] The arguments are also factually inaccurate.

[5] If *Filburn* (the broadest extent of Commerce Clause jurisdiction) is good law, *Rock-Royal* is rock solid.

contention. However, the Briefs in Chief address this issue [UDA Brief in Chief at pp. 26-28; Shamrock and Dean Brief in Chief, PFF 5-10 and 18-20] and this Record supports such a conclusion drawn from all the evidence. Any prior statements to the Secretary which may appear to be less than an endorsement of this finding were based upon records not deemed to be sufficient to give rise to a Final Decision and in any event did not provide the Secretary with the wealth of data here.

Moreover, any criticism that the Secretary is making a change in policy concerning exempt producer-handlers would be unwarranted. The Secretary is not making a change, nor even making a change in direction. The Secretary has steadfastly maintained that when he (or she) receives sufficient information regarding market disruption from producer-handlers, he will take appropriate actions. The rule has never been stated as being producer-handlers are forever exempt or even that they could expect to continue to be exempt. Rather the Secretary has always held that sufficient market impact by producer-handlers will be dealt with in order to protect the order program. UDA Brief in Chief, pp. 2-22 and Shamrock and Dean Brief in Chief, Part III-A, pp. 5-9. This the Secretary proposes to do, and this he should do – immediately.

2. We strongly endorse and encourage the Secretary to reiterate the conclusion supported by testimony from Dean Foods and DFA that a pool impact of one cent per cwt is significant is fully correct and needs to be the ultimate overall rule. PFF 13 and Tr. 1597 (Christ).

D. Rulemaking is NOT a Popularity Contest – Mass E-Mail Generated Comments Are Worse Than Useless

We are obviously aware that Sarah Farms and others have banded together to create a website self-servingly entitled "keepmilkpriceslow.com" in an effort to generate consumer and other comments regarding USDA's Recommended Decision. Of course in this age of mass-media, spamming and other forms of alleged public comments, a little bit of advertising (for instance we are aware of a newspaper advertisement taken out in the "Statesman Journal" by Mallorie's linking to the same website) can generate a lot of comments. In considering the entire Record under 7 C.F.R. § 900.13(a), the question for the Secretary is how much weight, if any, to subscribe to such mass generated comments by persons who without having heard both sides of the argument, simply turn on their computers and send an e-mail to the Secretary opposing the Recommended Decision. As discussed below, the Secretary should give no weight to these comments. More likely the Secretary should ascribe the negative inference that opponents have no evidence to support their position, instead attempting a useless (and legally irrelevant) consumer campaign designed, we believe, merely to slow down this process.

1. There is nothing in the AMAA or the implementing regulations for rule-making in these proceedings that even hints that the number of comments submitted, as opposed to the substance and quality of those comments, is relevant to the Secretary's decision. Indeed in his recent Recommended Decision declining to merge the Southeast and Appalachian milk marketing orders[6], the Secretary implicitly recognized that rule-making is not a popularity contest exercise. 70 Fed. Reg. 29409-19428 (May 20, 2005) (overwhelming percentage of dairy

[6] Parties, other than Dean Foods, do not by this statement endorse the result of the Secretary's decision in that proceeding.

farmers within those marketing areas purportedly supported proposed merger). The right answer may not please all, and may even be "unpopular". *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319 (3rd Cir. 1967) (Court upheld Secretary when plaintiff supported alternative solution to problem as being more popular - "Only the legality of [the Secretary's] choice is in issue here"); *Dairylea Co-op, Inc. v. Butz*, 504 F.2d 80, 91 (2nd Cir. 1974) (producer approval of proposed regulation not dispositive). The Secretary's statutory obligation is to establish and maintain orderly marketing conditions not to win a popularity contest. 7 U.S.C. § 602.

Moreover, the Secretary certainly will recall that United Dairymen of Arizona, as a dairy farmer owned cooperative, itself represents most of the dairy farmers presently pooling milk on the Arizona-Las Vegas milk marketing order. Together with Shamrock Farms and related entities, these comments can and do represent comments on their behalf. The fact that comments are jointly filed, rather than individually filed, can make no difference to the Secretary. Similarly Dairy Farmers of America, Select Milk Producers (upon a brief filed in August, 2004), National Milk Producers Federation, West Farms Foods and others all represent the vast majority of dairy farmers serving these markets. Their endorsement of a limitation on the exemption for producer-handlers is highly relevant should the Secretary deem it important to have producer support.

2. The summary on the "keepmilkpriceslow" website tells consumers what allegedly would happen if the Recommended Decision is adopted: "Tax four independent family farms located in the Pacific Northwest and Arizona over one million dollars each per year and give that money to others in the dairy industry." Leaving aside the inaccuracy of the use of the terms "tax" and "give" in this context, the website conveniently forgets to tell consumers guided to the website by advertisements or otherwise, how and why the actual program exists

and works. The site also neglects to tell those they urge to comment that the producer-handler "diversion of funds claim" has been expressly rejected by the U.S. Supreme Court. If their exception about conversion of funds is to be granted then it necessarily follows that federal orders are invalid generally. And Federal Orders have been repeatedly upheld by the Courts. *See e.g. Rock Royal, supra; Stark, supra,* and *Lamers, supra.*

The comments (and the related website) also presuppose the idea that these producer-handlers otherwise compete in a free market free of any subsidy. Leaving aside the relevance of that assertion, it is untrue. In addition to the subsidy these producer-handlers receive by being able to compete in a regulated market but free of the same restraints and costs to others, we request official notice of the Environmental Working Group's (an unbiased organization that collects and publishes data regarding federal government payments to farmers among others) website (http://www.ewg.org/farm/top_recips.php?fips=00000&progcode=dairy) detailing USDA subsidies received from 1995-2003 by these entities as follows:

Hein Hettinga -	$840,180
Smith Brothers -	$238,343
Edaleen Dairy -	$183,571 (combined "customer numbers" – 010975712, 009710930, and 009409840)
Mallorie's Dairy -	$148,312

Once again the fiction that these are small family dairy farms is overcome by the facts that these entities are among the largest dairy farms in the United States, if not the world. To exempt the handlers related to these producers from regulation, when they are so very large, is wholly inconsistent with Congress's intended purpose found in the AMAA.

The website generated comments all conclude without any factual evidence (of course no new facts may be introduced into evidence at this time regardless) that the Recommended Decision will raise milk prices. This supposition is unsupported by the Record and is certainly

contested by proponents. However, the statement that these producer handlers are able to sell milk to retail customers for less (obviously strongly supported by the producer-handlers themselves) can also be read by the Secretary as an acknowledgement by the producer-handlers of their existing advantage in sales to retail accounts.

3. As with any mass generation of e-mails, there are spectacular errors. One in particular must be pointed out because it goes to the heart of why the Secretary should be leery of these kinds of comments being given any weight. Attachment A shows two comments submitted on May 19 (e-mail through "keepmilkpriceslow") and May 20 (directly submitted comment) by "Jim Tillison", Executive VP and CEO of the Alliance of Western Milk Producers. Mr. Tillison and his organization support immediate implementation of the Recommended Decision. Mr. Tillison went to the website and attempted to submit a favorable, instead of an opposing, comment. The website submission, however, only permitted Mr. Tillison to add his personal (and real) thoughts to the first three standard paragraphs "in OPPOSITION" to the Recommended Decision. Thus his comment has ended up in a binder listed as being "Opposition" to Recommended Decision.[7]

Another commenter from Gig Harbor, Washington (allegedly writing a personal letter on behalf of 40,000 residents in Washington receiving home delivery from Smith Brothers) writes a not-so personal 3 page letter that just happens to be word for word identical to a letter submitted the same day from Bonney Lake, Washington.[8] Moreover, there are at least three identical

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[7] The efficient Hearing Clerk's office and AMS have established a program to print-out, and place in the public Record, the various comments received in this (and all other) rulemakings. The Hearing Clerk's office is open to the public for public inspection of submitted documents and communications with that office are of course not *ex parte* when they concern only retrieving, copying or noting information in the public record.

[8] Contradicting the assertion of lost business or losses of customers, these comments also "assert" that they "love" Smith Brothers milk so much that they will buy the milk regardless of any price increase. If the comments

versions from the same Gig Harbor submitter (one mailed and two e-mailed) in the submission binders. Our brief unscientific survey revealed a number of duplications contained in the records. Is the Secretary supposed to conclude that these are multiple comments? Of course not.

In the ongoing attempt to make illogical connections, the Gig Harbor letter (and other identical versions) decries regulating Smith Brothers and compares Smith Brothers to Dean Foods. Of course as the Record evidence demonstrates, Dean Foods has no plants in the Pacific-Northwest Marketing Area and sells at best a fraction of the milk consumed in that area. Ex. 6, Table 1; Ex. 5, Table 1. This red herring has long since rotted.

Finally, one King County Council Representative erroneously asserts that adoption of the Rule would add "an unnecessary middle-man to their milk production process by having to sell their milk to a cooperative and then buy it back to process at their plant." Another Washington House Representative baldly asserts that "[t]his proposed rule would limit the ability of local consumers to purchase their milk straight from the source." Say what? Beyond the inaccuracies (nothing in the Recommended Decision will prevent any producer-handler from supplying their own milk or purchasing milk from independent sources and nothing will prevent consumers from getting home delivery of milk), the only way a person could come by such convoluted statements is from Smith Brothers or some publicity agent. This just serves to emphasize how little value there is in mass generated e-mails from persons not well acquainted with these kinds of regulatory programs.[9]

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are relevant at all, the Secretary could conclude that Mallorie's and Smith Brothers are so popular that adoption of the rule will actually increase their sales.

[9] There is yet another cautionary note regarding e-mail comments. How does the Secretary distinguish from those actually generated by different people as opposed to a sophisticated computer user that is able to phish or fake identities? We simply have no way of knowing. Regardless, while these kinds of comments should not be ignored, they should be given little, if any, weight.

4. A review of the Comments and Exceptions filed to date (June 7) is quite revealing. The vast overwhelming number of e-mail generated comments and other comments are purportedly submitted on behalf of or by consumers and several political representatives in Oregon and parts of Washington, including Seattle. One is literally struck by the lack of such support for Sarah Farms (of course the website is general, but the submitters' locations are not). While we do not purport to have conducted anything approaching a scientific survey, or for that matter make a determined search for Arizona comments, our random examination revealed only one comment from a purported resident of Arizona. Apparently the website does not generate for Sarah Farms (one of the largest dairy farms in the country (Shamrock and Dean Brief in Chief, Proposed Finding of Fact 3 and citations therein) selling through the large retail accounts routinely criticized in comments received from Washington) the kind of sympathy reserved for home delivery of milk. Taking nothing away from the Secretary's Recommended Decision regarding the Pacific-Northwest, we agree.

5. Having not of course participated in the proceeding or had the benefit of the full and rich Record, these website generated comments also neglect to consider the ramifications of a mandatory statutory scheme that requires simply minimum prices paid by all handlers to all dairy farmers. Once the Secretary establishes milk orders, there is no discretion in uniform application. These comments by their very nature are thus legally irrelevant to the Secretary's decision-making.

III. EXCEPTIONS

A. <u>The 3,000,000 Pound Route Disposition in the Marketing Area Recommendation is Too Generous</u>

We genuinely appreciate and applaud the Secretary's efforts in this hearing and reflected in the Recommended Decision. Without in any way subtracting from that appreciative response and certainly not wanting to slow down immediate implementation of the Recommended Decision, we nonetheless note with some regret the Secretary's narrow interpretation of his powers to use the hearing process after proper notice to formulate the best solution for the problem. We read the Secretary's Recommended Decision at 70 Fed. Reg. 19654 to suggest strongly that only the Hearing Notice prevented the Secretary from adopting even more strict, and, we believe, regulatory sound size limitation for producer-handlers. Moreover, and more importantly for present purposes, the Secretary appears to have felt constrained by actual proposals (submitted now years ago) that would establish the limitation only after there are 3,000,000 pounds of route disposition **in the marketing area.**

We respectfully suggest that the Secretary has unnecessarily (and perhaps to his future regret in another proceeding) understated the extent of his own regulatory powers. As the Record demonstrates [Tr. 2642-2648, 2658-2661 and 2687 (Hettinga)], the nature and location of milk marketing in the western states provides ample opportunity for handlers to sell 2.9 million pounds of milk each in multiple regulated and unregulated areas. The 3.0 million pound threshold was designed and discussed as being a total route disposition provision, not route disposition only in the marketing area. The Record reflects that Sarah Farms has a related facility now selling milk into federally unregulated territory (California). Tr. 2658-2660 (Hettinga); *see also* Northwest Dairy Association Brief in Chief, pp. 15-16 and 21. A provision that permits each facility to sell 2.99 million pounds in Arizona and the remainder of its milk elsewhere without regulation will likely provide amply opportunity for mischief. Factually, as the Secretary appears to acknowledge at 70 Fed. Reg. 19654 a lower route disposition level or a

3 million pound level regardless of the location of the retail sale of milk is justified. These parties endorse the Record evidence that would limit the exemption level for producer-handlers to 150,000 pounds.

The only question then is the Secretary's authority in the face of the Hearing Notice to fit the regulation to the problem actually established at the hearing. For this purpose, it is especially instructive to examine the "summary" of the hearing found at the very beginning of the Notice of Hearing: "The proposals seek to, **among other things**, end the regulatory exemption of producer-handlers from the pooling and pricing provisions of these two milk marketing orders **if their Class I route disposition exceeds three million pounds of milk per month.**" (emphasis supplied). Ex. 1. The summary clearly put any producer-handler on notice that their exemption was at issue especially, but not exclusively, if their total route dispositions exceeded three million pounds. The summary does not restrict the three million pounds of route disposition to being in the marketing area. To be sure, the proposals, again submitted now years ago, do read as the Secretary now proposes.

However, the critical legal test is not that the Recommended Decision adopt identical language to that proposed. Indeed the Secretary has very recent legal support for a much broader proposition as stated in *Alto Dairy v. Veneman*, 360 F.3d 560, 569-570 (2003) (Secretary had given proper notice for adoption of rule limiting "paper pooling" of distant milk even though "none of the proposals was identical to the amendment that the Department adopted at the end of the proceeding."). The *Alto* Court pointedly discussed the summary and noted that "though this is gobbledygook to an outsider, insiders such as plaintiffs would realize that the focus of the proceeding would be on their eligibility to be pooled with Mideast producers." *Id.* at 570. Here the summary in the Hearing Notice certainly justifies at least "modifying" the final result to

eliminate the in-area route disposition requirement. Indeed Judge Posner's excellent opinion in *Alto* goes further, suggesting that the Secretary could go so far as to adopt now a restriction as suggested at 70 Fed. Reg. 19654:

> We have said that "notice is adequate if it apprises interested parties of the issues to be addressed in the rulemaking proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner." *American Medical Assn v. United States*, 887 F.2d 760, 767 (7th Cir. 1987). But "while an agency must explain and justify its departures from a proposed rule, it is not straitjacketed into the approach initially suggested on pain of triggering a further round of notice-and-comment." Id. at 769. "The law does not require that every alteration in a proposed rule be reissued for notice and comment. If that were the case, an agency could 'learn from the comments on its proposals only at the peril of' subjecting itself to rulemaking without end." *First American Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000). The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of evidence and arguments presented in the course of the proceeding. If every modification is to require a further hearing at which that modification is set forth in the notice, agencies will be loath to modify initial proposals, and the rulemaking process will be degraded.

Alto Dairy at 569-570.

The logical conclusion of the *Alto Dairy* case is that once opened by the Hearing Notice, the producer-handler sections in these two sections were wholly open. The provisions could have been eliminated in their entirety since the Secretary has the obligation to maintain only those provisions that effectuate the order. 7 U.S.C. § 608c(16)(A). The producer-handler proposed amendments could have been curtailed substantially by altering some existing rules if the hearing Record supported such change. Here the only change the Hearing Record supports that is not identical to the hearing notice language would be an even lower route disposition limit and certainly an omission of the in-area sales requirement for this purpose only. *Alto Dairy*

provides clear support for the Secretary to implement a final rule establishing an exemption limit at 150,000 pounds, putting producer handlers on the same footing as other handlers so as to provide for administrative ease for the Secretary.

What *Alto Dairy* teaches us is that everyone with any interest in a hearing provision that is opened for amendment at a hearing had better appear and protect their interests. Indeed here the hearing notice brought out many interests all dedicated to protecting the status quo (including a producer-handler from another federal order and ex-producer handlers). According to Judge Posner: "They knew enough to know that if they wanted to protect their participation in the Mideast pool they would have to participate in the rulemaking proceeding. Their choice not to do so cannot be attributed to lack of notice." *Id.* at 570.

B. Other Proposed Limitations Also Should Be Adopted.

Proponents also express significant and real concern that producer-handlers can and do use sales to retailers with the same or substantially similar label as regulated handlers. According to the Record evidence, this has resulted in regulated handlers, and the dairy farmers who serve them, balancing the producer-handler through customer orders. For whatever reason, there has been a reluctance on the part of the Market Administrator to insure that such balancing does not take place. Tr. 133-134 (Wise) and 558 (Krueger). It is for this reason that proponents at the hearing, on brief, and now in exceptions strongly support the proposals, for now denied by the Secretary, to make certain the producer-handlers, regardless of size are not able to shift these balancing costs unto the remainder of the market while reaping all of the benefits of the Class I market.

Again, we remain urgently in need of adoption of at least the three million pound exemption limitation, and do not want these exceptions to delay implementation. However, the Secretary should not take such urgent request for action as acquiescence for these remaining serious issues.

IV. THE *EX PARTE* ALLEGATIONS

Realizing that there is a lack of evidence favoring their substantive positions, Sarah Farms now makes inchoate allegations of *ex parte* communications. On May 23, 2005 the Secretary filed a memorandum responding to and rejecting such allegations. Moreover, we know of no evidence presented to establish that USDA officials were in fact in the room(s) when the alleged communications took place except as noted in Ms. Dana Coale's memorandum of May 23, 2005 (now part of this Record). Nonetheless without such additional evidence Sarah Farms demands that the Department track down the details and circumstances of these communications and place them on the Record.[10] The result of complying with this demand would be further delay of this long-standing proceeding.

Moreover, it is precisely because Sarah Farms' allegations are inchoate that the Department must conclude that they are made in furtherance of a delay tactic and nothing more. If Sarah Farms wanted these allegations to be taken seriously, it necessarily would have to provide evidence, as opposed to conclusory and unsupported allegations, that USDA officials were actually in the room when such communications were made. Thus, it is apparent that the Sarah Farms' inchoate allegations are just another attempt to slow down the decision-making

[10] While an agency may require a party "to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected," the legislative history suggests that this remedy was intended to be invoked only rarely. *PATCO v. FLRA*, 685 F.2d 547, 564 (D.C. Cir. 1982). At a later date, the proceeding might be subject to judicial review and depending on the nature of the communications, they might serve as a basis to void the proceeding, but it certainly would not necessarily follow. *Id.* It is in a very limited circumstance where an *ex parte* communication serves as a basis to void a proceeding. *Id.*

process, which notably would give them and other producer-handlers time to bilk more dollars out of the pockets of neighboring dairy farmers through their unjustified exemption. As succinctly stated in Mr. Tillison's (butchered by "keepmilkpriceslow" website submission) comment: "If USDA is interested in saving true family farms it should expedite issuing a final decision so these huge factory farms owned by millionaires stop taking money out of real family farmers pockets." Attachment A.

Beyond these apparent motivations of opponents of reform, the Department must also conclude that the allegations of *ex parte* communications are not sustainable under the existing precedent relating to *ex parte* communications. As the Department knows, section 900.16 of the Department's General Regulations was amended in 1977 to implement to the *ex parte* provisions of the Government in the Sunshine amendments to the Administrative Procedure Act (hereafter, APA). 42 Fed. Reg. 10833 (Feb 24 1977). Thus, a review of case law interpreting the APA prohibition *against ex parte* communications as well as the legislative history of the APA is instructive.

The provision for the disclosure of *ex par*te communications serves two distinct interests:

> Disclosure is important in its own right to prevent the appearance of impropriety from **secret communications** in a proceeding that is required to be decided on the record.[11] Disclosure is also important as an instrument of fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered. When these interests of openness and opportunity for response are threatened by an *ex parte* communication, the communication must be disclosed.

PATCO v. FLRA, 685 F.2d 547, 563 (D.C. Cir. 1982) (followed by numerous cases including *Electric Power Supply Assoc. v. FERC*, 391 F.3d 1255, 1258 (D.C. Cir. 2004)) (emphasis and

[11] There is also an argument that this proceeding is not subject to the APA rule against *ex parte* communications because it is not a proceeding that Congress has directed to be "on the record." *See Marketing Assistance Program v. Bergland*, 562 F.2d 1305, 1309 (D.C. Cir. 1977).

footnote added). At its core, therefore, the disclosure requirement is important where communications are **made in secret** and where communications involve arguments of which other interested parties are not already on **notice**.[12] Where these interests are not compromised, the precedent is clear, the Agency is under no obligation to delay open proceedings in order to track down and place communications on the record. *PATCO,* 685 F.2d at 563-64.

Importantly, none of the communications alluded to in Sarah Farms' allegations involve secrecy or information/arguments that are not already in the Record. First, the presentations specifically cited by Sarah Farms as potentially problematic – including the speech by Gary Hanman at the Dairylea meeting– were made in meetings that were open to all walks of the dairy industry. Thus, any suggestion of secrecy, especially given the fact that members of the trade press are always in attendance at these meetings, is ludicrous. Because of the public nature of these statements, even if it were the case that something was said in those speeches that was different or additional to information already in the hearing Record, it would not follow that the interested parties would be surprised and unable to respond. But, more importantly, there still remains no evidence that USDA personnel did not generally excuse themselves from the room when hearing issues were being discussed (subject to Ms. Coale's May 23, 2005 Memorandum). Still further, and not insignificantly, a review of the transcript of the speech by Mr. Hanman reveals what the common sense person knows about these types of publicly attended meetings – nothing was said that had not already been presented to the hearing officer through testimony and briefing. These presentations were clearly just a statement of the positions being taken by the speaker's respective companies, nothing more. As such, it simply cannot be said that the communications alleged somehow could have an impact on the open proceedings.

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[12] Indeed, Congress made clear in legislative history that disclosure is the antidote to secret communications stating "[i]n this way the secret nature of the contact is effectively nullified." Government in the Sunshine Act, P.L. 94-409, 1976 U.S.C.A.A.N. (Leg. History) 2203.

In sum, the alleged communications were not secretive and were not new or additional to statements and evidence already in the Record. As such, there is no risk that the alleged communications would affect any open proceedings and thus a further delay of the decision-making process for the purpose of searching and disclosing the details and circumstances of such communications, beyond Ms. Coale's May 23, 2005 memorandum, is unnecessary. The Department need not and should not give in to Sarah Farms' obvious and continued delaying tactics.

V. IMMEDIATE IMPLEMENTATION NECESSARY

Nothing in these comments is more important than requesting that the Secretary implement a Final Decision as quickly as possible. This Hearing was first requested a number of years ago. The hearing began in September 2003. The Briefs were filed in August 2004. None of the disorderly marketing conditions have gotten better in the interim. The Secretary should consider the full Record promptly and issue a Final Decision that can be implemented immediately. Ironically, opponents of regulation inaccurately asserted (letter dated March 8, 2005) that the Secretary's employee(s) had leaked the idea that the Rule would promptly issue and be implemented without a Recommended Decision. Proving the inaccuracy of their own rumor, that did not happen. But that does not undercut the urgency that the entire industry has shown towards this matter. We urge the Secretary to implement a Final Decision no later than September 1, 2005 (a referendum vote in late July upon a Final Decision issued one month from now is of course doable).

VI. CONCLUSION

The war of words generated by the website and by the slew of opposition briefs ignores one very simple point. The exemption from full regulation for producer-handlers is not a "right". It is not unlimited. It is nothing more than an act of administrative convenience much as the wheat allotment program in the 1940's exempted very small operations. The Secretary does not propose to change course, rather he has determined that there is a threshold way to know for these milk marketing orders that an exempt producer-handler has a sufficient adverse impact on the producers and handlers in that order. To that end, the Secretary's evaluation of the producer-handler exemption in 1975 when he merged the Boston and Connecticut orders is most instructive:

> Typically, a producer-handler conducts a relatively small, family-type operation in which he processes, packages, and distributes only the milk on his own farm. **Full regulation of such operations usually results in considerable difficulty in administering the provisions of an order.** For this reason, it has been customary under Federal orders, including in New England, to exempt producer-handlers from the pooling and pricing provisions of the orders. **Such exemption has been feasible because such businesses are usually so small that their exemption does not undermine the effectiveness of the regulatory program.**

40 Fed. Reg. 47316, 47320, c. 2 (Oct. 8, 1975).

The Secretary's finding that the producer-handler exemption has an 4-6 cent per cwt impact on the Arizona pool[13], of large impacts resulting from significant differences in raw product costs to handlers, and of lost sales and margins by regulated handlers served by market producers establishes more than sufficiently for a rule-making record that it no longer feasible to permit the exemption to go unchecked. These producer-handlers are not small by any measure.

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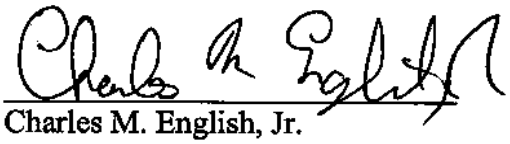
[13] The Record evidence in fact suggests that this finding is very conservative. *See, e.g.*, PFF 12 in the Shamrock and Dean Brief in Chief - calculating as least a conservative 10 cent per cwt impact on the pool. Indeed with 12-18% of the market, a cost to the pool of at least 12 cents per cwt as calculated by UDA at the time of the hearing is likely more accurate. Regardless the impact is large and causes disorderly marketing.

The effectiveness of the program presently has been, as with the wheat program in *Filburn,* undermined. There is no administrative difficulty in regulating these large producer-handlers (indeed it will be easier since once an entity hits three million pounds neither that entity nor the Secretary will be required to monitor the record-keeping required for the exemption).

There is a simple answer given these undisputed facts and conclusions. The exemption must end, and three million pounds of route disposition anywhere is the logical place to start that process. There is no higher priority in the industry than immediately fixing this overwhelming loophole threatening the entire regulatory program.

Respectfully submitted,



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ATTACHMENT A

Taylor, Erin

From: milkjet@aol.com%inter2 [milkjet@aol.com] on behalf of milkjet@aol.com
Sent: Thursday, May 19, 2005 11:07 AM
To: amsdairycomments; Johanns, Mike -USDA
Subject: Jim Tillison - Milk in the Pacific Northwest and Arizona-Las Vegas marketing areas: Docket No. AO-368-A32; AO-271-A37; DA-03-04B

Dear USDA:

I am writing in OPPOSITION to the proposed regulation of producer-handlers.

I am very troubled that USDA would enact rules that increase the price of milk to the consumer and that limit competition in the marketplace.

I urge USDA to reconsider its recommendation and to act in way the respects both consumers and the investment of time and money that producer-handlers have put into their family businesses.

If USDA is interested in saving true family farms it should expedite issuing a final decision so these huge factory farms owned by millionaires stop taking money out of real family farmers pockets.

Sincerely,
Jim Tillison
1225 H Street
Sacramento California, 95814
Household Count: 2
milkjet@aol.com

Before the Secretary
United States Department of Agriculture

Regarding: Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Proposed Amendments to Orders

Docket Nos. AO-368-A32, AO-271-A37

May 20, 2005

Comments on Recommended Decision

By Jim Tillison, Executive VP, CEO
Alliance of Western Milk Producers
12 25 H Street, Suite 102
Sacramento, CA 95814

Introduction

The Alliance of Western Milk Producers represents California's dairy cooperatives which are owned by 1100 dairy farmers, producing nearly 70% of California's milk. While California is not part of the federal milk marketing order system, our dairy farmers are impacted by what happens in federal orders.

That is why the Alliance supports prompt implementation of the recommended decision published in the Federal Register of April 13, 2005. The decision would limit the eligibility for the producer-handler exemption to those producer-handlers with less than 3 million pounds of route disposition of fluid milk products per month within the marketing area. The quick implementation of this decision will address the inequities and the market disruptions that have occurred as a result of the current unlimited producer-handler exemption.

The recommended decision addresses the competitive pressures the producer-handler exemption has on what producers in surrounding markets receive for Class 1 milk that would otherwise impact California dairy farmer milk prices.

The Alliance also supports the revision to 1131.13 which prevents what we call double dipping – producer milk being pooled in both a state order and a federal order. Such activity creates a competitive advantage in both procuring milk and competing for markets for milk for the handler utilizing this loophole.

In conclusion, the Alliance of Western Milk Producers urges USDA to quickly implement the recommended decision which limits the producer-handler exemption to those who have less than 3 million pounds a month in route dispositions.

Respectfully submitted:

James E. Tillison, Exec. VP, CEO