

**BEFORE THE SECRETARY
UNITED STATES DEPARTMENT OF AGRICULTURE**

In the Matter of:

**Milk in the Pacific Northwest and)
Arizona-Las Vegas Marketing Areas;)
Proposed Amendments to Tentative)
Marketing Agreements and Orders)**

**Docket No. AO-368-A32
AO-271-A37; DA-03-04**

**PROPOSED FINDINGS, CONCLUSIONS
AND SUPPORTING BRIEF**

**On Behalf of
UNITED DAIRYMEN OF ARIZONA**

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July 28, 2004

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Preliminary Statement

A public hearing was held on proposed amendments to the marketing agreement and to the order regulating the handling of milk in the Arizona -Las Vegas and Pacific Northwest marketing areas on September 23-25, 2003 at Tempe, Arizona, November 17-21, 2003 at Seattle, Washington, and January 20-22, 2004 at Alexandria, Virginia. The hearing was held pursuant to a notice of hearing published on August 6, 2003, 68 F.R. 46505 and notices of reconvened hearings published on October, 31, 2003, 68 F.R. 62027 and December 29, 2003, 68.F.R. 74874.

The material issues on the record of the hearing relate to:

1. ending the regulatory exemption of producer-handlers from the pooling and pricing provisions of the two marketing orders if their Class I route distribution exceeds three million pounds of milk per month,

2. operational requirements to qualify for designation as a producer-handler;
3. prohibiting the ability to simultaneously pool the same milk on the Arizona-Las Vegas Order and on a State-operated milk order that provides for marketwide pooling.

Proposed Findings and Conclusions

The following proposed findings and conclusions on the material issues are based upon evidence presented at the hearing and the record thereof:

I. Definition of Producer-Handler. On June 10, 2002 United Dairymen of Arizona (UDA) filed with Deputy Administrator USDA AMS a request that a notice of hearing be issued to consider amendments to the “producer-handler” definition contained in Section 1131.10 of the Order regulating the handling of milk in the Arizona-Las Vegas marketing area. UDA proposed that Section 1131.10 of the Order be amended to define the term “producer-handler” to mean “a person who operates a dairy farm and a distributing plant from which there is route disposition in the marketing area during the month of not to exceed 3 million pounds and who the market administrator has designated a producer-handler after determining that all of the requirements of this section have been met.” UDA’s proposed “Requirements for Designation”, described as Section 1131.10(a)-(e) of its proposed amendments, were drawn, principally, from the analogous provisions of Order 124, the Pacific Northwest Order.

In support of its request for a hearing to amend the Order 131 producer-handler definition, UDA advised the Deputy Administrator that Sarah Farms entered the Order 131 marketing area as a producer-handler in 1994 with a Class I distribution of approximately 1.3 million pounds per month, increased its monthly Class I distribution to 4.6 million pounds by 1996 and by 2001 had reached a monthly Class I distribution of 15,000,000 pounds according to extrapolated data of the Order 131 Market Administrator.

Amendment of the “producer-handler” definition of the Order was needed, UDA explained, because exemption of Sarah Farms from pricing and pooling was simply inconsistent with the rationale for exemption tracing back to the Secretary’s earliest decisions in which he explained that:

Typically a producer-handler conducts a small family operation.... Normally, exemption from regulated status is made in a Federal Order for such individuals on the grounds that such businesses are so small that they have little or no effect on the pool. (Decision on Proposed Amendments to New England Order , 25 F.R. 7819, 7825. August 16, 1960)

See also In re Jacob Tanis, 17 A.D. 1091, 1104 Nov. 10, 1958, (exemption granted to handlers whose own farm production was “not sufficiently significant to constitute a serious competitive factor in the marketing area.”)

UDA’s request for a hearing was joined in and supported by Maverick Milk Producers, a qualified Arizona cooperative association, Shamrock Foods Company and The Kroger Company, two Order 131 regulated handlers, and by Dairy Farmers of America and Northwest Dairy Association.

On October 9, 2002, UDA renewed its request for a hearing noting in its letter to the Deputy Administrator that trade sources had reported that Sarah Farms had continued to expand its route distribution in the Arizona-Las Vegas marketing area, displacing regulated handlers from a significant number of mega-store outlets. In addition, the Deputy Administrator was advised that Sarah Farms had under construction another processing plant in Yuma, Arizona, capable of processing 2 million pounds of Class I product per day.

In further support of its request for a hearing to amend the producer-handler definition of the Order, UDA reminded the Deputy Administrator that:

There is nothing in the AMAA that purports to exempt a producer in his capacity as a handler, from full regulation under a milk order. In fact, the AMAA specifically requires full regulation of producers in their capacity as handlers ...by providing in Section 8c(5)(C) of the AMAA that in order to insure the uniformity of class prices among “all handlers” mandated by Sections 8c(5)(A) and (B) of the AMAA, the Secretary “shall provide” in each order:

a method for making adjustment in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

The critical issue presented by the UDA and supporting proponents’ proposal limiting the producer-handler exemption is whether, or to what extent, if any, the Secretary is authorized to regulate, or exempt from regulation, under the AMAA a handler engaged in processing and marketing the milk of the handler’s own farm production in a regulated marketing area. That question can be answered by an analysis of the AMAA’s statutory language, the legislative history

preceding its adoption and judicial decisions which address and define the authority granted to the Secretary by the AMAA.

A. The AMAA Defines And Limits The Secretary's Authority To Regulate Or Exempt From Regulation Handlers Who Are Also Producers

1. The Statutory Language

An analysis of the language of the several sections of AMAA discloses a single, salient, irrefutable fact relating to the issue presented by proponents' proposal to limit the producer-handler exemption: the AMAA, by its terms, does not grant to the Secretary authority to exempt from pricing and pooling under a milk order the milk of a producer acting as a handler of his own milk production. As the Secretary's Judicial Officer explained in Independent Milk Distributors Association, 20 A.D. 1, 29 (1961), producer-handlers "have no legal right to be exempt from regulation."

A review of the AMAA's several sections clearly supports that conclusion. The basic mechanism for achieving the "orderly marketing" policy objectives declared by Congress in Section 2(1) of the AMAA is through the statutory authority granted to the Secretary to regulate "handlers" by requiring them to pay minimum "uniform prices" for milk purchased from producers. The term "handler" is defined in Section 8c(1) to include "processors, associations of producers, and other engaged in the handling of any agricultural commodity or product thereof..." Under Section 8c(5)(A), the Secretary is authorized to fix minimum class prices for milk "which all handlers shall pay...for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers subject only to [specified] adjustments..." (emphasis added).

While Section 8c(13)(B) of the AMAA precludes the Secretary from issuing a milk order “applicable to any producer in his capacity as a producer”, there is nothing in the Act that purports to exempt a producer “in his capacity as a [handler]” from the full regulatory coverage of the Secretary’s milk orders. In fact, the AMAA expressly contemplates complete regulatory coverage of producers in their capacity as handlers by providing in Section 8c(5)(C) that in order to insure the uniformity of class prices among handlers and producers mandated by Sections 8c(5)(A) and (B), the Secretary shall provide in each order:

a method for making adjustments in payments as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

Counsel for opponents, and their witnesses (including their “expert”), seized on the words “milk purchased” in an effort to avoid the clear intent of the statutory provision, totally ignoring the settled law which not only authorizes, but directs, the Secretary to require the pricing and pooling of milk of “producers who are also handlers.”

2. The Authority Of The Secretary To Regulate Producers Who Are Also Handlers Has Been Settled Law For Over Half A Century

Judicial decisions and prior adjudicatory decisions of the Secretary have confirmed the Secretary’s authority to fully regulate producer with respect to their own farm production which they market as handlers. United States v. Rock Royal Cooperative, 307 U.S. 533, 579-580 (1939) (“the word ‘purchased’ [in 8c(5)(C)] means ‘acquired for marketing’”); Freeman v. Vance, 319 F.2d 851 (5th Cir. 1963),

cert. denied, 377 U.S. 930 (1964); Ideal Farms, Inc. v. Benson, 288 F. 2d 608 (3rd Cir. 1961, cert. denied, 372 U.S. 965 (1963); Acme Breweries v. Brannan, 109 F. Supp. 116 (N.D. Cal. 1952). In Acme Breweries, the court held that the Secretary was authorized under the AMAA to regulate a brewer who processed in the brewing of beer all of the hops which he grew because “the Act authorized the Secretary to apply orders regulating the handling of [agricultural commodities] to “processors, associations of producers, and others engaged in the handling of” [the commodity]...(109 F. Supp at 117). The court noted further that:

The Act exempts two classes of persons from regulation: “any person who sells agricultural commodities... at retail in his capacity as such retailer,” 7 U.S.C.A Sec. 608c(13)(A); and “any producer in his capacity as a producer.” 7 U.S.C.A. Sec. 608c(13)(B). The inclusion of these exemptions in the Act indicates that it was intended that the incidence of regulation should fall upon those who do something with ...hops other than to grow them or to sell them at retail. The language “in his capacity as...” limits the exemption in each instance.

Id at 18. The court concluded that “[t]he declared policy of Congress can be achieved only if all hops which supply the commercial demand therefore are regulated.” Id. at 120.

In Ideal Farms, Inc. v. Benson, supra the Third Circuit upheld the Secretary’s authority under the AMAA to compel a handler to account to the federal order pool for milk which the handler produced on his own farm and bottled and sold in competition with other regulated handlers. In rejecting the appellants’ contention that AMAA did not authorize the Secretary to regulate producers in their capacity as handlers, the Third Circuit said:

Were we to accept appellants’ construction...they could avoid the intent of the Act to achieve a fair division of the more profit-

able fluid milk market among all producers and they would avoid the necessity of sharing the burden of surplus milk. See United States Rock Royal Cooperative, Inc. supra...

288 F. 2d at 613. Noting that Sec. 8c(5)(C) of the AMAA authorizes the Secretary to regulate “handlers (including producers who are also handlers) to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed [by the order]” (id. at 614), the court concluded that “[t]he more reasonable construction [of the section] is that the parenthetical phrase was meant to reach a producer-handler who handles or distributes milk which he himself produces.” Id. at 615. Accord, Freeman v. Vance, supra. (“the AMAA applies to a producer in his capacity as a handler”).

The Secretary has never questioned the validity of the foregoing judicial decisions but has, in fact, acknowledged their controlling effect in the administration of the milk order program under AMAA. See e.g. In re John Bertovich et.al., 36 A.D.133(1977). As the Judicial Officer, who speaks for the Secretary, explained (quoting In re Associated Milk Producers, 33 A.D. 976, 992-993 (1974)):

It is settled that the Secretary is authorized by the Act to fully regulate “producer-handlers” even if They receive no milk from anyone else....The Secretary is not required to provide any exception for “producer-handlers.”

Though the express language of Section 8c(5)(C) of the AMAA, as interpreted by the courts and acknowledged as controlling by the Secretary, would appear to require the Secretary to fully regulate “producers,” who are also “handlers,” with respect to their own farm production “even if they receive no milk

from anyone else,” that has not been the case. From the earliest days of the administration of the milk order program, the Secretary, for reasons of administrative convenience and simplicity, decided to partially exempt from regulation “producer-distributors” whose “businesses are so small that they have little or no effect on the pool.” (Decision on Proposed Amendments to New England Order, 25 F.R. 7819, 7825 (1960) - a practice that developed under the 1933 and 1935 legislation that preceded adoption of the AMAA of 1937, as the following will show.

B. Legislative History Of The AMAA And Administrative Practice Under Its Predecessor Legislation

The present provisions of the AMAA were first enacted as amendments to the Agricultural Adjustment Act of 1933 by the Act of August 24, 1935, 49 Stat.750. After the Supreme Court in 1936 held invalid certain provisions of the 1933 Act, Congress re-enacted the sections of the 1935 Act, discussed above in part A in the AMAA of 1937.

1. Legislative History Of The AMAA And Its Predecessor Legislation

The sections of AMAA of 1937 discussed above in part A, 1 grew out of a series of hearings in 1935 on H.R. 5585 before the Committee on Agriculture, House of Representatives, 74th Congress, First Session. The instrument of regulation proposed by H.R. 5585 was that of a “license,” as in the 1933 AAA. At a later stage in the development of the legislation the term “license” was changed to “order”. A substitute bill was later submitted as H.R. 8492 when it came before the Senate.

During the House hearings on the bill, considerable discussion focused on Sections 608c(5)(C) and 608c(13)(B) (“No license...shall be applicable to any producer in his capacity as producer”) because of concern by Committee members that nothing in the bill should impose any limitation on producers. Responding to that concern, Chester C. Davis, Administrator, Agricultural Adjustment Administration, explained the relationship between 608c(5)(C) and 608c(13)(B) as follows:

No matter what anyone has said or may say, licensing of producers is definitely not contemplated...except the licensing of a producer acting in the same capacity as a commercial enterprise; that is, where a producer also is a large distributor or engages in business in such volume that his cooperation is necessary to carry out the plan; in that case he would be licensed, not as a producer but as to his capacity as a handler and processor. Hearings on H.R.5585, 74th Cong., 1st Session at 14

During further questioning of Mr. Davis, the following colloquy occurred:

Mr. Fulmer:

What do you propose to do with the farmer who produces and processes his own farm products?

Mr. Davis:

If the volume is large enough to be an important factor in the market, then they would be expected to come under the market plan just the same as the man who buys and sells. Id. at 27

Mr. Beam:

Now you are talking about this licensing feature with reference to the farmer himself, in the event that he raises a certain amount of his commodity, whereby he would dispose of his product. I would just like to get clear in my own mind how far that would go, Mr. Davis.

Mr. Davis:

In the case of a milk producer...it would not affect him until he became an

important commercial factor in the market;...but when he becomes an important commercial factor he will have to abide by the same conditions as the other men marketing milk.

Now, the man who is just a producer of milk for the market and is not a considerable factor - we have attempted to arrive at a figure which would exempt him from any license. Let me say the man, for instance, sold 250 quarts of milk, just some arbitrary figure. He would be free from any license up to that amount. But if he expanded his operation beyond that point he would be subject to the same license provision as the other commercial operator.

Mr. Gilchrist:

I would like to have your comment upon the question as whether... producers are to be required to take out a license if this bill is passed... I wanted that matter cleared up for the country and the Congress.

Mr. Davis:

Now, Mr. Gilchrist, as an illustration of the point I referred to, the producer-distributor of whole milk - ... I talked to the Chief of the Dairy Section and I find that in many of the milk licenses [under the 1933 Act] in markets where the producer-distributor is an important factor...particularly in the Mid-South and the South, the producer-distributors handle more than 50 percent of the total volume of milk handled in the market, and I find that it has been the practice to exempt from license any man who sells less than 250 quarts of milk a day to consumers direct.... The man who himself is a distributor shall be subject to a license to market his milk under the license plan only in case the volume he handles shall exceed 250 quarts... being about a wagon load of milk; that is, where he has just one wagon... in a neighborhood or city, he has not been considered important enough as a commercial operator to require a license. But if he gets beyond that and runs a fleet of delivery wagons, ...then he is considered a distributor of milk and should be subjected to a license as a distributor, not as a producer. Id at 51

Mr. Goodwin:

And do you presume, under the license plan, to have in mind what you may call the "producer-processor"; that is, are you going to reach the farmers of this group through that combination of producer-processor item?

Mr. Davis:

When the producer-processor becomes an important commercial figure in the market, then he is licensed as a producer-processor in competition with other producer-processors, and not as a farmer, but in his capacity as a distributor, ...and it would be thoroughly impractical to carry that down to the point where we would attempt to license a man unless the volume of his distribution becomes an important factor in that market, such as to bring him under the license. Id at 54

When the bill reached the Senate, identified as H.R. 8492, the following colloquy occurred on July 15, 1935, appearing in the Congressional Record at page 11138:

Mr. Copeland:

In up-state New York a great many of the milk handlers are producers and distributors. According to the amendments as they are set up, if I am correctly advised, every one of those who may directly... affect interstate commerce would be subject to all the orders promulgated by the Secretary of Agriculture. These producers and distributors would be required to make adjustments in payments by being compelled to contribute to the maintenance of an adjustment or equalization fund and to pay their pro-rata share of the expenses to the authority or agency which administers the order. Therefore, the distributors who have an additional investment in not only producing their own milk, but also in pasteurizing the milk...would have to share their position in the market with other producers. Is that correct?

Mr. Murphy:

Yes; that is correct. (79 Cong. Record 11, 138 (1935).)

As explained by Senator Byrd later during debates on the floor of the Senate: “if a producer handles his own milk, he becomes a handler and therefore is subject to all the rules and regulations affecting handler.” 79 Cong. Rec.11, 140 (1935)

Thus, as is plainly revealed by the foregoing review of the legislative history and excerpts of the debates on the bill that became the Agriculture Act of 1935,

- (a) Complete regulation as to all handlers, with no exemptions as for example License No. 30 effective December 12, 1934, for the Chicago, Illinois market;
- (b) Exemption up to a specified daily quantity of milk produced by the distributor, as in License No. 63, Alameda County, California, effective January 20, 1935 which exempted own production up to 16 pounds of butterfat per day; License No. 38 for the Greater Boston Area, effective July 15, 1935, exempting own production up to 500 quarts per day to be allocated pro-rata to such distributor's own uses, and License No. 60 for Louisville, Kentucky which exempted own production up to 250 pounds per day, allocated pro-rata to such distributors' own utilization.
- (c) Exemption of a quantity not to exceed the assigned base of the producer acting as a distributor. See e.g. License No. 65, Ann Arbor, Michigan, effective April 29, 1935; License No. 50, Detroit Michigan, effective May 6, 1935; License No. 57, Los Angeles, California, effective February 28, 1935.

As stated above, the Secretary's practice of exempting from full regulation all or some portion of a producer-handler's own farm production, though not authorized by the AMAA's statutory language, reflects a carry-over from administrative practices adopted by the Administrator under the 1933 AAA and the Agricultural Act of 1935. Between the date of the enactment of the 1935 Act and the enactment of the AMAA of 1937, re-enacting the provisions of the 1935 Act authorizing the issuance of milk orders, six milk orders had become effective in six markets based on the provisions of the 1935 Act. These six orders regulated in various ways milk distributed by a handler who produced all or some of the milk that he handled.

Order 11, the District of Columbia Order, effective September 21, 1936, included in the handler definition a person who was also a producer

reenacted as the AMAA of 1937, it was the clear intent of the Congress that enacted Section 608c(5)(C) of AMAA that “producer-handlers” be regulated in the same manner and to the same extent as the AMAA regulates other handlers, excepting from full regulations only such “producer-handlers” who do not constitute “commercial factors” in the market.

2. Administrative Practice Of The Secretary Under License Provisions Of The Agricultural Adjustment Act Of 1933

The AAA of 1933 was enacted May 12, 1933 (P.L.10, 73rd Congress, 48 Stat. 31). Licenses issued under the authority of Section 8(3) of the Act operated during a period of approximately two years during which period licenses had been issued regulating the handling of milk in approximately 50 markets throughout the country.¹

It was standard practice to specifically include within the definition of “producer” in the licenses a person who produced the milk identified for regulation “irrespective of whether he was also a distributor” and to include within the definition of “distributor” all persons engaged in a defined type of distribution “irrespective of whether such person was also a producer.” Provisions of the licenses specifying obligations of producers who were also distributors varied among the licenses as follows:

¹. Information concerning operations under the licensing provisions of the AAA was provided to the undersigned by a former Director of the Dairy Division, now deceased, and by a 1958 USDA General Counsel’s Memorandum: “Authority to Regulate A Handler Who Is Also A Producer With Respect To Milk Which Is Produced By Him In His Capacity As A Handler.” What follows may be confirmed by records within USDA.

but provided no exemption for own produced milk. The other five Orders (Order 3, St. Louis, Mo.; Order 4, Boston, Ma., Order 5, Fall River, Ma., Order 12, Dubuque Ia., and Order 13, Kansas City, Mo.) provided in the case of producer-distributors too small for full regulation, for various methods of pro-rations when milk was also purchased from other producers. See e.g. as to the Kansas City market “Early Development of Milk Marketing Plans in the Kansas City, Missouri Area”, Marketing Research Report No. 14, USDA Production Marketing Adm., Dairy Branch, May 1952 at 39 (Official Notice, Ex 69)(“exemption from pricing and pooling ...to each producer-distributor of a quantity of milk equal to his established base”).

C. The Secretary Is Not Authorized To Exempt From Pooling And Pricing Producer-Handlers Who Operate As “Commercial Factors” In The Marketing Area

The only arguably legitimate basis that the Secretary can invoke to support the practice of exempting from pricing and pooling the own farm milk production of “producer-handlers” are the debates in the House on H.R. 5585 reviewed above. Clearly, no such authority can be found - or even implied - from any language in the AMAA where the term “producer-handler” does not even appear. Seizing on the explanation of Chester Davis, AAA Administrator, that the “license [order] would not affect a ‘producer-distributor’ until he became “a ‘commercial factor’ in the market”, the Secretary from the inception of the milk order program under the AMAA, has included in the milk orders provisions defining the term “producer-handler” and the conditions for their full or partial exemption from regulation under the orders. From the early days of the milk order program up until the present time, the Secretary has used the “commercially insignificant factor”

rationale of the Administrator of the AAA as justification for full or partial exemption of producer-handlers from pricing and pooling under milk orders.

In Jacob Tanis et. al 17 A.D.1091, 1104 (1958) for example, the 800 pound per day fixed quantity exemption of the order was adopted, according to the Secretary, out of concern “for the family - farm type of operation” because: “That type of operation was not thought to be sufficiently significant to constitute a serious competitive factor in the marketing area.”

In In re Stew Leonard’s, 59 A.D. 53 (2000), the Secretary’s Judicial Officer explained, as the reason for the producer-handler exemption, that:

Historically, producer-handlers were normally “family-type” operations... Customarily, a producer-handler has a relatively small operation, is operating in a self-sufficient manner, and is not a major competitive factor in the market for regulated handlers...

In affirming the Judicial Officer’s decision, the district court explained, further, the basis for the New England Marketing Order’s producer-handler exemption by quoting from the Secretary’s 1960 Decision amending the order:

Typically, a producer-handler conducts a small Family-type operation processing... and distributing only his own farm production. Full regulation of such individuals provides considerable administrative difficulties. Normally exemption from regulated status is made in a Federal order for such individuals on the grounds that such businesses are so small that they have little or no effect on the pool...

(Decision on Proposed Amendments To Tentative Marketing Agreements and to Orders, 25 F.R. 7819 (Aug. 16, 1960). Quoted in Stew Leonard's v. Glickman, 199 F.R. D. 48, 55 (D. Conn-2001).

In the later case of In re Mil-Key Farms, Inc., 54 A.D. 26 (1995), the Secretary's Judicial Officer again adopted the same rationale for the producer handler exemption by drawing on the Secretary's explanation for the exemption in his decision adopting amendments to the present Pacific-Northwest Order:

A primary basis for exempting a producer-handler from the pricing and pooling provisions of the order is that such a person has a relatively small operation and is operating in a self sufficient manner. . . Under this arrangement, a producer-handler seldom can be a major competitive factor in the market for regulated handlers...⁵³ F.R. 49154,49159-49160 (Dec. 6, 1988)

Again, in the Secretary's initial January 21, 1998 Proposed Rule and April 2, 1999 final Proposed Rule issued in response to Section 143 (a)(1) of the 1996 F AIR Act, the Secretary justified the continued exemption of "producer-handlers" from pricing and pooling with the same explanation that:

It has been a long standing policy to exempt from full regulation many of those entities that operate as both a producer and a handler. . . A primary basis for exempting producer-handlers from the pricing and pooling provisions of milk orders is that the entities are customarily small businesses that operate essentially in a self sufficient manner... (63.F.R. 4939, 63 F.R. 15135).

The problem with that "explanation" is that it fails to explain why the Secretary continues to exempt producer-handlers in the Arizona and Pacific

Northwest marketing areas who are not small businesses either under the Regulatory Flexibility Act and Executive Order 12866, or under any meaning of the term “small business.”

Proponents submit that compliance by the Secretary with the mandate of the AMAA requires more than that mere lip service be given to the only arguably legitimate “small business” basis for exempting producer-handlers from full regulation required by Section 8c(5)(C) of the Act. Producer-handlers who distribute on routes in the Arizona-Las Vegas and Pacific Northwest marketing areas in excess of three million pounds of fluid milk products per month cannot be described as small businesses. Their continued exemption from full regulation by the Secretary can only be described as an arbitrary exercise of raw power.

D. Congress Did Not Change The Legal Status Of
Producer-Handlers Under AMAA When It Adopted
Amendments to the Act In 1965.

The Food and Agricultural Act of 1965 amended several sections of the AMAA. Section 104 of the Act, which did not amend the AMAA, contained the following language:

The legal status of producer-handlers...under the [AMAA]
shall be the same subsequent to the adoption of the amend-
ments made by this title as it was prior thereto.

When UDA proposed, in its comments on the Secretary’s January 21, 1998 initial order reform decision that the producer-handler exemption should be terminated or limited, the Secretary responded in his April 2, 1999 Proposed Rules:

One of the public comments received proposed that the exemption of producer-handlers...be eliminated. This

proposal is denied. In the legislative actions... by Congress to amend the AMAA since 1965, the legislation has consistently and specifically exempted producer-handlers from regulation. The 1996 Farm Bill, unlike previous legislation, did not amend the AMAA and was silent on continuing to preserve the exemption of producer handlers from regulation. However, past legislative history is replete with the specific intent of Congress to exempt producer-handlers from regulation. If it had been the intent of Congress to remove the exemption, Congress would likely have spoken directly to the issue rather than the omission of language that had for, over 30 years, specifically addressed the regulatory treatment of producer-handlers. (64 F.R. 16135)

Counsel for the producer-handler opponents of proponents' proposals leapt to embrace the foregoing response of the Secretary to UDA's exemption termination proposal. It proves, they claimed, that the Secretary lacks the authority to fully regulate producer-handlers. Counsel for the producer-handlers are as wrong as the Secretary's reform decision on which they rely.

Congress did, in fact, address the producer-handler issue in the 1996 Farm bill, contrary to the Secretary's decision. Section 221 of H.R. 2854, the House bill that became Section 143 of the FAIR Act, contained a provision that the proposed changes to the Federal Orders "are not to affect the current status of producer-handlers" (House Report No. 104-462, p. 71). The Conference Committee did not adopt the House bill's language. Hence, if any significance is to be drawn from what Congress did, or failed to do, in the 1996 legislation, it is equally plausible to argue that by rejecting the "producer-handler status" language contained in the House bill Congress intended to authorize the Secretary to include, among his

“related reforms”, any changes in the status of producer-handlers that he deemed appropriate.

The more serious problem with the Secretary’s reliance on the 1965 and subsequent legislative enactments to legitimize the producer handler-exemption is that it misreads and misinterprets the legal significance of those enactments.

When H.R. 9811, the bill that became the 1965 Agricultural Act, was before the House, Congressman O’Brian offered an amendment from the floor that would have made the exemption of producer-handlers mandatory. The amendment was rejected. (Cong. Rec., August 18, 1965 at p. 20142). The House Report on Section 104 of the 1965 Act, relating to producer-handlers, states:

[We] disapprove of special treatment...for those producer-handlers who, singly or in the aggregate, have a volume of sales which represents a substantial enough portion of the sales in a federally Ordered market to substantially disrupt the operation of the Order to the detriment of other dairymen in that Market. (House Report No. 631, July 20, 1965 to Accompany H.R. 9811)

At a rulemaking hearing in 1966, counsel for a group of Puget Sound, Washington producer-handlers moved to exclude from the hearing proposals that had the effect of materially changing the status of producer-handlers under the Order, claiming that such proposals were precluded by Section 104 of the 1965 Act. The Secretary flatly rejected that contention:

Section 104 [of the 1965 Act] did not purport to change the previous law but merely reaffirmed it. The language is specifically directed to reaffirming legal status under the statute, rather than under the provisions of any order that has been issued under the authority of the statute. The Congress rejected an amendment which would have specifically denied

authority for regulation of producer-handlers. Thus producer-handlers who were potentially subject to regulation under the statute prior to the 1965 amendment remain potentially subject to regulation thereafter. (Decision on Proposed Amendments to Puget Sound, Washington Order, 32 F.R. 10742, 10746, July 21, 1967) (Emphasis supplied.)

Later in that same decision the Secretary made crystal clear his authority to fully regulate producer-handlers:

The position of producer-handlers in this market, both singly and in the aggregate, is especially significant in relation to the total Class I sales of the market. In such circumstances, the orderly marketing of milk in the area is particularly susceptible of being affected by producer-handler activities and any increase in producer-handler sales could substantially disrupt orderly marketing and the operation of the order to the detriment of other producers in the market. If, therefore, for any reason producer-handler activity in the market, singly or in the aggregate, increases, a public hearing should be held to give immediate consideration to the regulation of producer-handlers under the order. (Decision, 32 F.R. 10747)

In view of the foregoing, plus the post 1965 decisions of the Secretary's Judicial Officer referred above in part A,² that: "It is settled that the Secretary is authorized...to fully regulate producer-handlers", it is incomprehensible that the reform decision, and Counsel for the producer-handlers, should deny the Secretary's authority, under the AMAA, to fully regulate producer-handlers.

D. The Proposals To Fully Regulate Producer-Handlers
Whose Route Sales, Monthly, Exceed Three Million
Pounds Should Be Adopted

It is clear beyond dispute that the Secretary is not only empowered but required by the AMAA to fully regulate producer-handlers who constitute a “competitive commercial factor” in the marketing area. The Secretary’s “long standing policy” of exempting producer-handlers - irrespective of size - from the pricing and pooling provisions of the orders cannot confer legitimacy on the policy if it is in conflict with the AMAA. In 1969, the Supreme Court in Zuber v. Allen, 396 U.S. 168 (1969), invalidated the “nearby differential” provision of the Boston Order even though the provision had been part of the Order from its inception in 1937.

In Comments and Exceptions to the Secretary’s January 2, 1998 Proposed Rule, UDA proposed that, consistent with the Secretary’s orders under the Fluid Milk Promotion Act of 1990, the producer-handler provisions of the Proposed Rule should be amended by incorporating a provision in each milk order limiting the exemption from full regulation to producer-handlers whose monthly route disposition is 500,000 pounds or less. UDA’s proposal No. 3, which limits the producer-handler exemption to persons whose monthly route disposition does not exceed 3,000,000 pounds is compatible with the provisions of the comparable 2002 changes to the Fluid Milk Promotion Act.

Several times during the course of the hearing one of the Secretary’s representatives questioned the logic of proponents’ use of the Fluid Milk Promotion Act’s 3,000,000 pound per month limitation as an appropriate standard for limiting the producer-handler exemption under Orders 131 and 124, noting that

the Promotion Act's "purposes are different than those of a marketing order which is to regulate the supply of milk." (Deskin, Tr. 204,974)

It was not the Promotion Act's "purpose" that persuaded proponents to adopt the Act's 3 million pounds per month limitation. It was the fact that Congress decided that those fluid milk handlers whose monthly distribution exceeded three million pounds constituted a separate significant competitive segment of the market, representing the major share of the market's fluid milk sales. It is that same significant competitive producer-handler segment of the market that proponents contend should be regulated.

The 3,000,000 pound producer-handler exemption limit proposed by UDA and its proponent supporters follows the logic of Congress which in 2002, decided to limit the cost of promoting fluid milk sales to the handler segment of the market deemed by Congress to represent the most significant part of the fluid milk sales industry. Proponents' proposal is consistent also with the Herbein and Cryan record evidence which establish that producer-handlers whose production and route sales exceed 3,000,000 pounds per month achieve economies of scale which enable them not only to be significant competitive factors in the market but are also fully able to compete as fully regulated producer-handlers with the markets' other handlers. (Herbein, Tr.760-790, Ex. 25; Cryan, Tr. 895-896).

Further support for proponents' reliance on the pound limitation of the Fluid Milk Promotion Act as the appropriate limitation pattern for exemption of producer-handlers under the milk order program stems from the essential similarity of the agency structure that administers both programs. As one of proponents' witnesses testified:

They are both in the same general section of the Code

of Federal Regulations. They are administered by the same staff... And they both make certain fluid milk responsibilities common responsibilities within the market. The fluid promotion threshold is ... the level above which the individual handler's responsibility to the market and benefits arising from the program is great enough that they are required to make a contribution... I would point out ... that the Supreme Court in its decisions about promotion has indicated that promotion is tied to... a wider scheme of regulation and that...they are specifically and explicitly tied together. (Cryan, Tr. 911-912).

The Supreme Court cases to which the witness referred are Glickman v. Wilemann Bros. and Elliott, 521 U.S. 457 (1997) and U.S. v. United Foods, Inc., 533 U.S. 405 (2001). In Glickman, the Court upheld the Secretary's compelled funding of generic advertising as constitutional because the advertising and promotion program was part of a "collective marketing order program" authorized by Section 8c(6)(I) of the AMAA. In the United Foods case, the Court held that the forced assessments imposed on mushroom handlers under the Mushroom Promotion Act violated the First Amendment because the assessments were not "ancillary to a comprehensive regulated marketing program" under the AMAA as in Glickman.

The two cases reinforce the logic and validity of proponents' reliance on the Fluid Milk Promotion Act's assessment limitation on handlers to support proponents' 3,000,000 pound producer-handler exemption limitation.

Eliminating and ignoring the massive irrelevancies in the hearing record resulting from the argumentative and unduly extended examination of proponents' witnesses by Counsel for the producer-handlers, their opposition to Proposals 1 and 3 comes down to the following: (1) the contention that producer-handlers enjoy a Class I-blend competitive advantage in raw milk cost is groundless; (2) the

cost of balancing and the risks inherent in the producer-handler operation outweighs the benefit of the pooling exemption; (3) there is no evidence of “disorderly marketing” in the Arizona-Las Vegas or Pacific Northwest marketing areas. The history of the administration of the AMAA and a consistent line of decisions by the Secretary prove otherwise.

1. The Competitive Advantage Of Producer-Handlers Is Established By A Consistent Line Of Decisions Under the AMAA’s Milk Order Program .

Counsel for the producer-handlers ignore the testimony of one of their own witnesses plus a line of milk order decisions stretching back to the beginning of the program when Counsel and their witnesses deny the competitive advantage of their pooling exemption. David Beene, former CEO of a Texas producer-handler, was called by opponents’ Counsel to testify in opposition to proponents’ proposal to cap the producer-handler exemption. He testified on cross-examination as follows:

Q. Did you maintain cost accounting records in which you established a transfer price for the raw milk to your processing operation?

A. Yes, sir.

Q. And what was that transfer price you used? (Tr. 1697)

A. We used the price in the marketplace.

Q. You mean the blend price?

A. Yes, sir.

Q. The blend price of the market?

A. Yes, Sir.

Q. Okay. And that was your transfer price.

A. Yes, sir. (Tr. 1698).

Mr. Beene's testimony simply confirms what the Secretary's and court decisions have explained as the reason why handlers often employ a variety of stratagems to obtain or maintain producer-handler status, and why the producer-handler opponents argue so tenaciously to retain their exempt status.

In Elm Spring Farm, Inc. v. United States, 127 F.2d 920, 927 (1st Cir. 1942), an enforcement action by the Secretary, the handler tried to claim producer-handler status because, as the court explained, the handler "expected to escape making payments into the equalization pool, and thus to obtain an important competitive advantage over other handlers who had more than the market average of Class I fluid milk sales."

In Jacob Tanis, et al, 17 A.D. 1091, 1103 (1958) the Secretary's Judicial Officer explained that:

Absent regulation of producer-dealers, they would enjoy a competitive advantage over other handlers equal to the difference between the blend price and the Class I sales. Such advantage would have an important bearing on the equity of costs to handlers. In addition, other producers receive only the blend price for their milk while producer-dealers, in the absence of regulation, would not have to equalize their production and thereby carry part of the burden of surplus.

In a decision by the Secretary amending the Central Arizona marketing area, Order 131, the Secretary explained the need to impose regulatory restrictions on producer-handlers by noting that:

Such producer-handlers presumably can deliver milk to their own plant at a cost no higher than the blend price which other producers on the market receive. In their handling operations this blend priced milk provides a strong incentive to cut selling prices and expand operations. (Decision on Proposed Amendments, 27 F.R. 4782, 4783 (May 16, 1962).

See also, In re Independent Milk Producer-Distributors Association, 20 A.D.1, 20 (Jan. 4, 1961) (“A substantial price advantage in milk acquisition is enjoyed by producer-handlers...”)

During the examination of proponents’ witness Elvin Hollon, it was suggested by the Secretary’s Dairy Division economic specialist that the “single seamless” nature of the producer-handler operation somehow undermined the validity of using, as an appropriate measure of the producer-handler’s raw milk cost, or “transfer price”, the Order blend price of the market (Rower, Tr. 1208). He suggested that text book economics, in such a “seamless” operation case, would consider what “the entity as a whole would receive” as the market price, rather than separating the operation into its several parts. (Tr. 1209)

It is apparent that the author of Mr. Rower’s textbook was unfamiliar with the Federal Order system, classified pricing or marketwide pooling to compute a raw milk blend price. Raw milk and pasteurized, standardized and packaged fluid milk products are, both in fact and in federal order regulatory terms, different products. The orders classify and price the distributed form of the packaged product and also establish a separate “blend price” for the raw product. The producer-handler operation may be “seamless”, but the “market price” of the processed milk is far different from the “market price” of the raw milk from which the processed product is derived.

2. The Claim That Higher Production And Balancing Costs And Risks Inherent In The Producer-Handler Operation Outweighs The Competitive Benefit Of the Pooling Exemption Has Been Soundly Rejected By the Secretary

Throughout the hearing record, Counsel for the producer-handlers and their witnesses sought to explain away the “competitive advantage” contention of proponents’ witnesses with the claim that higher production and balancing costs and the risks inherent in the producer-handler operation outweighed whatever benefit flowed from the pooling exemption. An almost identical claim by producer-handlers in a rule-making hearing early in the history of the milk order program was answered, fully, and rejected by the Secretary, as follows:

It was contended...by handlers with own farm production that they were entitled to exemption from pricing and pooling because of alleged higher costs of production... caused by operating conditions normally associated with and peculiar to their type of business enterprise and that, because of their higher production costs, an exemption would not provide them with a competitive advantage over fully regulated handlers. It was contended that their higher costs of production were due to (1) higher labor costs, (2) maintenance of “show places”...(3) use of land with higher value...and (4) maintenance of a more even seasonal pattern of production.

These reasons as justification for an exemption are not valid. Cost of production cannot be used as a sound basis for granting an exemption from pricing and pooling any more than it can be used as the sole criterion for establishing minimum order prices. If production costs were used as a criterion for exemption of producer-handlers it logically would follow that comparable exemptions also be provided for milk received by fully regulated handlers from other producers with higher than average production costs. Aside from administrative difficulties, ...such a criterion for exemption would be in direct conflict with the principles of the classified

system of pricing, marketwide pooling and the requirements of the act for establishing minimum prices.

It was not established that...the [producer-handlers] have production costs higher than many other producers... (Decision Proposed Amendments To...Order, New York-New Jersey Marketing Area, 23 F.R. 6050, 6053, Aug. 8, 1958).

The hearing record here is devoid of any probative evidence to support the claim that the producer-handlers' cost of "balancing" outweighs their exemption from pool payments that all other handlers bear. The record is replete with evidence that the "balancing cost" claim is groundless (Mykrantz, Ex. 7, Table 6, Van Dam, Tr. 1953-1354, Hettinga, Tr. 2693-2694). As the record discloses, Order 124 producer-handlers disposed of 27 percent of their "surplus" for Class I and 52 percent for Class II uses during the period 2000-2003. In Order 131, Sarah Farms owner, Hein Hettinga, testified, with some pride, that he had a problem, once a year, at Christmas, disposing of surplus. During the remainder of the year he has Class I outlets available in Mexico, California and Texas "at the best prices I can get."

In addition, as one of the proponent's witnesses testified:

A producer-handler has a high degree of control over both the volume and variation in monthly milk production. For example, if he operates both a farm associated with a producer-handler enterprise and another farm he can shift cows back and forth to tailor his producer-handler milk supply to his Class I needs. A pooled producer can control his own milk production, but he cannot control the volume or monthly variation of other producers in the marketwide pool. Therefore, a producer-handler is likely to experience an even smaller reserve than the minimum average of 15 percent mentioned above... Whatever costs a producer-handler does incur in balancing his milk supply against his Class I sales are no different in kind than the cost incurred by pool participants, but they are likely to be much smaller....(Christ, Tr. 1602-1603)

3. The Secretary Is Empowered By The AMAA To Maintain And Prevent Potential Threats To Orderly Marketing

Throughout the course of their over-extended cross-examination of proponents' witnesses, Counsel for the producer-handlers and their witnesses challenged proponents to produce evidence of disorderly marketing that would warrant action by the Secretary to amend the existing producer-handler provisions of Order 131 and 124. Implied in their questions was the assumption that the Secretary was powerless to act absent a showing of market chaos or disorder.

The producer-handler witnesses and their Counsel disclose a basic misconception of what the hearing record must show to warrant exercise of the Secretary's regulatory powers. Section 608c(3) of the AMAA provides:

Whenever the Secretary...has reason to believe that the issuance of an order [amendment] will tend to effectuate the declared policy of [the Act]... he shall give notice and opportunity for a hearing upon a proposed [amendment].

The issuance of a notice of hearing on Proposals 1-4 constitutes a two-fold determination by the Secretary that (1) the Proposals are ones that lawfully may be adopted, (2) there is "reason to believe" they may promote the AMAA's "declared policy." That policy declaration appears in Section 2(1) of the AMAA. It provides that the Secretary should exercise the regulatory powers conferred by the Act "to establish and maintain... orderly marketing conditions." (Underline added.)

There is nothing in the AMAA that requires the Secretary to wait before exercising her regulatory powers until chaotic or disorderly marketing conditions

are shown to exist in the Order 131 and 124 marketing areas. In In re Independent Milk Producer-Distributors, 20 A.D. 1, 24-25 (1961) the Secretary's Judicial Officer explained:

The Secretary can regulate to cope with potential threats to a then-existing orderly market. The Secretary need not stand powerless or shut his eyes to possible disruptive factors or eventualities in a regulated market.

...

[P]etitioners attack some of the testimony advanced at the ... amendment hearing because such evidence does not demonstrate present disorderly marketing conditions which affect order minimum prices to producers. As indicated above, potential threats to order objectives may form a basis for regulation and evidence indicating such possibility is sufficient to support regulation to maintain orderly conditions. (Underline in original.)

4. The Record Evidence Establishes The Existence of Disorderly Marketing In the Orders 131 and 124 Marketing Areas

In the recent Tentative Decision on Proposed Amendments to Order 135, 68.F.R. 49375 (August 18, 2003) the Secretary deleted from the Order the proprietary bulk tank handler provision which, as the Secretary found, caused "disorderly marketing conditions because the order is unable to establish minimum prices that are uniform among regulated handlers, a requirement of Section 608c(5) of the AMAA," (68 F.R. at 49383). That precise condition exists now in Order 131 and 124. The record evidence here is clear beyond dispute that the exemption of producer-handlers from the minimum pricing provisions of Orders 131 and 124 not only "threatens" orderly marketing in those markets; "disorderly marketing"

already characterizes the marketing conditions that exist. As one of proponents witnesses explained “disorderly marketing” exists

where a handler or handlers have a price advantage created by the system that allows them to undercut pricing that others in the system don’t have the advantage of using. (Tillotson, Tr. 383-384).

Another of proponents’ witnesses concurred by stating that “disorderly marketing exists when the regulatory terms of trade are different among competitors in the same market.” (Christ, Tr. 15603).

The absence of uniform minimum prices among handlers or market-wide sharing of returns among producers is, alone, enough to establish “disorderly marketing” in the Orders 131 and 124 marketing area. The very purpose of the AMAA is “to establish and maintain orderly marketing conditions” (Section 602(b)(1)), by the issuance of orders fixing minimum prices “which all handlers shall pay” and by providing for payment of “uniform prices” to producers. It is the absence of those two conditions in any marketing area that constitutes the “disorderly marketing conditions” that calls for the exercise of the Secretary’s regulatory powers under the AMAA.

As the Secretary explained in his April 2, 1999 Proposed Rules decision:

Market-wide sharing of the classified use value of milk among all producers in a market is one of the most important features of a Federal Marketing Order. It ensures that all producers supplying handlers in a Marketing area receive the same uniform price for Their milk, regardless of how their milk is used. (64 F.R. 16130).

The record evidence here is clear beyond dispute that the exemption of producer-handlers from the minimum pricing provisions of Order 131 and 124

threatens not only orderly marketing, but a breakdown of the order system unless capped by the limits of Proposals 1 and 3. See e.g. Tillotson, Tr. 383-384, 389; Marsh, Tr. 329; Krueger, Tr. 5788-9; Yates, 656-7; Cryan, Tr. 898, 931-32; Van Dam, Tr. 1359, 1369; Christ, Tr. 1603; Hollon, Tr. 1025, 1110, 1143, 1197.

In Zuber v. Allen, 396 U.S. 168 (1969) the Supreme Court struck down the “nearby differential” provision of the Boston Federal order because it violated “the foundation for the statutory scheme to provide uniform prices to producers.” 396 U.S. at 180. As the Court explained, the “nearby producers” sought to preserve in the Federal order the price advantage that they had enjoyed over far out producers during what the Court described as the “crippling price war days” that preceded adoption of the order. A similar charge may be leveled against the producer-handler exemption from the orders’ minimum pricing and pooling requirement. In the Court’s words, as applied to the “nearby producers”: “[Producer-handlers] now seek the best of both worlds. Having achieved the security that comes with regulation, they now seek under a regulatory umbrella to appropriate...profits that were never secure in the unregulated market.” 396 U.S. at 181.

Simply put, what the producer-handlers demand is the continued minimum price regulation of their regulated competitors to enable the producer-handlers to continue to exploit the competitive advantage of their exemption from minimum pricing and pooling.

Section 608c(5)(C) expressly prohibits the Secretary from granting such favorable and discriminatory treatment to producer-handlers. Proposals 1 and 3 should be adopted to remedy the failure of the orders to achieve the uniformity of prices among all handlers and producers in the market that Sections 608c(5)(A) and (B) require.

II Operational Requirements For Designation As A Producer-Handler

Proposals 1 and 3 propose the adoption in Orders 131 and 124 of specific operational requirements to qualify for designation as a producer-handler. The operational requirements have been drawn, basically, from the existing “requirements for designation” language of Section 1124.10(a) of the Pacific-Northwest Order. The language of the comparable provisions in the proposals for both orders have been modified and redrawn to achieve greater specificity in the operational requirements that must be met to qualify for designation by the market administrator as a “producer-handler.”

The reasons for the proposed changes from the present “requirements for designation” language of Section 1124.10 is to impose on the person who seeks producer-handler status the “burden of establishing and maintaining producer-handler-status.” (Ex. 45, Section 1131.10(e) as revised, Hollon, Tr. 2752, 2782). As modified at the hearing, revised Section 1131.10(e) imposes on the applicant for producer-handler status the burden:

To establish by proof satisfactory to the market administrator through records required pursuant to section 1000.27 that the requirements set forth in paragraph (a) of this section have been met...
(Section 1131.10(e), Ex. 45)

As explained by proponents’ witness:

The intent of these modifications is to further clarify that the burden of proof and the responsibility for providing all of the details that substantiate such proof to the market administrator is on the producer-handler. (Hollon, Tr. 2752-53).

No better answer can be given to the question of why proponents' detailed operational requirements for designation as producer-handler are needed than the reasons that the Secretary's Judicial Officer provided in In re Yasgur Farms, Inc. 33 A.D. 389, 404 (1974):

Claims to "producer-handler" status have been frequently litigated because of the economic benefits resulting therefrom and because of the variety of schemes and devices handlers have employed to claim "producer-handler" status. As we stated in In re Independent Milk Producers Distributors Association...

The regulatory scheme set forth in such action is merely an attempt to prevent the evasion or circumvention of the distinction established in the order between producer-handlers and handlers by methods employed in the past or those that could be reasonably anticipated. In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation...

If handlers were able to circumvent the requirements of the Order by employing spurious schemes to claim "producer-handler" status, it would bring chaos to the milk industry...

[P]roducer-handler status is an exception to the general regulatory scheme of the Act, and as such it must be strictly construed, and must be established by a handler seeking the exception.

Proponents' revised Section 1131.10 Order language (Ex.45) is designed, as explained by proponents' witness (Hollon, tr. 1045), to address the case:

that a producer-handler may encompass a farm or multiple farms and a plant or multiple plants, or a combination of both.

Having route disposition in the marketing area gets a producer-handler regulated, if he has route dispositions or transfers of fluid milk products to other distributing plants anywhere in excess of three million pounds.

That exact case now exists in the Arizona - Las Vegas marketing area. Hein Hettinga, the owner of Sarah Farms plant, is the owner also of multiple dairy farms in Arizona and California (Hettinga, Tr. 2642-2648). In addition to the Sarah Farms producer-handler plant, Mr. Hettinga, as part of G-H Processing, owns and operates a second distributing plant in Yuma, Arizona, adjacent to the Sarah Farms producer-handler plant. (Hettinga, Tr. 2658-59, 2660). As Mr. Hettinga acknowledged, milk moves from the Sarah Farms producer-handler plant to the G-H Processing plant on a regular basis, as a disposition from one distributing plant to the other. (Tr. 2660-61).

The essential condition for designation as a producer-handler is the requirement that the entire control and enterprise risk of the milk production resources and plant facilities reside in the same person. The multi-farm character of the Hettinga milk production operations, with disparate ownership structures, (Tr. 2642-2645) any of which Mr. Hettinga can select as supply sources for the Sarah Farms producer-handler operation, plus the ability to dispose of fluid milk products to California outlets, (Tr. 2687) supports the need for inclusion in Section 1131.10 of the proposed language of 1131.10(a)(1)-(5) and 1131.10(b).

III. Simultaneous Pooling of Milk On Order 131 And A State Operated Order

Proposal No. 4 proposes the amendment of the producer milk definition of Order 131 to prohibit the simultaneous pooling of the same milk on Order 131 and on a State-operated order that provides for marketwide pooling. The “State-operated order” at which the proposal is directed, of course, is the California State milk order.

No extended discussion should be required to demonstrate the need for the adoption of Proposal No. 4. The language of the proposal is intended to be identical to what the Secretary has already adopted in Orders 30, 32, 33, 124 and 135. The ability of milk from California farms to move to Arizona pool plants is self-evident, and, in fact, now occurs. It has long been the rule under the Federal Order system that the same milk of a producer cannot be pooled simultaneously on more than one order. As the Secretary explained in the recent Tentative Final Decision in the Pacific Northwest and Western Order hearing:

The need to prevent “double pooling” became critically important as distribution areas expanded and orders merged. The issue of California milk already pooled under its State-operated program and able to simultaneously be pooled under a Federal order, has essentially the same undesirable outcomes that Federal orders once experienced and subsequently corrected. (68 F.R. 49375, 49378)

California milk should only be eligible for pooling on the Arizona-Las Vegas order when it is not pooled on the California State order and when it meets the Order 131 pooling standards. Proposal 4 should, therefore, be adopted.

Conclusion

The AMAA, by its terms, does not authorize the Secretary to modify the statutory term “handler”, as defined in Section 608c(1), by carving out from the statutory definition a separate category of “producer-handler” for exemption from the pricing and pooling provisions of Sections 608c(5)(A) and (B) which, by their terms, are applicable to “all handlers.” In fact, Section 608c(5)(C) expressly directs that the pricing and pooling obligations imposed on handlers are to be imposed, also, “on producers who are also handlers.” The statutory direction to the Secretary could not be clearer.

Nonetheless, relying on the debates in Congress preceding the adoption of the AMAA, the Secretary, by administrative action, decided to exempt from pricing and pooling “family farm type” operations of “producer-handlers” who did not constitute “commercially significant factors” in the market. As a preliminary matter, the Secretary’s “administrative” exemption of “producer-handlers” from pricing and pooling under the Federal orders is legally dubious. It has been well settled by the Supreme Court that when a statute is unambiguous, a court (or administrative agency) may not consider the statute’s legislative history. See e.g. Circuit City Stores, Inc., v. Adams, 532 U.S. 105 (2001). (“We do not resort to legislative history to cloud a statutory text that is clear.”)

Though the proponents of Proposals 1 and 3 could have challenged, directly, the basic illegality of the producer-handler exemption, they have not done so. Their proposals would leave over 95 percent of the Federal orders’ producer-handlers exempt from full regulation. Proposals 1 and 3 would subject to full regulation only those producer-handlers who are clearly and unambiguously substantial “competitive commercial factors” in the Orders 131 and 124 marketing areas.

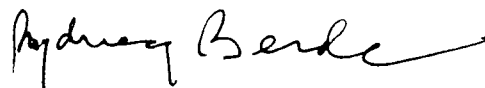
The proposals to fully regulate producer-handlers whose route sales, monthly, exceed three million pounds should be adopted for the following reasons,

as summarized by proponents' principal witness (Hollon, Tr. 1059-1060) and explained and expanded further in response to questions from the Secretary's representative (Tosi, Tr. 2844-2849):

- (1) The three million pound monthly cap is consistent with the Secretary's Orders in the Fluid Milk Promotion Act and follows the logic of that Act in limiting the cost of promoting fluid milk sales to what Congress considered to be the most significant part of the fluid milk industry;
- (2) The three million pound monthly limit is the level below which, on an operational cost curve, a producer-handler is not a significant competitive factor but above which its competitive impact on fully regulated handlers is significant and exemption causes disorderly marketing;
- (3) A producer-handler whose level of operation exceeds three million pounds, monthly, is fully capable of servicing large retail outlets in direct competition with fully regulated handlers;
- (4) A producer-handler who operates a production facility of a size sufficient to supply a three million pound per month processing facility can achieve significant economies in milk production costs;
- (5) The balancing costs incurred by producer-handlers are no different in kind or degree - are, in fact less, than those incurred by other producers or their cooperatives in the market.

For the foregoing reasons, and for the reasons set forth in its Proposed Findings and Conclusions, Proposals 3 and 4, proposed by United Dairymen of Arizona and its supporting proponents should be adopted.

Respectfully submitted,

A handwritten signature in black ink that reads "Sydney Berde". The signature is written in a cursive style with a long, sweeping tail that extends to the right.

Sydney Berde
Sydney Berde & Assoc. P.A.
for
United Dairymen of Arizona