

THELEN REID & PRIEST LLP

ATTORNEYS AT LAW

CHARLES M. ENGLISH, JR.
202-508-4159
~~sanfran@thelenreid.com~~
SAN FRANCISCO
LOS ANGELES
SILICON VALLEY

NEW YORK
WASHINGTON, D.C.
MORRISTOWN, N.J.

MARKET SQUARE, SUITE 800
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2608
TEL (202) 508-4000 FAX (202) 508-4321
www.thelenreid.com

August 21, 2002

Hand-Delivery

Office of Hearing Clerk
Attention: Ms. Joyce Dawson (202-720-2773)
U.S. Department of Agriculture, Room 1081
1400 Independence Ave., S.W.
Washington, D.C. 20250

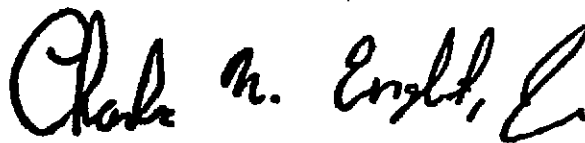
Re: Dean Foods Company's Brief and Proposed Findings of Fact and Conclusions of Law with respect to hearings held April 16-19, 2002 regarding Milk in the Western and Pacific Marketing Areas (Docket Nos.: AO-368-A-30; AO-380-A18; DA-01-08)

Dear Ms. Dawson:

Enclosed for filing, please find an original, plus 3 copies of our Brief and Proposed Findings of Fact and Conclusions of Law filed on behalf of Dean Foods Company.

Additionally, I have enclosed a fourth copy for our records. Please date stamp the additional copy and return with our courier.

Respectfully submitted,



Charles M. English, Jr.

Enclosure

cc: Honorable Jill Clifton, *via e-mail*
Garrett Stevens, Esq., *via e-mail*
Gino Tosi, *via e-mail*
Erin Feuillet, *via e-mail*
Richard Cherry, *via e-mail*
James Daugherty, *via e-mail*
Marvin Beshore, *via e-mail*
Doug Marshall, *via e-mail*
Rodney Carlson, *via e-mail and U.S. Mail*

**DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

Milk in the Western and Pacific Marketing)
Areas; Hearing on Proposed Amendments to)
Tentative Marketing Agreements and Orders)

Docket Nos.: AO-368-A-30; AO-380-
A18; DA-01-08

**BRIEF AND PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW FILED ON BEHALF OF DEAN FOODS COMPANY**

INTRODUCTION

This Brief and Proposed Findings of Fact and Conclusions of Law, submitted on behalf of Dean Foods Company, addresses a significant loophole in the existing regulations concerning minimum prices paid for milk in the Western milk marketing area. The rulemaking proceeding, in which proposals 5, 11, 12, 13 and 14 were considered, also addressed a number of other issues. However, of primary concern to Dean Foods, and to the continued integrity of the milk regulatory system that USDA administers is the problem existing only in the Western milk marketing area – competing fluid milk distributing plants, that are not otherwise exempt from regulation, are purchasing milk at prices less than the minimum prices charged to Dean Foods pursuant to federal statute and regulation. According to Dean Foods’ expert and considering sixty-five years of regulatory history and resulting litigation, the failure of competitive handlers to pay at least uniform minimum prices destabilizes the regulatory system and is fundamentally unfair.

It is for these reasons that Dean Foods urges the Secretary to adopt immediately regulations that would re-establish equal regulatory treatment among competing handlers while simultaneously protecting the interests of dairy farmers. As demonstrated below, the

Dean Foods proposals are both legal and necessary under the Agricultural Marketing Agreements Act (“AMAA”) and consistent with the Regulatory Flexibility Act (“RFA”).

Dean Foods also supports amendments to the Pacific Northwest and Western marketing orders that would eliminate the ability to pool producer milk simultaneously on a state order with market wide pooling and a federal milk marketing order. Finally, without taking a position on the various pooling proposals at issue, Dean Foods believes that so-called diversion limits should be real and meaningful diversion limits known in advance by the industry and USDA.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. The Regulatory Failure to Insure Uniform Minimum Payments by Handlers Constitutes Disorderly Marketing.

The core statutory mandate underlying federal milk orders requires that uniform minimum classified payments be made by milk handlers to producers. 7 U.S.C. § 608c(5)(A). There simply is nothing more central to the system than that requirement. The consensus expert for Dean Foods who has spent over 50 years employed in milk marketing regulation, testified concerning the emergency situation, that “I can’t think of a more critical problem than the lack of uniformity in the application of the prices out there in the marketing area.” Tr. 1231, lines 13-15. It is simply *per se* disorderly marketing for a situation to exist in which competing handlers are not paying the uniform minimum price for milk. And yet that is precisely what is happening presently in the Western Order.

Dean Foods came to the hearing with substantial, but admittedly somewhat circumstantial, evidence that two pool distributing plants, with which its Meadow Gold plants in Idaho compete, were not and are not paying minimum prices for the milk they receive from proprietary bulk tank handlers. Tr. 922-929. Meadow Gold, as part of its sales business operations, had studied the Idaho wholesale and retail market that constitutes its customers and had concluded that Falconhurst Dairy and Stoker Wholesale were engaged in economic transactions that could only make sense if those entities were not paying regulated minimum prices. *Id.* Dean Foods has suffered and continues to suffer competitive harm as a result of these practices. *Id.*

While that evidence should have been sufficient for the Secretary to reach the necessary conclusion that minimum prices were not being paid, the Secretary now has even more overwhelming and direct evidence of the problem from the testimony of the proprietary bulk tank handlers and their customers. The witness for Glanbia Foods, candidly admitted that “we get as much as we can for our milk when we sell it, but I can tell you that *we do not get minimum pricing for the milk.*” Tr. 793, lines 5-7. Glanbia’s non-minimum price paying customer is Falconhurst. Tr. 760-762. Falconhurst is in competition with the Meadow Gold plants in Idaho. Tr. 922-929.

The Stoker Wholesale witness also admitted that his company does not presently pay minimum Class I prices for the milk it receives from Jerome Cheese, Co.:

Having to pay Class I price is not my main concern. I feel that by paying the Class I price, I would have to change the way I market my product by being more aggressive in going after a bigger share of the market in order to stay in business.

Tr. 805, lines 10-14. The statement "*that by paying the Class I price, I would have to change the way I market my product*" means that Stoker is able to "market" differently because it is not paying the Class I price for milk while its competitors are paying minimum prices. The Meadow Gold Dairies witness testified that Stoker's different marketing methodology presently is to price below what is possible given the regulated minimum prices charged to Meadow Gold. Tr. 922-929.

The Jerome Cheese witness, while somewhat less forthcoming, nonetheless admitted that it sells its raw milk to Stoker under the same "market" conditions that it sells its finished cheese and whey products: "that's the same thing we do with Stoker, *get as much as we can on a month-to-month basis that the market will bear.*" Tr. 700, lines 13-20. What the "market will bear" and regulated minimum prices, especially for Class I milk, are entirely inconsistent concepts.

Dean Foods urges the Secretary to make an express finding of fact that Stoker and Falconhurst are purchasing, and are able in the future to purchase milk at less than the regulated minimum prices charged to Meadow Gold. Furthermore, the Secretary should find that the failure of Stoker and Falconhurst to pay minimum prices for their milk has caused and continues to cause competitive harm in the marketplace. Tr. 922-929. The Meadow Gold testimony on this point was simply uncontested. The Secretary also should conclude as a matter of law that such actions constitute disorderly marketing conditions. Tr. 1231, lines 13-15. The Secretary should also conclude that 7 U.S.C. §§ 608c(5)(A) and (C) provide authority for the Secretary to insure that minimum prices are paid by all handlers.

All of these Proposed Findings are facts in this record that were not available to the Secretary when she made her earlier decisions regarding proprietary bulk tank handlers at the

inception of what was then the Southwestern Idaho-Eastern Oregon order. For instance, there was no evidence that minimum prices were actually not being paid by proprietary bulk tank handler customers or that competitive harm was resulting from such failure to pay minimum prices. Now the uncontroverted testimony establishes both failure to pay minimum prices and competitive harm resulting from that failure. Therefore, these facts and circumstances constitute significant changes in circumstances justifying, should such justification be necessary under *Motor Veh. Mnfr. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983), the regulatory action proposed by Dean Foods.

2. The Proposed Solution is Minimally Intrusive, Economically Sound, and Permitted by AMAA and other applicable laws.

a. AMAA

Dean Foods proposes alternative modest changes to the regulations that would fix the underlying problem without creating new regulatory burdens. The opponents object to any proposal that would remove their competitive advantage for failing to pay or collect minimum milk prices from Class I handlers; in fact they object most strenuously to the very proposal that would create the least burden.¹ The Secretary has a range of options available as a result of the hearing notice. No fewer than five proposals deal directly with the proprietary bulk tank handler issue. Dean Foods would accept *any* option that insures that regulated minimum payments are made by its competitors who are not otherwise exempt. Nonetheless, Dean has gone out of its way to propose and certainly is prepared to adopt the least burdensome option

¹ As noted below in the discussion of the requirements of the Regulatory Flexibility Act, nothing in that law actually would require USDA to give these regulated entities preferential treatment or to adopt regulations imposing the least burden on them. Nonetheless, opponents assert that all alternatives to the first option are too burdensome. This Catch-22 cannot be used to defeat all proposed options designed to remediate disorderly marketing conditions.

that also resolves the underlying problem that other regulated handlers are not presently paying minimum order prices for milk received from producers.

The need for change is clear. There is an obvious regulatory loophole and the Market Administrator has taken the position that he will not enforce order prices based upon existing regulations. Tr. 1200, lines 3-8.

Proposals 11 and 13 or Proposal 12 would provide the Market Administrator with the order language that would make clear his authority and obligation to ensure that minimum prices are being paid by pool distributing plants participating in these transactions.

The language as set forth in proposal 11 provides that the milk delivered by a Proprietary Bulk Tank Handler to a pool plant will be producer milk at the pool plant. As such the pool plant operator (*i.e.* Stoker and Falconhurst) will be fully accountable to the pool for the value of the milk and for paying the producers whose milk was delivered to the pool plant. The distributing pool plant operator would be responsible for paying the producers the order price, but could for the convenience of a single payment to each producer, hand the value over to the proprietary bulk tank handler (*i.e.* Jerome Cheese and Glanbia) for distribution to the producers. As discussed below in the analysis of the Regulatory Flexibility Act, this process could also include permitting Jerome Cheese and Glanbia to prepare and file all the necessary paperwork (that is the paperwork that they must already file with the Market Administrator today).

The order of the proposals in the notice needs explanation. Proposal 11 and 13 should be adopted together. Together they make clear that the distributing pool plant operator is responsible for paying the producers and accounting to the pool for the minimum prices. Under this language the Market Administrator has authority to verify the payments to the

producer settlement fund and to producers as he has on all other transactions between handlers and producers. Again for convenience, the paperwork and much of the auditing could be accomplished at the proprietary bulk tank handler. The main issue will remain the market administrator's ability, now lacking, to audit and enforce the minimum payment on the volume actually processed by the customers of the proprietary bulk tank handlers.

Proposal 12 is offered as an alternative and would not change the current flow of funds, but would specify that the pool plant is obligated to pay the proprietary bulk tank handler at least the order prices. Statutory authority for such a provision in order to enforce minimum prices for raw milk can be found in §§ 608c(5)(C) and 608c(7)(D) of the Agricultural Marketing Agreement Act. Indeed, § 608c(7)(D) permits the Secretary to add terms in marketing orders that are “[i]ncidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.” Proposal 12 would merely treat transactions between proprietary bulk tank handlers and their customers identically as transactions between regulated pool handlers and cooperatives acting as handlers under the order.

With clear evidence that there is a failure to pay minimum prices by some otherwise regulated competitors, such a provision is “necessary to effectuate the other terms of the order”, “incidental to” and certainly “not inconsistent with” existing order provisions or the intent of the AMA Act. Moreover, the AMA Act expressly authorizes the Secretary to provide a method for making adjustments in payments *among handlers* to ensure that handlers are paying the full minimum price for their milk purchases. Section 608c(5)(C) authorizes the Secretary to “provide 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.” If this particular section is to be afforded any meaning (and under long-standing, elementary, and now standard rules of statutory construction it must be given meaning so that no word is left void, superfluous or insignificant), the Secretary plainly has the authority to adopt any of the proposals offered in this case. *Rake v. Wade*, 508 U.S. 464, 471 (1993) (“To avoid ‘deny[ing] effect to a part of a statute,’ we accord ‘significance and effect . . . to every word.’”), quoting with approval, *Ex parte Public Nat. Bank of New York*, 278 U.S. 101, 104 (1928) (quoting *Market Co. v Hoffman*, 101 U.S. 112, 115 (1879)).

It is long past time to give effect to words of 7 U.S.C. § 608c(5)(C) that permit adjustments in payments, as among handlers. Nothing in any of the proposals exceeds the Secretary’s authority to effectuate the minimum pricing provisions of the AMAA. To the contrary, the need for authority underlying these proposals was expressly contemplated by Congress.

Moreover, the Secretary today enforces regulated minimum payments between pool distributing plants and handlers known as 9(c) handlers (cooperative sellers of milk under 7 C.F.R. § 1135.9(c)). Cooperatives acting as 9(c) handlers must collect minimum class payments for the milk. Dean Foods’ expert testified that if a “pooling” payment from a pool distributing plant to a cooperative acting as a handler under 9(c) resulted in less than the minimum order payment being made, enforcement action would be taken. Tr. 1219, lines 17-19. So what Dean Foods is requesting in these proposals is nothing different in scope, magnitude or legality than what presently occurs with respect to transactions between 9(a) and

9(c) handlers. If those transactions may be lawfully regulated and enforced, so too can the transactions contemplated by Proposals 11, 13 and 12.

Opponents urge the Secretary to reject proposals 11, 13 and 12 because, they assert, that other “similar” transactions occur that are not regulated. However, while opponents strain to make the point, they fail to point out any relevant parallel situations actually occurring in this marketing area. There was no record evidence that sales of unregulated plant-to-plant transfer milk are occurring at less than minimum prices.² There was no evidence that any sales of unregulated milk were causing competitive imbalance in the market place. There was no evidence that exempt handlers (defined as processing less than 150,000 pounds per month, only 30% of the purported size of the customers of proprietary bulk tank handlers) are making any competitive impact in this market. There was no evidence that exempt producer-handlers (subject to additional regulatory restraints that turned out to be too burdensome for Stoker (Tr. 805)) are creating competitive havoc in the otherwise regulated market place. Tr. 1213-1215. It may be intellectually stimulating to spin out hypotheticals, but in this market there is only one real world example that fits the bill – customers of proprietary bulk tank handlers are not paying regulated minimum class prices and as a result have a competitive advantage that they are exercising over their regulated competitors.

Dean Foods did not propose Proposal 5. Adoption of Proposal 5 would eliminate any purpose for proposals 11, 13, and 12 because the transactions at issue – sales from proprietary bulk tank handlers to their customers – would cease to exist. Dean Foods prefers the approach found in Proposals 11, 13 and 12, and did not intend to impact the ability of Jerome and

² Transfer milk is also different in that it is first received (and priced) at one plant and then transferred (sometimes as tailored milk standardized for particular needs) to another plant. The milk in question, of course, is received instead first at Falconhurst and Stoker.

Glanbia to pool their milk as proprietary bulk tank handlers. The provision for a proprietary bulk tank handler was introduced into the predecessor Southwestern Idaho Eastern Oregon Order at its inception over 20 years ago. The justification given in the decision was the absence of traditional supply plants in the marketing area and the desire to avoid imposing the cost of upgrading to Grade A facilities on existing manufacturing plants.

The rulemaking decision implementing the provision suggested that the proprietary bulk tank handler concept was expected to facilitate the pooling of necessary market reserves in the absence of supply plants. 45 F.R. 71198 *et seq.* (Oct. 27, 1980). Since the current order has manufacturing plants that are now capable of serving as supply plants (*e.g.* Jerome Cheese is entirely a Grade A facility and would require no upgrade at all to serve as a traditional supply plant under the order (Tr. 733, lines 18-25)). Since USDA has implemented diversion provisions to accommodate the handling of market reserves from supply plants, it is not a big step to conclude that the proprietary bulk tank handler provision is no longer necessary. As a result of the 1981 Decision, the Department has effectively granted manufacturing plants in the Western Order privileges and benefits similar to, and with respect to shipping percentages better than, that of a 9(c) handler without the corresponding obligation of collecting the minimum classified price from its customer. It is not surprising, therefore, that notwithstanding the existence now of a supply plant provision that permits diversions as qualifying shipments, that no manufacturing plant (*e.g.* Jerome) has chosen to use that option. Therefore, while Dean Foods has advocated the remedy proposed in Proposals 11 and 13 or 12, Dean Foods would not object to Proposal 5 if the Secretary in her wisdom determines that the problem with which Dean Foods is concerned can best be

remedied by removing the outdated and unnecessary proprietary bulk tank handler provision altogether.

b. Regulatory Flexibility Act Clearly Permits Adoption of Proposals

Opponents to Proposals 11, 13, and 12 suggest that the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. may affect the Secretary's adoption of proposals herein. As demonstrated below the Regulatory Flexibility Act ("RFA") does not require additional analysis or special review in this matter, but even if it does, the regulatory problem that needs to be solved, the proposals presented and the alternatives offered all meet the requirements or guidelines of the RFA.

The Small Business Administration, the agency charged with enforcement of RFA, has described the major purpose of the RFA as being:

[T]o establish as a principle of regulatory issuance that federal agencies endeavor, consistent with the objective of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of entities subject to regulation.

The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, U.S. Small Business Administration, Office of Advocacy, Washington, D.C., 1998, p. 1.

Importantly, the RFA does not exempt small businesses from regulation. The Dean expert addressed directly the issue of small businesses, Regulatory Flexibility Act ("RFA") requirements and the Agricultural Marketing Agreement Act (consistent with this analysis):

[W]ith regard to requiring minimum Order prices, I don't believe you can say you're immune from minimum Order prices because you fall under the small business category. . . I don't think the Secretary could go draw that conclusion.

Tr. 1235, lines 11-15. At no time in the history of the AMAA has USDA, Congress or the Courts concluded that being a small business exempts one from minimum price regulation

entirely except to the extent USDA has adopted a uniform definition for exempt plants that is size based, but is far smaller than the operations in question here.

Instead, under the RFA the agency must, when it determines that there will be a substantial economic impact on a significant number of small entities, conduct additional analysis regarding the impact on small businesses. And as stated in the Hearing Notice (Ex. 1), the Secretary will, within the statutory authority of the program, ensure that the regulatory and informational requirements are tailored to the size and nature of small businesses. But the limitations are clear:

The RFA does not seek preferential treatment for small entities, require agencies to adopt regulations that impose the least burden on small entities, nor mandate exemptions for small entities. Rather, the RFA *encourages* agencies to examine public policy issues using an analytical process that identifies, among other things, barriers to small business competitiveness; and seeks a level playing field for small entities, not an unfair advantage.

Id. at 2 (emphasis added).

The first question then is does the RFA require any additional or special analysis. The clear answer here is “no” as to these proposals. Dean Foods concedes that there would be a regulatory impact on two small businesses (Stoker testified that it was a small business and suggested that Falconhurst was also a small business – Tr. 807, lines 2-15). As to Jerome Cheese and Glanbia there are two reasons why the Secretary should determine that RFA analysis is not applicable as to them at least as to these two proposals. First, any economic impact both for paying minimum prices and paperwork increase, if any, would fall on Stoker and Falconhurst, not Jerome or Glanbia. Jerome and Glanbia already face the paperwork and audit requirements under the order and would face no additional paperwork. Indeed Jerome

and Glanbia would now, if proposals 11 and 13 or 12 were adopted, be able to collect minimum payments for their milk sold to their customers – they plainly do not have an economic cost imposed on them if the proposals are adopted.

Second, the record is at best incomplete as to whether or not Jerome as part of Davisco and Glanbia are actually small businesses as that term is defined by USDA for RFA purposes. For handlers that rule is “fewer than 500 employees.” Ex. 1. The witness for Jerome Cheese Company acknowledged 200 employees in Idaho, but also admitted that their company also operated plants (handlers) in South Dakota and Minnesota. Tr. 730, 682, and 705-706. Similarly, Glanbia testified that for two plants in Idaho it employed fewer than 500 employees (Tr. 746), but neglected to mention the third Idaho plant’s employees (the whey facility in Richfield has for this hearing record an unknown number of employees (Tr. 747)) and did not mention the fact that Glanbia’s Idaho operations are part of a (hardly small) worldwide dairy company based in Ireland. *Available at*

<http://www.glanbia.com/applications/homepage/homepage.asp>:

Welcome to the Glanbia website. We are an international food company based primarily in Ireland, the UK and the USA. We rank among the world's leading dairy businesses, with strong international market positions in cheese and nutritional dairy ingredients. This site will introduce you to our operations and products.

(Official Notice requested of Website as published on August 17, 2002, or date of filing of briefs).

The Secretary has in the past taken the position (e.g. *Milk in the Mideast Marketing Area, Proposed Rule*, 67 F.R. 30871 *et seq.* at 30871, c.3 (June 11, 2002)) that if a plant is part of a larger company operating multiple plants, the local plant will be considered a small

business only if the business taken as a whole has fewer than 500 employees. Otherwise, Meadow Gold Dairies in Idaho operates two small businesses in Idaho requiring special analysis of the impact of the failure to require regulated minimum price payments from their competitors! Without knowing the number of employees employed throughout Davisco and Glanbia, the Secretary simply has no way of knowing whether the RFA applies to those entities. The burden should be on those companies to prove applicability; in this Record, they have not carried that burden.

Regardless, the proposals do not require Initial or Final Regulatory Flexibility Analyses because there cannot be shown to be a substantial economic impact on a significant number of small businesses. Whether the number of small businesses impacted is two (as argued herein for impact and qualification purposes) or four, the term “significant number of small businesses” simply cannot mean either. Beyond this, Dean’s acknowledged expert reached the following conclusion about Idaho pool distributing plants and their sizes in general:

I don’t think there are *any* large, what I would call large distributing plants in Idaho. I think the Class I use in Idaho is 20 million pounds a month, and there are five or six plants up there. That comes out to four or five million [pounds], something in that range, and I’m familiar with a few plants in the country that have twice that much milk in one plant of the whole 20 million. That’s a large plant. Those plants are small plants.

Tr. 1232, lines 16-24. Therefore, there is no special imposition of regulation on some small businesses that is not also imposed on all other businesses, all of which in Idaho happen to be smaller than most others in the U.S.

Third, even if the Regulatory Flexibility Act were to require increased review in this matter, Dean Foods has offered a number of “less intrusive” solutions that can solve the problem. This effort to provide less intrusive solutions goes beyond any requirements of the Regulatory Flexibility Act, and demonstrates that it is not the small business status of opponents that is in issue here, but fundamentally the question of regulatory fairness with respect to regulated minimum prices paid by competing entities. Moreover, as acknowledged by the Jerome witness, there is another existing regulatory alternative as to that facility, without additional cost, as it is now entirely a Grade A facility; therefore, it could, if it chose, meet the requirement of a pool supply plant under the Order.

Finally, with respect to the Regulatory Flexibility Act, Dean requests that the Secretary make an express finding that the solution adopted addresses the regulatory problem presented in this Record. Again, while not definitive given the lack of express requirements by the RFA, such a finding surely is justified given the extensive discussion in the hearing record, the number of proposals in the Hearing Notice intended to deal with the issue, and the conclusion by Dean’s expert that there is no “more critical problem than the lack of uniformity in the application of the prices out there in the marketing area.” The proposed solutions in proposals 11 and 13 or 12 or 5 are plainly designed to fix the defined regulatory problem.

c. Order Exemptions are irrelevant.

Opponents appear to urge rejection of any proposal based upon the unsupported notion that other order exemptions permit handlers to compete without paying minimum order prices. Tr. 1312. Of course there are Order exemptions as defined in 7 C.F.R. §1135.8 (incorporating 7 C.F.R. §1000.8); however, there is not a scintilla of evidence that any facility

operated under such an exemption under the Western Order is causing any concern in the market place. Tr. 1214-1215. And those other exempt plants have limitations precisely geared to this issue. If a government entity or college or university plant has route disposition in the commercial market, it loses its exemption as a government entity. 7 C.F.R.

§ 1135.8(e)(1) and (2). If a plant processing 150,000 pounds or less per month has route disposition and packaged sales to other plants of 150,001 pounds (one pound over the limit), it loses all of the benefit of that exemption. 7 C.F.R. § 1135(d)(4) and Tr. 1214, lines 8-14.

Finally, producer-handlers are also subject to certain specific restraints regarding their actions (notwithstanding the fact that in some orders at least those limitations may be less than fully effective). Tr. 1231-1232. But the handlers not paying minimum payments here have no limitations on their unintended "exemption" whatsoever. They are exempt, but not because the Order so provides. They fail to pay minimum order prices for the milk received, regardless of substantial evidence that they are using that regulatory advantage to the detriment of both dairy farmers and regulated handlers. This cannot stand.

d. Dean Urges immediate adoption of regulatory solution

Dean urges immediate adoption of relief. Candidly this issue has been hot on the table for over a year, and remains hot because each passing month further harms producers and other regulated handlers. "I can't think of a more critical problem than the lack of uniformity in the application of prices out there in the marketing area." Tr. 1231, lines 12-14. From Dean's expert, this is uncontested and powerful testimony that cries out for the Secretary to issue and implement immediately the relief requested. *Indeed given the number of proposals dealing with this issue and its immediate importance, Dean urges the Secretary to take whatever action necessary to insure orderly marketing conditions.* It is not at all out of

bounds for the Secretary to issue a partial interim decision dealing with this issue only; Dean urges that to occur, if other hearing issues slow down the Secretary's decision.

3. Double Pooling should be eliminated for reasons stated in the Record and other briefs

There is no need to burden this Record further with the need to prevent double pooling of California milk on both California's state and federal orders. Ample evidence in this Record (Ex. 14) and the briefs of Dean Foods in the Upper Midwest and Central Order (with virtually the same evidence) demonstrate the immediate need to deal with this issue. To the extent necessary, Dean incorporates by reference its previous filings made in 2001 and 2002 with respect to double pooling of milk only. USDA has a solution implemented in the Upper Midwest. That solution or another similar one for these Orders are appropriate.

4. Comments on Pooling, Net Shipments Provision and Diversion Limits

Diversion limits serve an important goal in the federal order system. Without diversion limits, there would be no regulatory requirement to actually serve the fluid market. Milk could be pooled on the milk order, collect the producer price differential that is funded by Class I processors (e.g. Dean Foods), and yet fail to serve the market in any meaningful way. Without commenting on what level of diversion limits the Secretary should adopt in this proceeding for the Western Order, Dean Foods notes that diversion limits must be meaningful and real. A diversion limit should give the industry (and in this case Class I handlers and those producers supplying Class I handlers) an assurance that other producers are supplying a concrete percentage of their milk to the fluid market in return for the privilege of pooling all of their milk.

The most important example of this principle is the fact that the existing diversion limit of 90% in the Western Order does not actually mean that 10% of the pooled milk will be

processed by a pool distributing plant. To the contrary, without a so-called net shipment provision, the Western Order has experienced actual pool distributing plant usage of 3-5%. Exhibit 10; Tr. 717, lines 9-10. For example, if a pool handler and a pool distributing plant agree, the following can occur: A pool handler delivers 2,000,000 pounds of milk to a pool distributing plant. The pool distributing plant processes and makes route disposition in the marketing area of 500,000 pounds (25% of the deliveries). The pool handler diverts 18,000,000 pounds using the 2,000,000 pound delivery and 90% diversion limitation, but then also receives back from the pool distributing plant the unused 1,500,000 pounds of milk (75% of deliveries). While only 500,000 pounds of milk have actually served the fluid market, 19,500,000 additional pounds have been pooled meaning that the effective diversion limit is not 90%, but 97.5%! This explains the fact that small juggers operating solely as Class I milk plants with minimal non-Class I usage (Tr. 928-929) have only 3-5% Class I usage as described on the table in Exhibit 10. *See* Tr. 716-717.

In the Western Order where milk supplies, manufacturing plants and pool distributing plants are, in some cases, located all within 20-40 miles of each other, the benefits of pooling easily outweigh the cost of hauling the milk into and out of the pool distributing plant from the farm ultimately to manufacturing use. Tr. 759-762. As a result, Glanbia acknowledged that every month it hauls milk in and out of Falconhurst for the purpose of pooling. Tr. 762-763. The witness for Jerome Cheese acknowledged that Stoker's Class I sales are only 5% of Jerome's pooled milk. Tr. 717, lines 9-12. This result must mean that Jerome is also hauling milk out of Stoker in a similar fashion as Glanbia and Falconhurst. *See* Tr. 695.

The Secretary should make a determination of what the real diversion limit should be and then either adopt that level with a net shipment provision or a level without a net

shipment provision that mathematically derives the same result. Dean Foods believes it would be simpler to select the net shipment option, but the more important issue is that the objective of establishing a realistic and real delivery requirement to pool distributing plants is met.

CONCLUSION

Dean urges immediate adoption of proposals 14, 11 and 13, or in the alternative 14 and 12, or, in the alternative, 14 and 5 as the Secretary determines appropriate. There is simply no question that disorderly marketing conditions are undercutting the Western Order's effectiveness at the expense of both producers and regulated handlers. The solution is straight forward and imposes few new costs. All that will change is that the market administrator will have the power he now lacks to insure that minimum order prices are being paid by all regulated handlers receiving milk. The changes should be adopted and implemented as quickly as possible.

August 21, 2002

Respectfully submitted,



Charles M. English, Jr.
Wendy M. Yoviene
Thelen, Reid & Priest, L.L.P.
701 Pennsylvania Avenue, Suite 800
Washington, D.C. 20004
(202) 508-4000

Attorneys for Dean Foods Company