UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

REPLY BRIEF FOR
CALIFORNIA DAIRIES, INC.,
DAIRY FARMERS OF AMERICA, INC., and
LAND O'LAKES, INC.

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CERTIFICATE OF SERVICE

I. INTRODUCTION

This Cooperatives' Post-Hearing Reply Brief ("Reply Brief") responds to the Dairy Institute of California (the "DIC")'s Post-Hearing Brief (the "DIC Brief"), as well as post-hearing briefs submitted by other parties opposing portions of the Cooperatives' Proposal No. 1.[1] But before we enter and possibly get lost in the trees in analyzing the issues involved in these proceedings, let's step back and take an overview of the forest.

Why are we here at all? We are here, first of all, because of the economic stress suffered by California dairy farmers due to the low minimum prices they receive under the California regulatory system, which are lower than those received by dairy farmers everywhere else in the country governed under Federal Milk Marketing Orders ("FMMOs"), including in adjoining or nearby states such as Arizona and Washington. Despite the claims of the DIC and its allies that all is well under the California system, the harsh reality is that making dairy farming economically viable is extremely and increasingly difficult under the current California State Order ("CSO"). This has led to a significant contraction of milk production in California, as dairy farmers have moved their operations to other areas, or have given up dairy farming altogether in favor of more profitable and reliable economic pursuits in agriculture or elsewhere. This is not speculation; it is reality. The table below dramatically demonstrates that California milk production is declining:

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[1] When addressing issues of common concern among the leading and often very similar post-hearing briefs of the Dairy Institute of California, Hilmar Cheese Company ("Hilmar"), Dean Foods Company ("Dean Foods"), and Leprino Foods Company ("Leprino"), the Cooperatives will refer to the parties collectively as the "Opponents." For clarity, if issues are particular to a single party, that party will be identified.

California Milk Production
USDA Baseline v. Actual (2014-15) and Projected (2016)

	2013	2014	2015	2016[2]
USDA Baseline in Billion Lbs.[3]	41.3	44.8	47.7	50.9
Actual[4]	41.3	42.3	40.9	40.2
Difference in Volume		-2.5	-6.8	-10.7
Difference in %		-5.58%	-14.26%	-21.02%

As the table demonstrates, 2016 California milk production will be an astounding 21.02% (10.7 billion pounds) below the United States Department of Agriculture ("USDA") baseline as of the beginning of these hearings (Hearing Exh. 7), and 1.1 billion pounds lower than actual 2013 production. This assessment looks back several years; this downturn is not just an anomaly, and under present regulatory conditions, does not appear to be temporary. (Erba Tr., Vol. XXXX, p. 8111-8113 (Nov. 18, 2015).) There is no evidence that it will get better unless the USDA intervenes.

We are also here because, after Congress twice took the unprecedented step of inviting California to join the FMMO system and, equally unprecedented, provided that the California order include provisions recognizing quota value created under state law, California dairy farmers, as their economic circumstances worsened, through their Cooperatives, accepted that invitation and filed their petition – Proposal No. 1.

What is the position of the DIC, its members,[5] and Proposal No. 1's Opponents? The main goal is clear: prevent adoption of a California FMMO.

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[2] 2016 full year projected on basis of year over year reduction for January to March. No adjustment was made for leap year of 2016.

[3] (Hearing Exh. 7.)

[4] USDA, NASS, Milk Production (Annuals 2013, 2014, 2015 and Apr. 2016.)

[5] By "members," we mean primarily, although not exclusively, its manufacturing handlers, including Hilmar Cheese, Dean Foods, Leprino, Saputo and HP Hood LLC ("Hood"). To the
(Footnote continued)

Why do the Opponents so strongly oppose adoption of a California order? Here, too, the answer is manifest: because they fear it will take away their advantage over competitors regulated by all other FMMOs on the key element of raw product cost. California cheese manufacturers already have competitive advantages – much larger, and more cost efficient manufacturing facilities, a favorable climate, and a well-organized industry at all levels; but Opponents are not content to compete on these advantages alone.

They wish to maintain the further advantage that California's regulatory system has given them – minimum prices for milk used for manufactured products lower than those uniformly established under all existing FMMOs. This, of course, is in opposition to well-developed USDA policy that has established national uniform Class II, III and IV minimum prices. The policy is based on the reality that the market for manufactured products is national, not regional and local, and has established that the prices for raw milk used for such products shall be the same for all handlers so that competition in national markets shall be on factors other than the regulated price.

The Opponents attempt to justify their position against competing on the same level playing field as their competition by arguing that, because of their greater distance from midwestern and eastern markets, the cost of transportation means California raw milk has a lower locational value and should be therefore priced lower. The USDA and the Secretary have previously rejected such arguments. (*E.g.*, 64 Fed. Reg. 16044, 16100 (Apr. 2, 1999)(Final Decision on Federal Order Reform).) But if the USDA and

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extent their briefs raise the same issues, which they often do, we address them only once for efficiency. This section also responds to contentions of Dean Foods, Hood, and other fluid handlers.

the Secretary were, for some reason, to accept the DIC's attempted justification in adopting a California FMMO, it would not only reverse well-established USDA policy, but would also create market disorder[6] and absurd results. Competitors of the Opponents who have similar transportation costs in shipping long distances to product markets – say cheese from the Pacific Northwest[7] to the midwest and east, or cheddar cheese from Wisconsin marketed in California – would be subject to a higher minimum price under their FMMOs than California cheese plants under the California FMMO. And the DIC and its members would likewise benefit from the lower FMMO Class III price on milk used to produce the extensive volume of California cheese marketed within California even though there is no increased transportation cost; that is, unless they were to sacrifice its sacred cow of "uniform AMAA prices" by suggesting a different price.

To achieve their primary goal of preventing adoption of a California FMMO, the Opponents have taken two tacks:

- Arguing, in the face of obvious Congressional intent expressed in two Farm Bills 18 years apart, that adoption of a California FMMO is not legally justified or even permissible.

[6] This very difference between minimum prices currently set under the California system versus those set, for example, under FMMOs in the adjacent Pacific Northwest and Arizona Orders, or under far away Order 30 as to cheese manufactured in that region and marketed in California, already creates disorderly marketing conditions that cry for a California FMMO that levels the playing field.

[7] See the brief filed herein by the Northwest Dairy Association, a cooperative with 460 members, more than 3/4 of whom market under the Pacific Northwest Order No. 124, in support of Proposal No. 1.

- Proposing an alternative version of a California FMMO that contains provisions, which if adopted, would surely doom the proposed FMMO to failure in a producer referendum. One could justifiably call these "no brainers" or "non-starters." A betting man would more likely place his money on a snowball's chance in hell than on the chance that Proposal No. 2 would be approved in a producer referendum.

These poison pills include classified pricing far below that proposed by the Cooperatives and below FMMO pricing elsewhere (Hearing Exh. 162A; Erba Tr., Vol. XXXX, pp. 8105-8108 (Nov. 18, 2015).); weak depooling protection that would allow California's uniquely large in size and few in number processing handlers to not participate in the pool and thus cause severe and destabilizing impacts on the pool; and a quota system that would destroy quota in a short period of time rather than recognize its value.

Now let us examine the flaws in the Opponents' position in greater detail.

II. THE AUTHORITY AND IMPERATIVE FOR A CALIFORNIA FMMO ARE CLEAR.

This section responds to the Opponents' burden of proof contentions and to their incredible assertion that, despite the provisions of the Farm Bill, the Secretary lacks the authority to adopt the Cooperatives' Proposal No. 1. We will demonstrate that the Cooperatives have met any "burden of proof" requirements, and that the Secretary has ample legal authority to adopt Proposal No. 1 as the California FMMO.

A. The Cooperatives Have Met Their "Burden Of Proof."

Several Opponents raise the issue of the burden of proof relevant to this rule-making, and whether or not they feel that burden has been met by the Cooperatives.

While the Cooperatives have already addressed this issue in their own brief, they note here that consistent with their Post-Hearing Brief, not one party has shown any instance where the substantial evidence measure has been applied in a quasi-legislative hearing such as this. In quasi-legislative proceedings, the USDA has found that the burden is more accurately likened to the burden of "going forward." *In Re: Midway Farms, Inc.*, 56 Agric. Dec. 102 (USDA, Apr. 18, 1997). That fact has gone undisputed by all parties in their briefs. In this quasi-legislative rule-making, the Cooperatives' burden is that of "going forward." The Cooperatives have met their burden.

Nevertheless, the Opponents of Proposal No. 1 request application of the burden of proof from individualized adjudicatory actions. Even under the more formal standard for individualized adjudicative administrative proceedings that is not applicable here, the proponent need only produce evidence which is in any qualitative single measure greater than that of its opposition to prevail. As long as the "scales tip, however slightly," in favor of the party with this burden of proof, that element has been proved by a preponderance of evidence. *In Re: Bitstreams, Inc.*, SBA No. BDP-122 (July 2, 1999). The record shows that the Cooperatives have met this burden as well, although they are not required to do so.

Finally, Opponents' claim that there is some additional burden on the Cooperatives to "present the best economic case"[8] is just wrong. *Tenoco*, specifically postured as a **post** rule-making challenge to an **already implemented** regulatory taking assessment of individual rights, actually noted that the party claiming a taking (most analogous here to the hypothetical and unsupported claims of the DIC), *could* (not

[8] *Tenoco Oil. Co. v. Dept. of Consumer Affairs*, 876 F.2d 1013 (1989).

mandatory) be compelled to present its best economic case to prove confiscation. *Id.* at 1027-1028. The reference to "best economic case" has nothing to do with Proponents' burden for issuance of an FMMO under the AMAA and Farm Bill.[9] And, like so many of the cases the DIC relies on, is about adjudication of individual rights and actions, not rule-making proceedings such as these.

The evidence of both the need for the issuance of a California FMMO and the disorder resulting from the failure of the USDA to act on this petition is manifest in the record. The Cooperatives have itemized the testimony of more than 30 different producers, all of whom are suffering under the CSO. Not one producer testified that things in California are alright; in fact, with near unanimity, the producers testified that they are in desperate need of an FMMO for California.[10] The California farmers' financial woes under the CSO, if not addressed, will mean we are a short time away from putting the supply of milk in California, and in the U.S., in jeopardy. In fact, even the Cooperatives' Opponents acknowledge this: "The fact that many California milk producers have experienced periods of financial distress during the past several years is undisputed, and is overwhelmingly demonstrated in the 9 week Fresno hearing record." (Hilmar Brief, p. 3.) Furthermore, the nationalization of the marketplace and the chaos of the California system regarding regulation of interstate transactions is well

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[9] Furthermore, even if some form of "best economic case" burden applied, which it clearly does not from even a cursory reading of *Tenoco*, the Cooperatives have met this burden. The economic case they have put forward, unlike the one described in *Tenoco* as "sketchy," is informative, fact-based, and thorough. The DIC just does not care for the evidence the Cooperatives have put into the record; unfortunately, that is not a relevant measure for the Secretary or the Courts.

[10] The Cooperatives also note the support of Proposal No. 1 as detailed in the Briefs filed by Select Milk Producers and Northwest Dairy Association, Inc.

documented. As the Maine, Kentucky, Georgia and Tennessee dairy trade associations noted: "The California Cooperatives have made a compelling case that they confront substantial marketing disorder warranting replacement of the state Order with a federal order." (Maine Dairy Industry Association, *et al.* Brief, p. 7.)

B. The Secretary Has Authority To Adopt Proposal No. 1.

To support its contention that the USDA lacks authority to adopt the Cooperatives' Proposal No. 1, the Opponents throw ten rules of statutory construction against the wall in hopes that one of them will stick. To begin with, these rules are not Ten Commandments but rather principles to assist courts to clarify ambiguities in a statute. But, except for some gratuitous lip service, the DIC overlooks the threshold rule of statutory construction, that is to examine the language of the statute. If its meaning is clear and unambiguous, that is the beginning and end of the inquiry. (*See* Cooperatives' Post-Hearing Brief, pp. 37-39); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also*, *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99 (2003). One need not, and indeed cannot, look behind that language by resorting to rules designed to assist in interpretation of ambiguous statutes. *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450 (2002).

1. The Language Of The 2014 Farm Bill Authorizes Adoption Of Proposal No. 1.

To place the Farm Bill's language in context, one must first examine the background. California dairy farmers could have petitioned for a California FMMO either before or after 1996 without adoption of either the 1996 or 2014 Farm Bill. But without those bills, a California FMMO that recognized the value of quota could not have been adopted.

Was Congress aware of this when it enacted the 1996 and 2014 legislation? Certainly, it had to be. Why else was this language adopted?

Was Congress aware that California produced over 20% of the nation's milk and an enormous percentage of the U.S. cheese and other manufactured milk products marketed in national markets,[11] and yet was outside the FMMO system under which the majority of the rest of the nation's milk is regulated, and was Congress desirous of bringing California into the federal fold if its dairy farmers wanted it? Again – certainly: Why else take the unprecedented step of specifically inviting one area, one state, to join the party upon petition of its dairy farmers?[12]

Was Congress aware of the California quota system and of its value to California dairy farmers? Of course: Why else include specific language regarding the recognition of quota value?

Was Congress aware of the provisions of the AMAA? Of course: The AMAA is mentioned in the very language of the statute, but, significantly only in the context that a

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[11] California's ranking compared to U.S. Totals: **First:** 21% of total U.S. production; 19% in number of milk cows; 32% of production of Italian cheese; 37% of mozzarella production; 52% of Hispanic cheeses; 37% of unsweetened condensed skim milk; 41% of nonfat dry milk (human grade); 33% of butter; 47% of dry buttermilk; 17% of ice cream and ice cream mix; 10% of sherbet mix; at $9.346, 19% of total value of milk production. **Second:** 21% of production of all types of cheese, 14% of American style cheeses; 21% of cheeses other than American style; 14% of sour cream; 6% of low fat ice cream; 6% of low fat ice cream mix. The California milk industry also ranks third for production of creamed cottage cheese (9%) and number of dairy plants (9%); fourth for cheddar cheese production (12%); and seventh in number of dairy farms (3%); and eighth in milk per cow. (Hearing Exh. 19, p. 4.)(NASS Milk Production (Feb. 2015); Dairy Products Annual (Apr. 2015); Milk Production, Disposition and Income (Apr. 2015).

[12] Congressional awareness of California's importance in the national milk industry is also demonstrated by provisions of the Federal Agriculture Improvement And Reform Act of 1996, Public Law 104-127, Apr. 4, 1996. Besides section 143's authorization of a California FMMO with value of quota recognition, the Act included section 144 (authorizing California standards of identity – i.e., solids-not-fat fortification); as well as Section 145 limiting state milk order make allowances, addressed to California's state order pricing.

California FMMO had to be approved by California producers in a referendum conducted under the AMAA procedures.

With that background, let's look at the specific language of the Farm Bills. The first sentence reads:

> Upon the petition and approval of California dairy producers in the manner provided in Section 608c of this title, the Secretary shall designate California as a separate Federal milk marketing order. 7 U.S.C. § 7253(2).

This is pretty strong language – no ambiguity here. Note the mandatory term "shall." There is no need to rely on other rules of statutory construction. In fact, it would be improper to do so. The inquiry begins and ends here.

2. Recognition Of Quota Value Is Mandatory, Not Discretionary.

The second sentence states: "The order covering California shall have the right to reblend and distribute receipts to recognize quota value." 7 U.S.C. § 7253(2). "Shall" indicates mandatory, not permissive, action. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *In Re: Pmd Produce Brokerage Corp.*, 60 Agric. Dec. 364, at *4 (USDA Apr. 6, 2001) ("The word shall is ordinarily the language of command and leaves no room for administrative law judge discretion."); *see also Exportal Ltda v. United States*, 902 F.2d 45, 49 (D.C. Cir. 1990) (rejecting an argument that the term "shall" indicates permissive rather than mandatory action).

The language is likewise clear and unambiguous that the Secretary could not adopt a California FMMO that ignored the right to recognize quota value; it is not

discretionary as the Opponents illogically argue. It is true that the statute does not specify exactly how the value of quota is to be recognized. But it is equally true that, however this is done, the provision must recognize the value of quota, and not instead destroy it. And the language is also unambiguous as to how the recognition is to be implemented: it is by "reblend[ing] and distribut[ing] receipts." It is not to be done by any other method, such as some sort of annuity, financed by who knows who, that retires quota.

The DIC makes the untenable suggestion that the language of the Farm Bill regarding inclusion of a provision recognizing quota value is discretionary. By tortured logic, it argues that "shall" as used in the second sentence of both the 1996 and 2014 Farm Bills really means "may," citing a footnote in *Guitierrez de Martinez v. Lamagno*, 515 U.S. 417, 430-34 (1995). From this the DIC argues that the Secretary has the discretion to ignore California quota and not recognize quota value.

The DIC lacks the temerity to interpret "shall" as used in the first sentence of the Farm Bills to mean "may."[13] So, in order to buy the DIC's sophism,[14] one would have to imagine that when Congress used the word "shall" twice in a two sentence statute, it meant "shall" the first time but "may" the second, a stretch no reasonable mind could make. Of course, Congress could have actually used "may" in the second sentence. It clearly knows how to use "may" to convey a grant of discretion. Here, if the word "shall"

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[13] To have done so would have meant Congress intended "Upon the petition and approval of California dairy producers, the Secretary may designate California as a separate marketing order," an absurd and tortured construction of Congressional intent.

[14] "[S]ophism … an argument apparently correct but actually invalid; *esp.:* such an argument used to deceive." Webster's New Collegiate Dictionary (1981). And here, the argument isn't even apparently correct.

is to have two different meanings in the same two sentence statute, clearly this is what Congress could or should have done.[15] But it did not. Intentionally.

A recent U.S. District Court decision aptly summarizes how to properly interpret a statutory provision that uses "shall" multiple times:

> Defendant's argument hinges on the Court deeming the second "shall" to mean "may." However, from a general perspective, the Court must recognize that it would be odd to deem the second "shall" to mean "may," while leaving the first "shall" as is. Accordingly, the Court finds that the only way to properly consider Defendant's argument is to replace both. … Therefore, if the first "shall" cannot reasonably be read as "may," then why would the Court find that the second "shall" should be altered? In the end, the Court rules that "shall" means "shall," which is an "obligation impervious to judicial discretion."

De Leon-Serrano v. Nw. Selectra, Inc., No. CIV. 13-1474 DRED, 2015 WL 1968598, at *7 (D.P.R. May 1, 2015) (citing *Lexecon, supra*, 523 U.S. at 35).

The DIC's argument regarding discretion also hinges on faulty logic. In the context of these statutes, if Congress meant to grant discretion – as the DIC

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[15] In pursuing the assertion that "shall" means "may," the DIC relies on a footnote in the *Gutiérrez de Martinez* case. 515 U.S. at 432, fn. 9. It is instructive to note that the U.S. Supreme Court's reference to the subject in the footnote begins, "Though 'shall' generally means 'must,' legal writers sometimes use, or misuse 'shall' to mean 'should,' 'will,' or even 'may.'" Surely, in a statute using "shall" twice, Congress did not mean to misuse it twice. In fact, there is no evidence Congress intended to misuse the term. Moreover, the cited language is not the holding of the case, and is made with respect to the distinct fact pattern and judicial history relevant to the case. And the examples used by the Court for instances where "shall" can really mean less than "must" are all examples where the word "shall" is made subject to a condition precedent, which is not the case here:

- Regarding Federal Rules of Civil Procedure § 16(e): "('The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.')" (Id.) In other words, only when manifest injustice is found must the order be modified; until then, it is not mandatory.
- Regarding Federal Rule of Criminal Procedure § 11(b): "('A *nolo contendere* plea "*shall* be accepted by the court <u>only</u> after due consideration of the views of the parties and the interest of the public…')" (*Id.* Original italics on "shall" and emphasis added on "only".) Again, <u>until</u> occurrence of the condition precedent, acceptance of a *nolo contendere* plea is not mandatory.

argues – then, to whom? The only possible option is the Secretary, of course. Yet the second sentence bypasses the Secretary entirely, and instead commands that "[t]he order covering California shall have the right…." (emphasis added.) In essence, Congress mandated what the order must contain, leaving no discretion in the Secretary to do otherwise.

To support its contention that, under the Farm Bill language, including a provision recognizing quota value in a California FMMO is in the discretion of the USDA, the DIC relies heavily on the Manager's Report in the 2014 Conference Report. (DIC Brief, p. 34.) That reliance is totally unjustified.

First, as demonstrated *supra* in this Reply Brief, the mandatory requirement to include in a California FMMO a provision recognizing quota is plain, clear and unambiguous. Where the plain meaning of statutory language is clear and unambiguous, legislative history cannot be used to change that meaning and it is indeed improper to resort to legislative history to interpret or change the plain meaning. *See*, *Connecticut*, 503 U.S. at 253-54, *supra*; *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176, 186-87 (2004)(holding that because the text of the statutory reservation was clear, the Court had "no occasion to resort to legislative history.")

The DIC itself accepts this principle with reference to the very Managers' Report upon which it relies. In the text of its brief, it argues that the language of the report supports its "discretionary, not mandatory" position. The DIC relies on the "discretion" word in the report, because it likes it. But buried in footnote 20 on the same page of its brief, the DIC somewhat reluctantly notes that the same sentence in the Managers' Report also refers to the California FMMO recognizing the California quota system.

This the DIC does not like, so it dismisses this Managers' Report language on the grounds that it "cannot change the plain meaning of the statute" – exactly the Cooperatives' point about the Managers' Report. The DIC cannot have it both ways.

Much of the DIC's argument concerning "discretion" (and also those concerning the fact that the Farm Bill did not expressly amend the AMAA, as well) focuses not on what Congress said in the Farm Bill, but what it did not say. Here the DIC has constructed its own petard on which it now must hoist itself. In its two sentence provision in the Farm Bill, surely Congress knew how to make the second sentence discretionary. It easily could have said "may" if it meant "may," as it could have used language granting authority to not recognize quota value. But it did not. It said "shall." TWICE.

3. The Mandates Of The Farm Bill Must Be Given Effect Notwithstanding No Express Amendment Of The AMAA.

To avoid compliance with these strong, clear and unambiguous Congressional mandates, the DIC wraps its arms around the AMAA, like a python enveloping its victim, and ignores Congress's clear language in the Farm Bill. Its primary argument is that the Farm Bill did not expressly amend the AMAA.

While we will demonstrate in more detail that this argument is unavailing, the short answer is, "so what?" The Farm Bill says what it means and means what it says. *Connecticut*, 503 U.S. at 254. When the words of the statute are unambiguous, "the inquiry is complete." *Id.* at 253-54.

Before the 1996 and then the 2014 Farm Bills, the Secretary could not under the provisions of the AMAA adopt an FMMO that recognized the value of California quota

by reblending and distributing receipts.[16] After enactment of those Bills, the Secretary not only can, but must. The effect of the clear English language of these Bills was recognized by no less authority than the DIC's economist and chief witness, Dr. Schiek:

> Q: And prior to this legislation, would a California Federal Order have had the right to distribute pool funds to recognize quota value?
>
> A: I don't believe so.
>
> Q: But now it does?
>
> A: "Has the right" is what the language says. It has the right.
>
> Q: Now, so now a California Federal Order can do something that it was not authorized to do under the Agricultural Marketing Agreement Act before the 1996 Farm Bill was passed; isn't that correct, Dr. Schiek?
>
> A: It has the right to do something it could not do before the Act was passed.
>
> Q: Right. It has the right to distribute order receipts to recognize quota value, which it could not do before the Act was passed; isn't that correct?
>
> A: Yes.

(Schiek Tr., Vol. XXXIII, pp. 6730-31 (Nov. 9, 2015).)

Either the mandates of the Farm Bill must be reconciled with the AMAA as set forth in Section IV.D. of the Cooperatives' Post-Hearing Brief, or if the Secretary deems this cannot be done, then the language of the Farm Bill must be deemed to impliedly amend or control the earlier provisions of the AMAA. To do otherwise would achieve

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[16] This is the teaching of *Zuber v. Allen*, 396 U.S. 168 (1969), discussed *infra*: only price differences expressly authorized in the statute are permissible deviations from uniformity. Without the 1996 and 2014 statutes, quota payments would have the status of the nearby differentials in *Zuber*.

the absurd and topsy-turvy result that the AMAA actually trumps the Farm Bill and pretty much leaves it null and meaningless.

In an attempt to lend credence to its absurd position, the DIC notes that in 1996, the Congressional language in question was enacted in a statute named the Agricultural Market Transition Act ("AMTA") and not as a provision of the AMAA. But suppose Congress had enacted a separate bill that directed the Secretary to adopt a California FMMO recognizing California quota but called the statute the "Cherry Blossom Enhancement Bill ("CBEB")?" Could anyone make a plausible argument that this did not require the Secretary to do what it specifically mandated simply because it was enacted as a separate bill named the CBEB?

In a further attempt to support its position, the DIC states that when Congress amends an Act, it "routinely" prefaces it with language that it is doing so. Similarly, the DIC states that amendatory bills "often" (but, significantly, not "always") precede amendatory statutes with "Notwithstanding any provision of law…." (DIC Brief, p. 14.) Nonetheless, the DIC cites no case that holds that a later specific statute that enacts a provision dealing with the same subject covered by an earlier statute (here, FMMOs), which provision adds a new element not dealt with in the earlier statute, cannot be given effect simply because the later statute did not contain such language.

By the same token, Congress clearly was aware of the provisions of 7 U.S.C. section 608c of the AMAA when enacting the language of the 1996 and 2014 Farm Bills. In fact, it specifically mentioned section 608c. But most significantly, it did so only in connection with the manner of a producer referendum. Congress, if it intended the AMAA to control, could have used language such as: "Subject to the provisions of §

608c(5)(B)," often used to make provisions of an earlier statute controlling over the later statute. But it did not. Or more specifically, Congress could have stated, "Provided that the requirements of § 608c(5)(B) are met. . . ." But it did not.

The DIC spends significant time and much paper on *Zuber v. Allen,* 396 U.S. 168 (1969). Unfortunately for the DIC, *Zuber* is totally distinguishable and not applicable to this proceeding. *Zuber* involved a USDA order merging four submarkets that also readopted for the Massachusetts-Rhode Island order a provision that granted producers located closer to cities and to Class I handlers an enhanced price over that received by more distant producers. *Id.* at 178-179. The USDA based its inclusion of these non-uniform price provisions on the fact they were part of a pre-existing agreement by the dairy farmers' cooperatives that had been entered into prior to the federal orders establishing such a non-uniform price structure. *Id.* at 184-187. The Secretary tried to justify his decision as an authorized adjustment of uniform prices under then-existing 7 U.S.C. section 608c(5)(B) of the AMAA. The U.S. Supreme Court struck down the disputed provisions in part because it concluded that Congress had intended to limit the Secretary's delegated authority to the confines of the statute and that these provisions did not fit within the exceptions to uniformity specifically enumerated in the statute.

The DIC contends that California quota, like the Order provisions shot down in *Zuber*, does not fall within the specifically enumerated 608c exceptions to uniform pricing. But the DIC ignores one glaring and notable difference between that case and the current situation: in *Zuber*, there was no Congressional legislation which specifically permitted the differential pricing the Secretary had adopted. Here, by specifically authorizing the California order to reblend and distribute proceeds to recognize the

value of quota, Congress established a new exception, whereas *Zuber* involved a new exception created by the Secretary that went beyond his delegated authority and lacked any statutory basis. This key difference likewise disposes of the DIC's contention that Congress in enacting the Farm Bills must have been aware of *Zuber* and hence should have clearly expressed its intent to overturn *Zuber* if it so intended. Indeed, Congress did not need to overturn *Zuber* because the *Zuber* decision dealt only with the Secretary's exceeding his authority.[17]

The DIC further asserts[18] that *Lehigh Valley, supra,* 370 U.S. at 76, invalidates the Cooperatives' proposal regarding quota. *Lehigh* is extensively discussed and distinguished in the Cooperatives' Post-Hearing Brief at pages 44-46.[19] *Lehigh* is distinguishable from the present matter and does not support a contention that the Cooperatives' proposal, particularly as amended, creates an impermeable trade barrier.

Most significantly, the amended Cooperatives' Proposal No. 1 provides out-of-state producers shipping to California plants a blend price before deduction of the quota

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[17] The DIC makes a similar contention with respect to the U.S. Supreme Court's holding in *Lehigh Valley Co-op Farmers, Inc. v. U.S.,* 370 U.S. 76 (1962). As will be demonstrated, *infra*, *Lehigh* is not controlling, so that the DIC's contention that Congress should have overturned *Lehigh* fails for the same reason.

[18] The same assertion is made, and thus collectively addressed here, by the post-hearing briefs of Hilmar, Trihope, and Leprino.

[19] In short, *Lehigh* held that a provision in the New York-New Jersey FMMO requiring handlers distributing out-of-state nonpool milk to pay into the pool a "compensatory payment" of the difference between the highest and lowest minimum classified prices constituted a trade barrier because in "all but rare instances" non-pool milk would be brought into the FMMO only when its cost was below the lowest class minimum price – a "barrier" in practical effect. That certainly is not the case with Proposal No. 1, as amended, which simply puts in-state and out-of-state milk on the same level playing field. Indeed, the Supreme Court suggested that a compensatory payment measured by the difference between the Class I FMMO price and the FMMO blend price would be acceptable, a provision later upheld in *County Line Cheese Co. v. Lyng*, 823 F.2d 1127 (7th Cir. 1987).

premiums, and further grants to California handlers receiving such milk the same transportation credits granted to California plants receiving milk from in-state producers. The amended proposal results in out-of-state producers being treated better than in-state producers who also hold no quota[20] and even better than quota holders as to that part of their milk not covered by quota.[21] This is certainly the opposite of a trade barrier that prohibits out-of-state producers from marketing their milk in California. Out-of-state producers cannot be heard to complain of the loss of the unfair competitive advantage they enjoyed under the California system that did not regulate them due to interstate Commerce Clause concerns. At the hearing, some witnesses asserted that out-of-state producers shipping to California handlers were receiving the in-plant blend price. Under the current California system, handlers (mostly plants with significant Class 1 usage) can pay out-of-state producers the plant blend price because they don't have to account to the California pool for their California Class 1 usage. This gives them a competitive advantage over similar handlers who receive in-state milk, a nonuniformity the DIC chooses to ignore. Those producers simply took advantage of the California system. Under Proposal No. 1, as amended, they cannot. That's the way FMMOs are supposed to work.

Similarly, the DIC's reliance on *Hillside Dairy, Inc. v. Kawamura* (E.D. Cal. 2004) is misplaced. That was a District Court case, and, frankly, the District Judge got it wrong. Unfortunately, the California Department of Food and Agriculture ("CDFA")

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[20] As of January 2015, 42% of California producers held no quota. (Hearing Exh. 42.)

[21] As of January 2015, only 20% of California producers held as much as 1% to 20% of their production in quota, and only 13% of California producers held as much as 21% to 40%. Most California milk is <u>not</u> covered by quota.

elected not to pursue an appeal. Also, unfortunately, California producer interests were denied intervenor status in that case on the mistaken belief that CDFA would protect their interests. Thus, not being parties in the case, dairy farmers could not appeal the judge's decision. At any rate, the decision is neither binding nor precedential. The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another. *Cactus Corner, LLC v. U.S. Dep't. of Agric.,* 346 F. Supp. 2d 1075, 1105-06 (E.D. Cal. 2004) aff'd, 450 F.3d 428 (9th Cir. 2006); *Starbucks v. City of San Francisco,* 446 F.2d 450, 457, n. 13 (9th Cir. 1977). Rather, "[s]uch decisions will normally be entitled to no more weight than their intrinsic persuasiveness on the merits … because the responsibility for maintaining the law's uniformity is the responsibility of the appellate rather than trial judges…." *Cactus Corner, LLC v. U.S. Dep't. of Agric.* (E.D. 2004) 346 F.Supp. 2d 1075, 1106. Moreover the District Court based its analysis on the Commerce Clause, not the narrower 7 U.S.C. section 608c(5)(G) trade barrier provision.

4. Proposal No. 1 Recognizes Quota Value; And Proposal No. 2 Does Not.

Turning from their "shall/may" argument that suggests that we ignore the ordinary meaning of "shall," the DIC argues that the ordinary meaning of "recognize" supports its interpretation of the Farm Bills' language on quota. (DIC Brief, pp. 28-29.) The DIC maintains that the USDA can "be aware of the significance of quota" and "'acknowledge'" quota by adopting its Proposal No. 2 that would destroy quota in a short period of time. In essence this interpretation would ignore the plain and mandatory meaning of the statute by giving the recognition no teeth, in violation of another definition of "recognize" contained in the very dictionary definition that the DIC cites: "to

acknowledge the existence, validity, authority, or genuineness of [*to recognize a claim*]…." (*Id.* at 28, original italics.)

5. Proposal No. 1 Does Not "Enlarge" The Quota Language Of The Farm Bill.

The DIC further complains incorrectly that the Cooperatives "enlarge" the quota language of the statute by including out-of-state milk and by inclusive pooling. First, by the Cooperatives' amendment to Proposal No. 1, out-of-state producers shipping to California plants will not have their payments reduced by the quota premium. Second, Proposal No. 1 as regards inclusive pooling does not enlarge the quota value provisions of the Farm Bill. In fact, inclusive pooling has nothing to do with the Farm Bill. Rather, it is based on the AMAA's express purpose to establish and maintain orderly marketing provisions, the achievement of which in California, because of the unique conditions pertaining to the industry conditions in the state, cannot be accomplished without inclusive pooling. The claims of the DIC, Dean Foods, and National All-Jersey Inc., that Proposal No. 1's inclusive pooling is merely a tool of quota expansion is without merit.[22] This position is fully explained in Section IV, *infra*, of this Reply Brief.

Although the DIC argues that "quota value" is different than "quota price," "overbase price" or "even the 'quota system'" (DIC Brief, p. 31), it does not give the Secretary a clear explanation of what the term does mean in the DIC's view. But one

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[22] In concluding its argument that the USDA must retain performance based pooling standards (DIC Brief, p. 68), the DIC dramatically, but irrelevantly, drops in a paraphrase of William Jennings Bryan's "Cross of Gold" speech, forgetting perhaps that this was the same William Jennings Bryan of Scopes Monkey Trial fame who denied the theory of evolution, probably on the grounds that Charles Darwin had not <u>expressly</u> amended Genesis.

In addition, to analogize the circumstances of Leprino, Saputo, et al. to the plight of Mr. Bryan's debt-burdened farm constituents, in the wake of the 1893 depression, is tone deaf to history at best.

thing is known for certain: it cannot mean a system that destroys quota and its value in a very short period of time.[23] And elsewhere, the DIC does concede what is meant by quota value. Indeed, arguing that one should ignore the Managers' Report (in the 2014 Conference Report) statement that the California FMMO would incorporate the longstanding California quota system, the DIC states that "[t]his substitution cannot change the plain meaning of the term "quota value" **which refers to the $1.70 premium paid under the CSO**." (DIC Brief, p. 34, fn. 20)(emphasis added.)

6. No "Constitutional Doubt" Is Implicated By Proposal No. 1.

Finally, the DIC resorts to a nebulous argument based on a "doctrine of 'Constitutional Doubt.'" What "constitutional doubt" might be involved here is not made clear. The only authority cited is "*See, Schechter, supra.*" (DIC Brief, p. 36) The only prior reference in the brief to the *Schechter* case is on p. 18, where there is a reference to the case in a quotation from the opinion in *Zuber v. Allen, supra*, 369 U.S. 168. As discussed *supra*, in relevant part, the *Zuber* case concerned limitation of the authority delegated to the Secretary, the case holding in part that the Secretary had exceeded the authority delegated to him in creating an exception beyond that then permitted by the AMAA. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) was cited in *Zuber* as a case invalidating a different statute that contained an overly broad delegation of authority, raising concerns about possibly overly broad delegation of

[23] The DIC suggests quota value can be "recognized" by being paid out of mandatory Class 1 proceeds. (DIC Brief, p. 35.) First, this is really a complaint about the Cooperatives' proposal about inclusive pooling, not recognition of quota. Second, the DIC's suggestion still results in different payments to quota holders and non-quota holders which would seem to undermine the DIC's argument concerning "uniform prices to producers."

authority under the Agricultural Adjustment Act ("AAA"), 48 Stat. 31, leading Congress to amend that Act to eliminate such concerns.

This is interesting history, but it has nothing to do with the present situation. There is here no question of an overly broad delegation of legislative authority to the Secretary under a California FMMO created pursuant to the Farm Bill provisions. The Farm Bill mandates that California become a separate FMMO on petition by its dairy farmers and their approval of the FMMO by referendum and further mandates that the Order contain provisions that recognize quota value by reblending and distributing proceeds. The only discretion is as to the specific manner of reblending and distributing proceeds to recognize quota value. There is simply no Constitutional issue raised regarding overly broad delegation of legislative authority nor any Constitutional doubt involved.

7. Conclusion.

There is ample legal authority under the Farm Bill to adopt Proposal No. 1. As regards quota, inclusion in a California FMMO of a provision recognizing the value of quota by reblending and distributing receipts is mandatory, not discretionary. Proposal No. 1 is the only proposal that truly recognizes quota by reblending and distributing proceeds as required.

III. THE OPPONENTS' CONTENTION THAT THERE IS "NO DISORDERLY MARKETING SUFFICIENT TO JUSTIFY" A CALIFORNIA FMMO IS WRONG ON THE LAW, WRONG ON THE FACTS, AND WRONG ON THE HISTORY OF THE AMAA.

Opponents contend at length that there is no "evidence of disorderly marketing sufficient to justify federal interference with CDFA's CSO." The argument is premised upon fundamental misreadings, misapplications, and misunderstandings of the

legislation which authorized this hearing, of the AMAA, and of the hearing record. We will first discuss the legal requirements for promulgation of this order under the 2014 Farm Bill; second, review the requirements under the AMAA; and finally, review the hearing record support for an order.

A. Under The Farm Bill, "Upon The Petition And Approval Of California Dairy Farmers . . . The Secretary Shall" Promulgate A California Federal Order.

As we discussed in the Cooperatives' Post-Hearing Brief, Section I.B., Congress has directed that the Secretary "shall designate the State of California as a separate Federal milk marketing order" upon the petition and approval of California dairy producers. (7 U.S.C. 7253.) Nothing more is required. Promulgation of an order is not discretionary. Congress has spoken. All of the debate and discussion regarding what, if any, prerequisites for an order are otherwise required under the AMAA are unnecessary and, in any event as we will show, to no avail so far as the Opponents' arguments are concerned.

B. The Assertions That The AMAA's References To "Pure And Wholesome Milk" And "Orderly Marketing" Requires Dysfunction In The Class I Market To Address Exclusively "Fluid Milk For Packaged Sales" By Promulgation Of An FMMO Under Are Baseless.

The DIC has argued in multiple contentions that the AMAA is Class-I-centric, asserting that: "federal intervention [must] be based solely on packaged fluid milk market failures; "that the AMAA's requirement "to insure a sufficient quantity of pure and wholesome milk" means *fluid packaged milk/or packaged milk sales ("fluid milk")*" (DIC emphasis); and that this is an "80-year interpretation of Declared Policy [Section 602(1)] of the AMAA." (DIC Brief, pp. 38, 52 & 79.) Building upon this thesis, the DIC then purports to identify a mandated "test" for promulgation of an FMMO, a test which in

essence requires the pre-existence of a non-regulated Class I marketplace. A review of the text of the AMAA, the history of the AMAA legislation, contemporaneous agency actions, and milk order promulgations over the years all reveal the utter baselessness of the various DIC postulations.

1. The Language And Purpose Of The AMAA Include All Milk.

Curiously, with respect to the Farm Bill, the DIC would require unerring fealty to the principle of strict adherence to the very words of a law before inquiring further for its meaning (DIC Brief, pp. 38-41.) But when it comes to the argument that the AMAA is intended to address Class I milk markets only, there is no reference whatsoever to finding that precept in the words of the statute – for good reason, since it is not there. There is simply no use of the terms "fluid" milk, or Class I milk, or beverage milk, or any similar reference in the AMAA. A review of the statutory language makes quite clear, the AMAA is directed to all dairy farmers and all milk, regardless of the specific use.

The operative language in 7 U.S.C. Section 608c(5),which prescribes terms for milk orders, makes no distinction as to uses of milk. It authorizes, with respect to milk orders:

> (5) Terms—Milk and its products
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . .

There are at least two important aspects of this language which are inconsistent with the DIC's Class-I-only thesis. First, orders can and do apply to milk and its "products." There is no way to explain the ability to apply a milk order to the "products" – **plural** – of milk, if such orders can only be addressed to "fluid packaged milk." The statute nowhere limits the "products" of milk in that way. Furthermore, milk is to be classified "in accordance with the form in which or the purpose for which it is used" and minimum prices are to apply to "**each** such use classification" (emphasis added). There is simply no way that language can be construed to only apply, or even primarily apply, to milk used for "fluid packaged milk products". Furthermore, the express authorization for milk order pooling allows "for the payment to **all** producers and associations of producers delivering milk to **all** handlers of uniform prices for **all** milk so delivered, **irrespective of the uses made** of such milk by the individual handler to whom it is delivered." 7 U.S.C. 608c(5)(B)(ii) (emphasis added). Clearly, this statutory language contemplates regulatory intervention involving milk for any, and all, uses.

The DIC finds the "fluid packaged milk products" limitation implied in the "orderly marketing" language of Section 602(1) and/or the "pure and wholesome milk" language of Section 608c(18) of the AMAA. The DIC ties this language to ruinous competition among farmers in the 1920s and 1930s for the highest-value, Class I market by relying on *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939) ("*Rock Royal*"). A close examination of the history of the AMAA and of *Rock Royal*, however, demonstrates beyond purview that the Act had, and has, no such fluid market limitation as the DIC would impose upon it.

Both the "orderly marketing language" in 7 U.S.C. 608(1) and the "pure and wholesome milk" language in section 608c(18) have their origin in the AMAA of 1937. (*See* Exh. 1, Attached.) Consequently, if milk orders are to be Class-I-centric, as the DIC would have it, one would expect to find something in the 1937 Act to corroborate this gloss. However, examination of the 1937 Act reveals nothing of the kind.

The AMAA of 1937 was primarily the "reenactment without change" of the AAA of 1935. The 1937 Act was passed in order to ensure the continuing validity of the 1935 legislation in the wake of the Supreme Court decision in *United States v. Butler*, 297 U.S. 1 (1936), which found certain processing taxes (relating to non-market order commodities) in the AAA unconstitutional. The AMAA was debated very little in either house of Congress, being implemented on a quasi-emergency basis to assure preservation of the AAA programs, including milk market agreements and orders, which were not directly involved in the *Butler* case. The AAA of 1935 was itself legislation which re-upped, and enhanced, the New Deal's flagship AAA of 1933 which had sustained legal setbacks from the Supreme Court's 1935 *Schechter Poultry*[24] and *Panama Refining*[25] decisions. The AMAA of 1937 reenacted, **without change**, the provisions of Section 8c(5) of the 1935 Act which specify the terms of orders for "milk and its products" and authorize classified pricing of "all" milk and payment of producers for "all" milk delivered "irrespective of uses made of such milk." The precise operative language of Section 8c(5) of the 1935 Act remains the law today.

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[24] *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

[25] *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

The AMAA of 1937 made as clear as legislative language could that all "provisions of the Agricultural Adjustment Act, as amended . . . are expressly affirmed and validated, and are reenacted without change except as provided." (Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (June 3, 1937, as amended, codified at 7 U.S.C. § 601 et seq.)(*See* Exh. 1, Attached).) The AMAA further expressly provided that then-existing "marketing agreements, licenses, orders, regulations, provisions, and acts" "executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof" "are expressly ratified, legalized and confirmed." (*Id.*, 50 Stat. 246, 249.) Among those pre-existing orders which were "ratified, legalized, and confirmed" by the AMAA was the national evaporated milk license/order, a regulation which self-evidently had nothing to do with "packaged fluid milk products."[26]

When the 1937 statute is further examined it is even clearer that the "orderly marketing" language added in Section 602(1), as well as the milk pricing language in Section 8c(18) had nothing to do with narrowing the scope of milk orders. Congress stated the purpose of the AMAA in its preamble:

> *Be it enacted* ***by*** *the Senate and House of Representatives of the United States of America in Congress assembled,* That the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and

[26] Hearing Exh. 58, pp. 3-4; Christ Tr., Vol. XII, pp. 2447-2450 (Oct. 7, 2015); *see* generally Baker, Burton A., and Rudolph K. Froker, "The Evaporated Milk Industry under Federal Marketing Agreements," Research Bulletin 158, University of Wisconsin, Sept. 1945. (Official Notice previously requested.)

> validated, and are reenacted without change except as provided.

Then, in order to eliminate the concern about production restrictions, Congress amended Section 2 of the AAA by:

> striking out "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish" and inserting in lieu thereof the following: "orderly marketing conditions for agricultural commodities in interstate commerce as will establish.

The result then of the 1937 Act was that Section 602(1) was amended as follows (showing the language eliminated and the new language):

> (1) To establish and maintain such ~~balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish~~ orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919 – July 1929.

Notably, Congress eliminated the reference to balancing production and consumption and put in its place the nebulous concept of "orderly marketing conditions" while explicitly retaining the same price enhancement objective which had been the foundation of the AAA from the beginning. This part of the statute, of course, pertains to all commodities, not just milk. And, again, notably, there is nothing in this language from which to infer that only some milk, and therefore only some dairy farmers, are intended to benefit from the ultimate parity price target. The DIC's attempt to find some exclusive fluid milk products directive in this legislative language borders on fantasy.

There is nothing in the addition of the milk pricing language in Section 8(c)(18) which changes this analysis in any respect. That language expressly retains the parity price formula of Section 2 of the Act (7 U.S.C. section 608(1)), as a reference and goal for producer milk prices while allowing the Secretary to deviate, up or down, from the parity prices if it is found on the hearing record that in light of the price and available supplies of feeds and other economic conditions the parity prices are "not reasonable," prices shall be fixed to reflect all those factors and "insure a sufficient quantity of pure and wholesome milk, and be in the public interest." Nowhere in that language is there anything which suggests that only Grade A dairy farmers eligible to supply "packaged fluid milk products" are the intended beneficiaries to the exclusion of their brethren[27] producing non-Grade A milk, including those subject to the national evaporated milk order and others. Again, the attempt to read "packaged fluid milk products only" in "pure and wholesome milk" (DIC Brief, p. 38) into Section 8c(18) borders on the delusional.

In order to adopt the DIC interpretation of the "orderly marketing" and "pure and wholesome milk" language in the 1937 Act, one must conclude that Congress simultaneously ratified, confirmed, and legalized a milk order for manufactured, canned, evaporated milk and the statutory language authorizing that order, while amending the underlying legislation to prohibit any such regulations in the future. And, furthermore, that Congress did this in code ("orderly marketing" and "pure and wholesome milk"), the

[27] The percentage of dairy farmers producing Grade A milk in the 1930s was something less than 60%, although we have not been able to identify a published source of that information for the 1930s. What is known is that by 1950, national production was 60% Grade A and 40% Grade B. *See* "Measures of Growth in Federal Milk Orders" AMS, USDA June 5, 2015 (Official Notice previously requested) (the national Grade A and B percentages can be interpolated from the reported percentages which federal order milk is of all "Grade A" and "all milk").

supposedly intended meaning of which was nowhere made explicit. This is utter nonsense and the *Rock Royal* case does not establish otherwise.

Rock Royal involved a challenge to the constitutionality of the milk order for the New York metropolitan area. That Order concerned the marketing area of New York City, and the counties of Nassau, Suffolk, and Westchester in New York State, an area which was supplied by milk originating on farms not just in New York but also from Connecticut, Massachusetts, Maryland, New Jersey, Pennsylvania and Vermont. The Court held, *inter alia*, that the AMAA's regulation of interstate commerce in milk was constitutional and that to require the Rock Royal Cooperative to account to the market order pool for the milk of its members did not violate its constitutional due process rights. Under the order at stake in *Rock Royal*, the milk of all producers delivering to plants "approved by any health authority for the receiving of milk to be sold in the marketing area" was pooled, without any performance requirements whatsoever; minimum prices for nine classified uses were established (only one of which was fluid milk); and minimum payments to producers were mandated for both Grade A and Grade B milk, with Grade A producers receiving a "Grade A premium" price.[28]

It is fanciful to suggest, as the DIC does, that the *Rock Royal* Court's general description of the marketing issues involved in fluid milk markets establishes that the AAAs of 1933 and 1935 and the 1937 AMAA were intended to address only fluid market dysfunction. As we have seen, the very Order at issue in *Rock Royal* priced Grade B milk, as well as Grade A milk. And it priced all milk delivered to plants which were

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[28] *See* 3 Fed. Reg. 1945, 1949 (Aug. 8, 1938)("Article VII. – Payments to Producers, Section 4: "Grade A Premiums.") (Official Notice requested).

eligible to market milk into New York, whether they marketed such milk or not, and irrespective of the use of the milk. This Order, perfectly in line with the broad purpose of the AMAA, cast a very, very broad net under the income of dairy farmers in at least seven states by establishing minimum prices for their milk production regardless of its use.[29]

In short, not only do the 1933, 1935 and 1937 Acts not limit their ambit to fluid milk market issues, but also their express language authorizes FMMOs to regulate market issues relating to all milk regardless of its uses in furtherance of this goal of enhancement of producer prices.

2. There Is No USDA-Established "Six Part" Test For Promulgation Of A Milk Order.

The DIC argues that promulgation of a new milk order under the AMAA requires a dysfunctional Class I market, one which meets a "multi-factor test [formulated by the USDA] for determining whether an FMMO is justified in the first instance." (DIC Brief, p. 42.) The DIC extracts language from decisions involving promulgation of orders, primarily in the high fluid use markets in the southeast. The DIC contends that, since there is a CSO, which provides classified pricing, market information, assures accurate testing, mandates uniform prices and uniform pricing differentials (butterfat), California

[29] When the USDA officials have from time to time made statements describing federal orders as focusing on fluid milk markets, they are describing the operation of the orders which they are referring to, or the orders then in existence, but they are not describing the scope of authority for orders under the AMAA, or the possible scope of future milk marketing orders. The reliance of Proposal No. 1's Opponents on such statements as defining the scope of the AMAA is misplaced. (DIC Brief, pp. 80, 104-105.) These letters do not refer to the language of the AMAA, and in particular to section 602(1). Moreover, with the institution of the federal milk price support program in 1949, the matter of price support for milk producers was implemented under that program. While there is no longer a price support program, the never-repealed goals which undergird the AMAA remain in effect.

does not and cannot meet the established test for promulgation of an order. This argument is devoid of merit.

First, we must note that the USDA decisions which the DIC cites and quotes at length never describe the factors noted as a "test" or "multi-factor test." The factors cited by the DIC are noted in some of the decisions, not all, as results or outcomes of the promulgation of an order. Nowhere are the factors cited as a "test," much less a mandatory one, for order promulgation. Instead, the factors are no more than a conglomeration by the DIC of results in several promulgation decisions. Furthermore, the history of order promulgation over the nearly 80 years of administration of the AMAA does not establish or create any legal impediments to promulgation of a milk order for California in this hearing.

It should go without saying that just because authority under a statute is not exercised does not mean it does not exist. By the same token, the fact that only certain authority under a statute is exercised does not mean that that is the only authority which exists under the statute. The fact that there is not a marketing order relating to every fruit and vegetable from every marketing area enumerated in 7 U.S.C. section 608c(2) does not mean that there is no authority to promulgate such an order. The fact that there are presently no marketing orders relating to "products of milk" does not mean that there is no authority to promulgate such an order or orders. The fact that there has not been an order for evaporated milk since the order promulgated in the 1930s was terminated in 1947[30] does not mean that there could not be one promulgated this year. Indeed, an order continued to be discussed in the late 1940s after the original one was

[30] *See* 12 Fed. Reg. 3241 (May 20, 1947).

terminated.[31] Likewise, the fact that there has never been an order for Grade B milk does not mean that there could not be one tomorrow. In fact, the possibility of such an order, its scope, terms and operation has been discussed over the years, including in important USDA-sponsored publications/studies regarding prices under existing orders.[32] So it is with the California FMMO. The mere fact that there has not been an order previously promulgated in the circumstances of marketing Grade A milk in California in 2015 does not mean that such an order is not authorized under the AMAA.

In any event, the DIC's selective citation of previous milk order promulgations does not define the universe, or provide a balanced picture of the breadth of such decisions. We would note just a few, beginning with the New York State Order at issue in *Rock Royal*. Quite clearly that Order cast a very, very wide net. Prices were specifically set in the regulations for points 400 miles from New York City. It was also coterminous with, and "complementary" to the New York Order. Obviously, the existence of the New York State Order did not eliminate the need for the federal order which added to the scope of regulation by drawing in actual, and potential, interstate transactions. There are more than a few similarities between New York and the record in this hearing. Another example of order promulgation in an area of existing state regulation is the 1975 expansion of Order 4 into southeastern Pennsylvania. (40 Fed. Reg. 14702 (Apr. 1, 1975).) Like our case, the state-set prices in that case were not at the federal level and created non-uniform prices among producers and handlers.

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[31] *See* proceedings of "Third Annual Meeting Midwestern Milk Marketing Conference, (Apr. 2 and 3, 1948), pp. 80-85, available online at http://dairy.wisc.edu/PubPod/Reference/Library/Simmons,etal.1948.pdf.

[32] *See* Jacobson, et al, "Pricing Grade A Milk Used in Manufactured Dairy Products," pp. 31-36. (Official Notice previously requested).

Another example is the promulgation of Order 68 in 1976. (41 Fed. Reg. 12435, (Mar. 25, 1976).) That Order combined all or parts of 5 existing orders and took in additional unregulated areas. (*Id.* at 12445-12449.) It established and entirely new category of "reserve pool plants" which had no performance requirements for pooling. (*Id.* at 12451-12452.) None of these decisions would fit into the cookie-cutter mold of the "multi-factor test" that the DIC claims to be the litmus test for order promulgation.

In conclusion, and ironically, one of the decisions which the DIC cites on this point, the promulgation decision for the Carolina Order, does **not** state that these six factors are a "test" for order promulgation. Moreover, when scrutinized, it involves marketing conditions and decision-making highly analogous to this proceeding. In the first instance, the federal order there was promulgated because the two state regulatory programs were not meeting the needs of the dairy farmers in the marketing area; they were not doing what a federal order could do. This is, of course, precisely why California producers requested this hearing: <u>The state order is not meeting their needs and is not doing what a federal order can do.</u> Dennis Schad insightfully pointed out various other parallel issues in that hearing and in this. He testified:

> In observing the 30-some days of this Hearing, I am struck with the similarities between this promulgation hearing and the Carolina promulgation decision (55 Fed. Reg. June 22, 1990 pg. 25,601) in 1990. Like the proponents of Proposal 1, the dairy farmers in Carolina testified that the Carolina order should adopt the national manufacturing price levels for Class II and III, at that time the Basic Formula Price (BFP.) While describing the determination of the monthly BFP in detail (Ibid, at pg. 25,641-3), the Secretary took official notice of Class II Final Decisions (1982 and 1989) to determine the new Order's Class II price (*Ibid.* pg. 25,641). The Secretary also relied on previous Federal order decisions to determine Classification of Milk, based on its use (*Ibid.* at pg. 25,634). As noted in my previous testimony, the Secretary rejected a

> proposal that would continue the Carolinas' state order pricing of butterfat that conflicted with the butterfat pricing in adjacent Federal orders, citing previous FMMO decisions (*Ibid.* at pg. 25,643). The importance of aligning the Class I differentials in the Carolina order and existing orders was also noted (*Ibid.* at pg. 25,639-40). The Carolina order also provided for an other-than uniform producer payment system through the approval of base-excess payment in the new order (*Ibid.* at 25,643).

(Schad Tr., Vol. XXXVIII, pp. 7872 (Nov. 16, 2015).) Promulgation of a California order from this hearing is fully, completely consistent with order promulgation precedent under the AMAA.

IV. PROPOSAL NO. 2'S PERFORMANCE-BASED POOLING STANDARDS ARE NOT REQUIRED BY THE AMAA OR BY USDA POLICY, NOR APPROPRIATE FOR CALIFORNIA'S MARKETING CONDITIONS; INCLUSIVE POOLING IS CONSISTENT WITH BOTH THE AMAA AND USDA POLICY.

The Opponents' compendious contentions that Proposal No. 1's pooling provisions are inconsistent with USDA policies and/or the AMAA are based on erroneous assumptions about and misunderstandings of USDA policy, and reflect several fundamental misunderstandings of the Proposal and the California marketplace. The recommended pooling provisions set forth in Proposal No. 2 are inchoate and unworkable.

A. Under USDA Policy, The Pooling Terms Of Each Order Must Reflect The Order's "Unique Marketing Conditions" And Be "Customized" To Those Conditions.

In the Final Decision for Order Reform, the USDA recognized and explained that each order's pooling provisions must be individually determined, stating: "Obviously . . . the very disparate marketing conditions found in different parts of the country requires customized provisions to meet the needs of each market." 64 Fed. Reg. at 16130, c.3. (Apr. 2, 1999). Likewise, after the post-reform series of pooling provision hearings –

which addressed depooling among other issues -- for multiple orders, the USDA reiterated this fact: "[E]ach marketing area has unique marketing conditions and characteristics that have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order." 71 Fed. Reg. at 54145, c.3 (Sept 13, 2006)(Order 30 Final Decision). This settled principle is, of course, applicable to this proceeding.

While advocating for the imposition of Order 30 pooling/depooling provisions in a California order, the Opponents nominally acknowledge the order-unique principle in passing, but ultimately fail to come to grips with it. For example, the DIC would reach its desired result by inappropriately tying the USDA's hands with misunderstood invocation of the concepts of "performance-based pooling standards" and "voluntary" association with a federal order pool. (DIC Brief, p. 64.) The DIC also attempts to inject its objections to producer quota into the pooling discussion. We discuss these objections[33] to Proposal No. 1's inclusive pooling program and demonstrate the complete unworkableness of its proposed alternative pooling scheme.

B. Prior Instances Of Inclusive Pooling.

First, it is important to understand that Proposal No. 1's inclusive pooling is not unprecedented in the federal order program. Over the 80 years of federal orders, there have been numerous orders with pooling terms quite similar to those in Proposal No. 1; and many orders with minimal if any "performance" requirements for pooling. These

[33] Two other parties submitted briefs with similar, almost too similar, comments about inclusive pooling as those expressed by the DIC. For efficiency, the Cooperatives' Reply Brief will address the concerns regarding inclusive pooling raised by Hilmar, National All-Jersey Inc. and Dean Foods in conjunction with those of the DIC.

orders have addressed the market conditions prevalent in their marketing areas during the time of their application. In the first 10 or more years of orders, the predominant pattern was one with mandatory pooling: all plants – and producers supplying those plants – that were eligible on the basis of health department permits to supply milk in the marketing area, usually a metropolitan area, were pooled, period. The New York metropolitan order at issue in the *Rock Royal* case was such an order, but by no means the only such order. (*See* fn. 35, *infra*.) The New York Order's participants were described by the Supreme Court as: "A producer is any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area. A handler is a person engaged in the handling of milk or cream received at an approved plant for similar sale." *See*, 307 U.S. at 554, *supra*.[34] There were no performance requirements in the nature of minimum distributions or shipments into the marketing area; nor provisions for opting out other than, presumably, giving up the health permit. Sixteen other orders with the same template of "handler" and "producer" definitions and pooling parameters.[35]

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[34] The precise Order language is as follows:

"5. "Producer" means any person who produces milk which is delivered to a handler at a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area.

6. "Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area. . . ." 3 Fed. Reg. at 1946 (Aug. 9, 1938).

[35] Milk in the Dubuque, Iowa, Marketing Area, 1 Fed. Reg. 1378, *et seq*. (Sept. 18, 1936);Determination of the Secretary of Agriculture with Respect to Milk in the Kansas City, Missouri, Marketing Area, 1 Fed. Reg. 1721, *et seq*. (Nov. 5, 1936); Milk in the Chicago, Illinois, Marketing Area, 7 C.F.R. Part 941(1939 Supp.); Milk in the New Orleans, Louisiana, Marketing Area, 7 C.F.R. 942 (1939 Supp.); Milk in the Fort Wayne, Indiana, Marketing Area, 7 C.F.R. Part 932 (1939 Supp.); Milk in the Shreveport, Louisiana, Marketing Area, 7 C.F.R. Part 952 (Supp. 1940); Milk in the Washington Marketing Area, 6 Fed. Reg. 4553, *et seq*. (Sept. 4, 1941); Milk in
(Footnote continued)

Over the intervening years there have been, and continue to be, many instances of no-performance, or nearly-no-performance pooling. The Order 2 "temporary" pool plant and call provision, which was discussed at the hearing, is perhaps the prime example. (Schad Tr., Vol. XXXVIII, pp. 7730-31 (Nov. 16, 2015).) It was in place for many years, until Order Reform when Order 2 became part of the northeast Order 1. The "old order" 68 reserve supply plant system is another example. 41 Fed. Reg. 12435, 12451-52 (Mar. 25, 1976). Similar to Order 2, those plants, after having shipped one load of milk, had no regular "performance" requirements, only the obligation to respond to a call. (*Id.*) Throughout many orders for many years, there were a majority of months during each year which were referred to as "free ride" or "automatic" pooling periods. During those months, plants and/or producers who had performed as required during a defined period, had a "free ride" on the pool.[36] Finally, various orders have had special provisions for pooling cooperative plants, or milk supplies, which serve as potential reserve supplies for the market without any actual, regular "performance" being required. *E.g.*, 7 C.F.R. § 1001.5c (1980)(Cooperative

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the Cincinnati, Ohio, Marketing Area, 7 Fed. Reg. 9503 (Nov. 20, 1942); Milk in the La Porte County, Indiana, Marketing Area, 8 Fed. Reg. 8782, *et seq*. (Tuesday, June 29, 1943); Milk in the St. Joseph County, Indiana, Marketing Area, 8 Fed. Reg. 8790, *et seq.* (June 29, 1943); Milk in the St. Louis, Missouri, Marketing Area, 8 Fed. Reg. 17451, *et seq*. (Dec. 30, 1943); Milk in the Sioux City, Iowa, Marketing Area, 8 Fed. Reg. 4688, *et seq.* (Apr. 10, 1943); Milk in the Suburban Chicago, Illinois, Marketing Area, 7 C.F.R. Part 969 (1946 Supp.); Milk in Tri-State Marketing Area [Revised], 7 C.F.R. Part 972 (1946 Supp.); Milk in the Columbus, Ohio, Marketing Area, 7 C.F.R. Part 974 (1946 Supp.); Milk in the Louisville, Kentucky, Marketing Area, 7 C.F.R. Part 946 (1946 Supp.).

[36] *E.g.*, 7 C.F.R. § 1001.5b (1980) (a plant which ships the required percentage during August to December has "automatic pool plant status" from January to July); 7 C.F.R. § 1040.7(b)(1)(1980)(a plant which ships during October to March has no shipments required the following April to September): 7 C.F.R. § 1030.7(b)(1)(1980)(a plant which ships during September to March has no shipments required the following April to August). These are just examples and there were similar "automatic" pooling or "free ride" periods in many other orders over the years.

plant located in the marketing area "shall be a pool plant [without any ‘performance' required']. . . [unless it has Class I disposition of more than 2%]".) The Order 124 provision, linked with a call, which was referenced in hearing testimony, is also one such provision. 7 C.F.R. § 1124.11 (Cooperative reserve supply unit with a majority of producers within 125 miles of a pool distributing plant, once qualified, has no shipping requirements, except pursuant to a call from the Market Administrator).)

Inclusiveness has also been achieved in other ways, where marketing conditions allow. The current Order 1 dairy farmer for other markets provision, 7 C.F.R. § 1001,12(b)(5)-(6), is an important example, which was referenced in some detail at the hearing. This provision effectively makes Order 1 function like an "inclusive" pooling order, as Dennis Schad carefully explained:

> As an active participant in the marketing of milk in the FMMO 1 marketing area, I can note that actually very little milk is de-pooled in the marketing area of the Northeast FMMO. That Order contains a provision, Dairy Farmers for Other Markets (§ 1001.12 (b) (5) and (6)), which excludes the milk from the pool of a dairy farmer that has been de-pooled. This onerous provision assures that virtually all milk associated with the Order remains pooled at all times, even when there is a negative PPD. Milk delivered to the plants listed on Exhibit 23 is routinely pooled on FMMO I.

(Schad Tr., Vol. XXXVIII, p. 7788 (Nov. 16, 2015).)

In sum, Proposal No. 1's inclusive pooling provisions are not the outlier they have been portrayed to be, although they would be unique among today's orders, as the California marketplace is unique.[37]

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[37] We cannot overemphasize the extent to which pooling provisions have always been and continue to be uniquely tailored to each marketing area. Just a few other unique-to-its-order provisions in the system today are: The "once and done" producer qualification provision in Order 30, 7 C.F.R. § 1030.13(d)(1); and, on the other side of the coin, Order 6 has a 10 day (Footnote continued)

C. Depooling, Disorderly Marketing, And The Fundamentals Of Federal Order Marketwide Pooling.

In challenging Proposal No. 1's conformance with USDA policies, its Opponents incorrectly conflate several pooling concepts: performance requirements; sharing in pool proceeds; and "voluntary" pooling. The confusion is most evident in the discussion of "voluntary" pooling, but also present with respect to discussion of the other issues, as we will see.

Performance requirements. Opponents essentially do not want to acknowledge that Proposal No. 1 has performance requirements, albeit not of the nature or extent that Opponents would prefer. Under Proposal No. 1, all plants and handlers in California are obligated to respond to a call for milk to be delivered to Class I plants, if one is issued by the Market Administrator, or be subject to financial penalties.[38] Moreover, plants and handlers outside of California have traditional performance requirements which are substantial, requiring delivery of 50% of pooled volumes. To assert that there are not performance requirements in Proposal No. 1, as modified to include the call provisions at the hearing and in the Cooperatives' Post-Hearing Brief, is simply not correct. The preponderance of testimony at the hearing – by witnesses for the DIC as well as the Cooperatives – was that call provisions work. (Zolin Tr., Vol. XXVI, pp. 5237-5239, 5261-5262 (Oct. 29, 2015); Schad Tr., Vol. XXXVIII pp. 7726-

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touch base requirement which is far beyond that required on any other order. 7 C.F.R. § 1006.13(d)(1).

[38] As described in detail in the Cooperatives' Post-Hearing Brief, pp. 115-117, the call system places meaningful performance requirements on both distributing plants and handlers subject to the call.

7730 (Nov. 16, 2015; Schiek Tr., Vol. XVIII, pp. 3587-3588 (Oct. 19, 2015).) They will work if they are needed, which is unlikely in the California order.

Marketwide pooling. The issue of who shares in the pool's proceeds and costs is the crux of the inclusive pooling debate. While Opponents discuss the concept completely from a performance perspective – as in which market participants serve the Class I market sufficiently to be entitled to earn a share of the pool pie – the heart of the depooling problem is the **avoidance** of pool costs and the consequent unequal sharing of those costs, as described in detail in the 2006 depooling final decisions. *See* 71 Fed. Reg. 54130 (Sept. 13, 2006(Order 30 Final Decision)); 71 Fed. Reg. 54152 (Sept. 13, 2006)(Order 32 Final Decision); 71 Fed. Reg. 54172 (Sept. 13, 2006)(Order 33 Final Decision). In quite similar statements in all three decisions, the USDA described the incentives and equities of depooling as follows:

> This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use-values of those milk receipts. They do not share in all the additional costs and burdens with those producers who are pooled and who are incurring the costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

71 Fed. Reg. at 54164 (Order 32).

> Handlers and cooperatives who depool purposefully do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's

> performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of depooling. Producers and handlers who regularly and consistently bear the costs of serving the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

71 Fed. Reg. at 54180 (Order 33); *Id.* at 71 Fed Reg. at 54145 (Order 30).

As these decisions of the USDA make clear, depooling is not essentially an issue of performance and servicing of the Class I market, as Opponents would make it out to be. That servicing will be assured by other order provisions, as discussed above. Depooling is fundamentally an issue of price equity – uniform pricing and marketwide pooling – among producers. For depooling handlers, it is an issue of minimum price avoidance.[39]

Voluntary pooling. Opponents link "voluntary" pooling to producer action, identifying it as "an opt-out choice for dairy farmers" (DIC Brief, p. 77; National All-Jersey Brief, pp. 4-5) and claim that "mandatory pooling removes" this choice, causing producers to be regulated in violation of 7 U.S.C. section 608c(13)(B). This analysis reflects some fundamental misapprehensions about how the marketplace works. Individual producers have very limited input into the pooling/depooling decision-making process. Therefore, Proposal No. 1 has very little effect on producer options. With or without Proposal No. 1, California producers can voluntarily waive their Grade A status

[39] Discussed in our Post-Hearing Brief at Section VI.B., and further addressed in the Reply Brief at Section V.

and be free to market their milk unfettered by market order price regulations.[40] Hilmar is offering such options now (DeJong Tr., Vol. XXIII, pp. 4508-4510 (Oct. 26, 2015)); and the same option would be available under Proposal No. 1. In other federal orders, there are very, very few producer-determined pooling or depooling options, other than waiving Grade A status. Pooling decisions are made by handlers, including cooperatives acting as handlers. The funds gained by depooling flow directly to handler accounts via escaping payments to the pool, as described in the depooling decisions above. Producers qua producers simply have no role in that process.

It is not really clear what the court in the *County Line* case had reference to in the language quoted and relied on by Opponents. (DIC Brief, p. 62.) The pooling problems in that case were caused solely by handler conduct and to the extent producers suffered losses, if they did, the producers were victims of deceitful or incompetent handler actions.

D. None Of The Grab Bag Of Legal Objections Cited Against Proposal No. 1's Pooling Provisions Has Any Merit.

In addition to the AMAA history and policy arguments, Opponents raise multiple purported legal infirmities implicated by the Proposal No. 1 pooling provisions, including: (1) that section 608c(13)(B) of the AMAA is violated; (2) that a trade barrier in violation of section 608c(5)(G) is erected; and (3) that constitutional rights to due process and equal protection of the laws are impaired. We address each of these contentions in turn. None has any merit whatsoever.

[40] Under California regulations, there is no "Grade B" status, despite the use of the colloquial term by several witnesses in these proceedings.

1. Proposal No. 1 Does Not Regulate Producers In Their Capacity As Producers In Violation Of 7 U.S.C. Section 608c(13)(B).

7 U.S.C. section 608c(13)(B) provides: "No order issued under this chapter shall be applicable to any producer in his capacity as a producer." Opponents cite no authority regarding this section and how it might be implicated by Proposal No. 1. Indeed, it is clear from the applicable case law that Proposal No. 1 has no such impact.

When raised in milk order cases, section 608c(13)(B)'s applicability has been uniformly rejected by the courts because milk orders regulate handlers, not producers. For instance, in *Freeman v. Vance*, 319 F.2d 841 (5th Cir. 1963), the court reversed a district court ruling which relied on 608c(13)(B), citing *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3rd Cir. 1961). Both the *Freeman* and *Ideal Farms* cases involved challenges by producer-handlers to milk order regulation of their own farm production, citing 608c(13). Clearly, Proposal No. 1 has less direct impact on any producer in California, in his capacity as a producer, than do order regulations requiring a producer-handler to, in effect, pay for the purchase of his own production. Moreover, vegetable order cases have found that even more restrictive regulations on the marketing of farm production do not run afoul of section 608c(13). For example, in *Bramsen v. Hardin*, 346 F.Supp. 934 (S.D. Fla. 1972), a celery order case, the court found that the quota provisions of a celery order did not regulate the producer in his capacity as a producer and, therefore, did not implicate Section 608c(13)(B), even though the order denied the plaintiff any base which was required to sell any celery produced.

In sum, Proposal No. 1 has no impact whatsoever on producers in their capacity as producers. In fact, they retain the option to waive Grade A status, if they so desire for any reason – including whatever inducements handlers, such as Hilmar, would offer.

Proposal No. 1's pooling provisions thus do not regulate producers as producers in violation of 7 U.S.C. section 608c(13)(B).

2. Proposal No. 1's Pooling Plan Does Not Violate Section 608c(5)(G).

Opponents contend that "Unique mandatory pooling will result in limitations on the marketing of the products of milk that are illegal under 7 U.S.C. § 608c(5)(G)." (DIC Brief, p. 70). This contention has no basis in the jurisprudence of Section 608c(5)(G). Moreover, the DIC and its allies have failed to demonstrate from the record that inclusive pooling would in any way limit their ability to market California manufactured milk products in other areas. In fact, the record clearly shows that they have operated for years under the California regulatory systems whose pooling provisions are the functional equivalent of inclusive pooling without so limiting their out-of-area marketing of California milk products. (*See*, *e.g.*, fn. 11, *supra* (recapitulating the high percentage of the nation's manufactured milk products that are made from California milk).)

3. Proposal No. 1 Does Not Violate The Due Process And Equal Protection Clauses Of The United States Constitution, United States Constitution, 5th And 14th Amendments As Opponents Allege.

Opponents conflate the California quota program's incorporation in Proposal No. 1 – as directed by Congress – with Proposal No. 1's inclusive-pooling-for-California-plants – *i.e.,* its customized pooling provisions for the unique California marketplace – and conclude that the differences from other federal orders deny California handlers their rights to equal protection and due process under the 5th and 14th Amendments to the United States Constitution. (DIC Brief, p. 78.) Opponents

reach this conclusion by first citing the dicta[41] of the USDA Judicial Officer ("JO") in a vacated "Tentative Decision" in *In re: Kraftco*, AMA Dkt. No. M-4-15 (1974). This vacated, tentative decision is a document which is entitled to no legal weight whatsoever.[42] Without *Kraftco*, Opponents' constitutional contentions rest on *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676 (1985). Neither of these cases, we hardly need to say, are milk order cases. In fact, neither are federal regulatory cases. In *Yick Wo*, the Supreme Court quite rightly found it unconstitutional for the City of San Francisco to deny laundry business permits to Chinese nationals, when it granted such permits to similarly situated non-Chinese citizens. In *Metropolitan Life,* the Supreme Court struck down an Alabama statute which taxed non-Alabama insurance companies at a higher rate than Alabama companies. In what is truly a "through-the-looking-glass" application of "equal protection" principles, Opponents complain that when the California handlers, who presently have an advantageously unequal status, vis-a-vis their federally-regulated competitors, are brought into the federal regulatory system, with uniform and equal prices, they will be unconstitutionally discriminated against. Opponents' complaint here is analogous to that of the plaintiff handler in *Lamers Dairy Inc v. United States,*

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[41] "Dicta" or a "dictum" is a comment made by a judge or court which is made without argument or full consideration of the point and which is not a determination or ruling in the case. *See, e.g.*, Black's Law The Dictionary, 2d Ed., online at thelawdictionary.org.

[42] As far as we can tell, the *In re: Kraftco* decision, relied upon by the DIC, was never published. The DIC provides no Agriculture Decisions citation and we cannot find it after a diligent search of the 1974 Agriculture Decisions volume. As best we can discern, the opinion was a "Tentative Decision" which the Judicial Officer in fact "vacated" by subsequent order. (*See In re: Kraftco Corp*., 33 Agric. Dec. 743 (1974)(*See* Exh. 2, Attached).) When a judicial opinion is "vacated," its legal status is as if it were never rendered. Whatever the Judicial Officer said in this vacated "Tentative Decision" has no more legal weight than water cooler conversation.

379 F.3d 466, 475-477 (7th Cir. 2004), which was unsuccessful in its equal protection challenge. Lamers Dairy, a Class I handler, complained that it was required to pool all the time while Class III plants were not. The Circuit court had no difficulty ruling there was no equal protection violation, holding "[S]o long as [regulatory] distinctions are conceivably rational . . . .Lamers' equal protection claim based on the different pooling regulations governing Class I and Class III handlers must therefore fail." *Id.* at 476. The differences in the California marketplace and those of other orders in the federal system make Proposal No. 1's pooling provisions more than "conceivably rational." Thus, the Opponents' equal protection arguments must fail.

E. The Hearing Record Demonstrates That Proposal No. 2's Adoption Of Order 30's Shipping Requirements And Repooling Limitations Will Not Work In The California Marketplace.

Initially, it is not clear what pooling terms the DIC is requesting under Proposal No. 2. Its Post-Hearing Brief summarizes the terms requested as follows: "The Dairy Institute proposes using . . . a sliding scale for pooling standards that are based on the actual Class I utilization for the market. Tr. 5214 - 5223 and 5787 - 5788 (Testimony of Mr. Zolin). . . . [and] also supports *supplemental* "call provisions" on top of real performance-based pooling provisions that are shipping requirements found in Proposal No. 2 (4) 1051.7(c)(2). Tr. 6601-- 6602 (Testimony of Mr. Zolin)." (DIC Brief, p. 64) However, at the hearing, Mr. Zolin had revised the proposal advanced, when cross-examination revealed it to be unworkable. (Zolin Tr., Vol. XXXIII, pp. 6615-6619 (Nov. 9, 2015).) Those revisions, however, are not referenced in the DIC Brief and, consequently, their status is unknown. Regardless, when one analyzes Proposal No. 2, with or without the revisions, it is not workable in the California marketplace.

Proposal No. 2 would adopt for California the Order 30 model for shipping requirements and repooling limitations. (DIC Brief, pp. 64-65.) The shortcomings of this Proposal will be discussed under three topics: First, there is a lack of baseline information in the record to establish the need, if any, for shipments from supply plants; second, the formula for determining the shipments required in any given month will tend to require more milk when less is needed and less when more is needed; and third, the record shows that all mandatory shipping requirements will necessarily cause major disruptions in existing supply relationships.

First, the root of these massive dysfunctions stems from the fact that there are not now, and never have been, shipping requirements in the CSO. It has operated since its implementation in 1969 with a backup call but no mandatory shipping requirements. That is the baseline upon which the marketplace is now organized. Consequently, there is no data in the record to establish how much, if any, milk which regularly goes to manufacturing plants will be needed to meet the needs of the market's distributing plants.

In federal order markets, when shipping percentages are established at hearings, there is generally data on the sources of milk for the distributing plants in the market. In particular, the data documents how much of the regular supply is from dedicated shippers to the Class I plants and how much is required from supply plants. The more the supply to distributing plants is committed, the less is needed from supply plants. In California we know that, for instance, Dean Foods has some dedicated shippers (Blaufuss), that Foster Farms does as well (Verburg), and that the out-of-state milk is dedicated to the receiving plants. It is possible that close-in milk to the metro areas of

Los Angeles and the Bay Area is dedicated to the fluid plants. But, that data is not in the record. Consequently, all that the DIC uses to set its shipping requirements is a comparison of the CSO Class I utilization to that in Order 30. (Zolin Tr., Vol. XXVI, pp. 5214-5217, 5229-5234 (Oct. 29, 2016).) Many federal order markets have shipping percentages well below Class I utilization because of market structure and dedicated Class I supplies: Order 1 – Class I – 34-35%; shipping required – 10% to 20%; Order 33 – Class I – 30-35%; shipping – 20-30%; Order 32 – Class I – 33%; shipping 20-25%. The geography and market structure of the California marketplace must be analyzed to determine an appropriate base shipping percentage which will not involve uneconomic shipments.

Second, Proposal No. 2's bracketed adjustment terms will not function in a volatile price, permissive depooling order. Proposal No. 2 requires the Market Administrator to increase the shipping requirements if the Class I utilization in the Order increases, using the second, third and fourth prior month's pool utilization average. This system is bound to malfunction because of the swings in dairy product prices. Looking again at Order 30, the DIC model for Proposal No. 2, and reviewing the swings in utilization due to depooling, one can readily see that utilization tends to go down several months after it has been high for a few months. Thus, under the DIC formula which calls for higher shipments after utilization has been higher, there will be more shipments required when more milk is being repooled – a system which will inevitably lead to uneconomic shipments. By the same token, when utilization has been low for several months, the formula would lead to lower required shipments just when it is likely that depooling will be leading to less milk pooled and higher utilization thereby precipitating

potential shortfalls in required shipments. The system design is counter-productive given the swings in utilization and pooling which are inevitable where depooling is allowed.

Third, and most significant, the required shifts in supply relationships which will be necessitated by Proposal No. 2's mandatory shipping will be disorderly in the extreme. Hilmar is the perfect example. Hilmar supplies no Class I plants routinely. (Zolin Tr., Vol. XXXIII, p. 6612 (Nov. 9, 2015).) Under the DIC's Proposal No. 2, it would need to ship 10% of its monthly volume of over 400 million pounds. So, it would need to displace 40 million pounds of sales of other parties at California distributing plants in order to pool the Hilmar plant.[43] Then, in order to re-fill its manufacturing plant, it would need to go out and acquire producers or production which is then supplying other handlers, including the distributing plants. Similar changes in supply relationships would need to occur with other plants, handlers, and cooperatives. It is not an overstatement to say, there would be massive disorder in the marketplace – for no good reason.

In contrast, Proposal No. 1's inclusive pooling and call provisions would allow the continuation under a federal order pool of the basic institutional supply relationships in the California market as they have evolved over the years, while bringing national class price values to the state's producers, and thereby maintaining and promoting orderly marketing conditions.

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[43] Needless to say, pooling milk can work to the advantage of manufacturing handlers. For example, in the period from January 2008 to June 2015, it is estimated that Hilmar drew $244.3 million from the California pool, revenues which would have facilitated Hilmar's payment of $120 million in premiums it claims to have paid producers. (Garbani Tr., Vol. XXXIX, pp. 7963-67 (Nov. 17, 2015).)

F. Proposal No. 2's Modeling Of Order 30's Pooling And Depooling Provisions Does Not Address California's Unique Marketplace And Also Permits Disorderly Depooling.

When evaluating the contrasts between Proposal Nos. 1 and 2 for pooling terms, it is instructive to compare Order 30 – which is the model for Proposal No. 2's pooling – with the California marketplace. The contrasts are stark:

Characteristic/Factor	Order 30	California	Source
Number of Producers	10,334	1,463	Order 30 2015 average / July 2015 Hearing Exh. 61: CDFA-N
Market Area Population	21,534,189	39,144,818	https://www.census.gov/quickfacts/table Order 30: Calculation from census website for most current census data. (Official Notice Requested)
Population per Producer	2,083	26,756	*See* above; *see* also Order 30 2015 average / July 2015 Hearing Exh. 61: CDFA-N
Average Number of cows / producer	172	1,215	2015 NASS Volume/milk/cow/producers
Average delivery per day / producer	8,035	76,589	Order 30 or NASS volume/producers/365
Number of Distributing plants	17	35	Order 30 Dec 2015 plant list / Current CDFA plant list-fluid milk
Number of cooperatives	46	10	Order 30 plant list Dec 2015 [12 9 C handlers] / CDFA current handler list
Number of Cheese plants	137	62	2015 NASS (Wisconsin + Minnesota for Order 30)
Annual average production per cheese plant	27,369,847	39,284,387	2015 NASS (Simple average of annual total product pounds divided by number of plants)
Number of butter plants	* (too few to report)	14	2015 NASS (Wisconsin + Minnesota for Order 30)
Annual average production per butter plant	* (too few to report)	41,467,786	2015 NASS (Simple average of annual total product pounds divided by number of plants)
Number of NFDM plants	* (too few to report)	11	2015 NASS (Wisconsin + Minnesota for Order 30)
Annual average production per NFDM plant	* (too few to report)	65,367,636	2015 NASS (Simple average of annual total product pounds divided by number of plants)
Class I Utilization	11.5%	13.7%	Order 30 and CDFA 2015 annual average percentage
Class II Utilization	5.8%	6.7%	Order 30 and CDFA 2015 annual average percentage

Characteristic/Factor	Order 30	California	Source
Class III Utilization	79.2%	48.3%	Order 30 and CDFA 2015 annual average percentage
Class IV Utilization	3.5%	31.3%	Order 30 and CDFA 2015 annual average percentage

The table above does not itself reflect some very significant and vital facts: The three top cheese plants in California average 296.6 million pounds of milk per month for the manufacture of cheese (10,677,600,000 pounds of milk annually), and the top eight plants produce 81 percent of the cheese manufactured in California. (Hearing Exh. 96.) These facts, coupled with the high utilization for both Class III (48.3%) and Class IV (31.3%) are unique California conditions that require inclusive pooling in order to prevent frequent and massive market instability that would otherwise result from relatively easy monthly depooling.

It is not possible to apply this USDA policy – "[E]ach marketing area has unique marketing conditions and characteristics that have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order" – and derive essentially identical pooling, and depooling, provisions in the two orders, as the DIC has proposed. Proposal No. 1 is a much better fit. The Cooperatives have emphasized again and again that the structure of the California marketplace with large players and substantial volumes of both Class III and IV utilization would allow disorderly depooling under Proposal No. 2, and under any scenario like Proposal No. 2. Here is what Proposal No. 2 would allow in terms of pooling and depooling:

1. Any Market Player With Substantial Volumes Of Both Class III And IV Milk Could Keep The Most Valuable Use Depooled At All Times.

It is a simple matter of arithmetic that so long as the handler's volumes of Class III and IV are within 125% of each other, 100% of each use could be depooled and repooled from month to month without violating the Proposal No. 2 125% repooling limit. To the extent that the handler had Class I volumes to add to its pooled base, the variation in Class III or IV could be greater than 25% and any one full use could be depooled and repooled at will, without any economic consequences. Here are a few simple scenarios to illustrate how Proposal No. 2 would work:

Scenario 1: This scenario shows that when depooling incentives change between Class III and IV from one month to the next, a handler with equal volumes of Class III and IV utilization can depool and repool 100% of the desired use each month without constraint.

Class/Total/Ratio	Volume Month 1	Vol. Month 2	Vol. Month 3
Class I	0	0	0
Class II	0	0	0
Class III	25,000	0	25,000
Class IV	0	25,000	0
Total pooled	25,000	25,000	25,000
Total volume	50,000	50,000	50,000
Repooling percentage	NA	100%	100%

Scenario 2: This scenario shows that when a handler has Class I utilization, it provides the ability to repool either Class III or Class II/IV volume in excess of the other.

Class/Total/Ratio	Volume Month 1	Vol. Month 2	Vol. Month 3
Class I	12,000	12,000	12,000
Class II	8,000	0	8,000
Class III	40,000	40,000	0
Class IV	40,000	0	40,000
Total pooled	100,000	52,000	60,000
Total volume	100,000	100,000	100,000
Repooling percentage	NA	N/A	115%

Scenario 3: This scenario shows that the only time a repooling limitation impacts the handler is the extremely unusual occasion where it wants to pool all its milk of all uses. This occurred in only 2 out of 187 months from Jan. 2000 – July 2015. (Hearing Exh. 64.)

Class/Total/Ratio	Vol. Month 1	Vol. Month 2	Vol. Month 3	Vol. Month 4
Class I	12,000	12,000	12,000	12,000
Class II	0	8,000	8000	8,000
Class III	40,000	0	40,000	0
Class IV	0	40,000	15,000	40,000
Total pooled	52,000	60,000	75,000	60,000
Total volume	100,000	100,000	100,000	100,000
Repooling %	NA	115%	125%	N/A

It is extremely instructive to compare these realistic California order depooling scenarios under Proposal No. 2 with the actual depooling occurring in Order 30 as detailed in Exhibit 186 (12.D) by Dennis Schad. In 2014 in Order 30, 27,624,695,594 pounds of milk was pooled for Class III. Total depooled was estimated to be 1,993,960,786 or 6.7% of total Class III use. In the month of November, the month with the highest negative PPD and therefore the greatest incentive to depool, 603,956,164 pounds were depooled and 1,830,453,949 pounds of Class III use were pooled, a depooling ratio of only 24.8% of Class III use. Order 30 Class III utilization approaches 80%; the 3.5% Class IV utilization is negligible. Order 30 handlers have no non-Class III volumes to offset Class III depooling. Therefore, the percentage depooling limitation has impact in Order 30. There will be no such impact in a California order, however, as clearly shown in the scenarios above.

2. Joint Pooling By Cooperatives Or Other Entities Facilitates Depooling Maximization.

Proposal No. 2, as well as Proposal No. 1 and most if not all orders, provides for joint pooling by cooperatives and other handlers for purposes of pooling and marketing

efficiencies.[44] This facilitates depooling maximization in California. Under Proposal No. 2, the three proponent Cooperatives could file one pool report and jointly qualify 75% of the total pool volume, while having about equal volumes of Class III and IV utilization. They could depool and repool 100% of milk desired under Proposal No. 2 more than 95% of the time. The impact on the rest of the producers in the pool would be substantial and occur every month. It would always be negative and would likely average more than $.50 per hundredweight.

For example, the following charts show the impact on the pool of depooling 95% of Class IV volumes and 50% of Class II volumes for the month of July 2014, and 100% of the Class III volume in November 2014 To be as realistic as possible, this assumes that 50% of Class II volumes and 5% of Class IV volumes are at distributing plants and cannot be depooled.

Sample Month with Class II/IV Depooling: July 2014					
Class	Price	Pre-depooling utilization	Post-depooling utilization	Volumes Pre-depooling	Volumes Post-depooling
I	$ 24.94	12.78%	19.07%	437,376,907	**437,376,907**
II	$ 24.41	9.69%	7.23%	175,566,786	**87,783,393**
III	$ 21.60	46.28%	69.04%	156,059,366	**78,029,683**
IV	$ 23.58	31.25%	4.66%	1,069,485,785	**106,948,578**
Blend/Lbs in pool		$22.92	$ 22.53	1,583,865,668	**1,583,865,668**

[44] Proposal No. 2 specifically provides (Section 1051.7(e)) for units of supply plants operated by 2 or more handlers to qualify for pooling as one entity, which would allow any grouping of handlers for pooling purposes. Furthermore, both Proposal Nos. 1 and 2 adopt the uniform definition of “cooperative” from Section 1000.18 which provides for cooperatives to pool as one entity via formation of a cooperative federation.

Difference			$ (0.39)	3,422,354,511	2,294,004,229
Sample Month with Class III Depooling: November 2014					
Class	Price	Pre-depooling utilization	Post-depooling utilization	Volumes Pre-depooling	Volumes Post-depooling
I	$ 25.98	13.19%	24.92%	428,181,530	**428,181,530**
II	$ 19.91	7.77%	14.68%	252,234,305	**252,234,305**
III	$ 21.94	47.07%	0.00%	1,528,013,995	**-**
IV	$ 18.14	31.97%	60.40%	1,037,828,923	**1,037,828,923**
Blend/Lbs in pool		$21.10	$ 20.35	3,246,258,753	**1,718,244,758**
Difference			$ (0.75)		

This is absolutely disorderly and intolerably so.

3. Lower Repooling Limits Would Have A Very Minimal Dampening Effect Upon Disorderly Depooling.

Where the pooling handler has both Class III and IV utilization, the repooling of one class of use is going to be cancelled out in the pooling limitation equation by the depooling of the other class of utilization which has flipped to negative, which is the majority of the instances. Indeed, for the 187 months from January 2000 to July 2015 in Hearing Exh. 64, there are only eight months in which the repooling of Class III (when that would be desired) would be limited and the impact would never be for more than two months. By the same token, there would only be three months when the repooling of Class IV, when desired, would be limited by the Proposal No. 2 limitation – even if it were 115%.[45]

[45] Though no participant of the hearing has suggested using 115%, it is referred to herein because it exists in Order 33.

Proposal No. 1's inclusive pooling prevents all this disorder which is inevitable if voluntary depooling is allowed under a California order. Proposal No. 1 is the pooling system which the California industry is used to. It represents the "customized" pooling provisions which federal order regulation allows and provides for. It should be adopted for the California FMMO.

G. The DIC's Attack On The Alonzo Letter Lacks Merit; Proposal No. 1 Has All The Elements Of A Federal Order And Has Been Accurately Described At All Times.

One of the more opaque contentions made by the DIC in its arguments in opposition to Proposal No. 1's pooling provisions is that the "Cooperatives wrongfully claimed" in the letter to AMS Administrator Alonzo requesting this hearing that the requested "California FMMO will have all the benefits and characteristics of the ten FMMOs. . ." (DIC Brief, p. 65.) The basis for this assertion is that Proposal No. 1 does not include "the meaningful and real performance-based pooling standards found in each and every one of the ten FMMOs." (*Id.*) Elsewhere, the DIC expounds on this complaint, claiming that "performance-based pooling standards [are] the basic *quid quo pro* for charging Class I handlers the highest price and then blending it to share with other dairy farmers." (DIC Brief, p. 66.) The DIC is wrong in its attack on the Alonzo letter, in its claim of Class I entitlement, and in its understanding of Proposal No. 1.

To accuse the Cooperatives of a "wrongful" statement in the Alonzo letter with respect to the description of the proposed order's pooling is a bit much. **The letter expressly described the proposed pooling system stating: "All California plants purchasing milk from California grade A dairy producers will be pool plants. Voluntary depooling of any class of milk will not be permitted."** (Alonzo letter, p. 4.) Beyond that, the entire verbatim proposed California FMMO was a part of the

submission to Ms. Alonzo. Just because the proposed California order pool does not have the pooling terms which the DIC desires does not mean that it does not have the "characteristics" of the other FMMOs. The DIC's accusation of any "wrongful" conduct by the Cooperatives is absurd.

This entire argument is premised upon a claim of Class I entitlement which has no basis in the AMAA. There is simply nothing in the Act's provisions regarding terms of orders – 608c(5) – which grants to any class of milk utilization any special status. One would not know it from reading Opponents' briefs, but the statute was, and is, intended to benefit **producers**, not handlers. (*See Block v. Community Nutrition Institute*, 476 U.S. 340, 342 (1984)("[T]he essential purpose [of this milk market order scheme] is to raise producer prices . . .")(Cooperatives' Post-Hearing Brief, p. 29).) The only provision of the Act which might be thought of as a mandated handler benefit is that handlers shall have minimum uniform class prices among them. The AMAA mandates no "*quid pro quo*" for the regulation of Class I handlers. In a marketwide pool of multiple classes of utilization, the uses will have different prices – or there would be no purpose or need for the pool. Marketwide pooling of use values is a producer benefit under the AMAA. Class I handlers – or whatever class of handler has the highest minimum price at any given time – have no statutory entitlement to special service under the AMAA.

Even though there is no statutory entitlement to the type of pooling terms which Opponents would impose, Opponents completely ignore that Proposal No. 1 does provide benefits unique to the Class I marketplace which will assure that it is served at all times. Under Proposal No. 1, Class I plants are uniquely serviced with transportation credits paid for from the marketwide pool. These credits enable Class I plants distant

from milk supplies to be served as if they were less remote in terms of transportation costs. Furthermore, only Class I plants are entitled to have the Market Administrator require that they be supplied with milk via compulsory "call" provisions. The DIC's critique of the Alonzo letter and Proposal No. 1's term, stems from a myopic perspective of Proposal No. 1 which has no basis in the operation of the Proposal itself or in the AMAA.

H. Contrary To The Opponents' Contentions, Fulfilling Quota Is Not The Only Justification For Inclusive Pooling In A California FMMO.

Inclusive pooling is an essential ingredient of a California FMMO because it serves the purpose of ensuring market stability in a unique market. California's several unique characteristics make it different from Order 30—the DIC's primary comparison order—in significant ways. In particular, California differs from Order 30 in its utilization (low Class I and high Class III and IV), average plant size (*E.g.*, very large cheese plants), average producer size, and concentration of supplying/pooling handlers (very few handlers), not to mention its quota program. (Cooperatives' Post-Hearing Brief, pp. 100-02 (detailing differences between California and Order 30).) As a result of these significant differences, if depooling were permitted in California as it is in Order 30 and as it would be under Proposal No. 2, major disorder would ensue. (*Id.* at pp. 52-58.) As the Cooperatives' evidence showed, in fewer than 10% of the months since 2000 there would be no reason for Class III and IV to depool while Class II had the incentive to depool about 70% of the time. (Cooperatives' Post-Hearing Brief, pp. 103-04.) If Proposal No. 2 were adopted under such circumstances in which depooling is profitable, very large volumes of milk would be routinely depooled, resulting in detrimental market instability and denying California producers the minimum price

values they seek in a California FMMO. Thus, it is clear that it is the mix of these various unique aspects of the California market that justifies inclusive pooling, not just the maintenance of the quota program, as the DIC so myopically asserts.

V. THE OPPONENTS' CONTENTIONS THAT NATIONAL FEDERAL ORDER PRICES SHOULD NOT BE ADOPTED FOR CALIFORNIA ARE WITHOUT MERIT.

The DIC, Leprino, and Hilmar broadly attack the Proposal No. 1 prices as not being "up to date," not being "accurate," and not properly related to the California marketing area.[46] None of these challenges to the uniform national FMMO prices, and their applicability to California, has any merit, as we will discuss. But first, because the current system of uniform national prices has its roots in the federal order reform proceedings, we will address the role of California and California information in that process and in the price formulas coming out of this process because Opponents attempt to muddy the waters in that regard and to thereby cast unjustified doubt about the applicability of those prices to the California marketing area.

A. The USDA's Use Of California Data In The FMMO Reform Process Has Been Blatantly Misstated And Misrepresented.

Opponents quote repeatedly a sentence in the Federal Order Reform final decision (in the subheading discussion of "Consolidation of Marketing Areas") which describes the information relied upon by the USDA in determining how to combine the marketing areas of the then-existing 31 orders into the mandated 10 to 14 orders.[47] That data was, not surprisingly, limited to "receipts and distribution of fluid milk products

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[46] To the extent Leprino, Dean Foods, and Hilmar make assertions related to pricing formulas and accuracy of data as made by the DIC, we treat them jointly in one response.

[47] Opponents fail to keep in mind the statutory mandate that California was to be designated "as a separate Federal milk marketing order." 7 U.S.C. § 7253(2).

by all known distributing plants located in the 47 contiguous states, not including the State of California" which was, of course, not one of the marketing areas to be combined. Opponents attempt to leverage this fact that the USDA did not consider fluid sales distribution in California when it was determining how to re-configure the marketing areas in the rest of the country into an assertion that none of the findings in the order reform decision(s) can have any value in this proceeding. This would be a complete misreading and misapplication of the USDA's findings as is immediately clear from their context. We are attaching to this brief the page from the 1999 Final Decision (as published at 64 Fed. Reg. 16044 (Apr. 2, 1999)(*see* Exh. 3, Attached), which contains Opponents' quoted sentence. Two paragraphs before that quoted sentence, the Decision explains:

> The 1996 Farm Bill specifically provides for the inclusion of California as a separate Federal milk order, but the provision is contingent upon petition and approval by California producers. The Omnibus Consolidated and Emergency Supplemental Appropriations Bill, passed in October 1998, extended the time for implementing Federal milk order reform amendments from April 4, 1999 to October 1, 1999. The legislation provides that California has from the date of issuance of this final decision until September 30, 1999, to become a separate Federal milk order. **This additional time is intended to allow California dairy interests the opportunity to review this final decision to determine whether a Federal milk order for California, consistent with the provisions adopted for the consolidated orders, would best meet their milk marketing regulatory needs.**

67 Fed. Reg. at 16044 (emphasis added).

As this quoted, emphasized sentence directly states, the Final Decision was being placed upon the public record with the specific, Congressionally-directed intention that California producers consider whether a federal order for California with "provisions adopted for the consolidated orders, would best meet their regulatory needs." It is

impossible in good faith to read this language and conclude that the Class I prices and all other "provisions adopted for the consolidated orders" were not crafted in contemplation of potentially being made part of a California federal order. Thus, to say, as Opponents do, that the "USDA did not contemplate California's massive milk supply being a part of the FMMO system when it developed Federal Order Reform Prices" is simply not correct. The fact that the Final Decision itself did not apply per se to a California order does not in any way diminish the explicitly stated, contemplated intent of the USDA.

We demonstrated in our Post-Hearing Brief at pp. 58-59, that the Federal Order Reform process, from its very first steps, was undertaken with the contemplation that the "provisions adopted for the consolidated orders" could well be applicable to California. As Dennis Schad testified at the hearing, and the Reform decisions indicate, California interests participated in the process and their comments and opinions were taken into account in fashioning the "provisions adopted for the consolidated orders." (Hearing Exh. 70, pp. 33-35.) But the consideration of California marketing conditions in the current uniform, national class price grid did not stop with the federal order reform decisions. California products, manufacturing costs, and marketing programs have been a factor in every federal order hearing since 2000, including the hearings which resulted in the 2013 final orders now applicable, and continue to be a major factor in the uniform national federal order prices set every month in the federal order system.

The 2013 Final Decision and Order upon which current federal order prices are based relied heavily on California being part and parcel of the national marketplace for manufactured dairy products. 78 Fed. Reg. 9248 (Feb. 7, 2013). In that decision the

Secretary reiterated multiple times that California plant cost data should be used in the make allowances finding it "justified to best reflect the national market where dairy commodity products are sold." (*Id.* at 9271.) The Decision pointed out that AMS prices "used in the product-price formulas incorporate sales from across the country, including California." (*Id.*) The Decision rejected the request to exclude California data from federal order prices because that would ignore "California's dairy sector and its impact on the supply and demand for milk and dairy products nationally. Cheese, butter, dry whey and NFDM compete in a national marketplace . . . ." (*Id.* at. 9270.) The resulting uniform, national federal order Class III and IV prices include California as an integral part of the national milk and dairy product marketplace.

B. Use Of National Uniform Prices For The California Marketing Area Is Fully Supported By The Pricing Standard Of 7 U.S.C. Section 608c(18).

Opponents cite and emphasize the "in the marketing area" language in 7 U.S.C. Section 608c(18) to argue that more California-limited or California-specific data needs to be in the record to support adoption of the national, uniform FMMO prices in California. The application of Section 8c(18) put forward by Opponents has been rejected by the courts; and it should be rejected by the USDA here. In both the circuit court (*Arkansas Dairy Cooperative Association, Inc. v. USDA*, 573 F.3d 815 (D.C. Cir. 2009) and district court (*Arkansas Dairy Cooperative Association, Inc v. Espy*, 576 F. Supp.2d 147 (D.D.C. 2008)) decisions in litigation challenging the 2008 make allowance/Class III/IV pricing decisions of the USDA, the courts held that the Secretary's fixing of prices pursuant to 608c(18) in each marketing area "can be satisfied by an *indirect* relationship between prices and economic conditions." (576

F.Supp.2d at 157 (emphasis in original)). More specifically, the court agreed with the USDA that:

> Section 608c(18) requires consideration of "economic conditions which affect market supply and demand" in each marketing area, and USDA determined a number of years ago that the value of Class III and IV milk is driven by the national market for the dairy products for which the milk is used. . . . [therefore] there is no evidence, as charged by Plaintiffs, that its long-standing determination that it is appropriate to look at the national market to assess the value of Class III and IV milk is arbitrary and capricious.

Id. at 160. The circuit court affirmed and also held that:

> [T]he Secretary determined years ago that Class III and IV "dairy products can and do compete on a national market basis," and the value of milk used for Class III and IV products is thus driven by this national market. . . . [B]ecause those products "compete in a national marketplace," the data considered in setting make allowances must likewise be nationwide in scope. . . .
>
> [Thus when under 608c(18)] the Secretary must fix prices to reflect costs and conditions "in the market area to which the [milk marketing order or amendment]relates" . . . the Secretary has complied. . . .

573 F.3d at 830-31; *See also Bridgewater Dairy, LLC v. USDA*, 2007 WL 634059 (N.D.Ohio Feb. 22, 2007); *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632 (8th Cir. 1998).

The legal infirmity of the Opponents' position notwithstanding, on this record, it is not necessary to even pause to consider the adequacy of the California-specific data on marketing conditions because the record is full of detailed information presented by CDFA (Hearing Exh. 61), by the Cooperatives' witnesses (*E.g.*, Messrs. Hollon and Schad; and Dr. Erba), and by the dairy farmers themselves – independents and

cooperative members alike – establishing the inadequacy of the CDFA prices and the applicability of the uniform national FMMO prices.

C. The Uniform National Class II, III, And IV Prices Are Based Upon Mandatorily-Reported, Audited, Nationwide Dairy Product Sales Prices; Any Suggestion They Are Not "Up-To-Date" Or "Accurate" Is False.

The uniform national FMMO class price formulas as most recently reflected in the 2013 final decision should be adopted for the California order. Opponents' argument that these prices are not sufficiently "up to date" and "accurate" for the California federal order is baseless.

The current uniform federal order prices are the result of the federal order reform final order adopted in 1999 and three subsequent national hearings to consider those prices and price formulas, with the most recent national hearing concluding in a 2013 final order. The price formulas for all federal order class prices are based on the product prices collected weekly by AMS pursuant to the Dairy Product Mandatory Reporting Program ("DPMRP"). (Hearing Exh. 71, Cooperatives' Exh. 6.B.) The product price data is required by law to be reported by all plants making and selling the applicable products in the requisite volumes. It is collected and reported from plants in all states, including, of course, California – that a major portion of their production is marketed out of state. The federal order minimum prices are calculated monthly on the basis of this current, AMS-certified-accurate product price data. These are the foundation data for the prices which all federal orders from coast-to-coast use and which Proposal No. 1 recommends for adoption in California. All these mandatorily-collected product prices are, of course, part of this hearing record for the Secretary's

consideration. To contend that the resulting prices are not "up to date" and "accurate" requires a unique quality of mental gymnastics.

Weekly California FOB plant sales prices are a substantial part of the DPMRP/NDPSR data. (Schad Tr., Vol. XVI, pp. 3113-14 (Oct. 15, 2015).) Multiple hearing witnesses confirmed that their company reported to AMS weekly. (*E.g.,* DeJong Tr., Vol. XXII, p. 4468 (Oct. 23, 2015); Hofferber Tr., Vol. XXIV, pp. 4740-41 (Oct. 27, 2015); Dryer Tr., Vol. XXII, p. 4340 (Oct. 23, 2015); Erba Tr. Vol. X, p. 2122 (Oct. 5, 2015).) To suggest that this data is not data from the marketing area is baseless. The precise weighting of California sales in the NDPSR prices is not in the record; but there is no question that it is a very substantial portion. As Mr. Hollon testified early in this hearing, California's share of the national production of the basic products in the mandatory reporting surveys is: NFDM – 41%; butter – 33%; and cheddar cheese – 12%. Its percentage of national production of dry whey is not known, but it produces 21% of all cheese and more than 95% of its whey is processed so the share of national production of dry whey is significant. On this record it cannot be credibly contended that the product prices upon which national uniform Class II, III, and IV prices are based do not take into account current marketing conditions in California.

Furthermore, the record is replete with testimony that the marketing area for California-processed Class II, III, and IV products is nationwide, not limited to the state of California. Indeed, this is **a**, if not **the**, basic premise of Opponents' argument for lower prices in California. Consequently, the nationwide data, including prices, on marketing of manufactured dairy products is highly pertinent to the record regarding appropriate prices for the California order. Put another way, to limit the record inquiry

with respect to appropriate prices for Class II, III, and IV in the California federal order to information only from within the metes and bounds of the state of California would make no sense whatsoever.

Since there is no possible argument that the federal order product prices are not "up to date" and "accurate," Opponents' assertion that the Proposal No. 1 federal order prices are not "up to date" appears to be based upon two other aspects of the price formulas: the make allowances and the other solids product price formula. We will discuss each of these issues in turn.

First, make allowances are a necessary part of product price formulas. They reflect an "allowance" between the gross value of the product selling price and the minimum payment for the raw milk. The allowance is based upon the cost of manufacturing or "making" the product and, also provides an allowance for marketing expense, return on investment, and, for some products, an additional margin for excess plant costs attributable to balancing the market. The make allowances in the product price formulas for minimum milk prices have never been stated to be, or administered as, current, monthly cash out-of-pocket expenses of any individual or group of product manufacturers. Rather, both the USDA and CDFA have established make allowances as just that, "allowances" which the policy-making regulators determine, from time to time, to be appropriate in the price formulae. This is clear from both the USDA and CDFA history of setting make allowances.

In the Final Decision in 2013, re-adopting the current Class II, III, and IV uniform, national prices for the federal orders, the USDA declined to adopt, among other proposals, a request from a number of cooperatives (including Land O'Lakes) that a

procedure for regular, routine, cost-accounting-based procedures be put into federal order prices so that the make allowances are "up to date" with costs of making the manufactured dairy products in the class price formulas. In rejecting that amendment to federal order prices, the USDA re-adopted the make allowances then in the orders, which have continued to date. This action plainly rejects a policy that would mandate implementation of make allowances on the basis of an arithmetic, contemporaneous calculation of plant expenses.[48] The make allowances in the product price formulas are just one part of the formulas which, in their fullness, represent the embodiment of USDA policy for minimum pricing for the classes of utilization involved. Under Proposal No. 1, the California order will have the same minimum class prices as the rest of the country; prices which are established in the uniform Part 1000 regulations. When those are "updated" for the entire country on the basis of the USDA finding that such is appropriate, any updated allowances will apply to California. To assert that anything more or different is required for the California order from this hearing would create, rather than eliminate, the disorderly conditions which have required this proceeding.

CDFA, while regulating only California under the state statutes and not the AMAA, has followed similar policy practices as the USDA with respect to make allowances. As Dennis Schad insightfully pointed out: CDFA does not mechanically adopt its own cost accounting data into the pricing formulas. They apply other policy factors to the various elements of the price formulas including the "allowances."

[48] The Cooperatives submit that a change in a USDA policy is not appropriate for a California only FMMO. This is not to suggest that the USDA in the future might not consider an automatic procedure for "updating" make allowances on a national basis, on which the Cooperatives take no current position.

CDFA's repeated refusal of CDI's requests for a make allowance hearing confirms this regulatory approach to make allowance-setting.[49] CDFA's actions, as well as those of the USDA, reflect the policy-based decision-making process which is embodied in product price formulas. Their actions confirm that the mechanical, arithmetic-based approach to make allowances advocated by Opponents is not mandated in the minimum milk pricing regulatory framework.

The national, uniform Class II, III, and IV prices are supported in the hearing record, include California data as shown in the following table, and should be adopted for the California order:

California's Representation In National FMMO Class III And IV Price Formulas

Price/Data Category	CA Contribution Factor	Source
Cheddar cheese NDPSR prices	11.3%	2015 NASS Dairy Products Annual (Assumed pro rata)
Cheese make allowance	100%	73 Fed Reg at 35326 (6/20/2008); 78 Fed. Reg. 24334 (4/25/2103)(CDFA 2006 data)(*See* Hearing Exh. 186 (12.G)
Butter NDPSR prices	33%	2015 NASS Dairy Products Annual (Assumed pro rata)
Butter Make allowance	31.0%	73 Fed Reg at 35326 (6/20/2008); 78 Fed. Reg. 24334 (4/25/2103)(CDFA 2006 costs weighted as per AMS calculations on Hearing Exh. 186 (12.G)).
NFDM NDPSR prices	40.7%	2015 NASS Dairy Products Annual (Assumed pro rata)

[49] *See* https://www.cdfa.ca.gov/dairy/pdf/hearings/2014/HearingDecision_Jun27-2014.pdf and https://www.cdfa.ca.gov/dairy/pdf/hearings/2012/DepartmentResponseLetter%2001.13.12.pdf (hearing denial letters from CDFA to CDI in 2012 and 2014.)

Price/Data Category	CA Contribution Factor	Source
NFDM make allowance	50.1%	73 Fed Reg at 35326 (6/20/2008); 78 Fed. Reg. 24334 (4/25/2103)(CDFA 2006 costs weighted as per AMS calculations on Hearing Exh. 186 (12.G))
Dry whey NDPSR prices	10.2%	2006 NASS Dairy Products Annual
Whey make allowance	0%	73 Fed Reg at 35326 (6/20/2008); 78 Fed. Reg. 24334 (4/25/2103) (CPDMP survey)(*See* Hearing Exh. 186 (12.G))(No California data available)

D. Proposal No. 2 Would Inappropriately Subdivide The Local California Market From The National Market For Manufactured Dairy Products, Seeking To Use Regional Finished Product Prices Rather Than National Market Clearing Prices And Placing A Localized Meaning On "Market Clearing" Which The USDA Has Never Applied.

Opponents[50] urge adoption of its bottom-of-the-barrel Class II, III, and IV prices for California (Hearing Exh. 162A), by seeking to use only the below national market average California product prices and by misapplying the USDA pricing principle of "market clearing" prices.

Opponents cannot dispute, and do not directly attempt to challenge, the longstanding USDA finding that the market for manufactured dairy products is a national market. This is in clear contrast, of course, to the local and regional nature of the marketing area for fluid milk products. The record is incontrovertible in this regard. Faced with this real world fact, Opponents ask, nevertheless, that the USDA fractionate the pricing of milk to be used for manufactured products on the grounds that the California-specific segment of the national market has its own "unique" features. Those

[50] These arguments are advanced by the DIC, Leprino, Hilmar, and Trihope. Of note, National All-Jersey, along with Select and the Cooperatives, oppose the confusing, inconsistent and disorderly request by the DIC and its members, for non-uniform Class III and IV prices.

features are supply-demand, which Opponents deem to be more challenged than the national market in general, and finished product prices, which Opponents contend are lower than national averages. Neither of these features entitles California to deviate from the national uniform prices for manufactured dairy products.

We first want to point out that the contention about local supply-demand constraints and location value of milk is, in concept, no different than the argument for lower prices made in prior hearings by the International Dairy Foods Association ("IDFA") and others in opposition to use of national average make allowances.

Opponents' argument that the minimum price in the California federal order must be lower than that in the rest of the national federal order system because its commodity sales prices are lower, on average, than the national average prices for those products, must be rejected in this proceeding for the same reasons that the same argument has been rejected in the past. In the 2002 post-reform national make allowance hearing, several participants contended that national average make allowances should not be adopted because of the adverse impact upon the higher-than-average cost entities in the industry. IDFA, the national trade association for dairy product processors, argued that average make allowances "would by definition mean that the one-half of cheese produced in plants with greater than average costs would be forced out of business." 67 Fed. Reg. at 67915 (Nov. 7, 2002). Another objecting processor contended that "use of a simple average risks half the industry." (*Id.*) The USDA rejected these contentions, holding:

> This final decision finds that continuing to use an average make allowance of dairy manufacturing plants' costs is appropriate. Reliance on product-price formulas necessitates the need to reflect and to offset the manufacturing costs

> incurred and is supported by the record even though there is disagreement on exactly how to accomplish this. Using an average make allowance provides a reasonable measure to reflect and offset manufacturing costs and is the only reasonable measure that can be supported by the record evidence.

Id. at 67915.

The USDA's reasoning was cogent and has certainly stood the test of time. Rather than half the cheese and other dairy product manufacturers being "forced out of business" as IDFA predicted, processing of manufactured products under the federal milk order system has grown substantially since 2002, and continues to grow in all regions. As Paul Christ pointed out, this growth has included very substantial growth in the federal orders in the western U.S. which have been subject to the uniform national minimum prices and in which the cheese production has grown at a rate greater than cheese production in California. (Christ Tr., Vol. XII, p. 2457 (Oct. 7, 2015).)

The argument for a California-only lower price for Class II, III, and IV milk, which is premised upon product sales prices in California being lower than the national average, is the very same argument advanced by IDFA and others with respect to make allowances. California sales prices, as we have shown elsewhere, are a major portion of the NDPSR prices which are the national market-clearing prices of cheese, butter, NFDM, and dry whey. The USDA should reject Opponents' request for California – specific lower minimum prices for the very same reasons it rejected the "don't use averages" arguments for other elements of the minimum price formulas.

In the same fashion, Opponents' argument that the national prices for Class II, III, and IV products are not "market-clearing" prices in California is of the same order. Amanda Steeneck testified in the very first hearing days that in fact the NDPSR prices

are actual market-clearing prices in the market for manufactured dairy products: it is correct that "the product prices were the actual factual market clearing prices set in the marketplace at which the prices freely determined by supply economics." (Steeneck Tr. Vol. I, p. 175 (Sept. 22, 2015).) They are by definition weighted average prices and, of course, some are higher and some are lower. The DIC's whine on behalf of the California industry is the same as IDFA's with respect to make allowances. On behalf of California, Opponents are simply saying "our market-clearing prices are lower than average" and "the average should not apply to us." This plea makes no more sense in 2016 than it did in 2002, and it should be rejected.

Local market-clearing and in-area supply and demand. Opponents devote a substantial portion of their price-level argument to depicting California milk production as on an ever-ascending incline and to arguing that capacity in the state is constantly constrained. To Opponents, the upshot of the discussion is that California dairy farmers are doing just fine and that price increases are not necessary and will create disorder. There are multiple fallacies in this argument, which is both factually and legally erroneous.

First, on the factual front: As we have shown at the very beginning of this brief, milk production in California is in an historic decline. In just 3 years, production will be 10 billion pounds below the USDA's baseline projections in the economic analysis for this hearing. The picture painted by Opponents is just not accurate. Also, factually on the demand/capacity side, Opponents do not even take into account the plant expansion testified to by its member Hilmar. So the facts on that side of the supply-demand equation are also a bit different than Opponents would have them.

But, the more important point is on the legal side: The USDA does not set marketing area milk prices in order to fine-tune supply and demand within a local market. Hearing testimony makes clear that from order to order there are localized imbalances of plant capacity and milk supply. The imbalances may be seasonal (such as in the southeast) or semi-permanent year-round (as has apparently been the case in recent years in the southwest). The industry in the Southwest, which manufacturers under federal order prices, is investing $130-140 million in new plant capacity. (Hollon Tr., Vol. XXXX, pp. 8078-8079 (Nov. 18, 2015).) But Class II, III, and IV prices in the national FMMO system have not been locally jiggered to address these issues and they should not be in California either.

The USDA has never to our knowledge – at least not in the last 40 or more years – established Class III or IV prices to "clear" supply and demand in a single, local marketing area. It should not do so now in California.

E. Critiques Of Proposal No. 1's Prices And Advancement of Proposal No. 2 Prices Are Based On A Complete Misapplication And Misuse Of The USDSS Model.

Opponents' argument for the Proposal No. 2 lowball Class II, III, and IV prices in California is based primarily, if not almost exclusively, upon the concept of "location value" pricing for milk used for manufactured milk products. The theoretical basis for this position is the Cornell/USDSS economic model of the United States dairy marketplace as presented at the hearing through the testimony of Dr. Mark Stephenson. The model provides a computer-generated surface of "shadow prices" for raw milk generated to reflect an "optimum set of product flows" determined solely on the basis of transportation cost, and without factoring in any other features of real world commerce. Opponents' would-be use of this model to establish minimum regulated prices for milk

for manufactured products is a fundamental misuse of the model as its authors have stated from the very beginning:

> Two points need to be kept in mind when looking at these solution results:
>
> 1) These movements reflect the optimum set of milk, intermediate product and final dairy product flows determined by the model and there are numerous reasons that actual movements corresponding to those depicted might differ from the optimum ones. However, if you take market-wide efficiency as one of the goals of a regulatory system, **this solution represents a target, to which we would aspire if the industries [sic] activities were conducted for public service rather than for profit**. (emphasis added.)

(Pratt, Novakovic, Stephenson, Bishop, and Erba, "U.S. Dairy Sector Simulator – A Spatially Disaggregated Model of the U. S. Dairy Industry," Cornell University (Nov. 1996) at 37.) In other words, if California dairy farmers are to produce milk as a public service, the USDSS prices could be imposed. While this may be how the DIC essentially views its raw milk suppliers, that is not how dairy farmers are to be viewed and treated under the AMAA or by USDA policy.

On cross-examination, Dr. Stephenson acknowledged the limitations of the model. He candidly acknowledged: "[W]e would always view modeling as being a simplification of reality…." (Stephenson Tr., Vol. XXX, p. 6006 (Nov. 4, 2015).) It is a static economic model; not a dynamic or econometric one. (*Id.* at 6008.) The only determinant of the depicted milk and milk product movements in the model is transportation cost from location of supply to demand. (*Id.*) Plant capacity is not a constraint in any of the model results described in his testimony or depicted in Hearing Exh. 133. (*Id.* at 6009.) The model's "shadow" prices for cheese are based on the American cheese category only – which is over-inclusive for the NDPSR cheddar

product and under-inclusive for total Class III cheese utilization. (*Id.* at 6010-6013.) Agreeing that many actual cheese product movements are not reflected on the model figures in, *e.g.,* Hearing Exh. 133, Dr. Stephenson agreed "[T]his is a model . . . it [cheese and other dairy product] does not all move in this fashion, and in many cases it's because we have branding and product is going to move east and west and north and south." (*Id.* at 6014.) Acknowledging that actual cheese sales testified to in the hearing – such as from Vermont to California; and Wisconsin to California – do not show up on the model maps, Dr. Stephenson testified that these transactions are due to factors not in the model:

> [Mr. Beshore] Q. . . . . Is that because of branding, quality, human factors, history:
>
> A. Sure.
>
> Q. All those things?
>
> A. Yes.

(*Id.* at 6015.) As the USDSS authors made clear from the very beginning: "There are numerous reasons that actual movements corresponding to those depicted might differ from the optimum ones." (Pratt et al, *supra.*)

The USDA has not fallen into the trap of being seduced by the complexity of the USDSS computer-generated "price surface" into adopting that shadow price surface for manufacturing milk values. The results of the model have been before the USDA as part of the administrative record during and after federal order reform. (Stephenson Tr., Vol. XXX, p. 6022-6023 (Nov. 4, 2015).) The USDA has taken the shadow price surfaces into account in 2000 when adopting the federal order reform uniform national prices for milk for Class II, III, and IV; and in the subsequent, multiple national hearings

on those prices. It has explicitly stated that manufacturers of these products should compete on the myriad factors of marketplace commerce other than raw milk price. The USDA has recognized the USDSS model for what it is; has recognized that dairy farmers are not producing milk as a public service; and has explicitly found that the USDSS shadow prices are not appropriately used as a cookie cutter imprint for a price surface for milk for manufacturing purposes.

Opponents' advocacy of misuse of the USDSS model prices should be rejected.

F. Whey Pricing.[51]

So far as whey pricing is concerned, the deficiency in the product price formula which Opponents contend make it not "up to date" or "accurate" relates to the choice of product (as well as the make allowance presumably). In this case, Opponents advocate for insertion of a different product price in the other solids (whey) portion of the Class III formula. The new proposed product price series is, quite incredibly, one which does not now exist! Likewise, various other aspects of the new product price formula do not exist. The lack of data series to support these prices is represented by use of "default" values in Hearing Exhibit 162. It is not exactly clear how the failure to adopt a price formula for which the data does not exist would credibly make the price more "accurate" and "up to date." Regardless, this hearing in not the place to address this new price formula.

[51] To the extent Leprino advocates for the DIC's whey pricing formula, and relies on the same arguments, we address their concerns collectively here.

G. Adoption Of The Existing Class I Differentials For The California FMMO Is The Only Option For Orderly Marketing.

Both Proposal Nos. 1 and 2 in the Notice of Hearing proposed the adoption of the Class I prices in 7 C.F.R. part 1000, which has in place prices applicable in each county of California. These prices are currently applicable to California plants which are partially regulated in the federal order system; and they are aligned with federally regulated plants in contiguous federally regulated areas of Arizona and Oregon, as well as throughout the country. Adoption of these established prices for the California marketing area is an indispensable component of establishing and maintaining orderly marketing in California. In particular, adoption of any different set of Class I prices for a California marketing area would inexorably lead to market disorder for Arizona plants which market into and would be regulated in the California order. Thus, as we will show, the DIC's invitation (DIC Brief, pp. 117-123) to lower or eliminate Class I differentials in a California order is another poison pill advanced solely for purposes of defeating the order rather than furthering orderly marketing.

The consequences of adopting Class I prices for a California order which are not aligned with the national Class I price grid, or with Class I prices in adjoining orders, are disorderly and unacceptable. We need only consider the situation which would be created with the two distributing plants located in Yuma, Arizona and currently regulated by Order 131. (*See* attached Arizona marketing area map with distributing plant locations shown; *see* Exh. 4, Attached.) The two Yuma plants have common ownership. One is expected to be regulated under the California order. It is certainly possible that if there were an economic incentive to do so, route sales from the plants could be organized to have both regulated in California. In any event, if the California

order has a lower Class I price than the Arizona order, it will mean for the first time since 2000 that the federal order system would have multiple Class I prices at the same location, dependent solely on the market of regulation.[52] If the Class I price under the California order were $.80 lower, as suggested by the DIC, these Yuma plants, as well as other California distributing plants, would have a massive price advantage over the other 4 distributing plants in Order 131. The same misalignment would apply with respect to plants in Oregon, and perhaps with Nevada plants, depending on how Nevada state regulators reacted. The Arizona price misalignment would surely lead to calls for price corrections in that order and the domino effect would have no obvious stopping point.

In addition to creating price misalignments with adjoining markets, massively lower Class I prices in the California order would also make the problem of class price inversions so routine that there would literally be no logic to having a pool at all. This, of course, is the result Opponents intend although they cannot explicitly so state. We are not aware of Opponents promoting in the CDFA process the massive Class I price reductions which have been suggested, if not formally proposed, here. This fact reinforces our view that the suggestion is made purely as a poison pill, and not as a serious proposition for this hearing.

There is more than sufficient evidence in this hearing record to support adoption of the existing Class I prices in part 1000 for the California order.

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[52] Dennis Schad described the mischief this circumstance had created between Order 2 and Order 4 regulations pre-order reform in the northeast. (Hearing Exh. 70, pp. 27-28.) This circumstance had existed in other areas of the country as well before order reform's unified national Class I price grid.

H. Other Arguments Raised To Oppose The Uniform, National Prices For California Are Without Merit.

1. The Legal Argument That AMAA Minimum Pricing Is Ratemaking Is Erroneous.

Opponents assert that FMMO prices must adhere to legal concepts derived from "ratemaking" cases, primarily in the natural gas industry regulated by the then-existing Federal Power Commission. They contend that these cases establish a constitutional standard for a rate of return on investment which the uniform national minimum prices of Proposal No. 1 do not meet. This is not a new legal argument. It has been made and rejected in milk order hearings on multiple prior occasions. Specifically, the identical argument was rejected in the 2002 Final Decision to the post-reform make allowance national hearing. The USDA reasoned and ruled:

> Ratemaking. In comments received to the recommended decision, Kraft, joined by NDA, argued that including make allowances in the pricing formulas was ‘‘ratemaking." Kraft stated that the make allowances formulated and used in the Class III and Class IV formulas have not followed the standards needed to comply with ratemaking. Kraft stated that the make allowances are not constitutionally valid because they do not ensure that manufacturing costs provide for a reasonable rate of return for manufacturers.
>
> In seeking to characterize the provisions of make allowances in Class III and Class IV pricing formulas as ratemaking, the commentors are ignoring the unique and longstanding treatment of the milk pricing provisions, including make allowances, in Federal milk marketing order regulations. The make allowances in the Class III and Class IV pricing formulas do not constitute ratemaking despite arguments that they do. The make allowances adopted are used in establishing minimum prices for milk under the authority and requirements of the Agricultural Marketing Agreement Act and are different in kind from the ratemaking referred to by the commentors.

67 Fed. Reg. at 67918 (Nov. 7, 2002).

The reasoning applied by the USDA to the ratemaking argument in 2002 continues to be valid. Further, the differences between federal milk order minimum pricing under the AMAA and public utility regulation under the Natural Gas Act are many. Among the differences in the regulatory programs is the key fact that the Federal Power Commission, as a rate fixing agency in a regulated return industry, had full authority to prescribe the regulated entities' accounting system, full access to audit their books, and full compulsory process in the ratemaking and enforcement process. *See* 15 U.S.C. §§ 717g; 717h(b); 717i; and 717m(c). The rates of returns of the regulated gas companies were required to be "just and reasonable" – a limitation not imposed upon handlers under the AMAA. 15 U.S.C. § 717c(a). The USDA has none of these powers under the AMAA. The minimum price setting function under the AMAA plainly "do[es] not constitute ratemaking" as the USDA has properly held. The ratemaking legal prescriptions and precedents are wholly inapposite.

2. Attacks On Cooperative "Reblending" Should Be Disregarded.

The DIC, Hilmar, and Leprino seek to leverage their opposition to Proposal No. 1's pricing and pooling provisions by claiming that the Proposal unfairly impacts proprietary companies since cooperatives have the ability to "reblend." On pooling, the DIC contends: "[T]he negative effects of mandatory pooling would only apply to manufacturing facilities not owned by the Cooperatives." (DIC Brief, p. 75; Proposed Findings: H, AA, 37-38, 112-115.) Also, "[T]he Cooperatives are putting a straightjacket on their manufacturing competitors while leaving themselves room to escape." (*Id.*) With respect to pricing, the argument is:

> The unforgiving nature of this regulated minimum price is softened for cooperative-owned manufacturing plants. As with mandatory pooling, the strain from overly-high prices will be felt exclusively by private

> manufacturers, with cooperative manufacturing facilities being able to counterbalance their losses on the manufacturing side with the higher profits on the producer side. . . [cooperatives are] able to reblend the lower milk price back to [their] member-owners.

(DIC Brief, p. 103; Proposed Findings, *supra*.) There are multiple fallacies in this attack and it should be disregarded.

Farmer cooperatives are a unique structure of business enterprise, recognized as such under the AMAA and an array of other federal statutes. They fundamentally involve groups of producers of agricultural products placing their own capital and personal worth at risk in order to collectively market their agricultural products. Under the Capper-Volstead Act, 7 U.S.C. Sections 291-292, the basic federal charter for agricultural cooperatives, these enterprises have multiple structural and financial limitations imposed upon them – limitations not applicable to non-cooperative businesses, such as the Dean Foods, Saputos, and Leprinos of the business world. These differences in business structure have advantages and disadvantages. The Hilmar owners, for instance, intentionally chose a non-cooperative, proprietary business structure for their enterprise, although as dairymen they could have organized as a cooperative. (Ahlem Tr., Vol. XXV, pp. 4999-5000 (Oct. 28, 2015).) Proprietary businesses are not restricted by the one-farmer-one-vote and capital dividend payment limitations of the Capper-Volstead Act. Their suppliers have no say over their business operations, investment or marketing strategies, and, of course, no claim on their profits. Thus, the access of the Dean Foods of the world to the capital markets is totally different than that of farmer cooperatives.

At the same time, as noted above, the unique nature of cooperatives as farmer-owned, collective-marketing enterprises has led to that status being recognized as such

in the AMAA and other federal laws. The so-called right of "cooperative reblending" is one of those rights under the AMAA. Cooperative reblending means nothing more than that under federal milk orders when the cooperative has been paid for its members' milk, the milk buyer has satisfied the minimum price obligation to the farmer, and how the milk sales proceeds are handled between the farmer and the cooperative is a matter of contract between the farmer and his cooperative. This "right" is set out in 7 U.S.C. Section 608c(5)(F) of the AMAA:

> (F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

Opponents' complaint is nothing more than an attack upon the dairy farmers' statutory right to market collectively through cooperatives and to finance that cooperative enterprise as they agree. Cooperative "reblending" – *i.e.* paying a price on the member's monthly milk check which is different than, and may be less than, the regulated minimum price applicable to transactions between farmers and proprietary firms – is nothing more than a form of capital financing for the cooperative. The funds not paid belong to the member dairy farmers as owners of the cooperative, a relationship entirely different from that of the proprietary enterprise and its suppliers. The owners of proprietary companies have the same opportunity to finance their

processing enterprises with their own funds, which is all that cooperative farmers do with their cooperatives when they "reblend."

In the context of the complaints that cooperatives have an unfair advantage because of the so-called reblending privilege, it was, and is, most instructive that Dr. Stephenson, who warned of the danger, could identify no real world situation where this imaginary horrible had occurred. (Stephenson Tr., Vol. XXX, pp. 6024-6025 (Nov. 4, 2015).)

Under Proposal No. 1's pricing and pooling provisions, cooperatives have the exact same inclusively-pooled status as non-cooperatives. They incur the exact same minimum price obligation for every hundredweight of milk utilized as do non-cooperatives. What is different is the distribution of the profits and losses from these business enterprises. Proprietary corporations share those profits and losses among the shareholders; cooperatives share the profits and losses among the member producers. It is fundamentally offensive for the DIC and its members to assert that the "negative effects" of Proposal No. 1 "only apply to manufacturing facilities owned by the Cooperatives." If there are losses in the dairy product manufacturing business, those losses are felt by cooperatives just as they are by non-cooperatives. Dairy farmers' money and net worth are just as valuable as that of the DIC companies and their shareholders. These principles apply to the pooling and pricing aspects of Proposal No. 1; and, in fact, to all the issues in the entire hearing. The Department should refuse the DIC's invitation to demean the value of dairy farmer cooperative members' balance sheets and bank accounts differently than that of the proprietary companies.

3. Opponents of Proposal No. 1 Have Misplaced Their Reliance On Historical Cooperative Positions Or Statements.

The DIC and Trihope Dairies cite at several points statements made, or positions articulated, by the Cooperative proponents of Proposal No. 1. The intent is to depict the Cooperatives as insincere, or perhaps even dishonest, in their presentations and testimony in this hearing. What they ignore, but what the Secretary cannot ignore, are the clearly stated reasons that the Cooperatives and their dairy farmer member-owners are requesting a federal order now in this hearing, and not in prior hearings. The explanation was best provided by Dr. Eric Erba of California Dairies, Inc. ("CDI") on the first occasion he testified.[53] He was asked by Mr. Vlahos if he had any comments regarding the changes in CDI's position over time, which he was confronted with on cross-examination and he stated:

> The simple and I think valid explanation is that conditions change over time and positions and objectives of companies changed over time, and that's certainly true for -- for California Dairies, the company that I work for.
>
> I guess I'd like to point out that California Dairies didn't take this hearing lightly at all. We have at least as much invested in manufacturing facilities in California as any other party involved in this hearing. The members of California Dairies have reviewed this proposal in depth, reviewed the process in depth, and have concluded that they -- they want to be part of the national system of Federal order prices. They want to be on the same level playing field as their counterparts outside the state.
>
> And we understood fully when we entered into this that the decision given by USDA at the conclusion of these hearings may work to the disadvantage of CDI's plants, and we'd be challenged to maintain our level of profitability, and we

[53] (*See also*, Wegner Tr. Vol. VIII, pp. 1722-23 (Oct. 1, 2015) (testifying regarding LOL's conscious decisions to make changes regarding its business in California in response to changes in the marketplace).)

> accepted that any way, that the numbers, and we still have go forward with this.
>
> Just like with many other companies out there, we've got profit maximizing goals, but we're a cooperative and we also have an additional goal, at least one additional goal, and that is the goal of service to members. And sometimes the goal of providing service to members and the profitability goal are at odds with each other.
>
> So depending on the conditions, we may have a situation where CDI wears its processor hat and tries to maximize profits out of its plants, and other times it may wear its producer hat and try to maximize the benefits to its member.
>
> And, again, those goals may be at odds with each other. So, I guess what I'm saying, Mr. Vlahos, is that the statements that were made during those CDFA hearings over the last couple years, they were appropriate for the time. They -- they represented CDI's views for the times. They represented the regulatory environment for the times. And I don't think there's anything unusual or improper or maybe even surprising about changing from those positions as the company goals and objectives change.

(Erba Tr., Vol. XI, pp. 2173-2175 (Oct. 6, 2015).

4. Pricing Conclusion And Summary.

Proposal No. 1 Opponents' request to deviate from the uniform, national federal order pricing structure and create "individualized" class prices for the California FMMO because it is "unique," has no justification in policy, in fact, or in law and should be rejected. It is ironic, but instructive, to find that to achieve its objectives, the DIC advocates uniformity in pooling terms, where the USDA policy is that such terms must be "customized" to the order, but now seeks "individualized" and "unique" prices, where the USDA has repeatedly articulated a marketplace-grounded policy for uniformity in manufacturing class prices, and in the national Class I price grid. Adoption of the DIC prices is not justified in terms of California processor costs, which are already built into

the federal order price formula make allowances, and which, as Mr. Hatamiya demonstrated, are not greatly different, if at all different, from the costs of processors elsewhere. (Hatamiya Tr. Vol. XXXIX, pp. 7924-7945 (Nov. 17, 2015); Hearing Exh. 188.)

The request for individualized class prices by the DIC and Leprino is also not justifiable on the basis of any location value price theory, such as that promoted by Dr. Stephenson and Mr. Vetne, which would isolate and elevate one factor, among many, in the commercial marketplace and lead the USDA to create winners and losers via its minimum regulated prices. Finally, the individualized class prices advocated by DIC are not justified by California's size or place in the national market; the federal formulas already give California sales the weighting which they have in the national manufactured dairy products marketplace. (Hearing Exh. 9, Attachments A and B.) Adopting unique, lower prices for a California FMMO would create disorder, rather than promote order, in the national federal order system.

California processors are well-situated to adjust to becoming part of the national federal order price system. They have unmatched economies of scale, efficiency of raw milk assembly, and a huge local market to serve. (Christ Tr. Vol. XII, pp. 2457-70 (Oct. 7, 2015); Hearing Exh. 58, pp. 8-12.) If smaller – much smaller – Wisconsin and Vermont plants buying milk at federal order prices, plus premiums, can compete in California, as we know they can, California processors can compete from coast to coast with the same minimum regulated prices. The California processor with as much or more money invested in processing assets than any other entity – CDI – is prepared to

go forward and join the rest of the country in the federal order system and its request, and that of its Proposal No. 1 colleagues, should be granted.

VI. THE CALIFORNIA FMMO MUST RECOGNIZE QUOTA VALUE AS EXPRESSLY AUTHORIZED BY THE FARM BILL.

In this section, the Cooperatives respond to Section VIII of the DIC's Brief on the subject of quota.[54] For an Organization that claims that it and its members "did not set out, nor [was it their] goal, to destroy quota" (Hearing Exh. 145, p. 1), the DIC's Brief spends an extraordinary amount of verbiage on quota (*i.e.*, pp. 12, 14 and 20-37 of its Section IV, pp. 65-68 of its Section VI and pp. 124-143 of its Section VIII,[55] almost all of which is devoted to claiming that the USDA lacks legal authority to continue the California quota program, that the Cooperatives' Proposal No. 1 erects a trade barrier, that the recognition of quota value is really discretionary, that the DIC Proposal No. 2 that destroys quota value in a short period of time is okay since quota is at least recognized on the first effective day of a California FMMO, and that quota should be retired/eliminated. If the intent was not to destroy quota, that intent was exceedingly well-disguised.[56]

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[54] Most of the DIC's Section VIII is a rehash of and/or is premised and relies upon the validity of its "trade barrier," and "quota violates AMAA regarding uniform prices" claims. These claims have been rebutted in our Post-Hearing Brief at Section IV.C, and this Reply Brief at Section II.B.3, *supra.* The same opposition is presented, without distinction, by Trihope's Brief, pp. 24-28.

[55] This totals 44 pages. In other words, 27% of the DIC's 163 page brief is devoted to debunking quota. And as 14 pages of that brief (Section IX) oppose Proposal Nos. 3 and 4, the anti-quota percentage jumps to 29.5%.

[56] The concentration on quota is also extraordinary in that, prior to these proceedings, the DIC has taken the position that, as quota is about redistribution of producer revenues amongst themselves, the quota system was viewed as a producer program, not of concern to the DIC (Schiek Tr., Vol. XXXIII, pp. 6688-89 (Nov. 9, 2015).) But now that a relatively quick demise of quota might nix the chances of a producer-approved, California FMMO, the DIC and its members have become keenly interested.

A. Proposal No. 1, As Amended, Imposes No Trade Barrier Under 7 U.S.C. Section 608c(5)(G).

Much of the attack on quota concerns the claim that Proposal No. 1 erects a trade barrier because it would cover out-of-state producers shipping milk to California plants and provide for their receipt of a blend price after deduction of the quota premium. However, the Cooperatives' Amendment to Proposal No. 1, that provides for payment to such out-of-state producers of a pool blend before deduction of the quota premium and grants to their purchasing handlers the same transportation credits as afforded handlers purchasing from California producers, completely rebuts Opponents' trade barrier contention. As explained in the Cooperatives' Post-Hearing Brief at Section IV.C, and this Reply Brief at Section II.B.3, *supra*, with the amendment out-of-state producers actually would fare better than in-state producers with respect to milk not covered by quota.[57]

B. There Is No Merit To The Position That Quota Value Should Not Be Recognized For Economic Reasons.

The DIC argues that quota has no basis in dairy regulations, because it does not direct milk to fluid uses or create more efficient movement of milk.

Of course, this contention is premised on acceptance of the Opponents' argument that the FMMOs are limited under the AMAA to these concerns, which, as demonstrated, supra, in Section III.B. of this Reply Brief, is not the case. More

[57] The DIC speculates that the ability of out-of-state producers to ship into California and receive a higher in-plant blend price was somehow "compensation" for their being unable to acquire quota. Nonsense. There is not one scintilla of evidence in the record to support this speculation. In effect, out-of-state producers were able to receive in-plant blend prices by taking an artificial indirect advantage created by California's regulatory system.

importantly, to adopt Opponents' economic view would be to ignore the Farm Bill's mandate to recognize the value of quota.

C. California Quota Holders Benefit From Quota Both As A Steady Income Source And As A Capitalized Asset.

Opponents assert that California producers with quota cannot simultaneously receive the benefit of quota's steady income stream and its capitalized asset value because the latter can be realized only upon sale, upon which the income stream is lost.

What this has to do with recognition of quota value is unclear. What is more, it is wrong. One of the key needs of dairy farmers is access to credit and the ability to borrow for a variety of purposes. Uncontradicted testimony established that producers use their quota holdings as a basis to secure financing, and that banks utilize quota value as support for financing dairy farmers, either as collateral or balance sheet support.[58]

D. The Uniform Pricing Provisions Of The AMAA Do Not Bar Recognition Of Quota By Means Of Reblending.

As a further objection to quota, Opponents rely on the legal proposition that the AMAA, particularly 7 U.S.C. 608c(5)(B), bars paying producers with quota differently from other producers to the extent of their milk not covered by quota. This proposition is in turn dependent on Opponents' contention concerning the fact that the Farm Bill did not expressly amend the AMAA. These propositions have been fully rebutted in Section

[58] The DIC further asserts that quota's value fluctuates for a variety of reasons. But quota has always had value, from the month after July 1969, the effective date of the Pooling Plan, to date, rising from initial values in the low one hundreds of dollars per pound to the current $500 plus per pound. Prices have generally been in the $500 plus per pound range since June 2014. (Exh. 4B of Hearing Exh. 43, accompanying Hearing Exh. 42.)

IV of the Cooperatives' Post-Hearing Brief at pages 36-50, and in this Reply Brief, *supra*, at Section II.B.3.

It is worthy to note that while championing the sanctity of uniform prices to producers, the DIC's own Proposal No. 2 also creates a two tier price system for quota holders vs. non-quota holders. This is a tacit admission that it is really impossible to recognize quota value by reblending and distributing receipts without, in some way or another, creating two tiers. This reality further undermines the argument that the AMAA trumps the Farm Bill.

Recognizing its own proposal is contrary to its own argument, the DIC weakly submits that Proposal No. 2 complies with the "uniform prices" principle because under that Proposal a producer would receive a price different from the order blend price only if the producer voluntarily opted into the quota blend program.[59] (DIC Brief, pp. 135-36.)

But the point is, until all producers are out of the quota pool, there are two different pools, even under Proposal No. 2. Again, it is impossible to recognize quota value by reblending and distributing receipts without creating different prices.

One should also step back and reflect on why the AMAA speaks to uniformity of prices. It is not that "uniformity" standing alone is an immutable golden principle, but rather that uniformity has a practical purpose: to assure that all producers receive a uniform minimum price for all milk delivered to any handler <u>regardless of the uses to which the milk is put</u>. Section 608c(5)(B)(ii) provides:

> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for

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[59] Significantly, to make this point, the DIC misstates its own proposal. Under Proposal No. 2, producers are in the quota pool unless they opt out.

> all milk so delivered, irrespective of the uses of such milk by the individual handler to whom it is delivered.

The Cooperatives' Proposal No. 1 fully complies with this principle.

E. Proposal No. 2 Is Not Designed To Recognize Quota Value; It Is Designed, And Its Economic Effect Is, To Destroy Quota.

From these proceedings the DIC certainly is aware, if indeed it was not aware before, that its proposal would destroy quota in a short period of time. The DIC's economist and principal witness, Dr. Schiek, conceded that the DIC realized Proposal No. 2 for what it is:

> Q. Okay. You indicated that, in your testimony at page 1, that the Dairy Institute and its members did not set out nor was it your goal, this is [sic: should be: "that is,"] a Dairy Institute and its members goal, to destroy quota; is that correct?
>
> A That's correct.
>
> Q. Did you, when you made that statement, recognize that there were those who felt that by virtually the way Proposal 2 worked, that it would, in fact, destroy quota eventually?
>
> A. Yeah. I believe that we understood, as I said in my testimony, that given what happened with the Oregon program, that quota would probably go away over time. What we didn't understand was the analysis that basically indicated it would occur more quickly. That was something we weren't aware of.

(Schiek Tr., Vol. XXXIII, p. 6690 (Nov. 9, 2015).)

* * * * * *

> Q. Now, keeping that comment in mind, you are aware that the preliminary economic analysis, impact analysis, predicated that after three decision points, quota essentially would be gone.
>
> A. Yes, I'm aware of that.
>
> Q. And you were present during Mr. Hatamiya's testimony, correct?

A. I was.

Q. And in his analysis it would take four decision points, by that time quota would essentially be gone.

A. Yes, I remember that.

Q. And you acknowledge that after some period of time, it is really true that quota would essentially be gone.

A. Yes, I believe after a some period of time. It is a question of how long.

Q. So your only question is how long it would take?

A. That's accurate.

(*Id.* at p. 6706.)

* * * * * *

Q. Okay. So, now, when did you come up with the proposal in Exhibit 191?

A. So this was developed much more recently. As I said when, again last week, when we got to the hearing when we saw USDA's preliminary analysis and heard their analysis of our original proposal and the, sort of way it would lead to quota's demise after several decision steps, we felt like we needed to talk about other alternatives as a way to recognize quota value.

(Schiek Tr., Vol. XXXIX, p. 8016 (Nov. 17, 2015).)

Yet, despite the realization of the rather quick destruction of quota under Proposal No. 2, the DIC stubbornly clings to the position that its Proposal does indeed comply with the provisions of the Farm Bill. It contends that payment of the 19.5 cent premium per pound of quota solids-not-fat is sufficient recognition of quota value (DIC Brief, p. 126) - blatantly untrue if quota is destroyed in three to four decision points.

Realizing that its Proposal No. 2 quota ship will founder upon the shoals and be destroyed, the DIC attempts to throw out some lifelines in hope that it can save something. (Schiek Tr., Vol. XXXIII, p. 6708 (Nov. 9, 2015).)

First, the DIC suggests that, perhaps, the elimination of quota may not happen as quickly as predicted because of the "social and communal importance that quota has in the California dairy industry . . . ." (*Id.*) In other words, the psychic income and warm feelings derived from quota will overcome the adverse economic consequences of staying in the pool. Given that many of California's dairy farmers are on the edge financially and often faced with prices that do not meet the cost of production, to say this outcome is extraordinarily unlikely would be a considerable understatement. We must conclude that, as the DIC itself has concluded, "It is unquestionable that farmers will act in their own best interests . . . ." (DIC Brief, p. 141.) As Dr. Schiek testified,

> Q. And you think that producers would be, if there were such a proposal, that they would not have the economic incentives to opt out, so-to-speak?
>
> A. If there were such a proposal as Proposal 2, is your question would they have economic incentives to opt out?
>
> Q. Yes.
>
> A. Yes, they would.
>
> Q. Okay. At the bottom of page 13, and I think it is the second to the last sentence, it's the one that begins "as such", and I'll quote it. "As such, it may be that the economic decisions suggested by the preliminary economic analysis and Mr. Hatamiya's testimony, may not happen in the timeframe expected." What if they did happen in the timeframe expected? Excuse me, the timeframe expected, yes.
>
> A. Then it would be a rapid reduction or rapid decline in quota.

(Schiek Tr., Vol. XXXIII, p. 6708 (Nov. 9, 2015).)

This argument is based on a fiction that there is a realistic choice for dairy farmers, but it is in fact a Hobson's Choice. The DIC itself concedes that the strong

economic incentives for producers to abandon the quota pool will prevail. (Schiek Tr. Vol. XXXIII, p. 6708 (Nov. 9, 2015) and DIC Brief, p. 141.) To paraphrase the primacy of financial concerns as H.L. Mencken more bluntly expressed it, "When [they say] it's not about the money, it's about the money."

Next, the DIC further maintains that the fact that quota may quickly disappear is immaterial because "[o]n the day a new California FMMO is implemented, quota value will be recognized." What happens after opening day, however, "has no legal relevance." (DIC Brief, p. 140.) The "no relevance" argument is based on the DIC's cynical proposition that, after all, if California dairy farmers opt out of the quota pool after the effective date of a DIC-style California FMMO, that would be a purely voluntary act and not a feature of Proposal No. 2, and that those still remaining in the pool would get the quota premium. What makes this proposition particularly mendacious is that it ignores the powerful economic forces unleashed by Proposal No. 2 that, in a short period of time, would drive all quota holders out of the quota pool and thus totally destroy or eliminate quota, a result that even the DIC has conceded would occur, but which the DIC has conveniently chosen to ignore in making this argument. The DIC's argument is excruciatingly disingenuous, but at least it provides illumination as to the DIC's interpretation of the word *recognize*: to pay lip service to.

The DIC suggests that the USDA could rescue its Proposal regarding quota by making the option to not participate in the quota pool reversible. Although the "irrevocable option" language makes the DIC quota proposal particularly Draconian, its elimination does not alter the inevitable result that quota and quota value would be

quickly destroyed; it is the powerful economic incentives to opt out that propel that result.

Turning from economics, the DIC argues that the USDA could not orderly administer a California FMMO because it is subject to California law. Why not? Apparently, the USDA was able to administer a joint federal-state program in Oregon (which the DIC says was its model for Proposal No. 2 on quota) and has jointly administered programs with New York and New Jersey.[60] Let's examine some of the particulars cited by the DIC:

- "USDA could not change the quota program to correct features violating the AMAA:"[61] But, as demonstrated in this Reply Brief, nothing in the quota program or in the Farm Bill violates the AMAA. The supposed violation is fashioned only from the DIC's construct of the interplay between the AMAA and the Farm Bill.
- "California could make changes in the quota program:" As an example, the DIC suggests that if the USDA were to adopt a California FMMO that recognized the exempt quota afforded to producer-handlers, nothing would stop producer-handlers from running to the California legislature for more exempt quota. Of course, arguable, the USDA needn't recognize California exempt quota in the FMMO or, if it did, it could limit the

[60] *See* Hearing Exh. 43 (4.E and 4.F).

[61] The quotation marks used in these bullet points do not suggest direct quotations from DIC's Brief. Rather, they are meant as a shorthand way of describing DIC's claims.

exemption to that existing at the time of the FMMOs adoption.[62] This is all very speculative, but the point is that the USDA would retain the flexibility to alter a California FMMO to adjust to any changes in the California program.[63]

The DIC suggests that the USDA could "compromise" in recognition of quota, citing the annuity proposals it threw out as alternatives to its Proposal No. 2 when the DIC recognized its Proposal would lead to "quota's demise after several decision steps." (Schiek Tr., Vol. XXXIX, p. 8016 (Nov. 17, 2015).) The myriad problems with these alternatives, the lack of USDA mechanisms to implement them, and the lack of a source to fund them have been amply covered and will not be repeated here. (Cooperatives' Post-Hearing Brief, pp. 143-45.)

The intent of the DIC's quota proposal is revealed on page 142 of its brief: "If California is permitted to join the Federal System and California producers are also allowed to receive a quota price for their milk, then the USDA under the AMAA must limit the time period for receipt of such quota." The DIC cites no provisions in either the AMAA or the Farm Bill that require that result – for good reason: there are none.

The red herring nature of the DIC's various attacks on Proposal No. 1 regarding quota is evident in its admission that "[a]dmittedly, this challenge is a shortcoming faced by all proposals to the USDA, including Dairy Institute's." (DIC Brief, p. 139.) But although the California quota system is unique, and the Farm Bill's mandate is unique, a

[62] The idea that California would grant additional producer-handler exempt quota is far-fetched to say the least.

[63] Changes by California in its quota program have been few indeed, particularly in recent decades.

California FMMO can be crafted to satisfactorily accommodate both. Proposal No. 1 accomplishes that result. Proposal No. 2 does not.[64]

VII. ADDITIONAL OPPOSITION TO PROPOSAL NO. 1 IS MERITLESS.

While the bulk of the issues raised by the various post-hearing briefs which oppose some portion or provision of the Cooperatives' Proposal No. 1 are addressed largely by this Reply's response to the brief of the DIC, there are a few issues the Cooperatives address individually, so that the record clearly reflects none of them are barriers to issuance of a California FMMO.

A. The USDA Does Not Have An Obligation To Predict And Offset Illusory Impact In Other Markets Before Issuance Of A California FMMO.

Several parties,[65] while largely supporting the efforts of the California Cooperatives to petition for a California FMMO under the express grant of the AMAA and Farm Bill, have wrongly suggested that in order to do so, the Secretary must address, whether through findings of fact or remedial measures in the FMMO, some hypothetical and unproven "uncertainties" that issuance of a California FMMO might have on orderly milk marketing in the other regions of the country. This proposition is unfounded and has no basis in law or fact.

The language of the Farm Bill is clear. The Farm Bill mandates that "[u]pon the petition and approval of California dairy producers" the Secretary "shall designate the

[64] In addition to its substantive flaws, Proposal No. 2 is riddled with drafting errors, incorrect or missing internal references, etc. (Schiek Tr., Vol. XXXIII, pp. 6715-26 (Nov. 9, 2015) (reviewing some but not all of these problems.) As drafted, Proposal No. 2 doesn't work.

[65] *See* Maine Dairy Industry Association, Kentucky Dairy Development Council, Georgia Milk Producers, Inc., Tennessee Dairy Producers Association, and Walter Whitcomb Briefs (collectively hereafter "NE Industry Briefs") at pp. 29-31 and 1-3, respectively. Trihope Dairy Farms, while not supporting an FMMO for California, also raised this non-issue as one basis for its opposition. (Trihope Brief, pp. 6-14.)

State of California as a separate Federal milk marketing order." 7 U.S.C. § 7253(2). The producers of California are not required to show that the California FMMO will have zero impact on other regions. Nor can they be expected to disprove these parties' hypothetical fears about what may or may not happen upon issuance of a California FMMO – that kind of speculation is not only unhelpful, but impossible to address.

Rather, the Cooperatives need only demonstrate a California FMMO will "maintain orderly marketing conditions that will result in parity prices for farmers and will protect consumers." *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 411 (3rd Cir. 1987). They have done this in the record before the Secretary. In fact, the NE Industry Briefs themselves acknowledge that the Cooperatives did provide evidence that the impact on other markets would not lead to the hypothetical doomsday scenarios. (NE Industry Briefs, pp. 2-3, 27-29.)

Furthermore, every Order has provisions for seeking amendment or redress, and under certain conditions, the Secretary has discretion to act swiftly. Thus, these parties' request[66] for the Secretary to build into the California FMMO, or into other already codified orders, some special remedial measures in the event their doomsday hypotheticals ever become reality, is unnecessary. Like all producers subject to FMMOs, should producers in any state need amendment of their Order, they have the methods at their disposal created for them by the Secretary and Congress.

[66] (NE Dairy Industry Briefs, pp. 3-5, 32-33.)

B. Forcing A PPD System On California Producers Is Confusing And Does Not Establish Orderly Marketing.

National All-Jersey also objects to the Cooperatives' Proposal because, like the California system currently in place and known and understood by California producers and handlers, Proposal No. 1 does not include a producer price differential ("PPD.") (National All-Jersey Brief, pp. 1-4.) They are correct. In the California FMMO under Proposal No. 1, there will be no PPD value, as such, paid to producers. (Wegner Tr., Vol. VIII, pp. 1580-1 (Oct. 1, 2015).) Instead, the funds generated from the PPD value computation will be paid across all three components in a ratio representative of their value in the pool. (Wegner Tr., Vol. VIII, p. 1581 (Oct. 1, 2015).) The PPD concept, in the Cooperatives' view, adds an unnecessary level of complication to the understanding of the FMMO pricing. (*Id.*) More specifically, negative PPDs that can occur when increases in commodity prices lead to class price inversions are even more difficult to explain to producers. (*Id.*) Additionally, since the existing California system does not include a PPD, eliminating a PPD will mean one less pricing complexity and thus less chance of confusing disorder.

C. The Concerns Raised By Ponderosa Dairy And The California Producer-Handlers Association In Their Briefs Have Been Addressed By The Cooperatives.

Because the Cooperatives have expressly amended their Proposal No. 1 to provide for a pre-quota-deduction blend price for out-of-state producers, and to allow transportation credits to be applicable to deliveries from out-of-state locations within 175 miles, the issues raised by Ponderosa Dairy have been addressed. (*See* Cooperatives' Post-Hearing Brief, pp. 133, 147-48.) Also, as Dr. Erba testified on the last day of the hearing, (Erba Tr., Vol. XXXX, pp. 8108-09 (Nov. 18, 2015)), while taking no position on

the specifics of the language proposed, the Cooperatives do not oppose in concept the recognition of exempt quota as advocated by the California Producer-Handlers Association.

D. The Cooperatives Do Not Object To The Dean Foods And DIC Fluid Carrier Provision For "Three-Factor" Class I Pricing.

Dean Foods has proposed, and the DIC has supported, a fluid carrier price for Class I, making the Class I price a "three-factor" price. (DIC Brief, p. 161; Dean Foods' Brief, pp. 4-8.) Subject to the express understanding that adoption of this fluid carrier/three-factor price does not negatively impact Class I prices otherwise applicable, the Cooperatives have evaluated the proposal and do not object to it.

E. Proprietary Bulk Tank Handler.

The Cooperatives continue to oppose the Proprietary Bulk Tank Handler ("PBTH") provision (Proposal No. 2 section 1051.12(a)(2)) on the grounds stated in our Post-Hearing Brief at p. 121. We did not find any specific discussion of that proposal in the briefs opposing Proposal No. 1 or in the briefs supporting Proposal No. 2. Therefore, we simply reiterate here our opposition on the grounds that the provision is unnecessary, prone to create disorder, and, as proposed, administratively unworkable.

As we stated: The mischief that comes with a PBTH order provision is documented in the Western Order experience. *Milk in the Pacific Northwest and Western Marketing Areas; Propose Rule*, 68 Fed. Reg. 49375-49390 (Aug. 18, 2003). That experience should not be repeated here.

F. Proposal No. 2's Increased Shrinkage Allowance For Section 7(B) Plants Is Unwarranted And Unsupported By The Evidence.

In Proposal No. 2, the DIC requests changes to the standard shrinkage allowance provided in uniform §1051.43 to accommodate purported excess shrinkage in

§1051.7(b) plants for extended shelf life (or ESL) dairy products. In particular, the DIC's proposal seeks an unprecedented shrinkage allowance of an additional 3% more than what is currently provided in the uniform provisions and the Cooperatives' proposal. (Compare Exh. 1, pp. 47214 (Cooperatives' proposal for §1051.43, adopting the uniform provision) and 47226 (DIC's proposal for §1051.43, changes set forth in subsections (b)(1)(i)-(v)).) Despite providing testimony of four different witnesses, including one expert, the DIC failed to justify this substantial change. Indeed, the DIC's insertion of this major change to a uniform provision into this promulgation hearing is inappropriate; rather than one more rifle shot across the bow of this contested hearing, it should be the subject of a national hearing.

As Mr. Schad explained in his rebuttal testimony, the DIC's expert's study of federally pooled Section 7(b) plants and CSO pooled plants was inadequate proof because it included at least 6 plants that are not pool distributing plants and therefore not even subject to shrinkage provisions. (Hearing Exh. 185, p. 12.) Further, the USDA's table of 7(b) plants with excess shrinkage referenced by the DIC also fails to provide support because it included no California plants in its study. (*Id.*) Moreover, because ESL products are value-added products for which manufacturers like HP Hood already receive a premium in the market, this additional excess shrinkage allowance is unwarranted. (*Id.*) Indeed, the manufacturing costs cited by HP Hood in its Post-Hearing Brief are not so unusually significant as to require such a substantial change to this uniform provision.

VIII. GENERAL COMMENTS REGARDING PRODUCTION HISTORY IN CALIFORNIA.

The DIC devotes considerable attention to the historical trends in California milk production over the past several decades, going as far back as 1970 (DIC Brief, p. 84), for the purpose of exhorting the USDA to "set prices at a level that send[s] the proper production signals to California producers" (*Id.* at p. 88), so that "production reflects a long-delayed recalibration that the California market needs to undergo." (*Id.* at p. 89.) What the DIC wants, of course, is the continuation of the current bottom-of-the-barrel CSO pricing regimen. The DIC would have the USDA seriously misread the record of this hearing, and the USDA should decline the invitation.

We emphasize in the Introduction and the Conclusion to this Reply Brief the raw, current data on production in California: production for 2016 is actually down from 2013, three years earlier (p. 2, *supra*, USDA, NASS data), and the Cooperatives' aggregate volumes were down more than 7%, year over year, during the 2015 period of the hearing. (Erba Tr., Vol. XXXX, pp. 8112-13 (Nov. 18, 2015).) These current, real world numbers don't fit very well on the charts and graphs – which end in 2014 – in the DIC worldview. (DIC Brief, pp. 85-86). The DIC continues to see the world through the same lens as the USDA baseline projector (DIC Brief, p. 97), but the hearing testimony of the California dairy farmers tells a different story.

The unanimity of the testimony of the over 30 California dairy farmers at the hearing was truly incredible when considered in the context of any federal order hearing precedent. There has probably never been a promulgation hearing without dissenting producer voices as the nature of the economics of pooling and pricing always tends to create some losers and winners. In the Carolina hearing, for instance, the proposed

order was opposed by the Carolina Guernsey Producers' Association. 55 Fed. Reg. at 25621 (June 22, 1990). In another recent example, producer opposition led to defeat of federal order expansion into state-regulated areas of Pennsylvania in 1985. *See Lehigh Valley Farmers v. Block*, 829 F.2d 409 (3rd Cir. 1987). But, in this hearing there was not a single California producer voice heard in opposition to the proposed FMMO.

Sometimes silence speaks as eloquently as many words and it did so in this hearing. Not a single one of Hilmar's 200 producer suppliers came to support its cause. All of the independent producers under contract with Leprino, Dean Foods, Saputo, and Hood spoke eloquently with their silence as well. The reason that no producer dissenting voices were heard is that California milk production economics are not what they once were. The graphs of years past do not depict the present painful reality.

The days of the "California advantage" are history, as lifelong California dairy farmer Rien Doornenbal testified at the outset of his detailed narrative of more than 40 years' dairying in California: "California dairy farmers have lost their competitive advantage." (Doornenbal Tr., Vol. XXXII, p. 6498 (Nov. 6, 2015).) When a California producer receives $3.25 to $3.75 per hundredweight less for his production of the same components, in the same month, on his California dairy as on his Order 30 dairy in Minnesota, he can no longer compete. (Fluegel Tr., Vol. XV, pp. 2981-82 (Oct. 14, 2015).) The "astonishing number" of 13 dairies which dispersed in the last 60 days in Melvin Medeiros' neighborhood could no longer compete. (Medeiros Tr., Vol. XXXVII, p. 7510 (Nov. 13, 2015).) Without being on the "level playing field" so urgently requested by California producers to be provided by the national federal order system of prices, the California dairy industry can no longer compete as it was able to do over the

past decades. It shows in the current production, and in the live, sworn testimony of the California producers. The DIC's stale statistics, its appeal for a continued "period of readjustment" and "recalibration" (DIC Brief, pp. 87, 89), and its "take-your-medicine" lecture to California dairy farmers should be rejected and Proposal No. 1 adopted.

IX. CONCLUSION

Forty days of hearings, over 8,000 pages of transcripts, exhibits consuming reams of paper sufficient to have destroyed an entire forest – and from this some immutable propositions emerge:

- Because California's state regulatory system has failed to keep pace with the economic provisions of the nation's FMMOs, California dairy farmers are suffering and the California dairy industry faces very serious problems, well summarized in the testimony of Dr. Erba on the final day of the hearings:

  Q. Okay. And Dr. Erba, do you have some comments of the, on your view of the state of the dairy industry in California as it stands now in 2015?

  A. I do. And we have talked about a lot of different pieces of data, mounds of data really, and I don't want this to get lost in all the data that we have talked about over the last 40 days. And that is, what is our status today?

  If we look at the - - what's happening to the three co-ops that submitted Proposal 1, and look at the year-to-date milk production, and taking all of our information into account, we are 5.2 percent lower year-to-date through October than we were last year for the same time period. Unfortunately, what we have all seen is that this is accelerating, so we have actually gotten worse if you look at the more recent months. And I'll just give you the example. If we look at just October of 2015 and October of 2014, that average is not 5.2, it is now almost 7.69 percent. And

again, that represents data from the three co-ops combined.

Q. Do you foresee any continuation of the trend?

A. Unfortunately, yes. That acceleration that we have seen in 2015 is not a mistake. There's been a lot of changes in the structure of the industry. We have seen this all year long. There are a lot of choices out there. We have heard about that for, again, the last 40 days from different witnesses, including producers, about the different competition risks for resources, and I am thinking of land and water specifically. And the producers that have chosen to stay with the dairy industry are looking to diversify, get into other parts of agriculture perhaps, not just strictly dairy. And there are some that have said, I'm done with the dairy industry, I'm going to sell my land, or perhaps I'll turn my land into orchards, or trees, or other permanent crops, and I don't - - those dairies aren't coming back. So the fact that this trend is accelerating is more than a little bit alarming to us.

Q. Do you think that adoption of Proposal Number 2 would have any impact on that trend?

A. I don't think it would change anything in terms of the trend itself, it may even make it worse. Things are going to happen, and there may be, the different proposals may have different impacts. But for certain, Proposal 1 is actually one that would actually save some of this from happening, Proposal 2 would not.

(Erba Tr., Vol. XXXX, pp. 8111-8113 (Nov. 18, 2015).)

- California is a huge part of the national dairy industry and the only major national player not regulated under the FMMO system.
- The USDA has repeatedly recognized that the markets for the products of milk are national, not regional or local, and has established a long standing policy that the minimum prices for milk for manufacturing uses be uniform nationally, not regional or local.

- Congress has recognized the importance of the California dairy industry and has twice, in 1996 and 2014, enacted legislation inviting California to become part of the FMMO system upon petition of its dairy farmers and their approval by referendum of a California FMMO.
- The provisions in the 2014 Farm Bill regarding adoption of a California FMMO and recognition of the value of California quota must be given effect, notwithstanding the fact that they did not expressly amend the AMAA.
- These are important unique features of the California dairy industry that must be accommodated in a California FMMO in order for it to operate properly without planting the seeds of market disorder:
  - The long-standing quota system, in effect since 1969 upon which a large segment of California's dairy farmers have based their investments, operational decisions, and financing, a system all of California producers and, indeed, the DIC, its members, and other manufacturing handlers have lived with for almost half a century must be retained.
  - California's regulatory system provides, in effect, for inclusive pooling, the demise of which would lead to extremely disorderly marketing conditions, given the unique structure of the California industry – consisting of relatively few manufacturing handlers with large volumes of both Class III and IV usages.

- Support for adoption of Proposal No. 1 as the California FMMO is virtually universal in the dairy producer community – the major cooperatives, the major trade associations and individual producers. As noted in the Cooperatives' Post-Hearing Brief, all producers support maintenance of quota, even those like Mr. Machado, who do not own "a single pound of quota." (Post-Hearing Brief, p. 15; Machado Tr., Vol. VI, pp. 1312-1313 (Sept. 29, 2015).)

How do the DIC and the Cooperatives' proposals stack up against these principles?

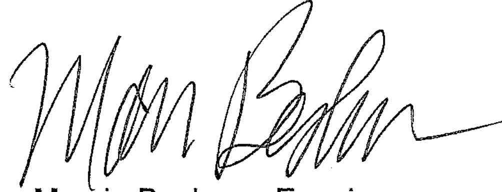
Proposal No. 2 would have the uniform pricing provisions of the AMAA essentially denigrate the Farm Bill and leave it with little or no meaningful effect. It would establish a pricing system for a California FMMO different from and lower than that of all other FMMOs, even those geographically adjacent to California, in violation of longstanding USDA policy. It would perpetuate the lower minimum pricing differences between California and the rest of the nation's FMMOs that have provided a major motivation for California's dairy farmers to petition for a California FMMO. It would allow depooling that, given the unique structure of the state's dairy industry, would plant the seeds for future frequent and continuous market disruption. It would destroy the value of quota, and even quota itself, in a short period of time.

The Cooperatives' Proposal No. 1, on the other hand, would directly address the economic problems of dairy farmers that flow from the discrepancy between California's state order minimum prices and those in existing FMMOs; comply with USDA policy of uniform minimum prices throughout the FMMO system; recognize the unique features of

the California dairy industry, the long history of the quota system and the inclusive nature of its pooling provisions since 1969, abrupt changes in which would be extremely disruptive; and fully recognize the value of California quota.

The opportunity to bring California into the federal milk regulatory system is before us. That opportunity, if missed, may not occur again for a generation, if at all. The Cooperatives, on behalf of themselves and all segments of the dairy producer industry, urge the USDA and the Secretary to seize the opportunity, reject Proposal No. 2, and adopt Proposal No. 1 as the California FMMO.

Respectfully submitted,



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Date: May 16, 2016

Attorneys for California Dairies, Inc., Dairy Farmers of America, Inc. and Land O'Lakes, Inc.

Agricultural Marketing Agreement Act of 1937

EXHIBIT 1

work or material shall remain available for payment therefor as in the case of orders or contracts placed with private contractors."

Approved, June 2, 1937.

[CHAPTER 295]

AN ACT

June 3, 1937
[H. R. 3473]
[Public, No. 136]

To authorize the Secretary of State to sell, for a price, transfer, and convey the title, rights, and interest of this Government in a lot situated at Sin Lu T'ou Jetty, Kulangsu, Amoy, China.

Amoy, China.
Sale, etc., of lot authorized.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State is hereby authorized to sell, transfer, and convey all the title, rights, and interest of this Government in a foreshore lot, approximately one hundred feet long by one hundred feet wide, situated at Sin Lu T'ou Jetty, sometimes called "Lu Erh Chiao", Kulangsu, Amoy, China, for a price of not less than 1,000 yuan (Chinese dollars): *Provided*, That the net amount received from such sale remaining after the deduction of all necessary fees and expenses shall be covered into the Treasury of the United States as miscellaneous receipts.

Proviso.
Use of receipts.

Approved, June 3, 1937.

[CHAPTER 296]

AN ACT

June 3, 1937
[H. R. 5722]
[Public, No. 137]

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Agricultural Marketing Agreement Act of 1937.
Designated provisions of Agricultural Adjustment Act reenacted, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

7 U. S. C. § 601.
7 U. S. C., Supp. II, § 602.
7 U. S. C. § 608a; Supp. II, § 608a.
7 U. S. C., Supp. II, § 608b.
7 U. S. C., Supp. II, § 608c.
7 U. S. C., Supp. II, § 608d.
7 U. S. C., Supp. II, § 608e.
7 U. S. C. § 610; Supp. II, § 610.
7 U. S. C. § 612; Supp. II, § 612.
7 U. S. C. § 614.
12 U. S. C. § 781; Supp. II, § 781.
Post, p. 563.

(a) Section 1 (relating to the declaration of emergency);

(b) Section 2 (relating to declaration of policy);

(c) Section 8a (5), (6), (7), (8), and (9) (relating to violations and enforcement);

(d) Section 8b (relating to marketing agreements);

(e) Section 8c (relating to orders);

(f) Section 8d (relating to books and records);

(g) Section 8e (relating to determination of base period);

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

(i) Section 12 (a) and (c) (relating to appropriation and expenses);

(j) Section 14 (relating to separability);

(k) Section 22 (relating to imports).

SEC. 2. The following provisions, reenacted in section 1 of this Act, are amended as follows:

(a) Section 1 is amended to read as follows:

"DECLARATION

Declaration.

"It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which

support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

Establishing, etc., orderly marketing conditions.

(b) Section 2 (1) is amended by striking out "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish" and inserting in lieu thereof the following: "orderly marketing conditions for agricultural commodities in interstate commerce as will establish".

District Courts; jurisdiction. 48 Stat. 675; 49 Stat. 762.

(c) Section 8a (6) is amended by striking out ", the provisions of this section, or of".

Milk price adjustments. 49 Stat. 755.

(d) Section 8c (5) (B) (d) is amended by striking out "production" and inserting in lieu thereof "marketings".

Allotments. 49 Stat. 756.

(e) Section 8c (6) (B) is amended by striking out "produced or"; and by striking out "production or sales of" and inserting in lieu thereof "quantities available for sale by".

Section added. 49 Stat. 761.

(f) Section 8c is amended by adding at the end thereof the following:

"MILK PRICES

Milk prices.

"(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

48 Stat. 32; 49 Stat. 750, 762.

49 Stat. 752, 753.

Adjustments.

"PRODUCER REFERENDUM

Producer referendum.

"(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required

Cooperative association representation.
49 Stat. 759.

under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12)."

Conversion factors; provision repealed.
48 Stat. 37.

(g) Section 10 (c) is amended by striking out ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

Geographical application.
48 Stat. 37, 675.

(h) Section 10 (f) is amended by striking out the last sentence thereof.

(i) Section 10 is amended by adding at the end thereof the following new subsection:

"Interstate or foreign commerce" defined.

"(j) The term 'interstate or foreign commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word 'State' includes Territory, the District of Columbia, possession of the United States, and foreign nations."

Agricultural commodity, etc., marketing transaction.

"State" construed.

Appropriations.
48 Stat. 528.

(j) Section 12 (a) is amended by striking out "and production adjustments".

Arbitration of milk disputes.

SEC. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this Act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

Conduct of meetings.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

Approval of award.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department

of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

Agreements, etc., not deemed violation of antitrust laws.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Agreements, orders, etc., under Agricultural Adjustment Act ratified.

SEC. 4. Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Agricultural Adjustment Act.
No processing, etc., taxes to be levied under.
Provisions affected.

SEC. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this Act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this Act) to the provisions of the Agricultural Adjustment Act, this Act, and other provisions of law to which they have been heretofore made applicable.

Applicability.

Short title.

SEC. 6. This Act may be cited as the "Agricultural Marketing Agreement Act of 1937".

Approved, June 3, 1937.

[CHAPTER 297]

JOINT RESOLUTION

June 3, 1937
[H. J. Res. 193]
[Pub. Res., No. 38]

To authorize an appropriation for the expenses of participation by the United States in the Eleventh International Dairy Congress, Berlin, Germany, in 1937.

Eleventh International Dairy Congress.
Appropriation authorized for participation expenses.
Post, p. 770.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of defraying the expenses of participation by the Government of the United States in the Eleventh International Dairy Congress, to be held in Berlin, Germany, in 1937, an appropriation in the sum of $10,000, or so much thereof as may be necessary, is hereby authorized for personal services in the District of Columbia or elsewhere without reference to the Classification Act of 1923, as amended, stenographic reporting and other services by contract if deemed necessary without regard to section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5); rent; traveling expenses; purchase of necessary books, documents, newspapers and periodicals; official cards; printing and binding; entertainment; local transportation and such other expenses as may be authorized by the Secretary of State, including the reimbursement of other appropriations from which payment may have been made for any of the purposes herein specified.

Services in the District.

Contracts without advertising.
R. S. § 3709.
41 U. S. C. § 5.

Reimbursement of other appropriations.

Report to Congress.

SEC. 2. That the delegates shall make a report to Congress of the results and conclusions of the said dairy congress.

Approved, June 3, 1937.

***In Re: Kraftco Corp.*, 33 Agric. Dec. 743 (1974)**

EXHIBIT 2

LIST OF DECISIONS REPORTED
JUNE 1974

AGRICULTURE DECISIONS

Page

Agricultural Marketing Agreement Act, 1937

KRAFTO CORPORATION. AMA Docket No. M 4-15. Order terminating proceedings 743

OAK TREE FARM DAIRY, INC. AMA Docket No. M 2-44. Resolution of issues — Dismissal 744

(No. 15,866)

In re KRAFTCO CORPORATION. AMA Docket No. M 4-15. Decided June 14, 1974.

Order terminating proceedings

This order is issued in accordance with the facts set forth herein.

Robert T. Cochran, Nashville, Tenn., for petitioner.
Victor W. Palmer, for respondent.
Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

ORDER TERMINATING PROCEEDINGS

Petitioner and Respondent having stipulated that, without any admission of liability on the part of the Petitioner, all matters in this proceeding have been agreed, settled and satisfied, and upon their joint motion that the proceedings herein should be terminated, it is this 14th day of June, 1974

ORDERED, That for good cause shown the proceedings herein be and hereby are terminated. This Order constitutes a full, final and complete disposition of the underpayment notices served on Petitioner involved in this proceeding; and supersedes and vacates all prior decisions in this matter, including the Recommended Decision of the Administrative Law Judge and the Tentative Decision by the Judicial Officer.

Federal Register Volume 64, p. 16044, April 2, 1999

EXHIBIT 3

Request for Public Input on Analyses

Comments on the Executive Order 12866 analysis, the initial regulatory flexibility analysis, and the paperwork reduction analysis were requested in the proposed rule, which was published in the **Federal Register** on January 30, 1998. Specifically, interested parties were invited to submit comments on the regulatory and informational impacts of this proposed rule on small businesses. More than 1,000 comments were received from interested parties that specifically stated or documented they were small businesses. However, this number may not be fully representative of the number of small businesses that actually submitted comments because a majority of commenters did not indicate their size. A few comments specifically addressed the initial regulatory flexibility analysis (IRFA), the Executive Order 12866, and the Paperwork Reduction Analysis. These comments have been considered and addressed above.

Preliminary Statement

The material issues in this rule relate to:

1. Consolidation of marketing areas.
2. Basic formula price replacement and other class price issues.
3. Class I pricing structure.
4. Classification of milk and related issues.
5. Provisions applicable to all orders.
6. Regional issues:
   a. Northeast Region.
   b. Southeast Region.
   c. Midwest Region.
   d. Western Region.
7. Miscellaneous and administrative matters.
   a. Consolidation of the marketing service, administrative expense, and producer-settlement funds.
   b. Consolidation of the transportation credit balancing funds.
   c. General findings.

II. Discussion of Material Issues and Amendments to the Orders

A discussion and explanation of the material issues and determinations contained in this rule are as follows:

1. Consolidation of Marketing Areas

Subtitle D, Chapter 1 of the 1996 Farm Bill, entitled ''Consolidation and Reform of Federal Milk Marketing Orders,'' requires, among other things, that the Federal milk marketing orders be limited to not less than 10 and not more than 14. Nearly 1,300 public comments received in response to the proposed rule addressed the subject of order consolidation. Preceding the proposed rule, two preliminary reports on order consolidation were issued by the Agricultural Marketing Service's Dairy Division, in December 1996 and May 1997. The proposed rule, issued in January 1998, included consideration of public comments received in response to these preliminary reports.

The 1996 Farm Bill specifically provides for the inclusion of California as a separate Federal milk order, but the provision is contingent upon petition and approval by California producers. The Omnibus Consolidated and Emergency Supplemental Appropriations Bill, passed in October 1998, extended the time for implementing Federal milk order reform amendments from April 4, 1999 to October 1, 1999. The legislation provides that California has from the date of issuance of this final decision until September 30, 1999, to become a separate Federal milk order. This additional time is intended to allow California dairy interests the opportunity review this final decision to determine whether a Federal milk order for California, consistent with the provisions adopted for the consolidated orders, would best meet their milk marketing regulatory needs.

Over 150 comments were received that addressed the issue of a Federal milk order for California, with approximately 120 of them being a form letter advocating a California Federal milk order. These comments, and a number of additional individual comments, came primarily from commenters outside California who expressed a need for California and Federal order prices for milk used in manufactured products to be in closer alignment to eliminate California manufacturers' perceived competitive advantage in product prices.

Interest in a Federal milk order has been expressed by some California producers, but for the most part California commenters expressed a desire to have a chance to study and comment on this final decision before deciding whether to pursue a proposal for a California Federal order.

The preliminary reports, the proposed rule, and this final decision concerning order consolidation were prepared using data gathered about receipts and distribution of fluid milk products by all known distributing plants located in the 47 contiguous states, not including the State of California. Data describing the sources and disposition of fluid milk products for the month of October 1995 were used to compile the initial Preliminary Report. In response to comments and questions about certain marketing area boundaries and changes in marketing conditions in some of the markets after publication of the initial Preliminary Report, data concerning those markets was updated to January 1997, and more detailed information was gathered regarding the geographic distribution of route sales by individual handlers and their specific sources of producer milk. The updated and more detailed data were used in re-examining the appropriate boundaries of the initially-suggested Northeast, Appalachian, Southeast, Mideast, Central, and Western marketing areas for the Revised Preliminary Report on Order Consolidation. The Revised Preliminary Report, in turn, was modified on the basis of comments received for development of the proposed rule.

Nearly 1,300 comments filed in response to the proposed rule had some applicability to the topic of order consolidation. Approximately 750 of these comments were received as 6 form letters, one of which (filed by approximately 120 commenters) advocated a national marketing area map comprised of 10 order areas covering all of the contiguous 48 states. The other form letters advocated the addition of currently-unregulated area to the Northeast area. Another 350 comments also addressed the desirability of adding unregulated areas to the proposed consolidated marketing areas (primarily the Northeast), with only about 55 of these being opposed to the inclusion of unregulated areas.

The comments specifically applicable to each of the consolidated marketing areas are described in the sections dealing with the individual consolidated areas.

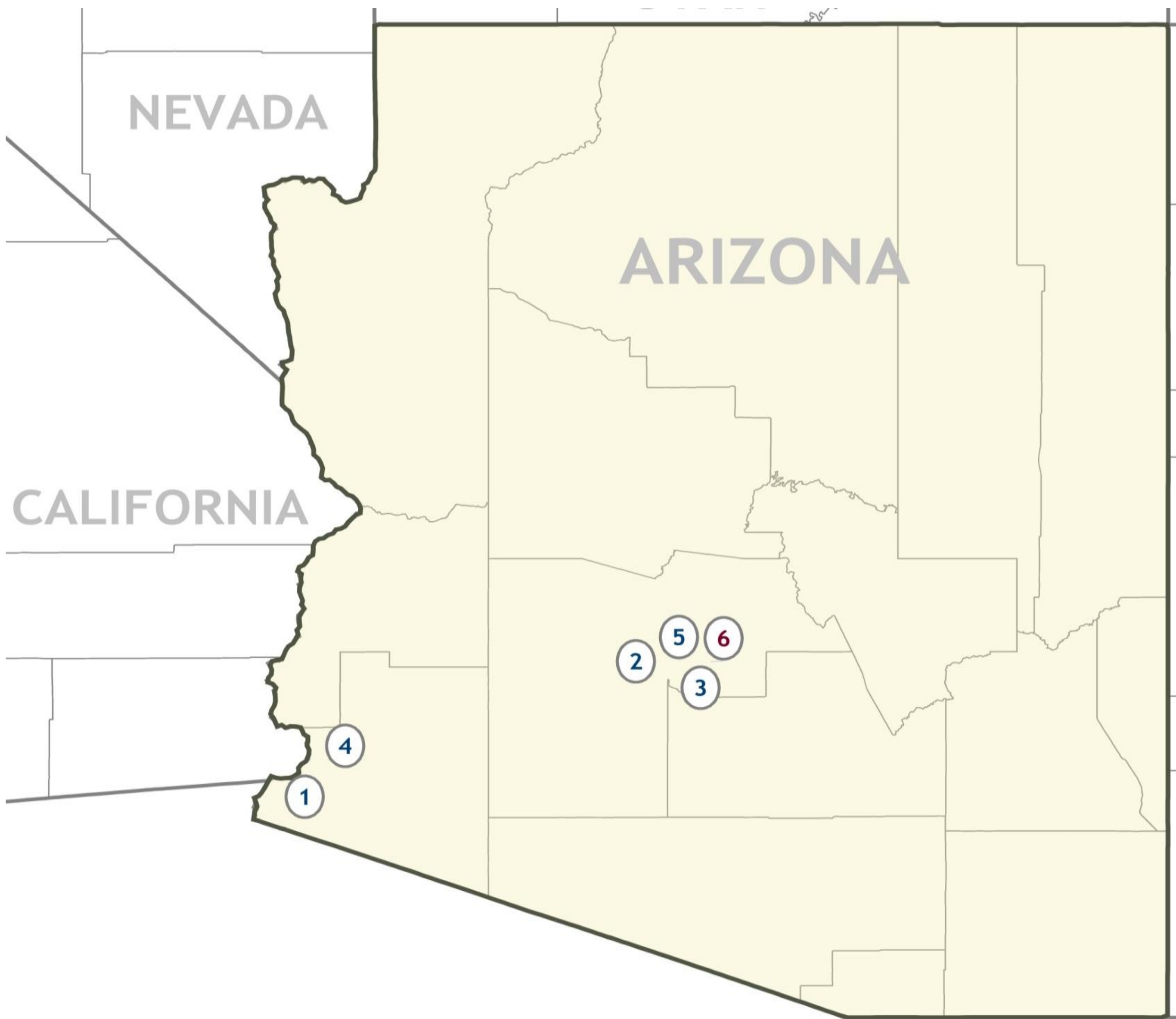
In combination with consideration of the comments received, data similar to that gathered for October 1995 were compiled for October 1997 to determine whether the consolidated marketing areas delineated in the proposed rule continued to represent the most appropriate boundaries for the purpose of implementing the requirements of the 1996 Farm Bill.

The October 1997 data allowed a ''snapshot'' of the marketing patterns of fluid milk processors for that month. The regulatory status of distributing plants for October 1997 is known, and the regulatory status of each plant could be projected on the basis of the plant's receipts and dispositions, and where its milk was distributed. The information in the sections entitled ''Distributing Plants'' within the description of each marketing area are based on the October data, as are the lists of plants and pool plant status following the consolidation portion of this decision. It should be

Map of Arizona Marketing Area, Federal Order No. 131

EXHIBIT 4

Arizona Marketing Area, Federal Order No. 131



Pool Distributing Plants

1. GH Processing, Yuma, AZ, Yuma, AZ
2. The Kroger Co., Tolleson Dairy, Tolleson, AZ, Tolleson, AZ
3. Safeway Stores, Inc., Tempe, AZ, Tempe, AZ
4. Sarah Farms, Yuma, AZ, Yuma, AZ
5. Shamrock Foods Company, Phoenix, AZ, Phoenix, AZ

Cooperative Pool Manufacturing Plants

6. United Dairymen of Arizona-Mfg, Tempe, AZ, Tempe, AZ

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

PROPONENT COOPERATIVES' RESPONSES AND OBJECTIONS TO

SUMMARY OF CRITICAL FACTS

and

PROPOSED FINDINGS OF FACT SUBMITTED BY

THE DAIRY INSTITUTE OF CALIFORNIA

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APPENDIX A

This proceeding "is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code." 80 Fed. Reg. 47210 c.l (Aug. 6, 2015). Pursuant to 5 U.S.C. § 557(c), the proponents of Proposal No. 1, California Dairies, Inc., Dairy Farmers of America, Inc., and Land O' Lakes, Inc. (collectively, the "Cooperatives") hereby provide our objections and responses to the Proposed Findings Of Fact submitted by The Dairy Institute of California (the "DIC").

Due to the volume of the “Critical Facts” and “Complete Proposed Findings Of Fact” to which the Cooperatives are responding, we provide below a key to our objections and responses to the deficiencies of the DIC’s full universe of proposed findings. In addition, “Post-Hearing Brief” refers to the Cooperatives’ Post-Hearing Brief submitted on March 31, 2016, and “Reply Brief” refers to the Cooperatives’ Reply submitted herewith.

Code	**Full explanation of objection/response code**
O	Object: the proposed finding is legal or economic theory, not fact and therefore improper.
OA	Object: the proposed finding is argumentative, not fact and therefore improper.
OC	Object: the proposed finding is conclusion, not fact and therefore improper.
D	Deny.
DB	Denied on the bases that the proposed finding is overbroad.
DU	Denied on the basis that the proposed finding is ambiguous and unclear.
DI	Denied on the basis that the proposed finding is irrelevant to the issue before the Secretary.
DC	Denied on the basis that the proposed finding is compound and thus prohibits response.

DH	Denied on the basis that the proposed finding is an improper hypothetical.
DS	Denied on the basis that the proposed finding is speculative and lacks foundation.
A	Admit.
AAD	Admitted only as to the accuracy of the citation; denied as to the interpretation of said citation as legal theory, not fact, which is improper.
AI	Admitted but irrelevant.

I. RESPONSES AND OBJECTIONS TO SUMMARY OF CRITICAL FACTS

No.	Asserted Critical Fact	Response/Objection
A.	California produces 20% of the country's milk supply.	D. California produces 21% of the country's milk supply. See, Post-Hearing Brief sections II, VI.B.
B.	California producers currently produce an adequate supply of milk for fluid use.	O; OA; OC; DB. See, Post-Hearing Brief sections II, VI.B.
C.	Raw milk supplies and manufactured milk products regularly are moving in and out of the state of California without market disruption.	O; OA; OC; D; DB. See, Post-Hearing Brief sections II, VI.B.
D.	In all current FMMOs, a dairy farmer may only receive a uniform regulated price if he is willing to serve the fluid milk market by meeting performance-based pooling standards.	OA; OC; D; DB; DI. See, Post-Hearing Brief section VII. See, Reply Brief section IV.
E.	In the current FMMOs, specific market situations may incentivize dairy farmers and the handlers to whom they ship milk to maximize their returns by electing non-pool status.	OA; OC; D; DB; DI. Admitted that the incentive to de-pool causes market

No.	Asserted Critical Fact	Response/Objection
		disorder as described. See, Post-Hearing Brief sections VII, VIII. See, Reply Brief section IV.
F.	In the current FMMOs, specific financial incentives exist for handlers to elect to not pool eligible milk when the handler acts rationally to maximize its profits.	OA; OC; D; DB; DI. Admitted that the incentive to de-pool causes market disorder as described. See, Post-Hearing Brief sections VII, VIII. See, Reply Brief section IV.
G.	In the current markets under existing FMMOs, many handlers have elected to not pool significant volumes of milk otherwise eligible to be pooled.	OA; OC; D; DB; DI. Admitted that the incentive to de-pool causes market disorder as described. See, Post-Hearing Brief sections VII, VIII. See, Reply Brief section IV.
H.	A cooperative that must pool all of its milk can blend losses internally with other revenue including increased revenue from the sale of producer milk at higher regulated minimum levels. A private manufacturing company who must pool all of its milk does not have the option to reblend such losses.	O; OA; OC; D; DB; DU; DC. See, Post-Hearing Brief section VII. See, Reply Brief sections IV, V.C.3.

No.	Asserted Critical Fact	Response/Objection
I.	California FMMO prices should reflect the current marketing conditions in California.	OA; DB; DU. See, Post-Hearing Brief sections VI, VIII. See, Reply Brief section III.
J.	A market-clearing price is where the supply and demand curves intersect.	O; OA; OC. See, Post-Hearing Brief section VI.
K.	Prices that are minimum prices should be set below market-clearing levels to ensure they do not rise above market-clearing prices.	O; OA; D; DB. See, Post-Hearing Brief section VI.
L.	Prices that are above market-clearing levels will disrupt the market and result in disorderly marketing conditions.	O; OA; OC; D; DB. See, Post-Hearing Brief section VI.
M.	Milk production levels in California have been on a significant upward trajectory for the last couple of decades.	D; DB; DU. See, Post-Hearing Brief section VII.
N.	California producers' increased production was not driven by increased manufacturing demand.	OA; OC; D; DB; DU. See, Post-Hearing Brief sections VI, VII.
O.	Increased prices will lead to increased production.	O; OA; OC; D; DB; DU. See, Post-Hearing Brief sections VI, VIII.
P.	Manufacturing demand for raw milk in California has been largely met by current supplies.	OC; D; DB. See, Post-Hearing Brief sections VI, VIII.
Q.	California's increased milk production has outpaced the increase in local demand for manufactured milk products.	OA; D; DB; DU. See, Post-Hearing

No.	Asserted Critical Fact	Response/Objection
		Brief sections VI, VIII.
R.	A large percentage of California's manufacturers are cheese plants that manufacture a large percentage of California's milk production. Proprietary companies own the vast percentage of the cheese plants and manufacture most of the cheese in California.	DB; DC; DI. See, Post-Hearing Brief sections VI, VIII.
S.	California's fluid milk processing fulfills local demand for Class I products. California's production of manufactured products significantly exceeds California's demand for these products.	OA; OC; D; DB; DU; DC. See, Post-Hearing Brief sections VI, VIII.
T.	California's manufactured cheese products must be marketed nationally, primarily on the East Coast, and internationally.	OA; D; DB. See, Post-Hearing Brief sections VI, VIII.
U.	Any California FMMO will increase California fluid milk production.	O; OA; OC; D; DB; DS. See, Post-Hearing Brief sections VI, VIII.
V.	A California FMMO will result in decreased prices for producers in other FMMOs.	O; OA; OC; D; DB; DS. See, Post-Hearing Brief sections VI, VIII.
W.	An increase in California milk prices will result in a decrease in processing capacity in California.	O; OA; OC; D; DB; DS. See, Post-Hearing Brief sections VI, VIII.
X.	An acceptable level of price difference exists between California prices and FMMO prices.	OA; D. See, Post-Hearing Brief section VI. See, Reply Brief section V.

No.	Asserted Critical Fact	Response/Objection
Y.	Increased manufacturing costs due to increased milk prices will disrupt sales of manufactured dairy products.	OA; OC; D; DS. See, Post-Hearing Brief section VI. See, Reply Brief section V.
Z.	If prices do not reflect real-life supply and demand, the market will react negatively.	OA; OC; D; DS. See, Post-Hearing Brief section VI.
AA.	Cooperatives can reblend losses from their manufacturing operations with profits from higher milk prices.	OA; D; DB; DS; DI. See, Reply Brief section V.G.3.
BB.	The cooperatives did not introduce evidence on a number of topics related to their proposed prices.	OA; OC; D; DU.
CC.	A number of production and marketing characteristics make the California dairy market unique from other order areas. Quota however is a function of California law and is not a production or marketing characteristic.	O; OA; OC; D; DB; DU. Admitted that California dairy market unique from other order areas; denied that quota however is a function of California law given its presence in the Farm Bill. See, Post-Hearing Brief section IV. See, Reply Brief section VI.
DD.	Manufactured milk products especially cheese, have different values depending on where the product is produced and where it has to be sold.	O; OA; OC; D; DB; DU. See, Post-Hearing Brief section VI.

No.	Asserted Critical Fact	Response/Objection
		See, Reply Brief section V.
EE.	Raw milk supply must clear locally, manufactured milk products clear nationally.	O; OA; OC; D; DB; DU. See, Post-Hearing Brief section VI. See, Reply Brief section V.
FF.	Producer-handlers under FMMOs have to meet different standards than producer-distributors ("PDs") under California law.	OA; OC; D; DB; DU. Admitted to the extent there are some differences.
GG.	Fluid milk processors have lost business to Producer-Distributors as the result of California's exempt quota.	OA; OC; D; DB; DU. See, Post-Hearing Brief section VIII.A. See, Reply Brief sections VI, VII.C.
HH.	Specific California FMMO provisions must comply with the AMAA.	OA. See, Post-Hearing Brief section IV. See, Reply Brief sections II, III.

II. RESPONSES AND OBJECTIONS TO PROPOSED FINDINGS OF FACT

No.	Asserted Finding of Fact	Response/Objection
1.	In the 1920s-1930's, U.S. dairy farmers produced surplus milk (otherwise dumped or used to produce non-fluid products such as cheese or butter) and pursued with this milk the more lucrative fluid market. Competition with the existing suppliers of fluid milk resulted in extreme competition which engendered business practices that jeopardized "the quality and in the end the quantity" of the vital fluid milk supply. *United States v. Rock Royal Co-op*, 307 U.S. 533,550 (1939).	OA; OC; D; DB; DC; AAD. See, Post-Hearing Brief sections II, III. See, Reply Brief sections II, III.
2.	The provisions of the AMAA were enacted to alleviate those problems by authorizing the issuance of orders to regulate the marketing of milk in the geographical market areas based upon economic market conditions in those areas. 7 U.S.C. §§608(c)(ll) and (18).	O; OA; OC; DB; DC. See, Post-Hearing Brief sections II, III. See, Reply Brief sections II, III.
3.	The AMAA provides for the classification of milk in accordance with the purpose for which it is used and the establishment of minimum prices for each class of use. The Secretary sets these prices at levels which he finds will reflect economic conditions affecting supply and demand for milk in the marketing area, will insure a sufficient quantity of pure and wholesome milk, and will be in the public interest. 7 U.S.C. § 608c(18); United States v. Rock Royal Co-op, 307 U.S. at 532-548.	OA; OC; DB; DC; DU. See, Post-Hearing Brief sections II, III, VI. See, Reply Brief sections II, III, VI.
4.	California currently has a 12-13% Class I utilization. See CDFA's California Dairy Statistics Annual2015, at 3, ("In 2015, utilization of pooled milk for Class 1 (fluid milk) products increased slightly to 13.0 percent (from 12.8 percent in 2014)."), found at https://www.cdfa.ca.gov/dairy/pdf/AnnuaV2015/2015_ Statistics_ Annual.pdf.	AAD. See, Post-Hearing Brief section II.

5.	California presently has an adequate supply of milk for fluid use. See, e.g., Ex. 79, at 33 (Testimony of Dr. Schiek) and Ex. 91, at 6 (Testimony of Mr. Dryer).	OA; OC; DB; DU. See, Post-Hearing Brief section II. See, Reply Brief section V.
6.	California Hispanic Cheese can be found in Pennsylvania and Cabot cheese from Vermont can be found in Fresno. See, e.g., Tr. 4878:21-4884:16 (Testimony of Mr. Moore and Mr. de Cardenas, discussing the sale of Cabot Cheese from Vermont in California, and the sale of their California Hispanic cheese products in Pennsylvania).	A.
7.	Cooperatives have downsized, sold or closed cheese-making operations in California. Ex. 98, at 11 (Testimony of Mr. de Jong).	OA; DB; DI. See, Post-Hearing Brief section II.
8.	Proprietary Class III investments are being made outside California. Tr. 4392:9-21 (Testimony of Mr. de Jong).	OA; A; DI. See, Post-Hearing Brief section II.
9.	The Cooperative witnesses provided six hypothetical examples of interstate sales competing in Phoenix-Los Angeles, Las Vegas-Los Angeles and Reno-San Francisco. Tr. 821:24- 823:24 (Testimony of Mr. Hollon); Ex. 19, at 13 (Testimony of Mr. Hollon); Ex. 20,Table I.C (Exhibits for Testimony of Mr. Hollon). Not one witness even appeared to testify that they actually knew about such conditions.	OA; OC; D; DB; DC. See, Post-Hearing Brief section II.
10.	No Arizona handler appeared to complain that they faced any price disadvantage or competitive disruption for sales into Southern California as a result of the California Class 1 prices.	OA; OC; DB; DI. See, Post-Hearing Brief sections II, III.
11.	No witness appeared to claim that there were market disruptions in Nevada whether from California or other areas not subject to federal regulation.	OA; OC; D; DB; DU; DI. See, Post-Hearing Brief sections II, III.

12.	CDFA credits processors (whether Class I or otherwise) at the plant blend for out-of-state milk sales to California Class I plants. Payment at the plant blend means that the plant may avoid the producer-settlement fund payment, but still pays the full use value for that milk to out-of-state handlers. The milk is not unpriced. Tr. 4081: 23 - 4082:4 (Testimony of Mr. Turner); Tr. 7600:20-21 (Testimony of Mr. DeGroot).	OA; OC; DB; DC; DI; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.A.
13.	The volume of out-of-state milk that is allocated to Class I has dropped more than 50% from March 2009 to August 2015. Ex. 155.	OA; A; DI. See, Post-Hearing Brief section II.
14.	In every one of the current 10 FMMOs, if a dairy farmer is unwilling to serve the fluid market when needed, then he is not entitled to that uniform price. 7 C.F.R. 1---.7 and .13	O; OA; OC; D; DB; DI; A. See, Post-Hearing Brief section VI. See Reply Brief section IV.
15.	Dairy farmers have always been able to voluntarily disassociate with the pool by not shipping to a Class I plant or other voluntarily pooled handler. See 7 C.F.R. §§ 1---.7 and .13; *County Line Cheese Co.*, supra.	O; OA; OC; D; DB; DI. See, Post-Hearing Brief section VII. See Reply Brief section IV.
16.	Dairy farmers in a number of the traditional FMMOs have logical incentives to elect, through their purchasing handlers, non-pool status. If the farmer's location is distant from the fluid market, his classified price at that location may be higher than the order's uniform price. Tr. 4932.13-20 (Testimony of Mr. Blaufuss).	O; OA; OC; A; AAD; DI. See, Post-Hearing Brief section VII. See Reply Brief section IV.

17.	The Cooperative Order by its terms would require Class I handlers both to pay the highest price for their milk, but also pay extra-order prices in order to actually obtain a milk supply. Tr. 6392: 3 -7 (Testimony of Mr. Blaufuss); Tr. 2535:8-2536:2 (Testimony of Mr. Christ) (explaining that under the Cooperative Proposal, private party transactions and premiums "will take care of supply in the Class I markets"); Ex. 58, at 13 (Testimony of Mr. Christ).	O; OA; OC; D; DB; DU; DC; AAD. See, Post-Hearing Brief sections VI, VII. See Reply Brief sections II, V, VI.
18.	Given the voluntary nature of pooling arising from characteristics of the ten FMMOs, cheese plants in California could not qualify as nonpool plants or receive nonpool milk. See Tr. 388:21-22 (Testimony of Mr. Schaefer) (explaining that under the §1000 provisions, "[m]ilk that is diverted to a nonpool plant may be pooled but does not have to be." (emphasis supplied)).	O; OA; OC; D; DB; AAD. See, Post-Hearing Brief sections VII. See Reply Brief sections II, V.
19.	All California cheese plant milk would be priced and pooled under the Cooperative Order at classified prices based upon the non-updated FMMO formulas. See, e.g., Ex. 111, at 7 (Testimony of Mr. Vetne); Tr. 1363:8-22 (Testimony of Mr. Hollon); Tr. 3235:3-9 (Testimony of Mr. Schad).	O; OA; OC; D; DB; DU. See, Post-Hearing Brief sections VI, VII. See Reply Brief sections II, V.
20.	Unlike their FMMO competitors who can and do avoid minimum regulated prices by de-pooling milk or receiving nonpool milk for instance as nonpool plants or as split plants under a number of the existing FMMOs (e.g., 7 C.F.R. §1032.7(h)(7)), mandatory pooling will prevent only California plants from adjusting to important economic conditions, such as: (1) surplus milk that can only be economically disposed of at prices less than regulated minimums; (2) FMMO pricing levels that encourage FMMO eligible milk to not be pooled. See Ex. 98, at 15-17 (Testimony of Mr. de Jong); Ex. 116, et seq. (Testimony of Sue Taylor); Tr. 2496: 4-18 (Testimony of Mr. Christ).	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VII. See Reply Brief section IV.

21.	The ability of manufacturers of cheese, butter and nonfat dry milk that may be otherwise regulated by an FMMO to avoid paying regulated minimums is a financial advantage. Tr. 2529:23-25 (Testimony of Mr. Christ).	OA; OC; A; DI. See, Post-Hearing Brief section VII. See Reply Brief section IV.
22.	The ability of manufacturers of cheese, butter and nonfat dry milk that may be otherwise regulated by an FMMO to retain monies that would otherwise be paid to the producer settlement fund is a financial advantage. Tr. 2497:25-2498:4 and 2529: 13-25 (Testimony of Mr. Christ).	OA; DC; A; DI. See, Post-Hearing Brief section VII. See Reply Brief section IV.
23.	The ability to retain monies otherwise payable to the producer-settlement fund reduces the entities' cost of milk for making products. Tr. 2498:22-2499:24 (Testimony of Mr. Christ), Tr. 3754:18-22 (Testimony of Mr. Metzger).	O; OA; OC; D; DB; DU. See, Post-Hearing Brief section VII. See Reply Brief section IV.
24.	USDA does not and cannot audit and thus, truly know, the prices paid for milk that is not pooled. Tr. 602: 12-20 (Testimony of Mr. Schaefer).	O; OA; OC; D; DB; DU; AAD. See, Post-Hearing Brief section VII. See Reply Brief section IV.
25.	Significant volumes of eligible milk are not pooled on today's FMMOs. See USDA Data Request, Table 9 (Total Eligible Milk Pooled/Not Pooled) (demonstrating, for example, that in 2014 Order 30 had handlers de-pool or not pool 4.5 billion pounds of eligible milk and that 8% of all eligible milk in all orders was de-pooled or not pooled); see also Tr. 613:19-614:1 (Testimony of Mr. Schaefer) (describing a period where one billion pounds of eligible milk was de-pooled from Order 30).	OA; OC; DB; DU; DI. See, Post-Hearing Brief section VII. See Reply Brief section IV.

26.	Businesses regulated under FMMOs make individualized decisions that impact their bottom line with respect to pooling and de-pooling. Tr. 588: 20-589:3 (Testimony of Mr. Schaefer) ("Some plants choose to be nonpool plants, and that choice is predominantly in our market made based on the economics of pooling milk in a particular month ... Basically, it's based on the relationships of the prices, which lead to the producer price differential and the return that they would get from pooling.").	OA; OC; DB; DU. See, Post-Hearing Brief section VII. See Reply Brief section IV.
27.	The ability to leverage eligible milk not pooled or purchases of milk below class prices in the existing FMMOs, provides a financial benefit to businesses operating with that system. Ex. 98: 15- 17 (Testimony of Mr. de Jong); Tr. 2529: 13-25 (Testimony of Mr. Christ).	OA; OC; DB; DU. See, Post-Hearing Brief section VII. See Reply Brief section IV.
28.	In the existing FMMOs there are escape valves, in the form of voluntary pooling of milk that permit the sale and purchase of milk for use in manufactured products at prices that are at less than order minimums. Ex. 98: 15- 17 (Testimony of Mr. de Jong).	O; OA; OC; DB; DC; DU. See, Post-Hearing Brief section VII. See Reply Brief section IV.
29.	There have been many times, especially in the last year, in which supplies of milk exceed the ability of various FMMOs to absorb that milk at regulated minimums; milk is regularly purchased at prices below classified prices. See, e.g., Dairy Market News, p. 3 of Vol. 82, Nos. 11 (week of March 16-20, 2015), 14 (week of April 6-10, 2015), 21 (week of May 25-29, 2015), and 23 (week of June 8-12, 2015).	OA; OC; DB; DU; DC. See, Post-Hearing Brief sections VI, VII. See Reply Brief sections IV, V.
30.	Milk otherwise regulated by FMMOs has been routinely and regularly sold at significant discounts below class prices. Ex. 98: 15- 17 (Testimony of Mr. de Jong).	OA; OC; DB; D; AAD. See, Post-Hearing Brief sections VI, VII. See Reply Brief sections IV, V.

31.	Looking just at spot loads from November 2014 through May 2015 in the Dairy Market News showed that of the 28 weeks during this time there were 25 weeks that had examples where milk was sold under class. Ex. 98, at 15 (Testimony of Mr. de Jong).	OA; DS; DC; DI; AAD. See, Post-Hearing Brief sections VI, VII. See Reply Brief sections IV, V.
32.	Hilmar has purchased billions of pounds of other milk under Class III prices in the 12 months preceding the hearing. Ex. 98, at 15 (Testimony of Mr. de Jong).	AAD; A; DI.
33.	The results of overproduction that led to HP Hood enforcing their volume caps would be replicated if other manufacturers could not de-pool to find an affordable home for excess milk. See Tr. 4355:11-24 and Tr.4356:4-13 (Testimony ofMr. Newell), Ex. 97, at 4.	O; OA; OC; D; DB; DS; DU; DI; A. See, Post-Hearing Brief section VII. See Reply Brief section IV.
34.	Hilmar Cheese Company has de-pooled milk under the Southwest Marketing Area. Ex. 98, at 16 (Testimony of Mr. de Jong).	OC; DU; DI; A; AAD. See, Post-Hearing Brief section VII. See Reply Brief section IV.
35.	Without considering quota, the impact of de-pooling in California would be "quite similar" to that in other regions, like the Upper Midwest Order. Tr. 2549: 1 - 8 (Testimony of Mr. Christ).	O; OA; OC; D; DB; DU; DC; DI. See, Post-Hearing Brief sections IV, VII. See Reply Brief sections IV, VI.
36.	With Idaho's large cheese production unregulated by any FMMO or state agency, cheese production in the Pacific Northwest, Idaho and Southwest marketing areas are very competitive with California production. See, e.g., Tr. 6088: 18-21 (Testimony of Mr. Paris); Tr. 4738:10-25 (Testimony of Mr. Hofferber); Tr. 5119: 21-24 (Testimony of Mr. Vetne).	OA; OC; DB; DU; DC. See, Post-Hearing Brief, section VI.

37.	In an oversupply situation, the cooperatives have stated that they would be the ones bearing the burden of selling surplus milk. Tr. 4370:18-23 (Testimony of Newell).	OA; D; DB; DU. See, Post-Hearing Brief section VI.
38.	The cooperatives can internally balance losses with any increased payments to producers so that they can dampen any associated losses with dealing with the oversupply milk. Independent manufacturers cannot do the same if they are not allowed to de-pool. See Tr. 602:3-11 (Testimony of Mr. Schaefer) (Q. What enforcement is there of the minimum price regulation for Order 30 on pooled milk that is received by a nonpool plant? A. If the milk is pooled and received at a nonpool plant, we enforce minimum payment. Now that is true for proprietary handlers. Cooperatives are- because they're a cooperative are allowed to pay the price that their members have decided is appropriate for that month."); Tr. 2503:9-20 (Testimony of Mr. Hollon) ("Coops have a reblending privilege that they can market their products to their members in a variety of markets and reblend, and they can distribute the income ... So they have that flexibility.")	O; OA; OC; D; DB; DU; DS; DC; DI. AAD. Admitted only to the accuracy of the quotation of Mr. Hollon; denied as to the interpretation of said testimony as legal theory, not fact, which is improper. See, Reply Brief section V.
39.	A California FMMO would result in 20% of the nation's dairy being incorporated into the FMMO system.	OA; OC; DB; DS. D. California produces 21% of the country's milk supply. See, Post-Hearing Brief section II.
40.	CDI argued in a CDFA hearing in late fall of 2009: "[t]he Class 4a formula should reflect the most currently available cost-justified changes." Tr. 1881: 1 - 20 (Testimony of Dr. Erba) (emphasis supplied).	OA; DB; DI; AAD. See, Reply Brief sections V.C., V.G.4.
41.	National All Jersey testified that prices should be up-to-date. Tr. 3752:4-7 (Testimony of Mr. Metzger).	O; OA; OC; DB; AAD. See, Reply Brief sections V.C., V.G.4

42.	A market clearing price is the price at which goods can be sold and will be purchased; in other words, when supply and demand are equal or the equilibrium price where supply and demand intersect. Tr. 115:24-116: 3 (Testimony of Ms. Steeneck); Ex. 133, at 9.	O; OA; OC; DB; DC; DU; A; AAD. See, Post-Hearing Brief section VI.
43.	Ever-changing markets make it impossible for USDA to establish a perfect equilibrium price in real time. Thus, "FMMO's have regulated minimum prices that must be paid and have tried to set that standard somewhat below market clearing price." Tr. 5956: 2-7 (Testimony of Dr. Stephenson), Ex. 133, at 9 (emphasis supplied).	O; OA; OC; DB; DC; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.C.
44.	The importance of setting market clearing prices is heightened when the regulated minimum prices are mandatory rather than elected voluntarily as under the ten FMMOs.	O; OA; OC; D; DB; DS. See, Post-Hearing Brief section VI. See, Reply Brief section IV.
45.	The risks of setting the minimum regulated price too high in a system of binding minimum prices are significantly amplified. These include, amongst other things, threats to the financial viability of manufacturers and the plant capacity they provide and inefficient movement of milk in order to clear the market to out-of-area entities that are not subject to binding minimum regulated prices. This inefficient movement of milk in order to clear surpluses also results in lower producer returns due to increased cost to transport. Ex. 116, at 3 (Testimony of Sue Taylor).	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section IV.

46.	CDI stated to CDFA in 2009: Class 4a and 4b are market-clearing classes of milk, and process 75% of the milk produced in California. The products from these plants compete in national and international markets where price is a dominant consideration for buyers. The California dairy industry is wholly dependent on the continued operation of its manufacturing facilities. To burden these plants with higher minimum prices that cannot be extracted from the market, even for a brief period, would have potentially devastating consequences. Ex. 44, at 1 (Letter by Dr. Eric Erba on behalf of California Dairies Inc.).	O; OA; OC; DB; DC; DI; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.G.4.
47.	Prices at overly-high levels would disrupt the market. The combination of a low enough price move and geographically different Class I values has historically allowed blended pool values to represent an approximate spatial price for producer milk. Any differences could be made up with voluntary premiums paid above the regulated minimum. A real concern is with minimum pricing setting the regulated level above the market-clearing price. At this point, producers are willing to supply more milk to markets than consumers wish to purchase. This would certainly be evidence of disorderly marketing. Ex. 133, at 9.	O; OA; OC; DB; DU; DS; DC; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.
48.	Ignoring current location value of milk used to produce manufactured products would limit, in a way, the ability of California businesses to market their products in California.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
49.	Ignoring the changes in markets and market conditions both in California and nationally since 1996 would also limit, in a way, the ability to market in California.	O; OA; OC; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.

50.	Markets are driven from the top down, not the bottom up. The ultimate consumer determines how much milk is worth to them, and then suppliers and producers respond accordingly, not vice versa. Milk production levels in California have been on a significant upward trajectory for the last couple of decades.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
51.	Milk production in California has been on an upward trajectory for the last couple of decades. In fact, California producers more than tripled their milk production since 1980 through 2014. Ex. 91, at 4. "[T]he rate of milk production increases []has been simply extraordinary. California milk production has [increased] by nearly 300% over the last 25 years. Year-over-year growth has been negative only twice in the last 26 years ... " Ex. 51, at 3 (Testimony of Dr. Erba) (emphasis in original). This simple chart demonstrates milk production increases over the last 45 years: *[Image omitted]* Ex. 80, at 7 (Exhibits to Testimony of Dr. Schiek).	O; OA; OC; D; DB; DC; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.A.
52.	This growth in California was unparalleled in other dairy states. *[Image omitted]* Ex. 80, at 9 (Exhibits to Testimony of Dr. Schiek).	OA; OC; DB; DU. See, Post-Hearing Brief section VI. See, Reply Brief section V.
53.	A multitude of forces were driving increased production in California, even in light of the regulatory prices. California has the largest cow-per-herd average of any state in the U.S. Ex. 91, at 7 (Testimony of Mr. Dryer). Average costs of production, per hundredweight of milk produced, are lower in these larger herds found in California. Ex. 91, at 9 (Testimony of Mr. Dryer). In fact, California has the second lowest average costs of all states, lower than Wisconsin, New York, and Minnesota and only higher than Idaho. Ex. 91, at 9-10.	O; OA; DB; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.

54.	The increase in production was not demand driven, but a result of increasing efficiencies and a drive towards profits. Class I sales have stalled and had no correlation with the growth in California milk production (as demonstrated by Figure 7 below). [Image omitted] Ex. 80, at 17 (Exhibits to Testimony of Dr. Schiek).	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
55.	California's advantages in its economies of scale are not sufficient to explain this unparalleled growth in the face of such significant decreases in the industry's highest value sector. The continued push for profits and lack of effective production controls has historically left the market oversaturated.	O; OA; OC; D; DB; DS; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
56.	"If local prices were not adequate to cover [a high cost production area], you would experience a declining milk production industry. In an area where milk production costs are below available prices, you might expect expanding milk production." Tr. 2553: 10 -12 (Testimony of Mr. Christ).	AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.
57.	If the price for a good increases, production and sale of that good will also increase. Ex. 116, at 45 (Testimony of Ms. Taylor); Tr. 5302: 18 (Testimony of Ms. Taylor).	O; OA; OC; D; DB; DU; DS. See, Post-Hearing Brief section VI. See, Reply Brief section V.

58.	The following chart maps California milk production alongside estimated willing plant capacity based on data published by National Agricultural Statistics Service (as listed in Exhibit 80, at 3) for all classes from January 2006 until August 2015. Ex. 80, at 2.	O; OA; DB. AAD. Admitted only to the accuracy of the map's purported goals; denied as to the interpretation of said testimony as legal theory, not fact, which is improper. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
59.	As shown by the chart, producers largely have met milk demand (a.k.a, plant capacity) in California. In the 2006 - 2008 period, there were as many as 19 months when milk production in the state exceeded willing capacity. Ex. 79, at 28 (Testimony of Dr. Schiek). The excess milk had to be moved to out-of-state plants located in states as distant as Idaho, Texas, and New Mexico. From the second half of 2008 until 2012, plants had some capacity after a decline in milk output, the opening of new plants, and the expansion of others. *Id.* But by early 2012, milk production was again outpacing plant capacity. Producers exceeded plant capacity again in 2014. *Id.*	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
60.	"About five years ago, the California dairy industry began to recognize that a problem was brewing - gains in milk production were far outstripping gains in milk processing capacity." Ex. 51, at 5 (Testimony of Dr. Erba). According to the Cooperatives' estimation, on average only 5% - 10% of processing capacity sits idle. "Given that seasonal fluctuations in milk supply do occur in California, this puts California production during the spring flush months of March, April, and May very close to the State's processing capacity. *There are no short-term fixes available to increase processing capacity ...*" *Id.* at 5-6 (Testimony of Dr. Erba) (emphasis added).	OA; DB; AAD. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.

61.	Manufacturers testified at the hearing that production had largely met their manufacturing demand needs. Producers easily fulfill Class 1 needs in California. Ex. 91, at 6 (Testimony of Mr. Dryer).	OA; OC; D; DB; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
62.	In 2006 HP Hood reported having to take the drastic step of enforcing volume caps in their purchase agreements, because they could no longer find a home for all of the excess milk. Ex. 97, at 3. While HP Hood had previously sought to help their suppliers by accepting milk in excess to what they had agreed to purchase in their contracts, this approach became untenable with the significant surplus of milk they were receiving. Ex. 97, at 3. Tr.4351:1-4352:3 (Testimony of Mr. Newell). An overvalued mandatory minimum in the form of whey factor values led to this result. Ex. 97, at 4.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief sections II, VII. See, Reply Brief section V.F.
63.	The Cooperatives have sought to address the problem of excess milk production by enforcing caps on production in the form of base plans. See, e.g., Ex. 21, at 5 (Testimony of Mr. Kasbergen); and Ex. 39 (Article, "Land O'Lakes Western Initiating Supplemental Base Reduction Measures"). These plans were instituted in the last six or seven years, around the time that Land O'Lakes had to start moving milk out of state due to plant capacity issues. Tr. 975: 1-10 (Testimony of Mr. Kasbergen). The state does not mandate these base plans and the Cooperatives can terminate them at any time. Tr. 975: 4-20 (Testimony of Mr. Kasbergen).	O; OA; OC; D; DB; DU; DC; AAD. See, Reply Brief section V.G.4.
64.	These plans did not prevent the capacity issues in 2012 that led to Land O'Lakes moving milk out of state. Tr. 1661:1- 14 (Testimony of Mr. Wegner) and Tr. 1734:15-1735:18 (Testimony of Mr. Wegner).	O; OA; OC; DB; DU; DS. See, Reply Brief section V.G.4.

65.	One farmer testified that he has never had the base plan enforced for his milk. Tr. 1012: 16-Tr. 1013: 20 (Testimony of Mr. Fernandes).	OA; OC; AAD. See, Reply Brief section V.G.4.
66.	The Cooperatives have decreased manufacturing capacity in California in recent years. Ex. 98, at 11 (Testimony of Mr. de Jong). A DFA cheddar cheese plant in Petaluma closed May, 2004, a DFA cheese plant in Corona closed December, 2007, and a Land O'Lakes ("LOL") cheese plant in Tulare closed September, 2010. Ex. 98, at 11 (Testimony of Mr. de Jong). One cooperative also had to take some rather dramatic steps to reduce its incoming supply in light of the strained capacity. Ex. 79, at 28 (Testimony of Dr. Schiek) and Ex. 39 (Article on LOL Supplemental Base Reduction).	OA; DB; DU; DC; AAD. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
67.	Nationally the dairy industry has struggled to address lack of capacity issues that have resulted in extended and unusual volumes of dumped milk on dairy farms. Ex. 9, Table 10; Tr. 3641:12, 15 (Testimony of Dr. Schiek); Tr. 6087:14-21 and 6127:6-18 (Testimony of Mr. Paris); see also, AMS, Federal Milk Order No. 1, http://www.fmmone.com/Misc_Docs/TemporaryDumpedMilkPolicy031716.pdf(last visited March 29, 2016) and AMS, Federal Milk Order No. 1, December 2, 2015 Notice (found as Attachment 1 to Findings of Fact).	O; OA; OC; DB; DC; DU. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
68.	California produces 20% of the country's milk supply. See CDFA Bi-Annual and Annual Summaries, Statistics and trends Annual Tables and Data 2015, found at https://www.cdfa.ca.gov/dairy/dairystats_annual.html.	D. California produces 21% of the country's milk supply. See, Post-Hearing Brief section II. See, Reply Brief section V.A.

69.	In the 19 years from 1995 to 2014, California milk supplies had increased by about 67%, with western states milk supplies increasing by more than 82%. Ex. 133, at 8 (Dr. Stephenson Study).	O; OC; DB; AAD. See, Post-Hearing Brief section II. See, Reply Brief section V.
70.	In the 19 years from 1995 to 2014, the California population had increased by 23% and the western states by 34%. Milk production has far outpaced local demand in the region. *Id.*	OA; OC; DB; DU; AAD. See, Post-Hearing Brief section II. See, Reply Brief section V.
71.	The per-capita consumption of milk and dairy products has also risen over that 19-year time period, but not at the same rate as production growth. Taking into account the per capita demand for milk and dairy products, California had a 7.2 billion pounds net surplus of milk in 1995, which increased to a 18.7 billion pound surplus in 2014. As a region, the western states are about 34.4 billion pounds net surplus. *Id.*	OA; OC; DB; DC. See, Post-Hearing Brief section II. See, Reply Brief section V.
72.	A large percentage of California's manufacturers are cheese plants. California Dairy Statistics Annual 2015, at 11, found at https://www.cdfa.ca.gov/dairy/pdf/Annual/2015/2015_Statistics_Annual.pdf.	OA; OC; DB; DU. See, Post-Hearing Brief section II. See, Reply Brief section V.A.
73.	Just three of those cheese plants processed more than 56% of the 4b milk in the state, which means they processed in excess of 25% of the state's entire milk supply. Ex. 91, at 16. In other words, three cheese plants process one-fourth of all of the state's milk. To put this result in context for the greater dairy industry, on an annual basis these three plants process more milk than is produced in 45 of the 50 states. Ex. 91, at 16.	OA; DB; DU; DC. See, Reply Brief section V.

74.	California manufacturers produce large amounts of Monterey, Cheddar, and Mozzarella cheeses. CDFA, 2015 Annual Dairy Data, available at http://cdfa.ca.gov/dairyluploader/docs/DataArchives/2015Annua1DairyData.xlsx (last visited Mar. 29, 2016).	DU; DI. See, Reply Brief section V.
75.	California also has significant Hispanic cheese manufacturing. *Id.*	DU; DI. See, Post-Hearing Brief section II. See, Reply Brief section V.
76.	California manufacturers also make other products, including butter, nonfat dry milk ("NFDM"), ice cream, sour cream, buttermilk, cottage cheese, and yogurt. *Id.*	A.
77.	As of February 2015, the manufacturing plants operating in California included 63 cheese plants. Information regarding all manufacturing dairy plants in California can be found at: CDFA, California Dairy Plant List (2015), available at https://www.cdfa.ca.gov/dairy/pdf/CaDairyPlantList.pdf (last visited March 29, 2016).	AAD; A; DI.
78.	California has sufficient population and demand for most fluid milk finished products to be efficiently marketed locally. When simulating the lowest-cost (in other words, the most efficient) movement of fluid milk from farms to plants to consumers, California milk moves almost exclusively within the state. The below map shows the most efficient movement of milk from farms to plants to demand centers. The green lines represent the movement of milk from a producer to a plant (indicated by a triangle). Triangles or plants with no obvious green line have a local milk supply. The orange lines represent the movement of the finished product from the plant (indicated by a triangle) to a demand center (indicated by a square). As shown in the California portion, producers and manufacturers only have to make local shipments to get fluid milk to the market. *[Image omitted]* Ex. 133 at 4.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief sections V.A., E.

79.	On the other hand, the primary market for California's finished cheese products is located a substantial distance east of the state. Simulating the lowest-cost (most efficient) movement of cheese products from farms to plants to markets shows that this movement is only local in nature for the farm to plant transaction. As demonstrated in the table below, cheese products from California are most efficiently marketed east of the state, to Texas and the East Coast. While California manufacturers can market their cheese in California, there is ample evidence of cheese from elsewhere being marketed in California and displacing California- produced cheese (see, e.g., Tr. 4884, discussing the sale of Cabot Cheese from Vermont in California (testimony of Mr. Moore and Mr. de Cardenas). Thus, even more California cheese necessarily must be sold east in order to be successfully marketed. Ultimately, the market for finished cheese products from California is primarily not California, but demand centers much further east. *[Image omitted]* Ex. 133 at 4.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief sections V.A., E.
80.	While the milk market for manufacturers purchasing milk must be local, the market for manufacturers selling finished cheese products is national. Due to the extreme cost and perishability of the product, the most efficient movement of milk for processing requires that the plant be located closely to the production center or farm. However, locations east of the Rockies are the primary market for cheese products from California, requiring increased transportation and distribution costs. This means that the wholesale price for cheese in California that can generate value for dairy farmers must be less f.o.b. California than f.o.b. Wisconsin.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
81.	Increased prices indicate to farmers that manufacturers need more milk and it is worth your while to produce it.	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.

82.	Manufacturers in California are seldom in need of more milk.	OA; OC; D; DB; DU; DS. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
83.	California production will grow, on average, 54 million pounds per year under the Cooperative Order over the baseline. *[Image omitted]* Ex. 5 at 27 (emphasis supplied).	O; OA; OC; DB; DS; DU. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
84.	California production will grow, on average, 6 million pounds per year under the Dairy Institute Proposal over the baseline. *[Image omitted]* Ex. 5 at 27 (emphasis supplied). Ex. 5 at 42 (emphasis supplied).	O; OA; OC; D; DB; DS; DU. See, Reply Brief section V.
85.	The economic model prepared by USDA shows that there will be a negative effect on the prices received by milk producers through the Federal Milk Marketing Order system if California enters and the California producers also continue to receive a quota price for their milk. See Ex. 5, at 26-30 (Preliminary Regulatory Impact Analysis).	O; OA; OC; D; DB; DU; DS; DC. See, Reply Brief sections V.A., E.
86.	Setting minimum prices that are too high can shut down processing capacity which cannot afford to profitably purchase and process the milk. Ex. 98, at 8-9 (Testimony of Mr. de Jong), Ex. 107, at 11 ("To build a guaranteed price level at too high a cost to us, removing any ability to mitigate the costs of clearing the market in times of excess supply, would certainly put our operation at greater risk than we already face [under current whey prices].").	O; OA; OC; D; DB; DS; DC; DU; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.

87.	California's manufacturers cannot afford the increase in prices in the Cooperative Order.	O; OA; OC; D; DB; DU; DS. See, Post-Hearing Brief section VI. See, Reply Brief section V.
88.	An over-valued minimum milk price will be especially felt by cheesemakers, a devastating result for California's cheese-heavy manufacturing class.	O; OA; OC; D; DB; DS; DC; DU. See, Post-Hearing Brief section VI.B. See, Reply Brief section V.
89.	Additionally, California's manufacturing growth has mostly been bulk commodities plants which command lower margins than other specialty plants. Ex. 91, at 15.	OA; OC; DB; DU. See, Post-Hearing Brief section VI. See, Reply Brief section V.
90.	"[Hilmar] expects that the current FMMO Class III and IV pricing, if applied to a California marketing order combined with mandatory pooling, will result in extended periods of net losses to California manufacturing plants and depressed prices for California milk producers." Ex. 98, at 32.	D; AAD. See, Post-Hearing Brief section VI.B. See, Reply Brief sections V., V.C.
91.	Hispanic cheese makers cannot survive an increase in milk prices. Ex. 1OS (Testimony of Mr. Maldonado). Cacique testified as to how operating costs in California and transportation costs to other markets has already left them at a price disadvantage to their competitors in places like Texas, Ex. 108, at 3 (Testimony of Mr. de Cardenas and Mr. Moore), a problem that would be exacerbated by further increased prices.	O; OA; OC; D; DB; DS; DC; DU; AAD. See, Post-Hearing Brief sections VI.B. See, Reply Brief sections V., V.C.

92.	Mr. Vandenberg, testifying on behalf of Pacific Gold Creamery, stated that his company utilizes whey in the most efficient manner it can, and still is barely able to break even. Ex. 119, at 3 (Testimony of Mr. Vandenberg).	OA; OC; DB; AAD. See, Post-Hearing Brief section VI.B.3 See, Reply Brief sections V., V.F.
93.	The high whey prices in California in the 2000's led to Hilmar making such a decision and building a new plant in Dalhart, Texas, instead of California. Tr. 4392: 9-21 (Testimony of Mr. de Jong).	OA; OC; DB; DU. See, Post-Hearing Brief section VI.B.3 See, Reply Brief sections V., V.F.
94.	The Preliminary Regulatory Impact Analysis shows an annual Class III increase of $1.84 per hundredweight, resulting in a combined cost of $196.5 million annually combined for the three cheese plants that process the one-fourth of California milk. Ex. 91, at 16. This increase represents a 10% increase in the cheese's gross value. Ex. 91, at 6.	O; OA; OC; DB; DC; AAD. See, Post-Hearing Brief section VI.B. See, Reply Brief section V.
95.	Class III and IV prices impact all classes. Changes made to Class III and Class IV prices are compounded in Class I prices.	O; OA; OC; DB; DU; DS; DC. See, Post-Hearing Brief section VI.B. See, Reply Brief sections V., V.C.
96.	"An acceptable level of price difference between California prices and federal order prices is demonstrated." Ex. 53, at 8 (page 55 of the Exhibit, lines 1- 3) (Testimony of Dr. Erba before CDFA Dairy Marketing Branch 5/20/2013). A study commissioned by the cooperatives from Drs. Mark Stephenson and Chuck Nicholson confirms that the "California price for milk used for cheese ought to be 70 cents less than the Federal prices." Tr. 2131:12-2132: 15 (Testimony of Dr. Erba).	O; OA; D; DB; AAD. See, Post-Hearing Brief section VI. See, Reply Brief sections V.

97.	Present capacity will be moved or reduced if the Cooperative Order is adopted. Ex. 98, at 8 (Testimony of Mr. de Jong, and Ex. 116, at 3 (Testimony of Sue Taylor).	O; OA; OC; D; DB; DU; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.
98.	New cheese capacity is already being built or planned is building outside of California in response to uncertainties created by the CSO and the potential for an FMMO with mandatory pooling.	OA; OC; D; DB; DU; DS; DC. A. Admitted to the extent the current CSO has moved production out of California. See, Post-Hearing Brief section VI. See, Reply Brief section V.
99.	Demand for fluid milk products is elastic. See Tr. 4374:11 -25 (Testimony of Mr. Newell).	O; OA; OC; DB; DU; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.
100.	The industry is already seeing consumers move to alternative beverages like fruit punch when milk gets too expensive. See Tr. 4374:11-25 (Testimony of Mr. Newell).	OA; OC; D; DB; DS; DU; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.

101.	When the U.S. regulated minimum milk prices are set too high, manufacturers have less flexibility to withstand global market downturns and remain consistent suppliers to international customers. Ex. 98, at 27. This is especially true for California, which has a large percentage of butter and powdered milk. Ex. 98, at 13.	O; OA; OC; D; DB; DU; DC. See, Post-Hearing Brief sections VI, VII. See, Reply Brief section V.
102.	The loss of manufacturing capacity due to overvalued minimum prices leaves farmers without a purchaser for their milk. Ex. 98, at 8 (Testimony of Mr. de Jong). It also results in a loss of investment and loss of jobs for plant workers. Ex. 98, at 8 (Testimony of Mr. de Jong). National commodities customers would then seek competitively priced cheese from other sources within the U.S. Ex. 98, at 30-31 (Testimony of Mr. de Jong).	OA; OC; D; DB; DS; DC; DU. See, Post-Hearing Brief section VI. See, Reply Brief section V.
103.	If prices do not reflect real-life market and demand, eventually, "markets will win." Tr. 6024:17-18 (Testimony of Dr. Stephenson). "At some point along the way they are going to have to express what they need to express in one form or another, and if we regulate a minimum price above market clearing levels, there are relatively few release valves for that kind of a problem." Tr. 6024:18 - 22 (Testimony of Dr. Stephenson).	O; OA; OC; DB; DS; DC; DU; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.
104.	Normal markets balance the disparity of supply outpacing demand in one of two ways: 1) decreasing the price to meet demand; or 2) decreasing demand to meet the price.	O; OA; OC; DB; DS; DC; DU. See, Post-Hearing Brief section VI. See, Reply Brief sections IV, V.
105.	Normally a corresponding decrease in price accompanies a run-up in production unmet by demand (as demonstrated by simple supply and demand laws). If a minimum price prevents the price from dropping to respond to this market effect, then the only option is for demand to drop.	O; OA; OC; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.

106.	Premiums complement minimum prices set below market clearing levels so that manufacturers purchase milk at its actual value.	O; OA; OC; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VI.
107.	Current CDFA prices are only minimums- individual producers and cooperatives have the ability to seek higher prices if they are so justified. Ex. 98, at 9 (Testimony of Mr. de Jong).	O; OA; OC; AAD. See, Post-Hearing Brief section II.A. See, Reply Brief section V.
108.	If prices are not higher than a certain level, then it can only be concluded that the demand that raises premiums over the minimum price does not currently exist. To put it plainly, the milk is not worth more than the minimum price being paid. Ex. 98, at 10 (Testimony of Mr. de Jong).	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
109.	In the last CDFA hearing in June 2015, Pete Garbani (VP of Member Relations for Proponent Land 0' Lakes) was asked by CDFA what prevents LOL from getting what they think 4b milk is worth; he replied, "supply and demand." Cal Dept. of Food and Agric., Department of Marketing Branch Hearing, June 3, 2015, Tr. 293:18-20 (Testimony of Mr. Garbani).	O; OA; OC; DB; AAD. See, Post-Hearing Brief section II.A. See, Reply Brief section V.G.4.
110.	Hilmar has paid $120 million in premiums over the last several years. Ex. 98, at 10 (Testimony of Mr. de Jong). However, with the temporary CDFA change to the 4b formula raising prices, those premiums have gone down. Ex. 98, at 10 (Testimony of Mr. de Jong).	O; OA; OC; DC; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.

111.	Setting regulated minimum prices too high prevents milk from moving to its highest and best use. *Id.* (Ex. 116, at 3-4) (Testimony of Ms. Taylor); Tr. 5858: 13-16 (Testimony of Mr. Vetne) (Marketplace premiums play the important role of drawing milk to its highest and best use.).	O; OA; OC; DB; DU; DC; AAD. See, Post-Hearing Brief section VI. See, Reply Brief section V.
112.	If the manufacturing price of milk is overvalued, Cooperatives can re-blend it so that it is appropriately valued to their plant operations. In California, non-cooperative cheesemakers produce the vast majority of the cheese so it is more crucial that the regulated price be appropriate for the location value, manufacturing cost, and whey value. Ex. 133, at 9 (Dr. Stephenson Study); Tr. 5370:20-5372:5 (Testimony of Mr. Murphy).	O; OA; OC; D; DB; DU; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.G.3.
113.	Cooperative manufacturing facilities are able to counterbalance their losses on the manufacturing side with the higher profits on the producer side. Ex. 133, at 9 (Dr. Stephenson Study).	O; OA; OC; DB; DU; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.G.3.
114.	The cooperatives control the vast majority of manufacturing in the PNW and Arizona. Ex. 133, at 9 (Testimony of Dr. Stephenson).	OA; OC; DB. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII.
115.	When the Pacific Northwest experienced prices above market-clearing levels, the effects were minimized as most of the milk was cooperatively marketed and they were able to reblend the lower milk price back to its member-owners. Ex. 133, at 9. "The same mechanism cannot be implemented for proprietary transactions." *Id.*	O; OA; OC; DB; DC; DU; AAD. See, Reply Brief sections V., V.G.3.

116.	Cooperatives did not know if the cost conversion that serves as the 70 cent Price II differential had changed since the mid-1990's (when it was set). Tr. 1364:6-15 (Testimony of Mr. Hollon). Nor did cooperatives study that conversion for this proceeding. *Id.*	O; OA; OC; DB; DU; DI; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
117.	Cooperatives have done no price elasticity studies, nor are they basing their proposal on any known, current study from USDA. Tr. 1363:8-22 (Testimony of Mr. Hollon).	O; OA; OC; DB; DU; DI; A; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
118.	The Cooperatives acknowledge that Class I sales have fallen and that Class I processors face increasingly challenging markets, but have not done any study as to the effect of their proposal on these problems.	O; OA; OC; DB; DU; DI; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
119.	The Cooperatives have done no analysis of the increasing basis risk as a result of their PPD allocation. Tr. 1610:1-13. (Testimony of Mr. Wegner).	O; OA; OC; DB; DU; DI. See, Post-Hearing Brief section VI. See, Reply Brief sections V., VII.B.
120.	The Cooperatives have done no study of the impact that their omission of a fluid carrier in Class I prices would have on Class I handlers. Tr. 1613: 3-14 (Testimony of Mr. Wegner).	O; OA; OC; DB; DU; DI. Issue is mooted. See, Reply Brief section VII.D.

121.	The Cooperatives have provided no study of what the National Price Surface looks like post-1999. Tr. 3235: 3-9 (Testimony of Mr. Schad), nor have the cooperatives done any study of the impact of their proposed prices on manufacturers. Tr. 3240:5 - Tr. 3241:15 (Testimony of Mr. Schad).	O; OA; OC; DB; DU; DI; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
122.	USDA did not include data gathered about receipts and distribution of fluid milk products by all known distributing plants in their Federal Order Reform pricing analysis. 64 Fed. Reg. 16044, c.2.	O; OA; OC; DB; DU; DI; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
123.	Milk and cheese production in the Pacific Northwest region nowhere near matches California's output. Compare Ex. 100, at 2 (showing approximately 2.8 billion pounds of Class III Producer Milk for 2014 in the PNW) with Ex. 61, CDFA- E, D.4 (showing approximately 19.6 billion pounds of Class III Producer Milk in 2014 in California). Similarly, at the of Federal Order Reform time not a lot of milk or milk products needed to move east from that location. Tr. 5124:12-15 (Testimony of Mr. Vetne), Ex. 112, at 58.	O; OA; OC; DB; DU; DC; AAD. See, Post-Hearing Brief section VI.B. See, Reply Brief section V.
124.	The national dairy industry has seen changes since 1993, and California's milk supply and milk market have changed significantly over the past 23 years. Ex. 111, at 7 (Testimony of Mr. Vetne); see also, preceding paragraphs discussing the California market.	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.

125.	To aid in the understanding of the principle that markets require spatial pricing, Dr. Stephenson utilized the Cornell U.S. Dairy Sector Simulator (USDSS). Ex. 133, at 1 (Dr. Stephenson Study). This model is highly detailed and technical, but addresses a simple problem: "how to get milk from dairy farms to plants to be processed into various dairy products and distribute those products to consumers in the most efficient way (lowest cost) possible." Ex. 133, at 1-2. The model takes into account total milk supply, plant locations, product mix, and consumer demand. It then simulates the most efficient movement of the dairy products (raw milk, manufactured goods, and final consumer products) based on existing road networks. The amount of data and detail in this model in this invaluable model provides an incredibly clear and accurate snapshot of these movements. For example, the model considers the 200,000 possible road routes for connecting locations and optimizes movement to the top route. Ex. 133, at 3. These routes are even limited based on road weight limits by state law. Ex. 133, at 3. The model breaks per capita demand down to a county level, providing a honed-in reflection of actual consumer demand. Ex. 133, at 2. USDA has used this model a number of times, as has Congress in evaluating and making policy decisions. Tr. 5973:6-25 (Testimony of Dr. Stephenson).	O; OA; OC; D; DB; DU; DC; AAD. See, Reply Brief section V.E.
126.	The USDSS computes two solutions instructive as to the movement and value of milk in various locations. The first is the "primal solution." Ex. 133, at 3. This solution describes the optimal physical flows of product through the dairy supply chain network. The second solution is the "dual solution." This solution represents the relative monetary values of milk and dairy products at each model location. Ex. 133, at 3.	O; OA; OC; DB; DU; DC; AAD. See, Reply Brief section V.E.

127.	The primal solution describes how market participants should structure purchases and sales of dairy products in order to maximize efficiency. Essentially, this solution is the "best case scenario" for the producers, manufacturers, and consumers. As described above, California producers and manufacturers only have to make local shipments to get fluid milk to market. (fn 2) *[Image omitted]* Ex. 133 at 4. [Fn 2: Recall that the green lines represent the movement of milk from a producer to a plant (indicated by a triangle). Triangles or plants with no obvious green line have a local milk supply. The orange lines represent the movement of the finished product from the plant (indicated by a triangle) to a demand center (indicated by a square).]	O; OA; OC; DB; DU; DC. See, Reply Brief section V.E.
128.	However, the most efficient market for finished cheese products from California is primarily not California, but demand centers much further east. *[Image omitted]* Ex. 133 at 4.	O; OA; OC; DB; DU; DC. See, Reply Brief section V.E.
129.	Dr. Stephenson correlated this model with observed values of products for these months and observed greater than a 0.88 correlation for all products, and as high as 0.99 for cheese products. Additionally, the model results are not sensitive to changes of plus or minus 5% in demand values or estimated transportation costs. According to Dr. Stephenson, "[b]oth outcomes suggest a high degree of confidence in the sensibility of the model outcomes." In other words, Dr. Stephenson has proven to a high degree of probability that his models accurately reflect the real world as to efficient markets.	O; OA; OC; DB; DU; DC; AAD. See, Reply Brief section V.E.

130.	The primal solution serves as the first step for the broader question: how does demand and location affect the actual value of dairy and dairy products? Dr. Stephenson describes this question as follows: If you were to ask fluid plant owners how much more they would be willing to pay for another hundredweight of milk, they would have to consider all of their options for other milk supplies and the cost of transporting that milk to their plant. And, they would have to consider the additional sales opportunities for the finished product and the cost of distribution to those locations. This value would never be more than the cost of transportation from the closest supply region and it will be minimal in some locations where there is plenty of milk and little nearby demand. **Thus, supply, demand, and transportation costs become the important determinants for the relative spatial values of milk.** Ex. 133, at 5 (emphasis in original).	O; OA; OC; D; DB; DC; DU; AAD. See, Reply Brief section V.E.
131.	Dr. Stephenson used this model to show the relative value of milk in various regions in the country. The USDSS Model generated the price surface for milk based on 1995 data. At this time, milk used to produce cheese in Central California was worth about $0.30 less than milk used to produce cheese in Chicago. Ex. 133, at 6. While the California farmer may have the same milk as the Illinois farmer, a Central California cheese manufacturer could only afford to pay a price $0.30 less than an Illinois cheese manufacturer in order to still be competitive. Ex. 133, at 6. *[Image omitted]*	O; OA; OC; DB; DU; DC. See, Reply Brief section V.E.
132.	Dr. Stephenson then updated the model with 2014 prices and discovered that "the difference in marginal value between central California and Chicago is now about $0.70 per hundredweight of milk." Ex. 133, at 7. In other words, the competitive advantage of the Illinois manufacturer has more than doubled since 1995. [Image omitted]. Ex. 133, at 7.	O; OA; OC; DB; DU; DC; AAD. See, Reply Brief section V.E.

133.	As detailed above, milk production in California and the western states has been steadily growing. Dr. Stephenson noted that over the last five decades, milk production has grown faster in the west, further affecting the spatial value of milk. Ex. 133, at 9. "A fundamental conclusion from these analyses is that spatial milk values for milk cannot be considered static for long periods of time - and this has implications for minimum regulated milk prices." Ex. 133, at 9. Dr. Stephenson inarguably, empirically demonstrated that the value of milk changes over time and, specifically, that the value of milk in California has changed significantly from 1995 until 2014.	O; OA; OC; DB; DU; DC; AAD. See, Reply Brief section V.E.
134.	USDA cannot and should not force the California minimum market-clear price upon other markets. "The problem with a flat, but lower, minimum price is that the price may be so low in the higher value regions of the country as to be meaningless if premiums are asked to carry too much value." Ex. 133, at 9. Thus, recognizing the spatial value of milk protects the national dairy industry from disruption and potential disorderly marketing.	O; OA; OC; D; DB; DU; DC; AAD. See, Reply Brief sections V., V.E.
135.	The USDA model assumes parity between the ultimate consumer price for all finished products. The USDA analysis does not show that the market will clear regionally in California for Class III and IV prices, only that the products will clear at national prices. Tr. 137: 13-22 (Testimony of Ms. Steeneck).	O; OA; OC; D; DB; DU; DC. See, Post-Hearing Brief section VI. See, Reply Brief sections V.A-D.
136.	While markets for dairy products clear nationally, milk markets have to clear locally. Tr. 4155: 23-24 (Testimony of Dr. Schiek).	O; OA; OC; D; DB. See, Post-Hearing Brief section VI. See, Reply Brief section V, A-D.

137.	The NDPSR prices reported by USDA which include California, but also the remainder of U.S. cheese production, are higher than the prices actually received by California cheese plants. Tr. 4436-4437 (Testimony of Mr. de Jong). This is also true as to other manufactured products. Tr. 4437-4438 (Testimony of Mr. de Jong). The Cooperatives failed to adduce any affirmative evidence to the contrary. An analysis that fails to incorporate this fundamental principle cannot be the basis for an FMMO pricing scheme.	O; OA; OC; D; DB; DU; DC. See, Post-Hearing Brief section III. See, Reply Brief section V.
138.	The measure for Dairy Market News prices for delivered products in less than carload mixed lots is entirely different from what NDPSR, the CME, or CDFA measures. Tr. 5666:4- 18 (Testimony of Dr. Schiek).	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections VI. See, Reply Brief sections V., V.A.
139.	Northwest manufacturers faced these types of problems when competing on the national level with their finished products. Tr. 6060: 1-4 (Testimony of Dr. Stephenson). The regulated minimum price in that area made it difficult for manufacturers to remain competitive with other sources of dairy products. *Id.*	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections VI. See, Reply Brief section V.
140.	Almost all U.S. milk is Grade A. Milk produced in California that meets Grade A standards can elect Grade B status. Tr. 4552:23-4554:23 (Testimony of Mr. de Jong).	O; OA; OC; DB. See, Post-Hearing Brief section II.
141.	At the hearing, both examiners and witness would routinely refer alternatively to PDs, P-Hs, producer-distributors, and producer handlers. However, these terms are not interchangeable. PDs only refer to CSO producer-distributors with example quota under Option 70. [sic] Tr. 6945 (Testimony of Mr. Shehadey). Producer-Handlers in turn mean only producer-handlers as defined in paragraph 10 of any existing FMMOs. *See all* C.F.R. §1---.10.	OA; DB; DU; A; DI. Admitted to the extent producer-distributors, and producer-handlers are two different words.

142.	PDs operate both dairy farms and processing plants. Tr. 6820: 5-7 (Testimony of Mr. Gonsalves); Tr. 6948:13-18 (Testimony of Mr. Shehadey).	OA; DI; AAD. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII.
143.	PD processing plants can and do receive significant outside milk supplies in addition to the volumes received from their related business farms. Tr. 7086-7088 (Testimony of Mr. Shehadey) (describing how CDI helps the PD balance its milk supply); Tr. 7319:23-7320:16 (Testimony of Mr. Ortis) (stating that 85% of their milk comes from outside sources, and that they use a broker to balance their milk supplies); Tr. 7567:20-24 (Testimony of Mr. DeGroot).	OA; OC; DB; DU; DC; DI. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII
144.	The PDs also operate large volume Class I plants. Tr. 6948:13- 18 (Testimony of Mr. Shehadey).	OA; DU; DI; AAD. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII
145.	At least three of the PD's have more than three million pounds milk route distribution. Tr. 6422:3-19 (Testimony of Mr. Blaufuss).	OA; DU; DI; AAD. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII
146.	The four PD's would not qualify as producer-handlers under a traditional FMMO because they buy significant amounts of milk outside their own system. Tr. 6383: 15-24 (Testimony of Mr. Blaufuss).	OA; OC; DB; DU. See, Post-Hearing Brief sections VI, VIII.B.g. See, Reply Brief section IV.D.1.

147.	The two most significant factual distinctions between PDs and "producer- handlers" under traditional FMMOs are: (1) PDs do not operate fully integrated farms and processing plants (Tr. 6383: 15-24 (Testimony of Mr. Blaufuss)); and (2) PDs distribute large volumes of Class I milk in commercial channels. Tr. 6422: 3- 19 (Testimony of Mr. Blaufuss).	O; OA; OC; DB; DC; AAD. See, Post-Hearing Brief sections VI, VIII.B.g. See, Reply Brief section IV.D.1.
148.	No new entities could apply for or obtain this PD status. Tr. 6832:4-12 (Testimony of Mr. Gonsalves). New entities can become Producer-Handlers under FMMOs if they meet the criteria. See all C.P.R. §1---10.	OA; OC; DC; DI. See, Post-Hearing Brief sections VIII.B.g.
149.	Under the CSO, large Class 1 handlers with historical Class 1 sales predating the adoption of pooling under the Gonsalves Milk Pooling Act were issued regular quota and could make limited purchases of regular quota, both of which could be converted to exempt quota for those handlers. Exempt quota is quota solids nonfat ("SNF") converted into an equivalent volume of milk per cwt that is exempt from the pricing and pooling provisions of the CSO. Handlers with exempt quota are then exempt from the pooling and pricing provisions of the CSO on the equivalent volume of milk covered by their exemption. These Class 1 handlers do not contribute to the producer-settlement fund on the exempt quota volume of milk. See, generally, Ex. 139 (Testimony of Mr. Blaufuss) and Ex. 150 (Testimony of Mr. Gonsalves).	O; OA; OC; DB; DU; DC; DI. See, Post-Hearing Brief section IV. See, Reply Brief sections IV, VI, VII.C.
150.	When exempt quota was issued and when subsequently purchased, exempt quota's price was the same as regular quota. Tr. 8130, lines 2-13 (Testimony of Mr. Lund).	OA; DI; AAD. See, Post-Hearing Brief section IV. See, Reply Brief sections VI, VII.C.

151.	PDs retain the money that is the difference between the regulated Class 1 price and the quota price for milk. Tr. 6364:10-13 (Testimony of Mr. Blaufuss).	OA; OC; DB; DU; DI. See, Post-Hearing Brief section IV. See, Reply Brief sections V, VI, VII.C.
152.	Clover-Stornetta has lost business to PDs in the San Francisco Bay Area (which is the home of Clover-Stornetta). Tr. 5520-5522 (Testimony of Mr. Britt).	O; OA; OC; DB; DU; AAD. See, Post-Hearing Brief section VI. See, Reply Brief sections V, VII
153.	This was accomplished even though Clover-Stornetta has a well-known consumer brand supported by its North Coast Excellence Certified program for milk quality and participation in the American Humane Society's animal welfare program. Tr. 5517:23-5518:5 (Testimony of Mr. Britt). Farmdale Creamery has lost business to PDs because the PDs could offer a lower priced end product. Tr. 4725: 4-17 (Testimony of Mr. Hofferber). Dean Foods Company has lost business to PDs. Dean Foods Company provided a detailed and clear example of PDs successfully bidding on and taking business away from Dean Foods including stores in both Northern and Southern California. In this case, the PDs' processing facilities were in much more distant locations in the Central Valley of California than Dean Foods' (13.8 miles versus 241 miles for Southern California and 21.1 miles versus 154 miles for Northern California). Tr. 6374-6375 (Testimony of Mr. Williams). The only justification for the PD to be able to offer competitive pricing after taking into account the increased transportation costs is that the PD used its exempt quota price advantage. Tr. 6376:4-6378:13 (Testimony of Mr. Williams) Ex. 141.	OA; OC; DB; DU; DC; AAD. See, Post-Hearing Brief section IV. See, Reply Brief sections V, VI, VII.C.

154.	Class I milk sales are highly competitive. For packaged fluid milk, raw milk represents 70% of the cost of finished product. Tr. 6376:4-6378: 13 (Testimony of Mr. Williams), Ex. 141.	O; OA; OC; DB; DU; DC. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
155.	PDs are not able to benefit from the CSO's transportation credits and allowances system. Tr. 7045:17-20 (Testimony of Mr. Shehadey).	OA; OC; DU; AAD. See, Post-Hearing Brief section VIII.A.
156.	PDs also pointed out they must not sell milk below cost under California law. Tr. 7572:15-16 (Testimony of Mr. DeGroot).	O; OA; OC; DU; DI; AAD. See, Reply Brief section V.
157.	As with the rest of the United States fluid milk sales in California have been on an unfortunate and precipitous decline. Exhibit 155 shows that over six and a half years (to August 2015) that decline was 23.96%.	O; OA; OC; DB; AAD. See, Post-Hearing Brief sections II, VI. See, Reply Brief section V.
158.	During the same time period, PDs Class 1 volume grew slightly, but certainly did not decrease. As a result, while Class 1 sales are falling, the Class 1 market share for PDs has grown by 3.41%. These numbers show that the PDs' impact on the Class 1 market is significant, and increasing. The 333.0% growth of total PD California Class 1 sales from 1985 to 2015 is also notable. Ex. 154 and Ex. 155 (based on Ex. 153 (Testimony of Mr. Shehadey)).	OA; OC; DB; DU; DC. See, Post-Hearing Brief sections II, VI.

159.	Under the Cooperative Order, the following would be permitted: a handler "reports" 100 million pounds of milk; with 50 million of those 100 million pounds diverted to Idaho. Of the 50 million pounds diverted to Idaho, 25 million pounds (50% of diversions) are delivered to 7(a) or 7(b) plants, and another 25 million pounds "reported" by the 9(c) handler are received in Idaho and not treated as diverted by the reporting handler. Thus, the handler "reports" 100 million pounds of milk, but only 25 million pounds are actually received within the marketing area and 50 million pounds will not be properly treated as diverted.	O; OA; OC; DH; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
160.	Under the Cooperative Order, the following would be permitted: once one pound of milk is received from a dairy farmer in Churchill County, that plant is a pool plant and then can receive unlimited supplies of milk from Utah, Idaho or Oregon. The Cooperative Order's diversion rules above would permit significant diversions of milk to Idaho. And not one drop of milk connected or reported by that plant would ever have any requirement to serve the fluid needs in California.	O; OA; OC; DH; DS; DC. See, Post-Hearing Brief section VI. See, Reply Brief section V.
161.	Under the Cooperative Order, the following would be permitted: dairy farmers like Charles Turner located in Nevada but shipping into California would receive the so-called non-quota blend price under the Cooperative Order or a traditional FMMO blend under the Dairy Institute Proposal. But DFA, for its farmers in Churchill County, would receive prices better than either of these prices because DFA also ships milk in Nevada to a Class I facility in Reno, NV. Tr. 2893-2903 (Testimony of Mr. Hollon).	O; OA; OC; DH; DS; DC; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.
162.	Under the Cooperative Order, the following would be permitted: producers whose milk is received both at the Reno Class I facility and the Churchill County will generate a blend price value for milk that is always higher than the $15.08 overbase or $15.51 FMMO blend price.	O; OA; OC; DH; DS; DC; DI. See, Post-Hearing Brief section VI. See, Reply Brief section V.

163.	Under the Cooperative Order, any dairy farmer who ships both to Reno and Churchill County will receive the Class I benefit in the plant blend on the Reno plant and the California overbase or FMMO blend on the remainder of its milk. Any Class I value at Reno adds value to that producer that cannot be obtained by any other pool producer who must always share all Class I proceeds with all other pool dairy farmers.	O; OA; OC; DH; DS; DC; DI. See, Post-Hearing Brief section VI. See, Reply Brief section IV, V.
164.	Given California's separate statute requiring fortification of certain milk under California's Fluid Milk Standards, use of traditional two factor Class I pricing would result in non-uniform prices paid by handlers. Three-factor Class I pricing complies with the AMAA uniform price requirements and would raise dairy farmer prices.	O; OA; OC; D; DB; DC; DU. See, Post-Hearing Brief section VI. See, Reply Brief section V.
165.	The Dairy Institute hereby incorporates by reference the Proposed Findings of Fact submitted on behalf of Hilmar.	See Objections and Responses to Proposed Findings of Fact submitted on behalf of Hilmar, incorporated herein by reference.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

PROPONENT COOPERATIVES' RESPONSES AND OBJECTIONS TO

PROPOSED FINDINGS OF FACT SUBMITTED BY

HILMAR CHEESE COMPANY

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APPENDIX B

This proceeding "is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code." 80 Fed. Reg. 47210 c.l (Aug. 6, 2015). Pursuant to 5 U.S.C. § 557(c), the cooperative proponents of Proposal No. 1, California Dairies, Inc., Dairy Farmers of America, Inc., and Land O' Lakes, Inc. (collectively, the "Cooperatives") hereby provide our objections and responses to the Proposed Findings Of Fact submitted by Hilmar Cheese Company ("Hilmar").

Due to the volume of the "Proposed Findings Of Fact" to which the Cooperatives are responding, we provide below a key to our objections and responses to the deficiencies of Hilmar's proposed findings. In addition, "Post-Hearing Brief" refers to the Cooperatives' Post-Hearing Brief submitted on March 31, 2016, and "Reply Brief" refers to the Cooperatives' Reply submitted herewith.

Code	**Full explanation of objection/response code**
O	Object: the proposed finding is legal or economic theory, not fact and therefore improper.
OA	Object: the proposed finding is argumentative, not fact and therefore improper.
OC	Object: the proposed finding is conclusion, not fact and therefore improper.
D	Deny.
DB	Denied on the bases that the proposed finding is overbroad.
DU	Denied on the basis that the proposed finding is ambiguous and unclear.
DI	Denied on the basis that the proposed finding is irrelevant to the issue before the Secretary.
DC	Denied on the basis that the proposed finding is compound and thus prohibits response.
DH	Denied on the basis that the proposed finding is an improper hypothetical.

DS	Denied on the basis that the proposed finding is speculative and lacks foundation.
A	Admitted.
AAD	Admitted only as to the accuracy of the citation; denied as to the interpretation of said citation as legal theory, not fact, which is improper.
AI	Admitted but irrelevant.

RESPONSES AND OBJECTIONS TO PROPOSED FINDINGS OF FACT

No.	Asserted Finding of Fact	Response/Objection
1.	The interaction of supply, demand, and transportation costs to produce geographically variable commodity prices is simple to understand. It explains why fresh seafood is more expensive inland, why grapefruit is dearer in Ithaca than Miami, why apples are higher priced in Miami than Oregon or New Hampshire, and milk is more valuable in the Southeast than the Upper Midwest. [Footnote reference omitted here]	OA; OC; DB; DC; DH. See, Post-Hearing Brief Brief, section VI. See, Reply Brief, section V.
2.	It has long been acknowledged in FMMO pricing rules that the value of milk varies by location. The difference in value from one location to another is a function of supply, demand, and transportation costs. [Footnote reference omitted here]. Federal Class I milk prices expressly incorporate these variable location values.	O; OA; OC; DB; DC. See, Post-Hearing Brief, sections II, VI. See, Reply Brief, section V.D.
3.	Milk for manufacturing (Class III and IV) in FMMO markets has been priced uniformly at surveyed or derived values in low cost, high production areas such as the Upper Midwest. [Footnote reference omitted here]. But the value of milk used for manufactured products is also variable by location. [Footnote reference omitted here].	O; OA; OC; DB; DC. See, Post-Hearing Brief, sections II, VI. See, Reply Brief, section V.D.

4.	The Cornell U.S. Dairy Sector Simulator (USDSS) estimates US geographic price surfaces for milk in various uses by assembling information on supply, demand, and transportation in the most efficient manner possible to produce relative differences in milk value at various locations. The 1996 USDSS report revealed a price surface with lowest 1993 values of milk for cheese use in the Upper Midwest and California — Pacific Northwest, and lowest price surface values in California for milk in butter and NFDM. The 1993 milk cheese use price surface looked like this: [Footnote reference and image omitted here].	OA; OC; DB; DC. See, Reply Brief, section V.E.
5.	Later USDSS observations for May 1995 reveal a somewhat greater spread of about $0.30/cwt in the value of milk for cheese in the Upper Midwest compared to central California. [Footnote reference omitted here].	OA; OC; AAD. See, Reply Brief, section V.E.
6.	The West's share of US cheese production has increased dramatically since these 1993 and 1995 observations. In 1993, California produced 848 million pounds of cheese, 13% of total US production of 6,528 million pounds. In 2014, California produced 2,444 million pounds of cheese, 21% of US Cheese production of 11,450 million pounds. Other western states have also increased their share of US cheese production during this 21-year interval. The 11 NASS "Western Region" states produced 26.6% of US cheese production in 1993. In 2014, the Western Region states produced 43% of total US cheese production. [Footnote reference omitted here].	AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, section V.
7.	The difference in marginal value of milk at cheese plants between California and the Chicago region increased to $0.60/cwt in 2007, and to $0.70 in 2014, by USDSS analysis of most efficient movements. [Footnote reference omitted here]. The 2014 USDSS (most efficient) marginal value Class III milk price surface looks like this: [Image omitted here].	O; OA; DC; AAD. See, Reply Brief, sections V.C-E.

8.	Bulk commodity cheese, however, is not marketed as efficiently as in USDSS program simulations. There are numerous marketers who make independent marketing decisions, not a single marketing czar, although each marketer may be presumed to maximize its own efficiency. Significantly, the USDSS model also assumes that cheese is marketed directly from cheese plant locations to 424 aggregated consumer demand locations. [Footnote reference omitted here].	O; OA; OC; DB; DC. See, Reply Brief, section V.E.
9.	Most bulk commodity cheese in trucklot or carlot quantity is marketed by cheese plants to intermediary plants, "converters," which age, cut, shred, process, and wrap cheese for wholesale to supermarkets, warehouses, retail stores and institutional customers such as Kroger, Wal-Mart, Costco, and Sysco. [Footnote reference omitted here]. Thus, it is from intermediary converter locations that most cheese is supplied to consumer demand centers. Converter plant prices paid to cheese plants are adjusted for the cost of transportation to the plant, so that cheese from near or far arrives at the same cost. [Footnote reference omitted here].	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.C-E.
10.	Sales of commodity cheddar cheese by plants to converters are captured in prices reported to AMS (formerly to NASS), which are aggregated in agency reports of average prices in the National Dairy Products Sales Report ("NDPSR"). [Footnote reference omitted here]. The average NDPSR prices, in turn, are used to calculate monthly minimum FMMO regulated prices for milk (or milk components) used to make Class III (and other) milk products. [Footnote reference omitted here].	OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, section V.
11.	The USDSS model does not capture transactions from cheese plant to converters as a marketing step before cheese is sent on to consumer demand locations. This is an example of actual commercial practices that add costs not captured in the "most efficient" USDSS market simulation. [Footnote reference omitted here].	O; OA; DB; DC; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, section V.E.

12.	There are relatively few large companies operating converter plants that receive bulk commodity American style cheese from cheese manufacturing plants. The major converters are: Pacific Cheese, Great Lakes Cheese, Schreiber, Sargento, Marathon, and Saputo. These companies operate converter plants in Nevada, Utah, Idaho, Texas, Wisconsin, Tennessee, Ohio, and Missouri. There is no large converter plant purchaser of commodity cheddar cheese in California. [Footnote reference omitted here].	O; OA; OC; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, section V.
13.	As predicted by the USDSS model, the observed market value of commodity cheddar cheese as surveyed and reported by USDA and CDFA varies from region to region. The lowest cheddar cheese market prices are observed at plants located in California and western states.	OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.C, D, E.
14.	From March 1997 through March 2012, at the request of AMS, NASS surveyed and reported commodity cheddar cheese prices fob manufacturing plants. Prices were reported weekly in a "Cheddar Cheese Prices" report from March 1997 through September 1998, and in a weekly "Dairy Product Prices" report from October1998 through March 2012.23 Since March 2012, dairy product prices have been reported by AMS in the weekly National Dairy Products Sales Report. [Footnote reference omitted here].	DC; AAD; AI. See, Post-Hearing Brief, section VI. See, Reply Brief, section V.

15.	The 1997 — 98 NASS weekly Cheddar Cheese Prices reported average prices for commodity cheddar 40 pound blocks in three regional price groups: (1) U.S. national, (2) Minnesota and Wisconsin, and (3) West, defined as California, Oregon, Idaho and Washington. During the nineteen month period this report was published, it consistently revealed that cheddar cheese values were lower in the West Coast than the U.S. average, and higher in Minnesota and Wisconsin than the U.S. average. [Footnote reference omitted here]. This is illustrated by the graph published in the December 29, 1997, Cheddar Cheese Prices report, reproduced below: [Image omitted here]. These NASS-surveyed cheddar cheese prices were expressly considered by USDA in the course of FMMO reform: "At the time the proposed rule was published the NASS survey included prices for cheddar cheese only." 64 Fed. Reg. at 16093.	O; OA; OC; D; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.C, D.
16.	The 1997 — 98 Cheddar Cheese Prices reports do not reveal how cheddar sales volume or price was weighed among the four western states — California, Oregon, Idaho, and Washington. But the corresponding NASS Dairy Products report for 1997 and 1998 reveals cheddar cheese production for California, Idaho and Washington, along with American cheese production of all four states. [Footnote reference omitted here]. California's share of the four states' American cheese production was 44% in 1998 and 46% in 1997. Oregon (for which there is no specific cheddar information) produced less than 5% of the four-states' total American cheese in each year.	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.C, D.
17.	For 2002 to mid-2011, CDFA reported weighted average cheddar cheese prices received by California cheddar plants. This data was gathered as part of its annual audit of plant manufacturing costs, and was reported in a separate publication that also compared audited California cheddar prices to cheddar prices reported by the Chicago Mercantile Exchange ("CME"). [Footnote reference omitted here].	AI. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.

18.	The CDFA-audited California cheddar cheese prices are compared to NASS reported average cheddar prices for the U.S., Minnesota-Wisconsin, and Other States, contained in the weekly NASS Dairy Products Prices for 2002 — March 2012, below: [Image and footnote reference omitted here]. These data confirm the geographic price surface in the value of cheese, and therefore in the value of milk used to make cheese, with an increasing spread over time between the lower value of cheese (and milk) in California versus the higher value of cheese (and milk) in Minnesota and Wisconsin. These geographic price differences continue. Commodity cheddar prices received by California's largest cheddar maker averaged four cents below US average NDPSR prices from 2010 — 2013. [Footnote reference omitted here].	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
19.	Since January 2000, the FMMO minimum Class III price for milk used to make cheese has been based on US average NASS-NDPSR cheese prices, less a manufacturer make allowance. The current FMMO cheese manufacturer make allowance is $0.2003/1b., calculated from the 2006 CDFA cheddar cheese plant manufacturing cost survey plus a marketing cost of $0.0015/1b. The 2006 CDFA cheddar cheese manufacturing cost survey, adopted by USDA, includes a return on investment of $0.0082/1b. [Footnote reference omitted here].	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
20.	In its final FMMO reform decision, USDA explained that the objective for pricing Class III and IV milk is to provide a regulated price that will "not exceed a level that would require handlers to pay more for milk than needed to clear the market and make a profit." [Footnote reference omitted here].	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.

21.	The observed geographical price surface for commodity cheddar cheese, like the simulated price surface produced by the USDSS model, demonstrates that national use of the US average cheddar cheese price in the Class III formula (including California, as proposed) produces margins between cheese prices and regulated milk prices, or effective allowances for manufacturing, that are smaller in some regions and greater in others than the regulated allowance of $ 0.2003 for plants that sell cheese at U.S. average prices, as shown below: [Image and footnote reference omitted here].	O; OA; DB; DC; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-E.
22.	The most significant aspect of these regional differences in plant margin between cheese price and regulated milk price (or proposed regulated price for California, in this case) is the impact on the cheese manufacturer's return on investment. USDA has adopted CDFA's conclusion (from the 2006 CDFA manufacturing cost study) that a reasonable return on investment is less than a penny per pound - $0.0082/1b. cheese. If applied to California, however, there would have been a negative ROI in every year under the Cooperatives' proposal, as shown below. [Image reference omitted here]. This result is aggravated by a 10-year old make allowance that should be increased by 3.7¢ or more. [Footnote reference omitted here].	O; OA; OC; D; DB; DC; DH; DS. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
23.	The value of milk used to produce NFDM and butter also varies geographically. This is illustrated in USDSS model results for 2014 March and September production, and for 1993 annual production, published in 1996. The USDSS 1993 butter and NFDM price surface maps are reproduced below. [Image and footnote reference omitted here]. Geographic variability in NFDM and butter prices is conclusively demonstrated in product price reports by CDFA and USDA since 1999. [Footnote reference omitted here].	O; OA; DB; DC; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-E.

24.	NFDM production in California has long dominated US total production. California's share of US total NFDM production was about 40% in 1998, during the course of FMMO reform. California has retained that market share through 2014. NDFM production in the NASS western region represented 65% of the US total in 1998 and 68% of US NFDM in 2014. [Footnote reference omitted here].	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.
25.	As may be expected by this production pattern, NASS and NDPSR prices for NFDM have been closer in value to CDFA-reported NFDM prices for California than California cheese prices to NASS and NDPSR values. Annual California weighted average prices (CWAP) for NFDM have been consistently below US average NFDM prices since 2000, as shown in the following graph. [Image omitted here].	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.
26.	The USDA NFDM make allowance in the FMMO Class IV price would have resulted in lower effective make allowances for California NFDM plants if FMMO prices had applied during 2000 through 2015, as shown below: [Image and footnote reference omitted here].	O; OA; OC; DB; DI; DC; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.
27.	This demonstrable California market product revenue shortfall, below prices attributed to NFDM manufacturers in the Federal Class IV price formula, would have provided negative returns on investment to California NFDM plants during most years. CDFA's 2006 manufacturing cost report (used in part by USDA) allows a return on investment to NFDM plants of only $0.0079/1b.38 Negative ROI in future years is aggravated by a 10-year old FMMO make allowance, which should be increased by at least 3.5 per pound according to CDFA's 2014 survey.	O; OA; DB; DC; DH; DS. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.

28.	Butter manufacturing in the United States is more geographically diverse than NFDM. But California has long been the largest butter producing state. California's share of the US butter market, along with the NASS Western Region share, has grown since 1998. In 1998, total US butter production was 1.2 billion pounds, of which California's share was 27% and the Western Region share was 36%. In 2014, total US butter production was 1.9 billion pounds, of which California's share was 33% and the Western Region share was 50%. [Footnote reference omitted here].	OA; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.
29.	Similar to the geographic variation in market prices for cheese and NFDM, market prices for commodity butter in California, as reported by CDFA, have been consistently lower than the US average butter prices as reported by NASS and AMS NDPSR publication. [Footnote reference omitted here].	OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
30.	Because California market prices for butter are lower than US average market prices reported by NASS and AMS, California butter makers would have a lower effective make allowance than the $0.1715 per pound Class IV butter allowance if the FM1V10 Class IV minimum price is exported to California, as proposed by the cooperatives. [Footnote reference omitted here].	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
31.	The effective average butter make allowance for California butter plants for the period of January 2002 — July 2015, under the Cooperatives' proposal, is shown in the graph below: [Image omitted here].	O; OA; DB; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-D.

32.	The observed shortfall in California plant margin, between audited commodity sales prices and Cooperatives' proposed regulated milk prices (FMMO Class IV), is of critical importance for evaluation of whether the proposed prices would provide a reasonable return on investment. The return on investment allowed in the 2006 CDFA butter manufacturing cost study, which USDA factored into its make allowance decision, was $0.007 cents per pound. For butter plants, as for cheese and NFDM plants, the cooperatives' proposal would result in a negative return on investment. Again, the result is aggravated by a 10-year old make allowance, which should be increased by about 4.7/lb, according to CDFA's most recent study.	O; OA; OC; D; DB; DI; DC; DH. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-D.
33.	The preceding findings on cheese values in California for FMMO Class III pricing purposes do not include cheese maker revenue and costs for the byproduct of cheese — whey. Since the time of FMMO reform, a surveyed value for whey, and a calculated value of imputed whey revenue to cheese makers, has been included in the Class III pricing formula. The product surveyed for this contribution to the Class III minimum price is "dry whey." 7 C.F.R. § 1000.50(o).	OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.
34.	USDA explained in its final FMMO reform decision that whey product values were incorporated into the Class III price "to assure that the Class III price reflects most of the value of milk used in Class III products," and "the dry whey price was determined to be the best indicator of value for other solids." USDA also relied on "more market activity" for dry whey, compared to other whey products such as whey protein concentrate that might be used in calculating or imputing revenue to cheese makers from whey byproducts. Surveys of dry whey prices were therefore deemed to be "a better price series" and "the best indicator of value" for milk "other solids" not captured in cheese. 64 Fed. Reg. at 16099 (1999).	O; OA; DB; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.

35.	During 1998, the time of FMMO reform, there were 49 plants in the United States that made dry whey, including 14 dry whey plants in California. There were also 31 plants in the United States that made whey protein concentrate ("WPC"). [Footnote reference omitted here].	AI. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.
36.	During 2014 there were 37 dry whey plants in the United States, 46 WPC plants, and 16 whey protein isolate plants. California has only one remaining plant dedicated to making dry whey. Most California cheese plants do not make whey products, but several plants concentrate whey solids by removing some water, and marketing the liquid concentrated whey to whey specialty plants, or for animal feed. [Footnote reference omitted here].	OA; OC; DI; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.
37.	As suggested by the 1998 — 2014 decline in whey powder plant numbers, and increase in whey protein concentrate and whey protein isolate plant numbers, there has been a significant decrease in dry whey and increase in other whey products as a percentage of whey solids produced in the course of cheese making. [Footnote reference omitted here].	O; OA; DB; DU; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.
38.	The manufacturing alternative to dry whey is WPC and dry lactose. But market prices for dry whey do not change in close correlation with WPC and dry lactose price. [Footnote reference omitted here].	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.
39.	The inadequate correlation between dry whey and WPC/dry lactose prices, along with higher processing and investment costs for WPC/dry lactose manufacturing, results in imputed revenue to FMMO cheese makers that frequently overstates product revenue for which they are charged in the FMMO Class III price formula. 47 For example, dry lactose product prices can drop below production costs for extended periods, while the FMMO "other solids" price implies value and imputes revenue to manufacturers.	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.

40.	For California plants that market liquid whey concentrate rather than making their own whey products, WPC market prices rather than dry whey prices serve as the common pricing index, as is the trend in national markets. [Footnote reference omitted here].	O; OA; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.
41.	A few years after FMMO reform, CDFA modified its Class 4b (cheese milk) price formula to correspond more closely with FMMO Class III pricing by incorporating imputed whey revenue based on dry whey prices. This proved to be untenable, because very little whey from California cheese plants was processed as dry whey. When dry whey prices spiked in 2006 — 07, without a corresponding increase in the value of WPC, the regulated revenue allowed to be retained by California plants — difference between product price or imputed product price revenue and the minimum Class 4b price — decreased substantially, producing severely negative returns on investment. California cheese plants responded by declining to receive milk for cheese use, and some plants closed during this period. [Footnote reference omitted here].	O; OA; OC; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.
42.	In order to address the marketing disorder created by use of dry whey in the Class 4b price formula, CDFA again amended its Class 4b price formula with a "whey factor" disconnected from extreme fluctuations in dry whey values, thereby restoring order to California's market for milk used to make cheese. [Footnote reference omitted here].	O; OA; OC; D; DB; DC; DS. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.

43.	In its most recent decision of July 2015, the CDFA hearing panel made the following findings concerning the predominant use of WPC and WPC index values in the California market. [S]ince dry whey is produced consistently by only one of approximately 57 California cheese plants, a whey factor based on dry whey does not appear to accurately represent the manufacturing conditions of most California cheese plants. There are 10 California cheese plants that make WPC ranging from 25.0 percent to 89.9 percent protein content. As a group, these 10 plants represent a significant percentage of California cheese production: 96.5 percent, 72.3 percent, and 57.5 percent of California's Cheddar, Mozzarella, and total cheese, respectively. Additionally, testimony indicates that there are some plants that do not make a dried WPC product, but do concentrate their wet whey stream. The revenue derived from selling the concentrated wet whey stream is based on the WPC34 price, albeit at a reduced rate. Compared to dry whey, it appears that a whey factor based on WPC34 could relate better to a larger portion of California cheese plants. The state agency will continue to examine the issue. [Footnote reference omitted here].	OA; DC; AAD. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.A-F.

44.	Compounding the problem of imputed but not realized dry whey revenue to California cheese makers under an FMMO Class III price, as proposed by the cooperatives, the current FMMO Class III formula overstates revenue for all whey uses by a make allowance that has not been updated for a decade. The current allowance to cover costs of converting the whey stream from the cheese vat to a finished dry whey product, and marketing that product, is $0.1991 per pound dry whey. This was based upon a 2007 hearing and a 2006 survey of dry whey manufacturing costs in 7 plants. [Footnote reference omitted here]. Although CDFA no longer surveys manufacturing costs at whey plants, changes in NFDM manufacturing costs are instructive, since both NFDM and dry whey require water removal from the raw product. Dry whey is a bit more energy intensive, since more water must be removed. CDFA manufacturing cost surveys reveal that NFDM make costs increased by 21% (3.47 cents) from 2006 to 2014, through the return on investment was only a penny. USDA's failure to update make allowances would aggravate the negative returns on investment to California cheese and whey plants if the cooperatives' proposed FMMO Class III pricing formula is adopted for a California Marketing Area.	O; OA; D; DB; DC. See, Post-Hearing Brief, section VI. See, Reply Brief, sections V.B-F.

CERTIFICATE OF SERVICE

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