

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1030**

[Docket No. AO-361-A35; DA-01-03]

**Milk in the Upper Midwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and To Order****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This tentative decision proposes to adopt, on an interim final and emergency basis, provisions that would eliminate the ability to simultaneously pool milk on the Upper Midwest Federal milk order and a State-operated milk order that has marketwide pooling. Additionally, the order would be amended by establishing a limit on the amount of milk that can be diverted to nonpool plants from pool distributing plants regulated under the order. Public comments on these actions and the other pooling and payment issues are requested. In addition, this decision requires determining if producers approve the issuance of the amended order on an interim basis.

**DATES:** Comments should be submitted on or before April 15, 2002.

**ADDRESSES:** Comments (6 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

**FOR FURTHER INFORMATION CONTACT:** Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2968, South Building, PO Box 96456, Washington, DC 20090-6456, (202) 690-1366, e-mail address: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that

administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

**Regulatory Flexibility Analysis Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. In June 2001, there were 12,748 producers pooled on, and 57 handlers regulated by the Upper Midwest order. Based on these criteria, the vast majority of the producers and handlers would be considered as small businesses. The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and, are consistently serving the fluid needs of, the Upper Midwest milk marketing area, and are

not associated with other marketwide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on a substantial number of small entities. The proposed amendments will engender a small change, relative to the total price paid to producers, and no substantial number of entities will change pool status as a result of the proposed amendments. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). It was determined that these proposed amendments would have little or no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This notice does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This proposed rulemaking does not duplicate, overlap, or conflict with any existing Federal rules.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

*Prior documents in this proceeding*

*Notice of Hearing:* Issued June 5, 2001; published June 11, 2001 (66 FR 31185).

**Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this tentative final decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Upper Midwest marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 60th day after publication of this decision in the **Federal Register**. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The Hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes. The materials are addressed in the discussion below of the particular issues considered.

The proposed amendments set forth below are based on the record of a public hearing held at Bloomington, Minnesota, on June 26–27, 2001, pursuant to a notice of hearing issued June 5, 2001 and published June 11, 2001 (66 FR 31185).

The material issues on the record of hearing relate to:

1. Eliminating the simultaneous pooling of milk on the order when already pooled on a State-operated milk order that has marketwide pooling.
2. Allowing overbase milk from California to remain as eligible for pooling on the Upper Midwest Federal milk order.
3. Changing certain pooling provisions of the order regarding performance standards and diversion limits.
4. Changing the rate of partial payments to producers.
5. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended

decision and the opportunity to file written exceptions.

**Findings and Conclusions***Preliminary Statement:*

Representatives from the California Department of Food and Agriculture, Dairy Marketing Branch, appeared at the hearing to provide information and to answer factual questions about the California State milk order program. Their appearance was at the request of the USDA and their participation was provided as a courtesy to the public. The participation of the California officials was neither in support of nor in opposition to any of the proposals or issues that were heard. The California officials provided publications that detailed and explained the history and operations of the California milk order program which included how milk is pooled and priced under that State order.

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

*1. Simultaneous Pooling on a Federal and State-Operated Milk Order*

A proposal, published in the hearing notice as Proposal 1, seeking to prevent the simultaneous pooling of milk on the Upper Midwest order and on a State-operated order with marketwide pooling, should be adopted immediately. The practice of pooling milk on a Federal milk order and simultaneously pooling the same milk on a State-operated milk order has also come to be referred to as “double dipping.” Currently, the Upper Midwest order (Order 30) only provides prohibitions for the simultaneous pooling of the same milk on more than one Federal order. The record provides evidence and support for eliminating the ability of milk already receiving the benefits of marketwide pooling through a State-operated milk order from simultaneously being pooled on Order 30.

Proposal 1, which sought to end the practice of double dipping, was proposed by Associated Milk Producers, Inc. et al., First District Association, and Lakeshore Federated Cooperative. These entities are dairy farmer cooperatives who supply a significant portion of the milk needs of the Upper Midwest marketing area. Other entities who joined in support of this proposal included: Foremost Farms USA; Mid-West Dairyman's Company; Bongards' Creameries; Cady Cheese; Cass-Clay Creamery; Ellsworth Cooperative Creamery; Family Dairies USA; Hastings Cooperative Creamery; Kraft Foods;

Lynn Dairy; Manitowoc Milk Producers Cooperative; Milwaukee Cooperative Milk Producers; Muller Pinehurst Dairy; Mullins Cheese; Plainview Milk Products; Swiss Valley Farms; Valley Queen; Weyauwega Milk Products; White Clover Dairy, Inc.; and Hilmar Cheese of Hilmar, California.

A witness appearing on behalf of Associated Milk Producers, Inc. (AMPI), a supporter for the direct elimination of double-dipping, provided evidence and testimony that showed an increasing amount of California milk being pooled on Order 30. For the time period of October 2000 through May 2001, said the AMPI witness, there was an estimated \$11.4 million negative effect on the pool, the equivalent of about a ten-cent (\$0.10) reduction for each hundredweight of milk pooled on the order, as a result of pooling California milk on Order 30. According to the AMPI witness, this estimate was calculated by factoring the amount of milk from California that had been pooled on the Upper Midwest pool from the Order's actual Producer Price Differential (PPD) and applying the difference to the volume of milk pooled on the order.

The AMPI witness indicated the reform of the Federal milk marketing order system, implemented in January 2000, provided economic incentives for California milk to pool on Order 30. Specifically, said AMPI, the use of the higher of either the Class III or Class IV milk price in setting and moving Class I milk prices had yielded generally higher PPDs than existed in the Upper Midwest region prior to reform.

The AMPI witness surmised that Order 30's pooling of California milk, already pooled under the State-operated milk order of California, resulted in obvious inequities. The witness provided estimates of extent and impact on Upper Midwest dairy farmers and was of the opinion that this situation is severe enough to conclude that the Department should move directly to a final decision and avoid the more lengthy procedure of first issuing a recommended decision and then issuing a final decision.

These views and conclusions by the AMPI witness were supported in testimony by a witness appearing on behalf of Foremost Farms USA (Foremost). The Foremost witness testified that California milk pooled on Order 30 grew from about 10 million pounds to an average of 260 million pounds during the 3-month period of March through May 2001. According to calculations by Foremost, an estimated \$6 million reduction in value for all milk pooled on the order occurred due

to the pooling of California milk on Order 30. This revenue, said Foremost, comes from Upper Midwest dairy farmers who already have the lowest PPD in the Federal order system. Acknowledging that tighter pooling provisions may serve to eliminate the double dipping issue, Foremost was of the opinion that tightening pooling standards would not be the best way to accomplish that end.

A witness representing the Mid-West Dairyman's Company/Lakeshore Federated Dairy Cooperative (MDC), a dairy farmer cooperative located in northern Illinois and southern Wisconsin, testified in support of ending double dipping. This witness also spoke on behalf of Lakeshore Federated Dairy Cooperative, which represents over 4,000 dairy farmers located in Illinois, Iowa, and Wisconsin, and whose milk is pooled mostly on the Upper Midwest order and to a lesser extent on the Central and Mideast Federal milk orders. This witness indicated that Mid-West Dairyman's Company milk supplies the fluid market.

The MDC witness expressed concern about equity among producers and equity among handlers. In this regard, the witness maintained that this issue should be handled on an expedited basis. The MDC witness indicated that the Federal order program has a long history of promoting equity to both producers and handlers. According to MDC, classified pricing contributes to equity among handlers, and the marketwide pooling of revenue generated from classified pricing provides for equity among producers. Specifically noted by the MDC witness was the purposeful elimination of individual handler pooling as milk marketing orders have consolidated in larger geographic areas.

Federal orders prohibit the pooling of the same milk of a producer on more than one Federal order, noted the MDC witness. Drawing money from one Federal order pool equitably shares revenue with those producers who supply the market, but drawing additional revenue from a second Federal order pool destroys the goal of equity among producers, a reason why the Federal order program prohibits double pooling, maintained MDC. As evidence of the impact of double dipping, MDC presented analysis showing that from January 2000 through April 2001, the Order 30 statistical uniform price per hundredweight averaged \$10.8850, with a pool draw of 84.5 cents. Over the same 16-month period, said MDC, the California overbase price averaged about 21.5 cents

higher than the blend price in Order 30. Not only is the California overbase price higher than in Order 30, noted MDC, but a California dairyman pooled on Order 30 will also draw the 84.5 cents by being able to simultaneously pool the same milk on Order 30.

The MDC witness testified that the California milk pooling plan places high importance on providing equity to producers and to handlers regulated by the state. The witness noted that establishing producer equity is a basic cornerstone of both the California and Federal milk order programs and that both accomplish this through marketwide pooling. If the Federal order program does not eliminate double dipping, there cannot be equity in prices received by producers in the Midwest or California, said the witness. Eliminating double dipping is desirable, said MDC, because it would not change the movement or the marketing of milk in any significant fashion. Milk would continue to be picked up at the farm and taken to the same plants as is currently done. According to the MDC witness, the only difference would be that no financial benefit would accrue to some producers who currently are able to double dip.

A dairy farmer from Minnesota, who is also the Chairman of the First District Association, President of the Nelson Creamery Association, and serves on the board of the Minnesota Milk Producer's Association (First District), testified in support of amending the Upper Midwest order to prohibit double dipping. The First District witness testified that it is unfair and wrong for dairy farmers pooled on Order 30 to have their milk price intentionally diluted as a result of California milk being pooled on the order. This witness estimated that the impact on the price received by dairy farmers in the Upper Midwest was about 15 to 17 cents per hundredweight. The First District witness also thought it important to indicate that California, with its State-wide milk regulatory system, had chosen not to be a part of the Federal milk order system.

A consultant witness with extensive experience in milk marketing regulations appeared on behalf of the supporters of Proposal 1. The witness provided detailed analysis regarding California milk movements and offered modified wording from that published in the hearing notice to end double dipping. This witness testified that Federal order provisions have always been tailored to prevent producers from pooling the same milk twice and enjoying the benefits of marketwide pooling from more than one order. To

this end, according to the witness, a handler regulated on the Upper Midwest order should not be permitted to pool diverted milk if that milk is pooled and priced under either a Federal order or State order that provides for marketwide pooling.

Important to the new consolidated orders was the rejection of "open pooling" where milk from anywhere can be pooled on any marketing order, said the witness. The witness indicated that, in his opinion, the Department rejected open pooling because it did not provide an assurance of milk being made available for the fluid market. The witness also expressed the opinion that in markets with 20 percent or less milk used for fluid purposes, the notion of assuring an adequate supply of milk for fluid use becomes of questionable importance.

The witness testified that the statutory requirements for milk marketing orders require the uniform treatment of producers and that uniform treatment is fundamentally the same as the equitable treatment of producers. The witness said that equitable treatment includes the equal sharing of the proceeds of the pool among all producers pooled on the order. However, the witness thought the notion of equitable treatment would not include producers who are sharing in the proceeds of other marketwide pools on the same milk. To this end, the witness maintained that pooling milk on both the California and Order 30 marketwide pools has resulted in the nonuniform distribution of proceeds to those producers who pool the same milk twice.

The witness also presented an analysis of data from the California Department of Food and Agriculture as well as relying on his knowledge of milk receipts at plants located in the western States of Oregon, Nevada, and Arizona. This analysis shows, said the witness, that almost all of the California milk pooled on the Upper Midwest order is not physically received within the Order 30 area, but is instead being received at California plants. Because the milk is received at a California plant, it is pooled under the California marketwide system.

The Secretary of the Wisconsin Department of Agriculture, Trade, and Consumer Protection (WDATCP), accompanied by the Director of Value Added Agricultural Development of the WDATCP, testified in support of amending the Upper Midwest order to stop and prevent the double dipping of milk. The witnesses testified that increasing volumes of California milk was diluting the Class I utilization of the market and was also lowering the

benefit to dairy farmers in Minnesota and Wisconsin who are pooled on Order 30.

These Wisconsin officials were of the opinion that artificial regulations, not market forces, allow California milk to simultaneously pool under California's State order program and Order 30. The witnesses found this to be patently unfair and noted that it only serves to lower the income to Wisconsin and Minnesota dairy farmers.

With regard to milk produced far from the order and pooled on Order 30, these witnesses expressed minimal concern about such milk being able to pool on the order provided the same milk could not and would not enjoy the benefit of two marketwide pools. While the impact of pooling distant milk which cannot double dip was acknowledged to have the same impact in lowering returns to Minnesota and Wisconsin dairy farmers, these witnesses took no issue with such distant milk being able to pool on the Upper Midwest order. They expressed the view that adopting more restrictive pooling standards for the purpose of preventing double dipping would interfere with and supplant market forces, such as the economics of transportation and distribution, with artificial regulations.

The President and Chief Executive Officer of Hilmar Cheese, located in Hilmar, California, also testified in favor of preventing California milk from being pooled simultaneously on the California State order and the Upper Midwest order. Hilmar Cheese (Hilmar) produces a variety of cheeses which are marketed throughout the United States. The Hilmar witness testified that the California milk order system employs marketwide pooling.

The Hilmar witness stated that dairymen in California participate in a marketwide pool through a regulated milk pricing and pooling system that includes quota milk and that is operated by the State of California. The Hilmar witness confirmed the testimony of the California State government witnesses that all Grade A milk sold to a pool plant in California is associated with the pool and shares in the revenue generated from the use of milk in all classes of use. While all plants that manufacture milk into manufactured products such as cheese, frozen products, butter, and milk powder need not be pool plants, said the witness, most plants opt to participate in the pool so that their dairy farmers can reap the benefits of marketwide pooling. Manufacturing plants become pool plants, said Hilmar, by making some of their milk receipts available for Class I and Class II uses. Producers are paid for

their milk on the basis of the milk components they ship and on the proportion of their milk sales that are covered by their quota holdings, said this witness. Fat and solids-not-fat, said Hilmar, have their own separate pools, and all producers share equally in the revenue generated by sales in the various milk classes. The total revenue from solids-not-fat in all classes, including revenue from the Class I fluid carrier value, is first adjusted to pay for transportation allowances and credits, and the remaining revenue is reduced by the total value of milk that is quota milk, said the witness. The quota milk pool is determined, said Hilmar, primarily by the pounds of solids-not-fat quota shipped multiplied by the quota premium of \$0.195 per pound of solids-not-fat, which is also equal to \$1.70 per hundredweight. After deducting the value of quota milk from the adjusted solids-not-fat revenue in the pool, the remaining revenue is divided by the total pounds of solids-not-fat to obtain the overbase (product in excess of quota) and the base solids-not-fat price, said the witness. The quota solids-not-fat price, said Hilmar, is equal to the overbase price plus \$0.195 per pound. Under the California milk pooling system, testified Hilmar, all dairy farmers in the pool receive a portion of the revenue from milk sales in all milk classes, even though some dairy farmers will receive more as quota holders than those who hold less quota or no quota.

Because of this revenue sharing with all producers pooled under the California system, testified the Hilmar witness, the same dairy farmers should not also have the opportunity to pool the same milk on a Federal milk order. The witness found it odd that some producers would seek to capture pool revenue from other parts of the country and, at the same time, collect pool revenue from the California pool. Engaging in this sort of behavior, said the Hilmar witness, results in some undesirable consequences. The witness presented an analysis of a 17-month period (beginning with the implementation of order reform) that compared California milk prices with Federal order milk prices. This analysis revealed, according to the witness, that during the 17-month time period, the California overbase price averaged \$11.21 per hundredweight (cwt), or \$1.03 per cwt over the California Class 4-B (milk used in cheese) milk price. In the Upper Midwest order at Hennepin County (Minneapolis), noted the witness, milk value was only 73 cents higher than the order's Class III price at the reference test. The witness drew

attention to the California overbase price averaging nearly 22 cents above the Upper Midwest statistical blend price despite the use of a quota system by California. California overbase dairy farmers, said the witness, already benefit significantly from its diverse product pool, and quota holders benefit in prices received by an additional \$1.70 per cwt of milk.

There is an inequity to Upper Midwest producers, said Hilmar, when California overbase milk is pooled in both California and on the Upper Midwest order. Hilmar compared the producer price differential (PPD) for two different locations in the Upper Midwest marketing area (Chicago and Minneapolis) with a plant located in Glenn County, California (some 90 minutes north of Sacramento), where milk pooled under the Upper Midwest order is received. Hilmar testified that comparison of both the California overbase price and the Federal order PPD on the California milk that is pooled but not delivered to the Upper Midwest, results in a 95-cent net higher price for the "double-pooled" California milk than from California milk not pooled on Order 30. According to the Hilmar witness, the double pooling only serves to augment California prices received by producers by drawing money from the Upper Midwest market which already has milk prices lower than California's.

In light of their analysis, said Hilmar, double dipping is not the type of innovation that creates real value, and that double dipping only moves money and distorts and discourages, and ultimately damages the dairy industry. Hilmar chose not to engage in this behavior.

Additional support for eliminating double dipping was offered by a representative of Marigold Foods. Marigold Foods (Marigold) is a handler which has five regulated distributing plants located within the Upper Midwest order. Marigold is concerned, the witness indicated, about California milk being pooled on the order and reducing dollars paid to their local dairy farmers. According to the Marigold witness, California milk is not leaving the state of California and is not available to serve the fluid market in Order 30. Marigold indicated that they pay a \$1.70 Class I differential on most of their milk purchases as well as over-order premiums to assure a supply of milk. However competitive the over-order premiums, Marigold indicated, they are not enough to assure themselves a supply of milk, noting that several of their suppliers have indicated a financial need to reduce shipments to

Marigold's distributing plants. The witness attributed this situation to the ability of California milk to be pooled simultaneously on the California State order and on Order 30.

The Marigold witness testified that the Order 30 PPD was being reduced by 10 to 15 cents per cwt by the pooling of California milk. Marigold indicated that this money was funded by the market's Class I fluid milk processors and that these funds should be going to the dairy farmers who serve, or are available to serve as needed, the Order 30 fluid market. Marigold stressed that they already compete for a supply of milk with handlers who are regulated by another Federal order and with entities who have obtained funds from Order 30 from the pooling of California milk. Competing with California only intensifies an inequitable situation in Marigold's ability to compete for a supply of milk, said the witness.

Marigold stated that it is through a regulatory loophole that producer milk which is not available to serve the fluid market is permitted to receive money from the Order 30 pool when the same milk is already receiving a benefit from marketwide pooling in a State-operated order. The witness said that this situation is unjust and contrary to the purposes of the legislation which authorizes Federal milk marketing orders for bringing forth an adequate supply of milk to meet fluid needs. Accordingly, the Marigold witness urged a prompt end of the ability of milk to double dip. By closing this regulatory loophole, said the Marigold witness, equity would be restored to Upper Midwest dairy farmers because the action would ensure that the money paid for milk by a regulated handler is shared among farmers who serve or are available to serve the fluid market.

Land O' Lakes is of the opinion that California does not have marketwide pooling. In support of their proposal, LOL pointed to other State dairy programs. They noted that the North Dakota State Order and the Pennsylvania Milk Marketing Board are currently considering the adoption of marketwide pooling. Other pricing programs, said LOL, such as the Northeast Compact and various over-order pricing agencies such as the Upper Midwest Marketing Agency would appear threatened if Proposal 1 were adopted. Other LOL views and proposals are discussed later in this decision.

Other opposition took the form of describing the general inadequacy of the Upper Midwest's pooling provisions and not the elimination of double dipping per se. While Dairy Farmers of

America (DFA) testified that it opposes the ability of the same milk to simultaneously pool on two Federal milk orders, they did not oppose simultaneous pooling occurring on both a Federal and State-operated milk order such as California's. DFA indicated their ability to derive monetary benefits from both the Federal and California State milk order program has been of assistance in meeting their desired business objectives. DFA did submit their own proposal, published in the hearing notice as Proposal 4, which addressed broader pooling standards and concerns. DFA's proposal is discussed later in this decision.

For over 60 years, the Federal government has operated the milk marketing order program. The law authorizing the use of milk marketing orders, the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders as an instrument which dairy farmers may voluntarily opt to use to achieve objectives consistent with the AMAA and that are in the public interest. An objective of AMAA, as it relates to milk, was the stabilization of market conditions in the dairy industry. The declaration of the AMAA is specific: "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." The AMAA provides authority for employing several methods to achieve more stable marketing conditions. Among these is classified pricing, which entails pricing milk according to its use by charging processors differing milk prices on the basis of form and use. In addition, the AMAA provides for specifying when and how processors are to account for and make payments to dairy farmers. Plus, the AMAA requires that milk prices established by an order be uniform to all processors and that the price charged can be adjusted by, among other things, the location at which milk is delivered by producers (Section 608(c)(5)). As these features and constraints were employed in establishing prices under Federal milk orders, some important market stabilization goals were achieved. The most often recognized goal was the near elimination of ruinous pricing practices of handlers competing with each other

on the basis of the price they paid dairy farmers for milk and in price concessions made by dairy farmers. The need for processors to compete with each other on the price they paid for milk was significantly reduced because all processors are charged the same minimum amount for milk, and processors had assurance that their competitors were paying the same value adjusted minimum price.

The AMAA also authorizes the establishment of uniform prices to producers as a method to achieve stable marketing conditions. Although some hearing participants are of the opinion that marketwide pooling cannot solve disorderly marketing conditions, marketwide pooling has been adopted in all Federal orders because of its superior features of providing equity to both processors and producers. A marketwide pool, using the mechanism of a producer settlement fund to equalize on the use-value of milk pooled on an order, speaks directly to the objective of the AMAA of ensuring uniform prices to producers supplying a market. The Federal order program purposefully moved away from individual handler pooling—a pooling method not uncommon when many milk marketing orders represented much smaller and much more local milk marketing areas. Through marketwide pooling, the equalization of prices paid to dairy farmers did have implications that affected the competitive relationship between processors along with uniform prices received by dairy farmers. Under individual handler pooling, the use-values of milk by a handler are averaged, or blended, and distributed separately to only those producers who had supplied the handler. With marketwide pooling, a handler regulated by an order with high Class I use was no longer able to exercise control over producers through the higher blend prices they were able to pay to producers who were, for example, more favorably located to the plant. Similarly, handlers with lower Class I use, unable to pay as large a blend price, found that marketwide pooling greatly improved their position in competing for a supply of milk. Prices paid by handlers were equalized across the entire market where handlers competed with each other for fluid sales and producers received a more uniform price for their milk.

Under the California State milk order program, similar objectives to that of the AMAA are clear. The record evidence indicates the California State order program as having a long history in the development and evolution of a classified pricing plan and in providing

equity in pricing to handlers and producers. Important as classified pricing has been in setting minimum prices, the issue of equitable returns to producers for milk could not be satisfied by only the use of a classified pricing plan. Some California plants had higher Class I fluid milk use than did others and some plants processed little or no fluid milk products. As with the Federal order system, producers who were fortunate enough to be located nearer Class I processors received a much larger return for their milk than producers shipping to plants with lower Class I use or to plants whose main business was the manufacturing of dairy products. Over time, disparate price differences grew between producers located in the same production area of the state which, in turn, led to disorderly marketing conditions and practices. These included producers who became increasingly willing to make price concessions with handlers by accepting lower prices and in paying higher charges for services such as hauling. Contracts between producers and handlers were the norm, but the contracts were not long-term (rarely more than a single month) and could not provide a stable marketing relationship from which the dairy farmers could plan their operations.

In 1967, the California State legislature passed and enacted the Gonsalves Milk Pooling Act. The law provided the authority for the California Agriculture Secretary to develop and implement a pooling plan, which was implemented in 1968. The California pooling plan provides for the operation of a Statewide pool for all milk that is produced in the State and delivered to California pool plants. It uses an equalization fund that equalizes prices among all handlers and sets minimum prices to be paid to all producers pooled on the State order. While the pooling plan details vary somewhat from pooling details under the Federal order program, the California pooling objectives are, for all intents and purposes, identical to those of the Federal program.

It is clear from this review of the Federal and the California State programs that the orderly marketing of milk is intended. Both provide a stable marketing relationship between handlers and dairy farmers and both serve the public interest. It would be incorrect to conclude that the Federal and California milk order programs have differing purposes when the means, mechanisms, and goals are so nearly identical. In fact, and as indicated in brief by the supporters for Proposal 1, the Federal order program has precedent

in recognizing that the California State milk order program has marketwide pooling. Under milk order provisions in effect prior to milk order reform, and under § 1000.76(c), a provision currently applicable to all Federal milk marketing orders, the Department has consistently recognized California as a State government with marketwide pooling.

Since the 1960's, the Federal milk order program recognized the harm and disorder that resulted to both producers and handlers when the same milk of a producer was simultaneously pooled on more than one Federal order. As noted above, producers do not receive uniform minimum prices, and handlers receive unfair competitive advantages. The need to prevent "double pooling" became critically important as distribution areas expanded and orders merged. The issue of California milk, already pooled under its State-operated program and able to simultaneously pool under a Federal order, has, for all intents and purposes, the same undesirable outcomes that Federal orders once experienced and subsequently corrected. It is clear that the Upper Midwest order should be amended to prevent the ability to pool on more than one order when both orders employ marketwide pooling.

There are other State-operated milk order programs that provide for marketwide pooling. For example, New York, as indicated in record testimony, operates a milk order program for the western region of that State. A key feature explaining why this State-operated program has operated for years alongside the Federal milk order program is the exclusion of milk from the State pool when the same milk is already pooled under a Federal order. Because of the impossibility of the same milk being pooled simultaneously, the Federal order program has had no reason to specifically address double dipping or double pooling issues, the disorderly marketing conditions that arise from such practice, or the primacy of one regulatory program over another. The other states with marketwide pooling similarly do not double pool Federal order milk.

The record contains various opinions offered to explain why the practice of double dipping has occurred. Some offered that the Class I price structure changes implemented with Federal order reform resulted in a much higher PPD than existed under the old Upper Midwest and Chicago orders, providing a financial incentive. Some cited the change in how orders, including Order 30, zoned Class I prices and producer blend prices, suggesting if these zoning methods had been retained, the

incentive for California milk to double dip on Order 30 may never have been an issue. Others noted that the Federal order location value of fluid milk in much of California is actually higher than in Order 30 and thus implied that tighter pooling provisions would most likely prevent California milk from being pooled on Order 30.

These are all interesting and valid observations that can lead to reasonably concluding that California milk would not seek to be pooled on Order 30 if not for the regulatory amendments. However, determining that double dipping and its impacts are a result of the reformed Class I pricing structure does not lead to the conclusion that the price structure needs to be abandoned or severely altered. Rather the issues here are whether the double dipping is a pooling problem that needs to be solved, and whether the first proposal, with or without various modifications, is an effective solution to that problem. As noted above, the Department believes the pooling problem needs a pooling solution and a modification of the first proposal will effectively solve the problem. When equity is not provided for, the disorderly marketing conditions that have arisen in Order 30 become the same as those existing prior to Federal orders adopting provisions preventing the double pooling of milk.

California milk should only be eligible for pooling on Order 30 when it is not pooled on the California State order, and meets the Upper Midwest's pooling standards. A distinction needs to be made here between a producer and the milk of a producer. While much of the record testimony speaks of producers in the same vein as the milk of producers, it is necessary to clarify the obvious intent of all hearing participants that it is the milk of a producer that becomes pooled. It is clear from the context of the record testimony that this was intended.

The Federal milk order program, including Order 30, does not regulate producers. Rather, the program regulates handlers, those entities that are the first buyers of milk from producers and who incur the minimum payment obligations to producers. The Federal milk order program has no authority to regulate producers in their capacity as producers, and cannot, for example, preclude a producer from being pooled anywhere, provided the milk of the producer meets the pooling standards of an order. For this reason, Federal milk orders, including Order 30, provide separate definitions for a producer in the Producer definition and for the milk of a producer in the Producer milk definition. This distinction is also

important because the record evidence indicates California milk delivered directly from farms to plants located outside the State is not pooled on the State order. If a California producer delivers milk directly from the farm to pool plants regulated by the Upper Midwest order, and if that milk satisfies the pooling standards of the Upper Midwest order, that milk will be pooled on the Upper Midwest order.

The amendatory wording provided below, intended to eliminate double dipping, is at some variance from that proposed by the proponents of Proposal 1. The wording is different because the proposed modified wording of Proposal 1 would prevent double dipping on only diverted milk. The wording presented below would apply to any milk that participates in a State-operated milk order that provides for the marketwide pooling of milk and, would not prohibit the ability of milk to participate in the Order 30 pool when not part of a State-operated order milk order program providing for marketwide pooling.

### *2. California Overbase Milk and Pooling*

A proposal, published in the hearing notice as Proposal 3, that sought to exclude California quota milk from being pooled on the Upper Midwest order should not be adopted. As California has quota and overbase prices for milk, this proposal would allow overbase milk from California to be eligible for pooling on Order 30.

Two proposals were offered by Land O'Lakes (LOL) that sought to permit the continued pooling of California milk on the Upper Midwest Order. Specifically, a proposal published in the hearing notice as Proposal 2, would "grandfather" or exempt any California milk previously qualified for pooling on the Upper Midwest order from any amendment to the order which would thereafter exclude the pooling of such milk. This proposal was abandoned and is not discussed further in this decision. Another proposal, published in the hearing notice as Proposal 3, sought to exclude only California quota milk from being pooled on the Upper Midwest order. LOL is a cooperative association that has member producers whose milk is pooled under both the California State and Upper Midwest milk orders.

The witness testifying on behalf of LOL indicated that his organization supports the concept of efficient and orderly marketing and, that the pooling of milk under an order should be based on performance. However, LOL indicated they were not in favor of restricting access to pooling to benefit a select few. LOL was of the opinion that fewer restrictions to pooling provides

for market efficiencies resulting in lower costs in serving the Class I needs of a market. The witness testified that LOL engages in double dipping. They indicated they engage in this practice to gain additional revenue to subsidize the losses incurred in servicing the fluid market in Order 30. They did not think marketing conditions warrant the Department of Agriculture treating the issue as an emergency.

The real issue facing the industry, said the LOL witness, is not California milk. The impact of pooling reserve supplies of milk is the same regardless of where the milk is located, said LOL. The witness argued that regardless of location, performance criteria must be met to provide for pooling eligibility, and therefore, performance requirements rather than the artificial restrictions offered by Proposal 1 should be addressed. According to the witness, increasing shipping requirements would provide all the equity necessary as handlers shipping the minimum requirements will be forced to ship more milk or reduce the volume of milk pooled. LOL contends that producers have the right to pool milk based on performance, stressing that where the milk originates is irrelevant.

The LOL witness testified that the Class I pricing surface adopted as a result of Federal milk order reform has allowed for more liberalized pooling, thereby allowing access to higher levels of Class I revenues. The witness said the net impact of Federal order reform has been positive for Upper Midwest dairy farmers. LOL did stress that access to additional Class I revenues should only be gained through performance, with market participants demonstrating a willingness to service the fluid needs of the market. According to the LOL witness, the utilization of milk for Class I fluid uses will tend to equilibrate as the needs of milk order areas beyond Order 30 are met based on performance. The witness said that the milk of producers should be allowed to move freely to meet the needs of the markets. In this regard, testified LOL, Upper Midwest entities must be willing to share the local proceeds from Class I use if they expect to share other markets' Class I proceeds or risk the loss of credibility when participating in deciding how milk orders should function.

According to the LOL witness, California does not have a marketwide pool. The witness noted that proceeds from fluid and soft dairy product use are paid to producers on the basis of quota, while non-quota milk is priced based on manufacturing values. The returns on quota equity, said LOL, are not

distributed marketwide, noting that it has been only recently that the State of California instituted a value difference between quota and overbase milk. It is LOL's assertion that California's lack of marketwide pooling should not prohibit the ability of overbase milk to be pooled on Order 30.

The LOL proposal for allowing the pooling of overbase milk from California on Order 30 should not be adopted for the same reasons discussed in finding that Proposal 1 should be adopted immediately. Regardless of LOL opinions, the only reasonable conclusion that can be reached is that the California State order program does have marketwide pooling and that overbase milk received at a California plant is pooled on the State order and thereby shares in the benefits that accrue to producers under the State's marketwide pooling plan. This conclusion is substantiated by the testimony and participation by California State officials who operate the California State milk order program. Additionally, it seems contrary to the argument advanced by LOL that milk, regardless of where it is located, should be pooled on the basis of performance. California milk, other than a one-time shipment of a days' production of a producer, does not actually leave the State to consistently service the Order 30's Class I needs.

### *3. Performance Standards and Diversion Limits*

A proposal offered by the Dairy Farmers of America (DFA) and the National Farmers Organization (NFO), published in the hearing notice as Proposal 4, addressed two separate issues: establishing performance standards for milk not traditionally associated with the Upper Midwest marketing area and, the ability of pool distributing plants to divert an unlimited volume of milk to nonpool plants. The portion of the proposal seeking to establish diversion limits for pool distributing plants should be adopted immediately. The record does not support adoption of performance standards for milk based on the location of the producer or the milk of a producer. DFA is a member-owned cooperative of nearly 17,000 farms that produce and market milk across a significant portion of the United States. NFO is also a member-owned cooperative that produces and markets milk in Order 30, the State of California, and in other Federal milk orders.

Specifically, the Upper Midwest order should be immediately amended to provide a diversion limit of 90 percent of producer receipts, including

diversions, for pool distributing plants regulated under the order. In addition, the market administrator may adjust the diversion limit for pool distributing plants as marketing conditions warrant. Since supply plants pooling milk on the Upper Midwest order must ship 10 percent of receipts, including milk diverted, to a pool distributing plant and certain other types of plants, there is no reason to impose a diversion limit on supply plants.

DFA testified that two primary benefits of the Federal order program include allowing producers to benefit from the orderly marketing of milk and to share in the marketwide distribution of revenue that results mostly from Class I milk sales. Orderly marketing influences milk to move to the highest value use when needed and, for milk to clear the market when not used in Class I, said DFA. The witness insisted that the pooling of distant milk that does not show a service to the Class I market is inconsistent with Federal order policy and such milk should not be eligible to share in the revenue that accrues from Class I use.

Pooling standards are universal in their intention, said DFA, requiring a measure of commitment to a market marked by the ability and willingness to supply the Class I needs of that market. The witness also noted that pooling standards are individualized in their application and each market requires standards that work for the conditions that apply in that individual market. The witness quoted the Final Decision of milk order reform: "the pooling provisions for the consolidated orders provide a reasonable balance between encouraging handlers to supply milk for fluid use and ensuring orderly marketing by providing a reasonable means for producers with a common marketing area to establish an association with the fluid market."

The DFA witness drew from the history of milk marketing and commented on the problems of producers in their attempts at improving their economic circumstances. The witness identified shortcomings of the marketplace resulting in the difficulty of the milk supply being able to service the market's fluid needs in a manner that treats all producers equitably. The superior negotiating position of milk buyers and the variations in supply and demand were examples provided by the witness that have always "tripped up" dairy farmers in their marketing efforts. The witness added that farmers' attempts to improve on past efforts always seemed to fail when one or more suppliers would find a way to opt out of the added cost of serving the market

to obtain a higher return for themselves. Marketwide pooling, said the DFA witness, eliminated the differences in prices paid to suppliers within the same market and, in turn, eliminated the non-productive competitive drive for higher returns since everyone faced the same terms of trade. The witness also noted the absence of any action recommending any change to these fundamental features of milk orders and, that every Federal order shares returns to all producers marketwide.

The DFA witness was of the opinion that the new Class I pricing structure, together with the interface of the pricing surface and the pooling provisions found in each order, resulted in significant changes in the marketplace for milk. The link between performance and pooling, said the witness, was altered by these reforms and needs review. DFA noted that many entities, including themselves, moved quickly to take advantage of these changes in order rules. The witness indicated that when in a competitive dairy economy, an entity must make pooling decisions that aim to increase returns, competitors must attempt to do the same or risk their competitive position.

Pooling provisions of the Order 30 order work well for milk produced in the marketing area, said DFA, but do not work well for milk produced out of the area. Producers need only deliver a days' production a single time to a pool plant to have their milk eligible for pooling. This, combined with no loss of producer eligibility provided a producer does not deliver to another Federal order plant, makes Order 30 an attractive market in which to pool milk, the witness stated.

The witness also relied on, and drew heavily from, the order reform Final Decision (64 FR 16026) which explained the marketing area boundaries of the consolidated Upper Midwest marketing area. Although the prior marketing order areas of the Chicago Regional and Upper Midwest orders did not have a considerable degree of overlapping fluid milk disposition, they did have an extensive overlapping procurement area, according to the witness. In light of this, the witness noted that the reform Final Decision could therefore find no justification on the basis of overlapping sales for increasing the consolidated marketing area beyond what was adopted. Rather, it is the extensive overlapping of a common procurement area, or milkshed, that is the most compelling reason for explaining the boundaries of the consolidated Upper Midwest marketing area.

The witness noted, too, that there was extensive discussion early in the

construct of the 1996 Farm Bill concerning the merits of having a single national Federal order. Such an outcome would have resulted in a single blend price across the entire country. Noting that Congress debated several proposals and several economic studies over this issue, Congress rejected the idea of a single marketing order with the premise of one blend price. According to the witness, open pooling, which may result in blend prices being equalized across a large territory, is counter to the intent of Congress and the legislative directive of the Farm Bill—to consolidate the orders into no fewer than 10 and not more than 14.

The DFA witness expressed alarm about milk from distant areas sharing in the blend price when that milk neither serves the fluid market, nor balances the market when extra milk is needed by fluid processors. The witness referenced the rejection of the concept of open pooling discussed in the reform Final Decision and indicated that the decision rejected this because open pooling provides no reasonable assurance that milk will be made available to satisfy the fluid needs of the market. The witness also noted further that proposals to create and fund "stand-by" pools were also rejected.

DFA was of the opinion that open pooling is not appropriate for Order 30. Additionally, because of the distance and cost involved in moving milk to the market, milk needed in the fall months to accommodate increased demand because of increased school milk sales, or to provide a manufacturing outlet for milk produced in excess of fluid needs would not be provided. It is irrelevant, said the witness, if the milk in question originates from California or any other place because such milk is no more burdensome than distant milk produced in Idaho or any other area. Under the open-pooling concept, said DFA, "distant" milk able to pool alongside "local" deliveries only serves to pyramid the volume pooled.

Prohibiting the simultaneous pooling of milk on a State-operated marketwide pool and the Order 30 pool, the focus of Proposal 1, said DFA, does not fully address the pooling problems at hand. The witness provided evidence and testimony that showed an increasing amount of "distant" milk pooled on the Upper Midwest order which, they maintain, is not serving the Class I needs of the market. The witness submitted analysis demonstrating that when milk is pooled without being available for Class I use, or "paper pooled" on Order 30, returns to local producers who are consistently serving the fluid market are decreased.

Analysis was provided by DFA to illustrate how the pooling of milk on Order 30 has changed by examining the amount of milk pooled on the order and where the milk was produced. Using October 1997 as a reference time period prior to the consolidation of the orders, 2.4 billion pounds of milk were associated with the Chicago Regional and Upper Midwest markets, but only 1.6 billion pounds of milk were pooled because of class—price relationships, provided the witness. The 2.4 billion pounds were produced by 27,250 producers located in 13 States from Tennessee to Minnesota, and from New Mexico to Michigan. The witness noted that over 93 percent of the producer milk was produced within the consolidated marketing area, and 91.4 percent of the milk pooled was produced within the States of Wisconsin and Minnesota. In comparison, the witness provided data subsequent to the implementation of order reform; during June 2001, 12,748 producers pooled 1.5 billion pounds of milk on consolidated Order 30, with a total of 84 percent of the milk pooled produced within the consolidated marketing area, and 79 percent originating from Minnesota and Wisconsin. The other 16 percent of the total milk pooled on Order 30 during June 2001 was from California.

The witness testified that DFA considers it important to end the near open pooling of large volumes of milk that never serve the fluid market by modifying the order's pooling standards and establishing diversion limits for pool plants. To this end, DFA offered a proposal requiring milk produced outside the States that comprise the Upper Midwest milk marketing area be grouped into, and reported as, individual State "units". Each unit would be subject to the same shipping standards for pool supply plants, said DFA.

Additionally, DFA was of the opinion that the order lacks the means to define the potential size of the pool. In this regard, DFA thought it appropriate to establish a limit on the amount of producer milk that a pool plant can divert. Because a producer need only deliver one days' production to an Order 30 pool plant to qualify and thereafter remain qualified to pool their milk on the order, DFA noted, a pool plant may subsequently divert all of the producer's milk to any plant without any of that milk being required to serve the fluid market. It is this shortcoming of the Order 30 producer milk definition which provides the means by which milk from distant areas is able to pool on Order 30, stated DFA.

Stressing the costs associated with transporting milk long distances, DFA was of the opinion that no economic basis exists for such milk to actually make itself available to consistently serve the fluid market. Therefore, the witness concluded, milk located far from the order should be required to meet performance standards equal to the performance standards for milk originating within the order. The ease of qualifying for pooling on Order 30, said DFA, has attracted and caused to be pooled increasing volumes of milk which have only served to lower the order's blend price. The economic burden of the cost of delivering milk to a pool plant becomes a one-time event, said DFA. Thereafter the milk need never perform in servicing the fluid market while reducing returns to producers whose milk is actually serving the market's Class I needs, the witness concluded.

DFA was of the opinion that their proposal provides reasonable standards for demonstrating consistent performance in supplying the fluid market by milk from outside the States comprising Order 30. This would result in milk from distant areas performing on the same basis as local milk, said the witness, while not discriminating, penalizing, or establishing any barriers to the pooling of milk from any area on Order 30. The witness also stated this feature of their proposal is an adequate and reasonable standard for requiring all market participants to share in the responsibility of serving the fluid market.

DFA presented an analysis of data depicting mileages from California and Idaho to locations in Order 30 with the performance standards they proposed. This was offered to illustrate DFA's opinion that distant milk would not rationally seek to be pooled on Order 30 when required to perform in the same way as milk from within the States that comprise the marketing area. The witness presented a review of the relationship between the order's blend price return versus the cost of delivering milk to the Order 30 market. The witness claimed that a daily delivery of milk from California would yield a net loss of \$71,647, while a daily delivery from Idaho would yield a net loss of \$48,576 in the month of January 2000. On the basis of such losses, DFA concluded that such distant milk would not seek to be pooled on Order 30.

DFA then presented a comparison of blend price return versus hauling costs with no performance standards. After absorbing the one-time hauling cost, both the California and Idaho milk supplies would have generated a

positive return in the first month, growing to much higher returns in the second month, concluded the witness. Stressing that once the cost of the initial haul to qualify a producer for pooling is incurred, the subsequent pooling of milk would continually enjoy monetary benefits of being pooled on Order 30 without servicing the fluid market.

The DFA witness was of the opinion that their proposal has a measurable economic consequence that is in line with existing Federal milk order principles. If the economic returns are positive, said DFA, regulation would not prohibit pooling of distant milk and thus would provide a reasonable and defensible standard. The witness also said that each State unit must be treated individually and perform as a stand-alone entity under the same performance standards as currently applicable to supply plants. The witness stressed that this feature of their proposal provides a reasonable economic test of whether or not the market needs such milk for Class I use, and that economic returns must be earned in the market place and not by what is provided in pooling reports.

DFA was of the opinion that Order 30 should not be amended on an emergency basis prior to proceedings to consider amending other orders. The distant pooling of milk on Order 30 has been occurring for a long time—since January 2000, DFA stated. While the volume of distant milk pooled has increased, the negative impact on Order 30 blend prices has been reduced by the fact that Order 30 handlers have, in a not dissimilar fashion, pooled large volumes of milk on the Central and Mideast Federal milk orders, stated the witness, adding that California milk under their control was also being double pooled on the Central Order, Order 32. DFA was also of the opinion that if the Upper Midwest order is amended prior to consideration of appropriate amendments to the Central and Mideast orders, the pooling problems exhibited in the Upper Midwest would only "migrate" to these other marketing areas, resulting in even more disorderly marketing conditions.

A witness from the Northwest Milk Marketing Federation testified in support of DFA's proposals. The Northwest Milk Marketing Federation (NMMF) is a cooperative representing over 97 percent of dairy farmers whose milk is pooled on the Pacific Northwest Federal milk order.

The NMMF witness stated that Federal orders should have performance requirements which reasonably require all volumes of milk associated with the pool to proportionately service the fluid

needs of the market. The witness was of the opinion that Idaho milk could pose a threat to producers in the Pacific Northwest if that milk can be pooled without meeting performance standards. The proposals offered by DFA adequately address such pooling issues and should be adopted in Order 30, said the witness. This would not only alleviate the issue of pooling distant milk, but would serve as a model for other Federal order hearings, namely the Pacific Northwest, where similar pooling problems exist, said the witness.

Opponents of DFA's proposals stressed that marketing conditions prevailing in the Upper Midwest require only the elimination of double dipping. Associated Milk Producers, Inc., First District Association, and Lakeshore Federated Dairy Cooperative, expressed concern that DFA's proposal does not thoroughly address the need to end double dipping. They claimed that DFA's analysis of hauling costs only serves to exclude and target Idaho and California milk, and the value of such analysis of the Order 30 marketing conditions is misplaced. Similarly, they noted that back-hauling, where a lower shipping rate can be obtained from a hauler who has the ability to back-haul or return with other freight instead of returning empty, leaves open the possibility that double pooled California milk could, in fact, have positive returns even if required to perform.

The opponents also claimed that other loopholes in DFA's proposal might allow California milk to continue double pooling on Order 30. Class I fluid milk products, including concentrated milk which California plants routinely process in meeting the fluid milk standards of California, could be pooled on Order 30, noted the witness. For example, concentrated milk could be delivered to Order 30 and subsequently returned to California for use in that State's Class 4a or 4b uses of milk, the witness added.

Opponents were also of the opinion that illegal trade barriers to the movement of milk in Federal orders would be erected if DFA's proposal were adopted. Idaho milk that performs in the same manner as Minnesota milk should be eligible for pooling in the same way the order now provides for Minnesota milk, provided the same milk is not pooled more than once, stated opponents. Similarly, said the opponents, eligibility requirements in other Federal milk orders should not exclude milk based on its point of origin. They also stressed that trying to differentiate "historical" milk supplies with other "distant" milk for pooling

purposes would be difficult and an unreliable test for determining pooling eligibility. In this regard, they noted the pooling of milk received from Montana dairy farmers on the old Upper Midwest order, Order 68. Also, their review of historical data revealed that Missouri milk, for example, was long associated with the Texas order, but is now associated with the Southeast order. Changes in milk association can and do occur, opponents noted, and USDA should not create rigid rules as to when, where, and how such association may be permitted.

A witness representing Kraft Foods (Kraft) also testified in opposition to DFA's proposal, depicting it as being designed to create a severe, detrimental, and economic disincentive to pool milk on the Upper Midwest market because the performance standards called for would increase the transportation burden borne by distant producers. They were of the opinion that if this proposal were adopted, it would be nothing more than Government imposing a discriminatory transportation burden on distant producers and hindering a producer's free marketing choices.

Along the theme of transportation burdens, the Kraft witness also expressed the opinion that when producers incur disproportionately large transportation costs in supplying the fluid needs of the market, those producers would not be receiving uniform prices as required by law. Kraft was of the opinion that DFA's proposal is inconsistent with what the witness described as the AMAA's prohibition against consideration of a handler's use of milk as a condition of blend price receipt, adding also that it would create an unlawful and unauthorized exception in providing for uniform prices to producers. In effect, detailed Kraft, the DFA proposal would require selected groups of distant producers to incur transportation costs and other regulatory burdens not required of nearby producers under the order, said the witness. Participation in the Upper Midwest market would only guarantee that distant farms would incur monetary losses, Kraft asserts. Additionally, said Kraft, DFA's proposal is unlawful because it conditions the pooling of distant producers upon utilization of their milk by a Class I distributing plant. In this regard, Kraft questioned the legality of requiring designated groups of dairy farmers to incur extraordinary expenses of shipping milk to Class I plants while other pooled farmers would be able to share in the Class I revenue without the same burden.

Finally, Kraft expressed the opinion that DFA's proposal would, if adopted, violate the law because it would be erecting illegal trade barriers by limiting the marketing of milk products in Order 30 depending on where the milk is located. The performance requirements placed on producers within Order 30, said Kraft, would be different than requirements for producers outside the order.

The proposal by DFA should be adopted in part but limited to the establishment of diversion limits for pool distributing plants. The record does not support the adoption of performance standards for pooling milk on the order on the basis of its location. Establishing a limit on the amount of milk that a pool distributing plant may divert provides for a complete set of provisions for identifying which producers, which producer milk, and which handlers should share in the benefits that accrue from the marketwide pooling of milk on the Upper Midwest order. By setting a limit, the integrity of the performance standards of the order will be improved. If Order 30 does not limit the amount of milk that may be diverted by pool distributing plants, the pool is effectively undefined.

Diversions are needed to accommodate the movement of milk properly associated with the market when not needed for Class I use. A diversion limit will also establish the amount of producer milk that may be associated with the integral milk supply of a pool plant. As discussed earlier, the diversions being considered are shipments of milk directly from the farm to a nonpool plant pursuant to the Producer milk definition provided for in § 1030.13(d). The Upper Midwest order also allows for supply plants to deliver producer milk directly from the farm to another pool plant. However, since the intent of allowing a supply plant to ship producer milk directly from the farm to pool plants is to provide for maximizing the efficient movement of milk to pool distributing plants, milk shipments such as these are not included in the context of diversions as it relates to pool distributing plants and are, therefore, not limited in the quantity of milk a supply plant can direct ship to another pool plant.

The marketing conditions of the Upper Midwest order are unique, and this uniqueness should be reflected in the pooling standards of this order. As indicated in testimony and in briefs, the Upper Midwest market area has about a 20 percent use of milk for fluid use, with the remainder of the milk used in lower-valued classes. In light of this

relatively low share of milk volume that is needed to supply the Class I needs of the market, this decision finds basic agreement with those who expressed opposition to DFA's proposal. Specifically, the marketing conditions of Order 30 do not exhibit the need to require additional performance standards for milk located outside of the marketing area or, as DFA describes, milk located outside of the States that currently comprise the consolidated Upper Midwest Milk Marketing Area. Accordingly, all pool plants, regardless of location, may become eligible to have the milk of producers pooled on Order 30 by meeting the performance standards specified for the various types of pool plants.

In several instances in testimony and in their post-hearing brief, DFA was of the opinion that "distant" milk does not have, and is not required to meet, the same performance standards as "local" milk. Any supply plant or a cooperative acting as a handler (as provided for and described in § 1000.9(c)) would need to ship ten (10) percent of their reported producer receipts to pool distributing plants and certain other plants each month in order to qualify for being pooled. Therefore, producer milk included in reports by handlers described in § 1000.9(c) is included in determining whether or not the handler has qualified for being pooled on the order. No distinction is made by the order whether the milk pooled is "local" or "distant." Thus all of the producer milk of the handler meets the same qualification standards regardless of the physical location of the producer or the milk of a producer.

DFA maintains that the proposal (Proposal 1) seeking only to eliminate double dipping does not go far enough in addressing their general concerns about performance standards for the system of orders, including the Upper Midwest order. The argument is troublesome. On one hand, DFA fundamentally asserts that performance standards are critical to the orderly marketing of milk and for determining those participants who are actually serving the fluid market, including the Order 30 market, stressing that only these participants should share in the benefits of the pool. At the same time, by their own testimony, DFA engages in the practice of double dipping, yet does not find double dipping disruptive to the orderly marketing of milk, even when such "distant" milk from California will rarely, if ever, again be shipped to pool plants, including distributing plants regulated by the order. This decision finds little logic in asking for a finding that no disorder

results from allowing the simultaneous pooling of distant milk under California's State operated system and on Order 30, while at the same time asking for a finding that alternative performance standards are needed because of the disruptive effects to orderly marketing by pooling "distant" milk which does not consistently service the fluid market.

Pooling standards of milk orders, including Order 30, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market for sharing in the Class I proceeds. Pooling standards of the order are represented in the Pool plant, Producer, and the Producer milk definitions of the order. Taken as a whole, these definitions set forth the criteria for pooling. Pooling standards should continue to be performance based in Order 30. This is the only basis viable for determining those eligible to share in the pool. It is primarily the additional revenue from the Class I use of milk that adds additional revenue, and it is reasonable to expect that only those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds.

With regard to the Final Decision for the reform of the Federal milk order program, it is true that the common procurement area was the most compelling basis in forming the consolidated Upper Midwest marketing area. However, it is not the procurement area that provides the additional revenue to the pool. Rather, the revenue is derived largely from the Class I use of milk by regulated handlers that have Class I sales in the marketing area. In this regard, it is not important who provides the milk for Class I use or from where this milk originates. The order boundaries of the Upper Midwest order were not intended to limit or define which producers, which milk of those producers, or which handlers could enjoy in the benefits of being pooled on Order 30. What is important and fundamental to all Federal orders, including Order 30, is the proper identification of producers, the milk of those producers, and handlers that should share in the market's pool proceeds.

Pooling of "distant" milk on the Upper Midwest order is neither new nor without precedent. The record testimony and evidence show milk pooled on Order 30 from nearly all corners of the country. However, this decision acknowledges that with the advent of the economic incentives for

California milk to pool on Order 30 and, at the same time, enjoy the benefits of being pooled under California's State-operated milk order program, significantly more milk has come to be pooled on the order that has no legitimate association with the integral milk supplies of Order 30 pool plants. The association at present has been made possible only through what some market participants describe as a regulatory loophole. The Upper Midwest order also provides a significant degree of pooling flexibility in the form of provisions allowing system and unit pooling. These provisions promote the orderly marketing of milk by minimizing the inefficient movement of milk for the sole purpose of meeting pooling standards.

This decision finds basic agreement with some of the reasons offered in testimony and reiterated in briefs by opponents to DFA's proposal for organizing "distant" milk into State units. Requiring each State unit to ship at least 10 percent of the quantity of milk to a distributing plant regulated under the order effectively sets a performance standard different from the States that comprise Order 30. For example, of the milk received from Idaho, the DFA proposal would establish a standard for at least 10 percent of such milk to be shipped to a distributing plant in order for this milk to be producer milk pooled on the order. However, the same would not be required, for example, that 10 percent of all Wisconsin milk be shipped to distributing plants regulated under the order. It is the ability of milk from California to double dip that is the primary source of disorderly marketing conditions and for much more milk being pooled on Order 30. By eliminating the ability to double dip, it is reasonable to conclude that California milk is unlikely to be pooled on Order 30 for economic reasons illustrated in DFA's testimony and analysis contained in the record of this proceeding. The remaining issue is establishing appropriate diversion limits for all pool plants, including limits for distributing plants which currently do not exist in the Upper Midwest milk order provisions.

In addition to describing what a dairy farmer must do to become a producer under the order, the producer definition of the order provides that a full days' production of the milk of a dairy farmer be physically received at a pool plant anytime during the first month a producer is associated with the market before the milk of a producer can be diverted. Provisions for diverting milk

are a desirable and needed feature of an order because they facilitate the orderly and efficient disposition of the market's milk not used in Class I uses. When producer milk is not needed in the market for Class I use, its movement to nonpool plants for manufacturing without loss of producer milk status should be provided for. Provision should also be provided to minimize the inefficient movement of milk solely for pooling purposes. However, it is just as necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

Diverted milk is milk not physically received at a pool plant. However, it is included as a part of the total producer milk receipts of the pool plant causing the milk to be diverted. While diverted milk is not physically received at the pool plant that causes the milk to be diverted, such milk is nevertheless an integral part of the milk supply of the diverting pool plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not, and is not, properly associated with the diverting plant. Therefore, such milk should not be pooled.

Associating more milk than is actually part of the diverting plant's milk supply only serves to reduce the potential blend price paid to dairy farmers. Allowing the pooling of milk far in excess of reasonable needs by the absence of diversion limits only provides for association with the market through "paper-reporting" and not by service to the Class I needs of the market. Without a diversion limit, the order's ability to provide for effective performance standards and orderly marketing is weakened.

On the basis of the record, the lack of a diversion limit for producer milk by distributing plants has opened the door for pooling much more milk, and, in theory, an infinite amount of milk on the market. In the specific marketing conditions of Order 30 evidenced by the record of this proceeding, the lack of a diversion limit for producer milk at distributing plants has caused more milk to be pooled on the order than can be considered reasonably associated with the market.

The diversion limits for pool distributing plants offered by DFA are reasonable, and, in fact, are needed for upholding the purpose of providing for performance requirements in serving the Class I needs of the market. The order already effectively sets a diversion limit on pool supply plants by requiring these plants to ship 10 percent of their receipts, including diversions, to distributing plants regulated under the

order. Therefore, an effective 90 percent limit on the amount of milk that could be diverted has already been established. Accordingly, the specific amendatory wording offered by DFA with respect to pool supply plants is not necessary. However, in the case of pool distributing plants, the order does need specific amendatory language to carry out this intent.

The amendatory language provided by DFA would add other order distributing plants that cooperative handlers (as described in § 1000.9(c)) may divert milk to. DFA claims that this matches the pool supply plant provisions for shipments to a distributing plant. It does do this. However, the amount of milk for which a pool supply plant is able to qualify for pooling is limited to the amount of shipments that are not made on the basis of agreed-upon Class II, Class III and, Class IV utilization. Milk that moves directly from the farm to another order pool distributing plant that is allocated to Class I becomes producer milk in the receiving order. This milk cannot be used for qualification, and the cooperative handler (as described in § 1000.9(c)) does not receive a qualification credit on direct shipped milk for Class I. A cooperative handler should not receive qualification for milk it ships to distributing plants if such milk is only to be used for pool qualification purposes and is delivered on an agreed upon Class II, Class III, or Class IV use of milk.

#### 4. Changing the Rate of Partial Payment

A proposal that would change the rate of the partial payment to producers and cooperatives for milk delivered during the first 15 days of the month to the lowest class price for the prior month times 103 percent, published in the hearing notice as Proposal 5, is not recommended for adoption. Therefore, the partial payment rate should remain as currently provided for by the order—at the lowest class price for the prior month.

Both DFA and NFO were among those who supported increasing the minimum partial or advance payment due producers and cooperatives from the prior month's lowest class price to 103 percent of the prior month's lowest class price. A representative of DFA testified that since the inception of Federal order reform, the percentage of a producer's pay price, as measured by dividing the statistical uniform price by the prior month's Class III price, has declined from 95 percent to 91 percent in comparison to this relationship prior to reform. The witness presented detailed analysis supporting their position that

the relative reduction in the partial payment is a trend that is having a significant negative impact on dairy farmers' cash flow. According to analysis presented, DFA concluded that using 103 percent of the lowest class price of the previous month would return the balance between the partial payment and final payment to the same relative level as prior to Federal order reform. The change should not have significant impact on handlers required to make minimum payments, said the witness.

A witness for the Wisconsin Cheese Makers Association (WCMA) testified in opposition to changing the rate of the minimum partial payment provision. The witness testified that the WCMA represents 25 supply plants supplying milk to the Upper Midwest order and that increasing the required minimum payment would be a burden to their member plants because they would need to borrow money to meet the partial payment. Requiring a larger partial payment, testified the WCMA witness, would require increased borrowing and thus increased costs for the plants. The witness explained that since the partial payment is only a minimum payment, plants may pay more if they desire to, but not all plants pay more than the minimum partial payment. According to the witness, the reduction in the percent of the prior month's Class III price as a percent of the statistical uniform price is a short-term phenomena and, that over time, the relationship would move back to the higher percentage that occurred prior to Federal order reform.

There is no compelling reason for changing the payment rate of the partial payment to producers. In the data presented by proponents at the hearing, the partial payment required by the order exceeded the final payment during numerous months. In most cases, the months in which the partial payment exceeded the final payment occurred prior to the implementation of Federal order reform.

It is difficult to determine whether or not there is a trend occurring, as DFA maintains, that would be corrected or mitigated by changing the rate of the partial payment. Milk prices are an outcome of supply and demand conditions for milk. Prices tend to increase during tighter supplies and fall when milk is plentiful relative to demand. The up and down fluctuations of milk prices does not in itself indicate a trend, nor does it suggest a structural flaw in how the order prices milk since price fluctuations are a response to changes in the quantity of milk supplied and in the quantity of milk demanded.

Since Federal order reform, a 17-month period at the time of the hearing, the data shows two months in which the partial payment and the final payment were equal. However, if the partial payment rate were increased to 103 percent of the lowest class price, as proposed, four months (about 24 percent of the 17-month period) would have had a partial payment greater than or equal to the final payment.

The opponents of this proposal noted that Federal order reform and its newer pricing system have only been in place for a short time—17 months—suggesting that there has not been adequate time to observe various pricing scenarios that might occur over a more lengthy evaluation period. For example, there has been no significant price decline since the implementation of Federal order reform that would serve to aid in evaluating the effect of declining prices on the difference between the partial and final payment obligations. Class III and Class IV prices have been relatively stable during the beginning two thirds of the 17-month period, with prices beginning to show consistent increases during the last third of the period (December 2000 through May 2001).

The record testimony and post-hearing briefs supporting a change in the rate of partial payment asserts that payments to producers and cooperatives, particularly by a cheese plant, is a “pass through” from the Federal order pool. A cheese plant/Class III handler receives the PPD from the pool (a “pool draw”), in order to pay the order’s minimum prices to producers. However, the majority of the payment to producers and cooperatives in the Upper Midwest is derived from cheese sales. The statistical uniform or blend price is received by producers in the form of a PPD calculated from the marketwide pooling of all milk on the order at classified prices. In a market like the Upper Midwest, which has a relatively low Class I differential (\$1.80) and low Class I utilization (15–20 percent), the resulting PPD is less than in markets with higher Class I use and higher Class I differential values. Over the 17-month period of January 2000 through May 2001, the Upper Midwest PPD ranged from 43 cents to \$1.43, and averaged \$0.83 per cwt. Handlers did not know what the PPD would be until several days before payment was due to its dairy farmers. In light of this, it is not reasonable to establish a partial payment rate at a level that may increase the likelihood of requiring handlers to pay out part or all of the PPD prior to receiving payments from the producer settlement fund. This caution seems especially important in

the Upper Midwest market where the PPD is relatively low and can be completely offset by the price difference between the prior month’s lowest class price and the current month’s Class III price.

#### 5. *Emergency Marketing Conditions*

Evidence presented at the hearing establishes that California milk pooled simultaneously on the California State-operated order and the Upper Midwest Federal order is resulting in a lowering of milk prices to Upper Midwest producers. The lack of diversion limits on the order’s pool distributing plants could allow excessive milk supplies from California or elsewhere to be pooled on the order. Additionally, the practice of double dipping renders the Upper Midwest Federal milk order unable to establish prices that are uniform to producers and to handlers. Finally, the amount of milk pooled on the order as a result of double dipping has greatly increased over the past year. Consequently, the issuance of a recommended decision is being omitted.

The opportunity to file written exceptions to the interim rule amending the order remains.

In view of this situation, the interim final rule amending the order will be issued as soon as the approval of producers is determined.

#### **Rulings on Proposed Findings and Conclusions**

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

#### **General Findings**

The findings and determinations hereinafter set forth supplement those that were made when the Upper Midwest order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the aforesaid marketing agreement and order:

(a) The interim marketing agreement and the order, as hereby proposed to be

amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The interim marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

#### **Interim Marketing Agreement and Interim Order Amending the Order**

Annexed hereto and made a part hereof are two documents; an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the order regulating the handling of milk in the Upper Midwest Marketing Area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

#### **Determination of Producer Approval and Representative Period**

June 2001 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Upper Midwest marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

#### **List of Subjects in 7 CFR Part 1030**

Milk marketing orders.

Dated: February 8, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

### Interim Order Amending the Order Regulating the Handling of Milk in the Upper Midwest Marketing Area

This interim order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

#### Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Upper Midwest marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

#### Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Upper Midwest marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR Part 1030 continues to read as follows:

Authority: 7 U.S.C. 601–674

#### PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

1. Section 1030.7 paragraph (g) is amended by revising the first sentence to read as follows:

##### § 1030.7 Pool plant.

\* \* \* \* \*

(g) The applicable shipping percentages of paragraphs (c) and (f) of this section and § 1030.13(d)(2), and (d)(3) may be increased or decreased, for all or part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. \* \* \*

2. Section 1030.13 is amended by revising the introductory text, redesignating paragraph (d)(3) as paragraph (d)(4), and adding new paragraphs (d)(3), and (e) to read as follows:

##### § 1030.13 Producer milk.

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

\* \* \* \* \*

(d) \* \* \*

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in § 1030.7(a) or (b) may not exceed 90 percent of the Grade A milk received from dairy farmers (except dairy farmers described in § 1030.12(b)) including milk diverted pursuant to § 1030.13; and

\* \* \* \* \*

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State

government maintaining marketwide pooling of returns.

#### Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR Part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1030.1 to 1030.86 all inclusive, of the order regulating the handling of milk in the Upper Midwest marketing area (7 CFR Part 1030) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of June 2001, \_\_\_\_\_ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name)

(Title) \_\_\_\_\_

(Address) \_\_\_\_\_

(Seal)

Attest

[FR Doc. 02–3634 Filed 2–13–02; 8:45 am]

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