

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 from 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, the Kraft witness explained that 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. 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 from requirements for producers outside the order.

The part of the proposal by DFA limited to the establishment of diversion limits for pool distributing plants adopted on an interim basis is proposed to be adopted on a permanent basis in this final decision. 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 more 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