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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1065

[DA-98-10]

Milk in the Nebraska-Western Iowa Marketing Area; Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Suspension of rule.

SUMMARY: This document suspends 11 counties from the marketing area definition of the Nebraska-Western Iowa Federal milk marketing order (Order 65) beginning on February 1, 1999, and extending for an indefinite period until the implementation of a final rule consolidating Federal milk orders, as required by the 1996 Farm Bill, or an action to subsequently terminate the suspension. The action was requested by Gillette Dairy (Gillette) of Rapid City, South Dakota, which contends the suspension is necessary to maintain its milk supply and to remain competitive in selling fluid milk products in the marketing area.

EFFECTIVE DATE: February 1, 1999.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Suspension: Issued September 23, 1998; published October 9, 1998 (63 FR 54383).

The Department is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil

Justice Reform. This rule is not intended to have a retroactive effect. This rule will 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 with the Secretary 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 Secretary 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 Secretary'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.

Small Business Consideration

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 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 \$500,000, 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 \$500,000 per year criterion was used to establish a production guideline of 326,000 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.

For the month of April 1998, which is the most recent representative month with data including Gillette Dairy, 1,649 dairy farmers were producers under Order 65. Of these producers, 1,573 producers (i.e., 95 percent) were considered small businesses having monthly milk production under 326,000 pounds. A further breakdown of the monthly milk production of the producers on the order during April 1998 was as follows: 1,001 produced less than 100,000 pounds of milk; 445 produced between 100,000 and 200,000; 127 produced between 200,000 and 326,000; and 76 produced over 326,000 pounds. During the same month, 8 handlers were pooled under the order. One was considered a small business.

Pursuant to authority contained in the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601-674), this suspension will remove 11 counties in the western panhandle of Nebraska from the marketing area definition of Order 65. The Nebraska counties are Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux.

Gillette, the proponent of this suspension, estimates that its sales in the counties represent 65 to 70 percent of total fluid milk sales in the 11 counties. Gillette explains that a loss of sales in an unregulated marketing area has resulted in its regulation under Order 65 without any appreciable increase in sales in the Order's marketing area. The handler contends the suspension is necessary to maintain its milk supply and to remain competitive in selling fluid milk products in the marketing area.

The July 1996 population estimate and the December 1992 fluid milk per capita consumption data show that the 11 Nebraska counties represent a small amount of the population and fluid milk consumption in the State of Nebraska and in the entire Order 65 marketing area. The 11 counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area.

There are three handlers other than Gillette that possibly have sales into the 11 Nebraska counties. The handlers are

Meadow Gold of Lincoln, Nebraska; Roberts Dairy in Omaha, Nebraska; and Meadow Gold in Greeley, Colorado. Roberts Dairy hauls milk for Nebraska Dairy, Inc., which is a distribution facility that is owned by the same principal company that owns Gillette. However, the dairy appears to be a separate entity from Gillette. Market information indicates that if these three handlers have sales into the 11 counties the volume is relatively small.

The suspension should not have a significant economic impact on handlers because of the relatively small number of sales by handlers other than Gillette in this 11-county area. In addition, the population in the 11-county area constitutes a small percentage of the population and fluid milk consumption in the State of Nebraska. This milk has not been historically associated with Order 65. Therefore, the removal of the 11 counties from the marketing area definition of Order 65 should not have a significant adverse impact on other order producers and other handlers.

A review of the current reporting requirements was completed pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), and it was determined that this suspension will have little impact on reporting, recordkeeping, or other compliance requirements because these would remain almost identical to the current system. No new forms will need to be proposed.

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

Statement of Consideration

This suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and of the order regulating the handling of milk in the Nebraska-Western Iowa marketing area. The action suspends 11 counties in the western panhandle of Nebraska from the marketing area definition of Order 65. The Nebraska counties are Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux.

The July 1996 population estimate, which represents the most recent population statistics, shows that the total population for the Order 65 marketing area is 2,000,529 (i.e., 412,167 for Iowa counties and 1,588,362 for Nebraska counties). The population estimate for the entire State of Nebraska is 1,652,093, while the population for the 11 Nebraska counties is 91,194. In addition, the *December 1992 Federal*

Milk Order Statistics Report (Per Capita Sales of Fluid Milk Products in Federal Order Markets) indicates that the Nebraska fluid milk per capita consumption is about 20 pounds per person per month. It is estimated that the fluid milk consumption per month within the 11 Nebraska counties is 1,823,880 (20 lbs. * 91,194).

The July 1996 population estimate and the December 1992 fluid milk per capita consumption data show that the 11 Nebraska counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area.

Gillette Dairy, the proponent of this suspension, was a fully regulated handler under the Black Hills, South Dakota, Federal milk marketing order prior to its termination (effective October 1, 1996) at the request of the Black Hills Milk Producers. After termination of the Black Hills order, Gillette for some time was a partially regulated handler under 3 Federal milk marketing orders: Eastern South Dakota (Order 76), Eastern Colorado (Order 137), and Order 65. From January 1998 through May 1998, Gillette was a fully regulated handler under Order 65 because its fluid milk sales in the marketing area represented more than 15 percent of its receipts. In recent months (i.e., June through November 1998), Gillette has been a partially regulated plant under Order 65 due to an increase in total milk receipts. During this period, Gillette has reduced its distribution in the 11-county area in an effort to avoid reducing the amount it pays its supplier, the Black Hills Milk Producers.

As a partially regulated handler, Gillette pays to the producers supplying its plant at least the full class-use value of its milk each month. Thus, Gillette has no further obligation to the producer-settlement fund of the orders under which it was a partially regulated handler. However, as a fully regulated handler, Gillette is required to pay the difference between its class-use value and the marketwide class-use value to the Order 65 producer-settlement fund. This payment, Gillette contends, increases its cost for milk and reduces the amount it can pay its producers.

Gillette was pooled under Order 65 during the months of January through May 1998. For the period of February through May 1998, Order 65 price data shows that the average uniform price to producers was \$13.34 per hundredweight. If Gillette had not been a regulated handler under Order 65 during this period, the average uniform

price to producers would have been about \$13.31 per hundredweight. Thus, the regulation of Gillette for the February through May 1998 period resulted in an increase in the average uniform price of 3 to 4 cents per hundredweight.

According to Gillette, marketing conditions in Order 65 have changed significantly since the order was promulgated. Gillette estimates that its sales in the 11 counties represent 65 to 70 percent of total fluid milk sales in the counties. Gillette explains that a loss of sales in an unregulated marketing area has resulted in its regulation under Order 65 because such sales represented at least 15 percent of its receipts, but without any appreciable increase in sales in the Order's marketing area. Furthermore, the handler states that since its milk supply comes from the Black Hills Milk Producers there is no balancing of milk supply for the plant from Order 65 or any other Federal milk marketing order.

Black Hills Milk Producers also requested that the counties be removed from the Order 65 marketing area definition. The cooperative representing the producers explained that it is dependent on Gillette's survival. It states that the regulation of Gillette under Order 65 has caused its producers hardship by costing them as much as \$1.00 per hundredweight during some months. According to the cooperative, this cost results from an agreement that it has with Gillette in which it refunds to Gillette an amount equal to half of the handler's obligation to the producer-settlement fund when Gillette is fully regulated. Although the producers pay this amount to Gillette, Order 65 price data for the February through May 1998 period indicates that their monthly pay prices were above the Order 65 uniform price.

Notice was published in the **Federal Register** on October 9, 1998 (63 FR 54383) concerning the proposed suspension of part of the marketing area definition of Order 65. Interested persons were afforded an opportunity to file written data, views, and arguments thereon. Six comments were received in support of the proposed suspension; two were received in opposition to it.

Gillette and Black Hills Milk Producers reiterated their support for the proposed suspension. Gillette anticipates that in the months ahead, as milk prices decline and milk production increases seasonally, the price spread between the Class I price and the blend price will increase. The handler states the impact will cause it to pay more into the producer-settlement fund while reducing its payment to Black Hills Milk

Producers. The cooperative states that the sharing of the cost of regulation with Gillette in addition to the low milk prices and high feed costs has caused several dairymen to discontinue dairying.

Associated Milk Producers, Inc. (North Central Region), in its comment letter, stated that because population, consumption, and milk supply in the 11 counties is fairly evenly balanced the proposed action would have a marginal effect on Order 65 blend prices. In addition, the other supporters who filed comments (i.e., the South Dakota Department of Agriculture, 5 United States Senators, and the Rapid City Area Chamber of Commerce) state that the action would eliminate the payments by Gillette into the producer-settlement fund (i.e., \$500,000 during the first 6 months of 1998 or \$83,000 per month) when regulated under Order 65. Thus, they claim that this cost directly affects the producers supplying the dairy and has been a contributing factor to producers discontinuing their dairy farm operations.

Dairy Farmers of America (DFA) and Meadow Gold Dairies expressed opposition to the proposed action and contend that it would create an inequitable marketing situation between handlers and producers. DFA is a cooperative that represents about 39 percent of the producers on Order 65 and 927 producers in other affected markets. DFA argues that the proposal would lower the returns of DFA member producers supplying the handlers affected by this action. The cooperative also contends that the proposal would lower the blend prices to these DFA producers in Order 65.

According to DFA, the proposal would provide Gillette with a financial advantage over competing handlers because Gillette competes with handlers over a broad geographic area (in counties in Nebraska, Colorado, and Wyoming). DFA asserts that the action would prohibit the sharing of revenues from the sale of milk by Gillette to DFA members and the Federal Order 65 producers. In addition, the cooperative claims that the action would assist Gillette in expanding its business further into Order 65 and the Eastern Colorado order (Order 137). The proposed action, it concludes, would adversely impact cooperatives' ability to negotiate over-order premiums in the future due to the perceived inequity in the marketplace.

Two additional letters were submitted after the comment period ended. Sinton Dairy filed a comment in opposition to the proposed action and Gillette submitted another letter in response to

the issues addressed by DFA. Both comment letters were dated and received after the comment expiration date and cannot be given due consideration.

After careful consideration of the comments submitted, it is concluded that there is sufficient basis to grant the request for suspension of the 11 counties from the Order 65 marketing area for an indefinite period of time until the implementation of Federal order reform. Statistics clearly show that the majority (i.e., 65 to 70 percent) of the fluid milk sales into the 11-county area is by Gillette. Moreover, the 11 counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area. In addition, this milk has not been historically associated with the Order 65. Therefore, the removal of the 11 counties from the marketing area definition of Order 65 should not have an adverse impact on other order producers and other handlers. However, if the counties were to remain as part of the Order 65 marketing area definition, the effect could be severely disruptive for the Black Hills Milk Producers.

At this time, the Federal order reform process is expected to be completed by October 1, 1999. In the proposed federal order reform rule that was issued on January 21, 1998 (63 FR 4802), the proposed Central order marketing area, which included most of the existing Order 65 marketing area, did not include the 11 counties suspended in this action. However, this recommendation, together with all of the provisions in the proposed rule, is currently under consideration.

After consideration of all relevant material, including the proposal in the notice, the comments received, and other available information, it is hereby found and determined that for the period of February 1, 1999, and extending for an indefinite period until the implementation of a final rule consolidating Federal milk orders as required by the 1996 Farm Bill, or a subsequent action to terminate the suspension, the following provisions of the order do not tend to effectuate the declared policy of the Act:

In § 1065.2(a), the words "Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux."

It is hereby found and determined that 30 days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of the proposed suspension was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. Several comments supporting the suspension, and one comment opposing it, were received.

Therefore, good cause exists for making this suspension effective less than 30 days from the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Part 1065

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR Part 1065 is amended as follows:

PART 1065—MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

1. The authority citation for 7 CFR Part 1065 continues to read as follows:

Authority: 7 U.S.C. 601-674.

§ 1065.2 [Suspended in part]

2. In § 1065.2(a), the words "Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, Sioux" are suspended.

Dated: January 26, 1999.

Enrique E. Figueroa,

Administrator, Agricultural Marketing Service.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98-NM-50-AD; Amendment 39-11018; AD 99-03-04]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 737-100, -200, -300, -400, and -500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 737-100, -200, -300, -400, and -500 series airplanes, that requires installation of