NO LONGER CRYING OVER SURPLUS MILK: THE DAIRY PRICE STABILIZATION PROGRAM ACT OF 2010

I. INTRODUCTION

"[S]urplus milk presents a serious problem. . . .A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk shed."[1] One of the main reasons for this surplus supply of milk are cycles of seasonal overproduction.[2] Overproduction, as well as the perishable nature of milk,[3] has led to a surplus in supply[4] and volatile market conditions.[5] Various "detailed, intricate and comprehensive regulations, including price-fixing" have been created in an attempt to stabilize these market conditions.[6] Unfortunately, many of these regulations have failed to achieve their intended purpose because they have not been designed to manage overproduction while benefiting producers.[7]

The Dairy Price Stabilization Program Act of 2010 ("DPSPA 2010")[8] seeks to better align supply with demand, and will work to curb periods of overproduction.[9] To better understand the history of the dairy industry, this Comment will briefly review past dairy regulation and specifically analyze the shortfalls of the Voluntary Milk Diversion Program that was enacted as part of the Dairy Production Stabilization Act of 1983 ("DPSA 1983").[10] Next, this Comment will introduce the DPSPA 2010

---

[1] Nebbia v. New York, 291 U.S. 502, 517-18 (1934).

[2] The winter months are generally low in yield whereas the summer months are generally fertile. Zuber v. Allen, 396 U.S. 168, 172-73 (1969).

[3] *Id.* at 173 n.3.

[4] *Id.* at 172-73 n.3.

[5] MARK STEPHENSON & CHUCK NICHOLSON, AN ANALYTICAL REVIEW OF A REFUNDABLE ASSESSMENT PLAN FOR DAIRY PRODUCERS 1 (2007).

[6] H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 529 (1949).

[7] *See* ERIC M. ERBA & ANDREW M. NOVAKOVIC, THE EVOLUTION OF MILK PRICING AND GOVERNMENT INTERVENTION IN DAIRY MARKETS 16 (1995).

[8] Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. (2010).

[9] MILK PRODUCERS COUNCIL, DAIRY PRICE STABILIZATION PROGRAM 10 (2010), *available at* http://www.stabledairies.org/spring2010dpsp.pdf.

[10] *See infra* Part II-III.

and explain how it works.[11] Specifically, this Comment will examine the various reasons why the DPSPA 2010 will be successful.[12] Finally, this Comment will recommend that the DPSPA 2010 be enacted to stabilize the volatility of the dairy market.[13]

II. THE DAIRY INDUSTRY AND VARIOUS AGRICULTURAL ACTS

Various agricultural products are regulated by the United States' federal and state governments, but there is no agricultural commodity that is "more regulated than milk."[14] Despite this regulation, the price of milk has "been volatile for more than [one hundred] years."[15] One of the main reasons why milk prices have been so unpredictable is because there has always been an inelastic demand for milk while dairy producers exhibit an inelastic response to changes in milk prices.[16] This discrepancy in supply and demand results in overproduction and government purchases of surplus milk for prices lower than what the milk is worth.[17] In addition to the inelastic responses from dairy producers, other factors such as weather, dairy product exports, and technology also affect the price of milk.[18] As a result of an unstable dairy market, the U.S. government intervened in an attempt to stabilize fluctuating milk prices with the enactment of the Agricultural Adjustment Act of 1933.[19] The Agricultural

---

[11] *See infra* Part IV.

[12] *See infra* Part V.

[13] *See infra* Part VI-VII.

[14] Population shifts, transportation advancements, and distribution difficulties of a perishable product greatly contribute to the regulation of milk and milk products. ERBA, *supra* note 7, at 1-2.

[15] STEPHENSON, *supra* note 5, at 1.

[16] This means that dairy producers make little changes in the amount of milk they produce in response to market conditions such as price and demand. This inelastic market demand and inelastic response by producers still continue today. An example would be the large production of milk in the spring season due to calving patters, contrasted with the great demand for milk in autumn due to the school year commencing and the demand for cheese and dairy products from Thanksgiving to the Super Bowl. *Id.*

[17] Leaving the milk market in a natural state is problematic because of volatile milk prices. These volatile milk prices result in excessive overproduction by milk producers in an attempt to maintain income. *See* Zuber v. Allen, 396 U.S. 168, 172-73 (1969).

[18] STEPHENSON, *supra* note 5, at 3-4. Historic events such as the Great Depression and World War II also illustrate outside influences on the dairy market. ERBA, *supra* note 7, at 6-9.

[19] The instability of the dairy market led to the breakdown of the dairy industry. The goal of the Agricultural Adjustment Act of 1933 was to improve prices and income for dairy farmers by declaring milk and dairy products as "basic commodities" and through the use of marketing agreement licenses. ERBA, *supra* note 7, at 6-7. The marketing agreement licenses were agreements between the "Secretary of Agriculture, producer

Adjustment Act of 1933 was not favored by retailers and violations of the agreements of the act were frequent, and ultimately, the U.S. Supreme Court ruled that it was unconstitutional.[20]

Since then, numerous acts that aim to stabilize milk prices have been enacted by Congress.[21] These acts attempt to stabilize milk prices and keep dairy producers in business by implementing price supports[22] through the United States Department of Agriculture's ("USDA") Commodity Credit Corporation ("CCC").[23] The CCC was reestablished on July 1, 1948[24] and currently has a continuous standing offer to purchase surplus dairy products which provides a steady and constant demand for dairy products.[25] The CCC retains the authority to purchase any quantity of milk that meets the USDA's requirements,[26] and supplies, at minimum, the support price to all manufacturing grade milk.[27] Since milk producers receive at least the support price, a price floor is indirectly established.[28] However, the CCC only purchases surplus milk and its

associations, processors, and handlers that" fixed prices and other regulations. *Id.* at 7 n.3.

[20] U.S. v. Butler, 297 U.S. 1, 73 (1936) (holding that the Agricultural Adjustment Act was an abuse of the taxing power and thus unconstitutional).

[21] Such legislation includes, for example, the Agricultural Marketing Agreement Act of 1937, Agricultural Adjustment Act of 1938, Agricultural Act of 1949, Food and Agriculture Act of 1965, and the Omnibus Budget Reconciliation Act of 1982. DOUGLAS E. BOWERS ET. AL., HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS, 1933-84: BACKGROUND FOR 1985 FARM LEGISLATION 12, 19, 26, 40 (1984), *available at* http://www.ers.usda.gov/publications/aib485/; Alfred A. Gallegos, Comment, *To Guarantee or to Protect? Fifty Years of Dairy Subsidies*, 1 San Joaquin Agric. L. Rev. 101, 101-12 (1991); Lois Bonsal Osler, *An Overview of Federal Milk Marketing Orders*, 5 San Joaquin Agric. L. Rev. 67, 67-71 (1995).

[22] Price supports guarantee that milk producers receive a minimum average price for their milk. COMPTROLLER GENERAL, EFFECTS AND ADMINISTRATION OF THE 1984 MILK DIVERSION PROGRAM 1 (1985), *available at* http://archive.gao.gov/d8t2/127525.pdf.

[23] The CCC is government-owned and implements the price support system for various agricultural commodities including dairy commodities. To support dairy prices, the CCC purchases non-fat dry milk, cheese, and butter. *Id.* at 2.

[24] The CCC was originally created in 1933. *About the Commodity Credit Corporation*, USDA FARM SERV. AGENCY, http://www.apfo.usda.gov/FSA/webapp?area=about&subject=landing&topic=sao-cc (last visited Oct. 17, 2010).

[25] *See* RALPH M. CHITE, ISSUE BRIEF FOR CONGRESS: DAIRY POLICY ISSUES 1 (2002), *available at* http://assets.opencrs.com/rpts/IB97011_20020628.pdf (purchasing surplus dairy products protect producers from seasonal imbalances of supply and demand as well as price declines which may put a producer out of business).

[26] COMPTROLLER GENERAL, *supra* note 22, at 2.

[27] *See* ERBA, *supra* note 7, at 10 n.8.

[28] *See id.*

programs were drastically reduced in 1996 by the Federal Agriculture Improvement and Reform Act and remain reduced today.[29]

A federal support price is established when the CCC purchases dairy overproduction.[30] While this may be viewed as a safety net for some producers, the CCC does not fully compensate producers for the value of their milk because the CCC is purchasing milk that is produced in excess of the market demand.[31] In order to curb overproduction and better align supply with demand, the DPSA 1983 was enacted.[32] This act quickly reduced the amount of governmental support and incorporated a voluntary Milk Diversion Program in an attempt to reduce the amount of milk produced.[33]

III. DAIRY PRODUCTION STABILIZATION ACT OF 1983

The DPSA 1983 was part of the Dairy and Tobacco Adjustment Act of 1983 and was designed primarily to control milk overproduction and reduce the high cost of governmental price supports.[34] This act sought to amend the Agricultural Act of 1949, by fixing the price of milk at $13.10 per hundredweight[35] for the first month of enactment.[36] After the first month, the DPSA 1983 allowed the Secretary of the USDA to decrease governmental price support considerably within the following years if it was determined that the CCC's purchases would exceed specific

---

[29] USDA, 1996 FAIR ACT FRAMES FARM POLICY FOR 7 YEARS 1 (1996), *available at* http://www.ers.usda.gov/publications/agoutlook/aosupp.pdf; CONG. BUDGET OFFICE, AGRICULTURAL RECONCILIATION ACT OF 2005 2, 4 (2005), *available at* http://www.cbo.gov/ftpdocs/67xx/doc6797/SenAgRecon.pdf.

[30] Since producers will get at least the federal support price, this means that producers may receive lower than the federal support price. ERBA, *supra* note 7, at 10 n.8.

[31] The CCC only creates a minimum price for surplus milk purchases. *See* Zuber v. Allen, 396 U.S. 168, 172-73 n.3 (1969) (stating that milk handlers would historically get a bargain during "glut periods" of overproduction from producers); CHITE, *supra* note 25, at 1.

[32] Crane v. Comm'r of Dep't of Agric., Food & Rural Res, 602 F.Supp. 280, 293 (D. Me. 1985).

[33] ROBERT CROPP, VOLUNTARY MILK SUPPLY MANAGEMENT 2 (1993), *available at* http://www.cpdmp.cornell.edu/CPDMP/Pages/Publications/Pubs/P7.pdf.

[34] *Crane*, 602 F.Supp. at 293. This act was enacted on November 29, 1983 and applied to, "all milk produced in the United States and marketed by producers for commercial use." Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 1983 U.S.C.C.A.N. (97 Stat.) 1128, 1129.

[35] A hundredweight is a unit of measure that equals one hundred pounds. ANDREW NOVAKOVIC ET. AL., GLOSSARY OF DAIRY MARKETING TERMS 12 (2000), *available at* http://www.cpdmp.cornell.edu/CPDMP/Pages/Publications/Pubs/Glossary.pdf.

[36] § 102, 97 Stat. at 1128.

amounts.[37] Additionally, the act required that regardless of the amount of CCC purchases, the price of milk must be reduced by fifty cents per hundredweight, to "all milk produced in the United States and marketed by producers for commercial use."[38]

In an attempt to stabilize the fluctuating dairy market, the DPSA 1983 also provided for a voluntary fifteen-month Milk Diversion Program.[39] This program was implemented to reduce the amount of milk marketed nationwide.[40] If a producer was interested in entering into the diversion program, that producer had to provide the Secretary with a plan describing how they were going to reduce their milk production and an overall estimated amount of reduction.[41] Each contract required that the producer reduce their quantity of milk in an amount equal to the producer's estimated amount, but not less than 5% or more than 30% of a producer's marketing history for the calendar year of 1982 or the average marketings of the producer for 1981 and 1982.[42] As a result of participating in the Milk Diversion Program and complying with the terms of the contract, each producer received $10 per hundredweight produced.[43] The program ultimately reduced the amount of milk produced, but the Milk Diversion Program had many downfalls and was temporary.[44]

The Milk Diversion Program went into effect on January 1, 1984 and ended on March 31, 1985.[45] Of approximately 200,000 commercial dairy farms operating in 1983, only about 38,000 participated in the program.[46] As a result of those 38,000 producers participating in the program, milk

---

[37] Governmental price support fell from $13.10 for the first month of enactment to $12.60 until Sept. 30, 1985. The act also allowed the Secretary of the USDA to decrease price support by fifty cents for the following twelve months if the estimated overall CCC purchases would exceed six billion pounds by Apr. 1, 1985. Then, on July 1, 1985, the Secretary could decrease support by an additional fifty cents for the following twelve months if the Secretary estimated that the CCC purchases would exceed five billion pounds. However, if the CCC purchases were less than five billion pounds, the price support could be increased by at least fifty cents per hundredweight. *Id.*

[38] *Id.* at 1129.

[39] *Id.* at 1129-30.

[40] *Id.*

[41] This diversion program also required that the producer slaughter dairy cattle in order to reduce their overall production and mandated that the producer give an approximate number of cattle to be slaughtered each month. *Id.*

[42] *Id.* at 1130, 1132-33.

[43] *Id.* at 1130-31.

[44] The report to the U.S. Congress explores these downfalls in depth. *See* Letter from Charles A. Bowsher to the President of the Senate and the Speaker of the House of Representatives *in* COMPTROLLER GENERAL, *supra* note 22.

[45] CROPP, *supra* note 33, at 2.

[46] COMPTROLLER GENERAL, *supra* note 22, at 1.

production was reduced from 139.7 billion pounds in 1983 to 135.5 billion pounds in 1984.[47] However, in 1985, production skyrocketed to 143.1 billion pounds.[48] Because of this surge in production after the Milk Diversion Program ended, it became clear that the program did not provide any solutions, but rather delayed when "the problem manifested itself."[49]

A. The Milk Diversion Program was Ultimately Unsuccessful

One of the main reasons why the Milk Diversion Program was unsuccessful in reducing milk production was because the program was voluntary.[50] Only an estimated 38,000 milk producers out of a total 200,000 commercial dairy facilities participated in the Milk Diversion Program.[51] While this may seem like a substantial number of participants, many dairies that did not participate actually increased their production leading to an offset in the total amount of milk diverted.[52]

Another reason why the Milk Diversion Program did not work was because many producers had already reduced their production between the 1983 base period and when the Milk Diversion Program took effect.[53] This allowed those producers that had coincidently reduced their production to cash in on the benefits of the program without any further reduction.[54] The coincidental decrease in milk supply consisted of approximately 2.2 billion pounds of the total volume that was reduced as a result of the program.[55] This coincidental reduction in milk production could have continued to occur had the Milk Diversion Program not been im-

[47] CROPP, *supra* note 33, at 2. Overall milk production declined in 1984 by approximately 3.74 to 4.11 billion pounds. It should also be noted that the CCC would have had to purchase this reduction in milk if the Milk Diversion Program was not enacted because "a milk surplus continued to exist." This surplus existed even though there was a 2% increase in the demand for milk products. COMPTROLLER GENERAL, *supra* note 22, at 7.

[48] CROPP, *supra* note 33, at 2.

[49] ERBA, *supra* note 7, at 14.

[50] Only about 20% of dairy facilities participated in the Milk Diversion Program, this would have been more if the program was mandatory for all producers. *See generally id.* at 13-14.

[51] COMPTROLLER GENERAL, *supra* note 22, at 1.

[52] ERBA, *supra* note 7, at 14.

[53] CROPP, *supra* note 33, at 2.

[54] There were two types of program participants: those who were already below their base and those with low fixed costs compared to their total costs. For producers with low fixed costs, the incentive to produce less was greater because they were penalized less for operating at lesser capacity, however for producers with high fixed costs such as high debt payments, cutting production was detrimental. *Id.*

[55] ERBA, *supra* note 7, at 14.

plemented.[56] Even more alarming is the amount of money the federal government paid to producers to enroll in the program.[57] Producers received $955 million in diversion payments for the total amount of the reduced production.[58]

Another problem with the Milk Diversion Program was that it was temporary.[59] The program was only implemented for fifteen months, and after March 31, 1985, producers that had just decreased their herd restored their herd size because they were no longer under any contract to maintain a certain production level.[60] This led to a record-setting surge in production and forced the CCC to purchase the surplus milk that was produced.[61]

The Milk Diversion Program also had more participants from certain areas of the nation than other parts of the nation.[62] Particularly, the Milk Diversion Program had regional trends of participation that were specifically correlated to the regional factors of that dairy industry.[63] For example, there was low participation in the program in the Northeast and Upper Midwest states because capital investments, land, and labor composed the majority of milk production costs.[64] Western states actually increased their production over the 1983 base level.[65] This increase in production in the Western states may have occurred since purchased feed and purchased labor is a large share of the overall production costs and many producers had to expand their operations in order to be profitable.[66] However, across the rest of the nation, participation was sporadic.[67]

---

[56] COMPTROLLER GENERAL, *supra* note 22, at 10.
[57] ERBA, *supra* note 7, at 14.
[58] *Id.*
[59] *See id.*
[60] *See id.*
[61] Participating producers used the program to cull their lower producing cows and replace them with higher producing and more genetically superior cows. This was "indicated by the record number of replacement heifers that producers held during" and after the program. S. Rep. No. 99-145, at 136 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1805; ERBA, *supra* note 7, at 14.
[62] CROPP, *supra* note 33, at 2.
[63] COMPTROLLER GENERAL, *supra* note 22, at 7.
[64] *See* S. Rep. No. 99-145, at 136; CROPP, *supra* note 33, at 2.
[65] COMPTROLLER GENERAL, *supra* note 22, at 13.
[66] *See* CROPP, *supra* note 33, at 2. In order to encourage participation of the West's producers, the diversion payments needed to be high enough to make it profitable. *Id.*
[67] Program participation in Florida was 15%, Georgia was 10.8%, Alabama was 11%, Missouri was 10.1%, and Kansas was 11.2%. These levels of participation are contrasted with Wisconsin with a participation level of 3.4%, California at 4.8%, Minnesota at 5.7%, and New York at 2.5%. S. Rep. No. 99-145, at 136; Gallegos, *supra* note 21, at 106-07 n.39.

While specific regions of the nation were participating in the Milk Diversion Program, and thus reducing their milk production, other regions were not participating in the program and increased their herd size.[68] This simultaneous increase and decrease in production offset any hope for production being lowered by the Milk Diversion Program nationwide.[69] More participation in the Milk Diversion Program also led to a shortage of milk in certain states and caused those states to buy out-of-state milk, which was usually purchased at a premium price.[70]

The DPSA 1983 only achieved short term goals and did not provide a long term solution to curb dairy overproduction.[71] The only actual goal the act accomplished was reducing governmental support by incrementally lowering the amount of money producers received per hundredweight.[72] Additionally, the Milk Diversion Program did not allow any long lasting effects to materialize because it was voluntary and temporary.[73] This left the nation with a surge in milk production that exceeded pre-program levels and forced the CCC to purchase the overproduction.[74]

In order to effectively decrease the surplus that is produced a program must be implemented that is mandatory and applies to all dairy producers equally.[75] The DPSPA 2010 is the first program of its kind that would mandatorily apply to all dairy producers nationwide to better align supply with demand.[76] This program will curb overproduction and stabilize the volatile market prices that are currently forcing many dairy facilities out of business.[77]

IV. How the DPSPA 2010 Would Operate

"Price volatility is endemic to the dairy industry" and there are problems with milk pricing.[78] Many studies on the price of milk have been

---

[68] Comptroller General, *supra* note 22, at 7.

[69] *Id.*

[70] S. Rep. No. 99-145, at 137; Gallegos, *supra* note 21, at 106-07.

[71] Dairy Policy Analysis Alliance, Food & Agric. Policy Research Inst.-Univ. Wis., Dairy Policy Issues for the 2012 Farm Bill 16 (2010), *available at* http://www.agobservatory.org/library.cfm?refID=107651.

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See* Robert Rodriguez, *Dairy farmers discuss price fix*, Fresno Bee, June 3, 2010, at A8.

[76] *See id.*

[77] *See id.*

[78] Stephenson, *supra* note 5, at 16. Recent all milk prices is as follows: $15.13 for 2005, $12.88 for 2006, $19.13 for 2007, $18.32 for 2008, and plummeted to $11.50 for Feb. 2009. *Dairy Price Stabilization Program*, Holstein Ass'n U.S.A., Inc.,

conducted to better understand why the price of milk is so volatile and to remedy the problem.[79] The DPSPA 2010[80] was specifically created to stabilize volatile milk prices "by better aligning growth in supply with growth in demand."[81] This program would prevent weakened milk prices that result in "low and negative returns over feed costs" to producers and would provide for a long term dairy program which could be modified.[82] Specifically, the DPSPA 2010 would amend the DPSA 1983 by adding a new dairy price stabilization program.[83]

The Secretary of Agriculture would be responsible for implementing the DPSPA 2010 and would consult with an established Producer Board.[84] The Producer Board would be composed of thirty members who would be appointed to the Board by the Secretary.[85] The Producer Board would contain producers from the various regions set forth in the amendment as well as some dairy consumers, fluid milk bottlers, and dairy processors.[86] The Secretary would also appoint one dairy economist to advise the Producer Board.[87]

---

http://www.holsteinusa.com/pdf/DSPS/DPSP_plan_v18_01152010.pdf (last visited Oct. 16, 2010).

[79] The DPSPA 2010 has been modeled after *An Analytical Review of a Growth Management Plan for Dairy Producers* and *An Analytical Review of a Refundable Assessment Plan for Dairy Producers*. These studies have forecasted milk price volatility through 2014. CHARLES NICHOLSON & MARK STEPHENSON, AN ANALYTICAL REVIEW OF A GROWTH MANAGEMENT PLAN FOR DAIRY PRODUCERS 2 (2009); STEPHENSON, *supra* note 5, at 9, 11; MILK PRODUCERS COUNCIL, *supra* note 9, at 12, 15-16.

[80] This is a proposed bill by Sen. Jim Costa. Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. (2010).

[81] MILK PRODUCERS COUNCIL, *supra* note 9, at 10; *Coalition to Support the "Dairy Price Stabilization Act of 2010,"* STABLEDAIRIES.COM, http://www.stabledairies.com/FAQ.htm (last visited Oct. 12, 2010).

[82] HOLSTEIN ASS'N U.S.A., INC., *supra* note 78. This amendment would apply to the 65,000 dairies across the United States in an attempt to keep them in business. *Id.*; MILK PRODUCERS COUNCIL, *supra* note 9, at 6.

[83] Operation of the DPSPA 2010 would treat each individual dairy as its own entity, that is, each dairy can choose whether or not to increase milk production. H.R. 5288, § 142(a)(1); Rob Vandenheuvel, *H.R. 5288, the "Dairy Price Stabilization Act of 2010," has been Introduced in the House of Representatives!* MILK PRODUCERS COUNCIL, (May 14, 2010), http://www.milkproducerscouncil.org/051410_dpsa.htm (last visited Oct. 15, 2010).

[84] The Secretary would also consult with an Appeals Committee. H.R. 5288, § 142(b)(1), (c).

[85] *Id.* § 142(b)(2)-(3).

[86] *Id.* § 142(b)(2)(A)-(D).

[87] *Id.* § 142(b)(4)(A).

The DPSPA 2010 will allow the Secretary to set the initial establishment of Allowable Milk Marketings.[88] This initial establishment of Allowable Milk Marketings will set a base quantity of how much a dairy facility can produce based on that specific dairy's past production rates.[89] Once the initial Allowable Milk Marketings are set, the Allowable Milk Marketings will be measured quarterly.[90] Additionally, each producer is allowed a Milk Marketing Growth Rate based on a Milk Feed Ratio.[91] The Milk Feed Ratio is an economic indicator of the overall conditions occurring within the dairy industry.[92] Typically, a dairy will be allowed a Milk Marketing Growth Rate of 3% each year.[93]

However, if a dairy intentionally or unintentionally produced more milk than the allotted 3%, that producer would have to pay a Market Access Fee.[94] The amount of the fee will be announced by the Secretary and will consist of the average of the previous three monthly figures for the Milk Feed Ratio.[95] The Market Access Fee can be calculated by either taking all of that facility's production and adding a lower Market Access Fee[96], or by taking the production in excess of that facility's Al-

[88] Establishment of the allowable milk marketings are based on the milk marketings of the dairy facility from the calendar year ending Dec. 2007, Dec. 2008, or Dec. 2009. *Id.* § 143(a)(2).

[89] *Id.*

[90] The allowable milk marketings for one quarter equal the quantity of milk produced for the corresponding quarter during the previous calendar year. *Id.* § 143 (b)(1)(B).

[91] For purposes of establishing the Milk Feed Ratio, the Secretary will use the USDA Jan. 2010 Agricultural Prices publication. *Id.* § 143 (b)(1)(B)-(C).

[92] *Id.* § 143(b)(3)(A)-(I); Vandenheuvel, *supra* note 83.

[93] This growth rate is the amount any dairy can expand without paying a Market Access Fee and is determined by the Secretary. This figure can fall below 3% in accordance with the Cornell University Studies. *Id.* § 143(b)(1)(B); MILK PRODUCERS COUNCIL, *supra* note 9, at 12.

[94] The Market Access Fee is a fee that is assessed on all the milk that exceeds that dairy's Allowable Milk Marketings. Note that when a dairy produces more than their share of Allowable Milk Marketings, the dairy's higher level of production becomes the new maximum level for that dairy's production. H.R. 5288, § 141(1), (3); STABLEDAIRIES.COM, *supra* note 81.

[95] The Secretary can make adjustments to the Market Access Fee and the Allowable Milk Marketing Growth Rate based on various economic indicators of the United States and the international dairy industry. H.R. 5288, § 143(b)(1)(D), (b)(3)(A)-(D).

[96] This option is called the Standard Market Access Fee. The lower Market Access Fee would range from .03 cents to fifty cents. *Id.* § (b)(2)(A)(iii); STABLEDAIRIES.COM, *supra* note 81.

lowable Milk Marketings which would then be charged with a higher Market Access Fee[97].[98]

However, not all dairies will expand their amount of production.[99] For those dairies that choose to keep their milk production equal to or below that facility's Allowable Milk Marketings for that quarter, that facility is entitled to receive a Market Access Fee Dividend.[100] These Market Access Fee Dividends are derived from those producers that intentionally or unintentionally increased their amount of production in excess of their Allowable Milk Marketings.[101] All of the Market Access Fee Dividends would be deposited and distributed from a secure account established by the Secretary.[102]

Establishment of new dairy facilities and operations would not be prohibited by the DPSPA 2010.[103] New producers are, "any individual or group of individuals entering the dairy business, none of whom have any interest in milk producing cows at the time of this bill's enactment."[104] Once the initial Allowable Milk Marketings base is established, the new producer would pay the Market Access Fee for any additional growth.[105] Under this amendment, there would be no significant barrier to any new dairy because that producer would simply pay the Market Access Fee.[106] For producers that have less than a three year history, their initial Allowable Milk Marketings will be based on the 2009 calendar year.[107]

The DPSPA 2010 could only continue to exist if a group of eligible producers elected to continue the program for an additional three years.[108] This review and referendum vote would take place no more than three

---

[97] This option is called the Alternative Access Fee. This fee is calculated by multiplying five by the Standard Market Access Fee amount. H.R. 5288, § 141(3), § 143(b)(2)(B)(i-ii).

[98] The producer could choose either option, whichever costs the producer less. *See* Vandenheuvel, *supra* note 83.

[99] *See* MILK PRODUCERS COUNCIL, *supra* note 9, at 12.

[100] H.R. 5288, § 143(e)(1)(A)-(B).

[101] *Id.* § 143(d)(4)(A)-(B).

[102] One hundred percent of the dividends that are collected will be distributed back to those producers who do not increase their milk marketings for that quarter. *See id.* § 143 (d), (f); Vandenheuvel, *supra* note 83.

[103] *See* MILK PRODUCERS COUNCIL, *supra* note 9, at 14.

[104] HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.

[105] The Market Access Fee would typically be $0.25 per hundredweight. Rob Vandenheuvel, *Part Two of a Series Delving Into H.R. 5288, the "Dairy Price Stabilization Act,"* MILK PRODUCERS COUNCIL (May 21, 2010), http://www.milkproducerscouncil.org/052110_dpsa2.htm (last visited Aug. 8, 2010).

[106] *See* MILK PRODUCERS COUNCIL, *supra* note 9, at 14.

[107] H.R. 5288, § 143 (a)(2)(A)-(C); HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.

[108] H.R. 5288, § 142(a)(4).

years after it was initially enacted.[109] The pool of producers must approve the program's existence by no less than a majority vote.[110] If the producers elect not to continue the program, the program would be terminated as soon as reasonably possible.[111]

The DPSPA 2010 is unlike any program that has been implemented before.[112] This program would require mandatory participation by all dairy producers nationwide, but is flexible, because it allows for additional production while incentivizing those producers that did not exceed their Allowable Milk Marketings.[113] The DPSPA 2010 is unique because it has been analyzed using a variety of market scenarios that have contributed to the current volatile market.[114] These tests and the subsequent analysis are important because it ensures that this program actually will stabilize the market and curb overproduction.[115]

V. THE GROWTH MANAGEMENT PLAN: THE FORECAST OF THE DPSPA 2010'S EFFICACY

Currently, milk prices are fluctuating and last year the dairy industry experienced one of the worst price drops in years.[116] However, this price drop was not unexpected because several individuals at Cornell University have calculated and followed milk price cycles in an attempt to identify "the biological and behavioral origins of these price cycles" inherent to the dairy industry.[117] These studies were conducted by Dr. Charles Nicholson and Dr. Mark Stephenson in a 2009 study titled, *An Analytical Review of a Growth Management Plan for Dairy Producers*.[118] In order to better understand why the dairy market is volatile, two twenty-year

---

[109] *Id.*

[110] A majority vote is a two-thirds vote. *Id.*; Vandenheuvel, *supra* note 105.

[111] H.R. 5288, § 142(a)(4).

[112] *See* Rodriguez, *supra* note 75.

[113] Vandenheuvel, *supra* note 105.

[114] Vandenheuvel, *supra* note 83; *see also* NICHOLSON, *supra* note 79.

[115] NICHOLSON, *supra* note 79, at 15-16.

[116] Overproduction and dwindling exports in 2009 led to one of the worst price drops in 40 years. This 18-month price drop led to many dairies going out of business. Rodriguez, *supra* note 75.

[117] NICHOLSON, *supra* note 79, at 3.

[118] Dr. Charles Nicholson and Dr. Mark Stephenson conducted these studies solely as academic professionals and do not promote or recommend any program or government intervention to remedy milk price volatility. While many of their studies indicate that there would be positive effects of such legislation, this does not imply that they support the enactment of the programs they research. NICHOLSON, *supra* note 79; CHARLES F. NICHOLSON & MARK W. STEPHENSON, ANALYSIS OF PROPOSED PROGRAMS TO MITIGATE PRICE VOLATILITY IN THE U.S. DAIRY INDUSTRY 3 (2010).

periods were analyzed for price fluctuations.[119] The most important factor that these studies revealed was a forecast that milk prices will be volatile in the future.[120]

As an integral part of the study of milk price cycles, a Growth Management Plan[121] was tested based on previous years' production.[122] Several scenarios were simulated to evaluate the impacts of the Growth Management Plan on various market conditions that contribute to recent market volatility.[123] These scenarios include the absence of major shocks,[124] a supply shock due to increases in feed costs during 2006 to 2010, and a demand shock involving an abrupt decline in manufactured dairy product demand with a feed cost increase.[125] According to the analysis of the study, the Growth Management Plan would substantially steady the fluctuating dairy market in all three scenarios.[126] Even the one-time and annual setting of the Market Access Fee with the Milk Marketing Growth Rate reduced volatility when there was a demand shock of a decline in manufactured dairy products with a feed cost increase.[127] Although the scope of the study did not focus on price recovery, it was determined that the Growth Management Plan would facilitate a faster price recovery when external economic shocks occurred.[128]

These studies demonstrate that the DPSPA 2010 would stabilize the market and that this program will facilitate a faster recovery from the

---

[119] These two twenty-year periods spanned from 1948-1967 and 1988-2007. The first time period showed strong seasonal trends in the dairy market, but were short in frequency and of low importance. The second time period, showed the same seasonal trends, but also indicated three shorter, individual cycles as well. The three individual cycles also gradually increased in time span—the first was 9 months, the second was 26 months, and the third was 36 months in length. NICHOLSON, *supra* note 79, at 3.

[120] This forecast can be assumed through the continuous high and low cycles that have occurred in the past and continue to occur; such as seasonal overproduction and individual choices of producers, processors, retailers, and consumers. *See id.* at 3-4.

[121] The Growth Management Plan was proposed by the Milk Producers Council and is designed to manage growth of U.S. milk production to stabilize milk price volatility. This plan is essentially the DPSPA 2010 as previously discussed above. *Id.* at 5.

[122] The Growth Management Plan was applied to data taken in 2007 through the forecasted price volatility in 2014. While the Growth Management Plan was not intended to provide a forecast of recovery, it was illustrative of its impact on market conditions experienced within the last six to eight months the study was conducted. *Id.* at 9.

[123] It should be noted that price volatility is influenced from these shocks, but does not arise primarily from it. This is evidenced by the failures of various governmental programs that have attempted to mitigate the impact these shocks have on prices. *Id.* at 3, 8.

[124] *Id.* at 8.

[125] For purposes of simplicity, these three scenarios were given in the study. *Id.*

[126] *See id.* at 9 n.9, 12-13.

[127] *Id.* at 12-13.

[128] *Id.* at 13.

current economic hardships the industry is experiencing.[129] This differs considerably from other dairy price programs because the DPSPA 2010 has been economically tested by a third party and analyzed to ensure the highest rate of success.[130] Other programs, such as the DPSA 1983, were created only based on data of the current dairy industry and were not subject to such scrutiny and analysis.[131] The fact that the DPSPA 2010 has been analyzed and shown to be successful makes it unique in that it is not an impulsive reaction to an unstable market.[132]

Additionally, the studies go beyond a current analysis of the Growth Management Plan and forecast the volatility of milk prices through 2014 based on the economic conditions that occurred in the past.[133] The analysis includes a forecast of milk prices if the Growth Management Plan is not implemented and shows how prices will be stabilized in the future if the program was implemented in January 2007.[134]

The market studies conducted by Cornell University are a critical component of the DPSPA 2010 because the program is supported by economic research.[135] The various scenarios that were tested by the individuals at Cornell University are actual economic shocks that have occurred.[136] After each economic price shock scenario had been tested, a more stable market resulted.[137] Not only has this program been researched and studied to ensure success, but the enforcement and application of the program are also unique.[138] The DPSPA 2010 is unlike any program that has been implemented before because it will require mandatory participation, but will allow dairy facilities to decide whether to increase production or not.[139] This unique program is a long term solution for aligning supply with demand which will stabilize market volatility.[140]

---

[129] *Id.* at 15; MILK PRODUCERS COUNCIL, *supra* note 9, at 17.

[130] *See* NICHOLSON, *supra* note 79; *see also* STEPHENSON, *supra* note 5.

[131] Only facts of the current situation of the dairy industry were given, there was no testing of the voluntary Milk Diversion Program before it was implemented. *See generally* S. Rep. No. 99-145, (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 1791-1809; MILK PRODUCERS COUNCIL, *supra* note 9, at 16.

[132] *See generally* NICHOLSON, *supra* note 79, at 16.

[133] *Id.* at 8-11.

[134] *See id.* at 8-15.

[135] *See id.* at 2.

[136] *See id.*; MILK PRODUCERS COUNCIL, *supra* note 9, at 5, 7.

[137] NICHOLSON, *supra* note 79, at 15-16.

[138] *See* Vandenheuvel, *supra* note 105.

[139] *Id.*

[140] *See* MILK PRODUCERS COUNCIL, *supra* note 9, at 11.

VI. RECOMMENDATION: THE DPSPA 2010 SHOULD BE ENACTED BECAUSE IT WILL CONTROL OVERPRODUCTION

A. The DPSPA 2010 will be a Mandatory, Long Term Solution

This program will provide for long term price stabilization,[141] whereas other programs have failed to do so.[142] The DPSPA 2010 will be more effective than other programs because it will require mandatory participation by all dairy producers.[143] Other programs, such as the Milk Diversion Program and Cooperatives Working Together,[144] are voluntary and therefore less effective in reducing milk production.[145] Because participation was voluntary in the past, not every producer was required to make the necessary change to reduce their production, and some nonparticipants may have even increased their production.[146] Past programs were problematic because it is unrealistic to expect all dairy producers to voluntarily participate and reduce their production.[147] However, this will not occur with the DPSPA 2010 because it will apply to all producers and dairy overproduction will be reduced.[148]

The DPSPA 2010 will also provide a long term solution for volatile milk prices because it is not intended to be a temporary program.[149] Other programs, such as the Milk Diversion Program, were designed to operate for only fifteen months.[150] The DPSPA 2010, however, is designed to operate on a quarterly basis, year after year.[151] This is important because not only will the program have plenty of time to actually stabilize dairy prices, but producers will not be able to undermine the

---

[141] This program is intended to take the boom-bust cycles out of the industry by streamlining production and prices. *Id.*
[142] *See* COMPTROLLER GENERAL, *supra* note 22, at 17.
[143] Compare the voluntary Cooperatives Working Together program and the voluntary Milk Diversion Program. Vandenheuvel, *supra* note 105; Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. § 141(9) (2010).
[144] Independent dairy producers and certain cooperatives fund the program through assessments of ten cents per each hundredweight marketed. DAIRY POLICY ANALYSIS ALLIANCE, *supra* note 71, at 16-17.
[145] Vandenheuvel, *supra* note 105.
[146] ERBA, *supra* note 7, at 14.
[147] Vandenheuvel, *supra* note 105.
[148] *See generally* H.R. 5288, § 141(9).
[149] *Id.* at § 142(a)(4).
[150] Other programs such as Dairy Termination Program that was authorized in the 1985 Farm Bill and the 1990 Omnibus Budget Reconciliation Act were terminated too early to provide a long term solution. Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 1983 U.S.C.C.A.N. (97 Stat.) 1128, 1129-30; *see also* CROPP, *supra* note 33, at 1.
[151] H.R. 5288, § 142(a)(4), § 143(b)(1)(A)-(B).

system.[152] For example, producers were able to undermine the Milk Diversion Program because it lasted for a short time span and they could cash in on the reductions made during the base-forming period, while temporarily holding back their current production.[153] However, the DPSPA 2010, once implemented, will last for an indefinite amount of time, which will not allow producers to cash in on temporary reductions to their milk production in order to satisfy a short-term goal.

The DPSPA 2010 also incentivizes producers to maintain their production within their allowable year-over-year growth.[154] This means that those producers that manage their milk production will receive a portion of the total Market Access Fees from those producers that chose to expand their production.[155] Essentially, this creates an agreement amongst all dairy producers because the producers that maintained their production are compensated for those producers that chose to increase production.[156] The dividend that those producers receive creates a real, tangible incentive to continue to maintain their growth which, in turn, contributes to the long-term goal of reducing production in order to better align supply with demand.[157]

B. The DPSPA 2010 will be Flexible

Additionally, the program is designed to allow for recommendations and changes at the discretion of the Secretary and the Producer Board.[158] The Producer Board[159] can make recommendations which will achieve effective administration and enforcement of the program over a long period of time.[160] Although the program can be terminated if the Producer Board elects to, the fact that recommendations can be made to the

---

[152] CROPP, *supra* note 33, at 2.
[153] *Id.*
[154] Vandenheuvel, *supra* note 83.
[155] *Id.*
[156] Vandenheuvel, *supra* note 105.
[157] Vandenheuvel, *supra* note 83.
[158] Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. § 142(b)(1), § 143(b)(1)(A)-(D) (2010).
[159] It is important to note that the Producer Board would be composed of many individuals that currently work in the industry. These individuals would come from various regions of the United States and represent producers, consumers, and bottlers. There would also be one economist that would provide information and data to the Producer Board. The fact that there would be various interests represented on the Board also allows for a more effective administration of the program. *Id.* at § 142(b). Programs during the 1970's and 1980's have not always been designed and administered effectively. ERBA, *supra* note 7, at 16.
[160] H.R. 5288, § 142(b).

program evidences a greater likelihood that it will remain in effect longer than past programs. This is especially important because as prices begin to stabilize, the program may need to be adjusted and the fact that the Producer Board has the power to make these changes is crucial to achieving this effectiveness.[161]

Not only does the DPSPA 2010 allow for flexibility with the administration and enforcement of the program, but it also allows the producers to be flexible in managing their dairies.[162] Under the program, dairy producers can either stay within their Allowable Milk Marketings or they can increase their production and pay the Market Access Fee.[163] If a producer decides to stay within their Allowable Milk Marketings, they will receive their quarterly dividend—which is a real incentive to maintain production.[164] On the other hand, if producers decide that paying the one-time Market Access Fee to increase their production is a better business decision, then they can do so.[165] In addition to choosing to either stay within the Allowable Milk Marketings for each facility or whether to expand production, the DPSPA 2010 will typically allow each dairy facility to increase production by 3%.[166] This flexibility combined with a typical overall increase in production will allow each dairy to conform to the program, while allowing each dairy to choose what is best for that facility's production and needs.[167] Allowing dairy facilities to use their discretion is unlike other programs and will provide for greater success once the program is implemented.

[161] The Producer Board of the Dairy Price Stabilization Program Act of 2010 can be compared to the National Dairy Promotion and Research Board that was responsible for promotion and advertisement of dairy products in the DPSA 1983. Unfortunately, the National Dairy Promotion and Research Board was authorized in Dec. 1983, but not actually created until the middle of 1984 and thus was ultimately unsuccessful in creating a demand for dairy products. ERBA, *supra* note 7, at 14.

[162] HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.

[163] Vandenheuvel, *supra* note 105.

[164] Vandenheuvel, *supra* note 83.

[165] Vandenheuvel, *supra* note 105.

[166] This overall yearly increase or decrease is called the Allowable Milk Marketing Growth Rate, is determined by the Secretary, and is based on several industry factors. Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. § 143(b)(1)(B) (2010).

[167] HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.

C. The DPSPA 2010 will Focus on Curbing Overproduction, rather than Fixing Milk Prices

Another unique aspect of the DPSPA 2010 is that it aims to manage production, rather than focusing on maintaining milk prices.[168] Past programs, such as the Milk Diversion Program, have focused on fixing milk prices for producers that chose to participate in the program.[169] This is not the case with the DPSPA 2010, because the goal of the program is to better align supply with demand and as a result, prices will stabilize.[170] The DPSPA 2010 also manages production without requiring producers to cull[171] any cow in their herd.[172] This differs sharply from Cull Cow Programs[173] and Heifer Incentive Programs[174] because a producer's production level does not have to fall below their initial base and this type of program promotes sound herd management.[175]

D. Impact on Export Markets

Exports are also important to the U.S. dairy industry because they are another source of demand for milk and milk products.[176] In 2007, several world events caused the United States to increase dairy exports.[177] During 2007, the United States was exporting around 10-12% of milk solids

---

[168] STABLEDAIRIES.COM, *supra* note 81.

[169] In addition to reductions of the base price in 1983, the Milk Diversion Program paid contracted producers $10 per hundredweight on diverted milk. *See generally* CROPP, *supra* note 33, at 1-2.

[170] *See* STABLEDAIRIES.COM, *supra* note 81.

[171] Culling is the act of killing cows. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 304 (11th ed. 2003).

[172] There is no provision in the DPSPA 2010 that requires a producer to terminate cows. *See generally* Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. (2010).

[173] Cull cow programs authorize the USDA to pay a producer once a cow is taken out of production. CROPP, *supra* note 33, at 4-5.

[174] Heifer Incentive Programs would incentivize producers who sell dairy heifers or heifer calves in an attempt to reduce milk production. This program would be problematic because it lacks guidelines for reporting *additional culling* as opposed to *normal culling* and it may depress beef prices. Cull Cow Programs and Heifer Incentive Programs have never been implemented, due to various concerns. *Id.* at 5.

[175] *See id.*

[176] E-mail from Andrew M. Novakovic, E.V. Baker Professor of Agric. Econ., Charles H. Dyson Sch. of Applied Econ. and Mgmt., Cornell Univ. to author (Oct. 5, 2010, 05:16 PST) (on file with San Joaquin Agric. L. Rev.).

[177] These events include the European Union's reduction in dairy export subsidies, a drought in Oceania, and China experiencing an increase in Gross Domestic Product which increased their U.S. dairy imports. Additionally, the U.S. dollar weakened, which incentivized other countries to import U.S. dairy products. NICHOLSON, *supra* note 118, at 6.

compared to the historical average of 3-4%.[178] This increase in global demand created a shortage in supply and resulted in historically high U.S. milk prices in 2008.[179] However, by the end of 2008, global demand drastically decreased "as the world entered an economic recession" and U.S. milk prices fell rapidly.[180]

While exports are small compared to domestic sales,[181] the DPSPA 2010 has been shown to increase the amount of net exports.[182] When there are no external shocks[183] to the world market, milk production has been found to be consistent and the average price of milk would be lower, thus causing more cheese to be exported.[184] Specifically, when there are no external shocks to the world market, the average net exports increase 9%, dry whey powder exports increase by 3.8%, and more non-fat dry milk is exported.[185] More importantly, according to the analysis of the DPSPA 2010, U.S. dairy exports would continue to increase even when external shocks to the world market occur.[186]

The increase in net exports of dairy products is another reason why the DPSPA 2010 should be enacted.[187] Exports provide an additional source of demand for the supply of milk products currently being produced and allow the U.S. dairy industry to compete in the world market.[188] This

---

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] Export sales are approximately 5-10% of total domestic sales. E-mail from Andrew M. Novakovic, *supra* note 176.

[182] Net exports are calculated as exports minus imports. The DPSPA 2010 will increase the amount of U.S. dairy products that are exported more than other programs that are currently being studied. These programs included in, *Analysis of Proposed Programs to Mitigate Price Volatility in the U.S. Dairy Industry* are the Foundation for the Future program and the Marginal Milk Pricing program. NICHOLSON, *supra* note 118, at 10, 22.

[183] Price variation can result from unpredicted shocks such as "a single large shock to feed costs and export demand." *Id.* at i.

[184] More cheese will be exported when compared to the "Baseline." The Baseline is defined as the, "continuation of current policies and no new programs." NICHOLSON, *supra* note 118, at i, 22.

[185] These figures are compared to the Baseline and assume no external shocks to the world market. Under the DPSPA 2010, milk is less expensive and the quantity demanded for export and domestic sales is greater. *Id.* at 22-24.

[186] External shocks frequently occur in the majority of markets. The external shocks included in the study are increased feed costs in 2015, export demand increases in 2016, and export demand decreases in 2017. These external shocks are designed to be similar to the ones that occurred in 2007-2009. The average net exports of cheese would increase by 2.5%. Dry whey and non-fat dry milk exports would increase by 2.6% and 8.1%. *Id.* at 27, 31.

[187] *See generally id.* at i-ii.

[188] STABLEDAIRIES.COM, *supra* note 81.

increased demand will allow the government to spend less taxpayer money on surplus milk;[189] will maintain a level of demand that is above governmental price support levels;[190] and will provide an additional constant market to sell to.[191] Without the DPSPA 2010, export demand volatility will continue.[192] Export volatility harms U.S. producers because they will continue to receive low prices for their products, which means staying in business will be harder.[193] Further, the U.S. dairy industry will be forced to continue to cope with the surplus that is produced and the volatile milk prices that result.[194]

E. The DPSPA 2010 would Reduce the Dairy Industry's Dependence on the Government

Additionally, the DPSPA 2010 would have no adverse effect on the CCC purchases of surplus milk production.[195] Under the DPSPA 2010, the CCC would still be able to purchase dairy products at support price levels.[196] While there would be no direct effect on the CCC, the DPSPA 2010 is crucial to keeping dairy producers in business because it reduces government dependence.[197] Reducing producer dependence on the government is important because the federal government has consistently cut funding for CCC purchases since 1996.[198]

Finally, operation of the DPSPA 2010 would decrease government expenditures substantially when compared to the Baseline when there are no external shocks occurring in the market.[199] Specifically, the DPSPA 2010 would moderate milk prices to the point where almost no governmental expenditures would occur for the operation of the Dairy Product

---

[189] *See* NICHOLSON, *supra* note 118, at 3.
[190] *See* Vandenheuvel, *supra* note 83.
[191] *See id.*
[192] *See generally* STABLEDAIRIES.COM, *supra* note 81.
[193] *See generally* NICHOLSON, *supra* note 118, at 6.
[194] *See generally* STABLEDAIRIES.COM, *supra* note 81.
[195] E-mail from Robert Vandenheuvel, Milk Producers Council, to author (Sept. 7, 2010, 12:41 PST) (on file with San Joaquin Agric. L. Rev.).
[196] It should be noted that the DPSPA 2010 will not interfere with other dairy programs that currently exist. These programs include purchases by the CCC and the Milk Income Loss Contract program. E-mail from Robert Vandenheuvel, *supra* note 195; HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.
[197] *See* E-mail from Robert Vandenheuvel, *supra* note 195.
[198] USDA, *supra* note 29, at 1; CONG. BUDGET OFFICE, *supra* note 29, at 2, 4.
[199] The Baseline keeps the current Federal Order, Milk Income Loss Contract Program, the Dairy Product Price Support Program, Tariff Rate Quotas, and Dairy Export Incentive Program in continuance and assumes no external shocks. NICHOLSON, *supra* note 118, at ii, 26.

Price Support Program and the Milk Income Loss Contract program.[200] Moreover, the actual cost of operation would be approximately one-third of what it was expected to cost at the Baseline level.[201] This is significant, because the DPSPA 2010 will be effective in curbing overproduction and reducing price volatility, while not costing the taxpayers significant amounts of money to operate.[202]

The DPSPA 2010 will stabilize the market and curb overproduction because it has been studied and analyzed on various market scenarios.[203] Not only has DPSPA 2010 been tested, but it also is a flexible program that will apply to all dairy producers.[204] The mandatory nature of the program, combined with the fact that it is designed to be indefinite, will provide a long term solution for the current, volatile market conditions within the dairy industry.[205] However, like all legislation, some individuals oppose the DPSPA 2010 and suggest alternative solutions.[206] These solutions are problematic because they only offer short term relief for individual producers and will perpetuate the volatility of the market.[207] Additionally, these opponents unjustifiably compare the program to the rigid Canadian quota system—a system that is expensive and gives the Canadian government complete control of the dairy industry.[208]

VII. Opposition Reaction: Revenue Insurance and Forward Contracts, Quota Systems, and Taxes

The main source of opposition to the DPSPA 2010 comes not from rational economics, but from values.[209] These individuals oppose limiting individual farm production by government intervention because that principle makes them nervous and uncomfortable.[210] Since many opponents of the DPSPA 2010 would rather keep the government from con-

---

[200] *Id.* at 26.

[201] Although the analysis with external shocks does cost the government more than the scenarios without the shocks, the DPSPA 2010 would cost the least when compared to the Foundation for the Future program and the Marginal Milk Pricing program. *Id.* at 26, 32, 37.

[202] It should be noted that the analysis of governmental expenditures does not include the cost of implementation. *See id.* at 3, 42.

[203] Milk Producers Council, *supra* note 9, at 15.

[204] Holstein Ass'n U.S.A., Inc., *supra* note 78.

[205] *See generally id.*

[206] Milk Producers Council, *supra* note 9, at 18.

[207] *See id.*

[208] *See id.* at 14.

[209] E-mail from Andrew M. Novakovic, *supra* note 176.

[210] *Id.*

trolling production,[211] they propose revenue insurance[212] and forward contracts[213] as remedies to stabilizing volatile milk prices.[214] Revenue insurance and forward contracts are problematic because they insulate the individual producer from volatile market conditions by guaranteeing an agreeable price before market prices fall.[215] The DPSPA 2010 specifically aims at managing production which will result in stable market prices.[216] Having a steady market is especially important when applied to forward contracts because they have an expiration date and thus there is no guarantee that market prices will be similar from year to year.[217] Market price stabilization is beneficial to the dairy industry as a whole because prices will ultimately be more predictable and there will be less of a need for producers to take such drastic risk management measures.[218]

A. The Canadian Quota System

Another criticism of the DPSPA 2010 is that it is similar to the rigid quota system in Canada.[219] The Canadian system essentially is structured to control a specific amount of milk that can be marketed.[220] Under the Canadian quota system,[221] dairy producers are assigned a quota, which allows them to produce and sell their milk.[222] If a farmer wishes to increase his/her milk production he/she must purchase quota on an ex-

---

[211] *Id.*

[212] Adjusted Gross Revenue insurance guarantees a percentage "of average gross farm revenue" in order to mitigate the financial effects of significant revenue shortfalls. CHRISTOPHER WOLF ET. AL., DAIRY FARM REVENUE INSURANCE: IS THE APPLICATION VIABLE? 2, 7 (Mich. State Univ. Dep't of Agric. Econ. ed., 2006).

[213] A forward contract is an agreement between a producer and a milk buyer or cooperative to purchase the milk at a set price. These contracts are risk management tools to lock in a price in order to escape milk price volatility. *Questions & Answers Concerning Dairy Forward Pricing Program*, USDA AGRIC. MKTG. SERV., http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5048675&acct=dgeninfo (last visited Oct. 19, 2010).

[214] *See* MILK PRODUCERS COUNCIL, *supra* note 9, at 18.

[215] *Id.*

[216] *Id.* at 10.

[217] *Id.* at 18.

[218] *Id.* at 11.

[219] Vandenheuvel, *supra* note 105.

[220] E-mail from Robert Vandenheuvel, Milk Producers Council, to author (Oct. 4, 2010, 16:52 PST) (on file with San Joaquin Agric. L. Rev.).

[221] *See* Dairy Products Marketing Regulations SOR/94-466, s. 2-7 (Can).

[222] DAIRY FARMERS OF ONTARIO, MILK QUOTA AND MILK TRANSPORTATION POLICIES 1 (2010), *available at* http://www.milk.org/corporate/pdf/Publications-DFOPolicyBook.pdf.

change from another producer willing to sell, in order to be compensated for the extra production.[223]

Quota will cost a Canadian producer approximately $25,000 CAD[224] within the province of Ontario, which happens to be the least expensive quota of the provinces.[225] Even more alarming is that one quota is estimated to be about one cow, which makes any increase in production extremely expensive.[226] This type of system is problematic because it requires a substantial sum of money to acquire the right to produce milk[227] and it makes establishing a dairy virtually impossible.[228] For example, if a farmer spends money purchasing quota, that money is unavailable to be used for other things such as improving the dairy or investments in the industry.[229] Additionally, under this rigid system, the Canadian government completely controls the dairy industry because the producer must purchase the quota on a governmentally-controlled exchange system and the government owns any over-quota milk production.[230]

While supply management systems that guarantee a producer a specific price for their milk may be enticing, producers in other countries,[231]

---

[223] The Canadian government is the only entity with the authority to purchase milk and any excess production belongs to the government at low or no cost. *See id.* at 1, 11; E-mail from Robert Vandenheuvel, *supra* note 220.

[224] These figures are in Canadian dollars. Currently, the Canadian dollar equals .9887 USD. BANK OF CAN., http://www.bankofcanada.ca/en/rates/exchange.html (last visited Feb. 15, 2011).

[225] This figure is for the province of Ontario for Aug. 2010. Quota in Alberta costs $36,600, Manitoba costs $29,500, and Nova Scotia is currently $28,195. GOV'T OF CAN., MILK QUOTA EXCHANGE, http://www.dairyinfo.gc.ca/pdf/quota10.pdf (last visited Oct. 4, 2010).

[226] One quota is the price per kilogram of butterfat. Therefore, a cow producing 65 pounds of milk at 3.5% butterfat would produce approximately 2.275 pounds of butterfat per day. Since 2.275 pounds of butterfat is about one kilogram of butterfat, a single unit of quota equals about one cow worth of production. E-mail from Robert Vandenheuvel, *supra* note 220.

[227] The Canadian quota system is drastically different from the United States policy of securing value to the farmland which is a common practice for food, feed grains, and other major crops. The DPSPA 2010 specifically works to not create excess rents—that is, there is no value created in any input or right. *See* E-mail from Andrew M. Novakovic, *supra* note 176.

[228] Adding one cow would cost a producer about $25,000 to $30,000. Additionally, the cost of quota is so high because buying quota is the only way a producer can increase their production which inflates the cost of quota. Vandenheuvel, *supra* note 105.

[229] *See id.*

[230] *See* DAIRY FARMERS OF ONTARIO, *supra* note 222, at 1.

[231] All European Union member countries are currently under a quota system. This quota system will be abolished by Apr. 1, 2015 in order to encourage safe competition and efficiency on the international scene. COMM'N OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL: DAIRY MARKET SITUATION

such as Canada, are limited in the amount of milk they can produce.[232] This is unlike the DPSPA 2010, because producers can increase their production over their Allowable Milk Marketings by paying a one-time Market Access Fee.[233] Once producers pay the one-time Market Access Fee, their increased production becomes the new benchmark for their future production.[234] Further, the payment that the Producer Board receives from producers that increased their production is distributed back to producers who managed their production,[235] which is unlike the Canadian quota system. This type of system is still in line with the American free market by allowing producers to sell to any handler[236] they choose and keeps the revenue collected in the pockets of milk producers and out of the hands of the government.

Additionally, the DPSPA 2010 allows new producers to enter the market by paying the Market Access Fee once their initial Allowable Milk Marketings base is established.[237] Unlike the Canadian quota system, the Market Access Fee does not create a significant barrier to establishing a new dairy facility.[238] Under the Canadian quota system, a new producer would have to pay approximately $25,000 for one Canadian quota[239] plus all the costs that are incidental to purchasing and maintaining the cow.[240] Twenty five thousand dollars for one quota is a significant initial invest-

---

2009 2-3, 11 (2009), http://ec.europa.eu/agriculture/markets/milk/report2009/com2009_385_en.pdf.

[232] DAIRY FARMERS OF ONTARIO, *supra* note 222, at 1.

[233] Note that if a producer wanted to increase their production, he/she would not have to purchase any quota from another producer in order to do so. If a producer wants to increase their production he/she would either have to pay a pre-determined Market Access Fee which ranges from fifteen cents to $2.50 per hundredweight on the additional milk produced or they can pay a fee on all their milk which ranges from three cents to fifty cents per hundredweight. Therefore, if the average Market Access Fee is $1.25 per hundredweight and a producer adds a cow that produces 20,000 pounds of milk per year, the cost of adding that amount of production would be a one-time fee of $250. Once this fee is paid, the additional amount of milk produced is the new benchmark for that producer's future production. E-mail from Robert Vandenheuvel, *supra* note 220.

[234] Note that after a producer pays the one-time Market Access Fee, they will be eligible to receive the Market Access Fees paid by other producers when they increase their production. *Id.*

[235] *See id.*

[236] Under the DPSPA 2010, a handler is a person that pays a dairy facility for milk that will be used commercially. Dairy Price Stabilization Program Act of 2010, H.R. 5288, 111th Cong. § 141(7) (2010).

[237] HOLSTEIN ASS'N U.S.A., INC., *supra* note 78.

[238] MILK PRODUCERS COUNCIL, *supra* note 9, at 11.

[239] GOV'T OF CAN., *supra* note 225.

[240] This figure is only for the cost of the quota and does not include the cost of maintaining the cow. *Id.*

ment considering that an average cow costs about $1,500 to purchase and the average U.S. cow might generate a gross income of $3,000 each year.[241] Under the Canadian quota system, it would take a new producer approximately eight years to recoup their initial investment.[242]

B. The Gramm-Rudman Assessment Tax and General Taxes

Further, opponents of the DPSPA 2010 argue that the Market Access Fee is similar to the Gramm-Rudman assessment tax.[243] The Gramm-Rudman assessment was imposed on producers to charge them for the cost of operating national dairy programs.[244] The DPSPA 2010 is not a tax because all of the Market Access Fees that are collected by the Producer Board will be distributed back to those producers that maintained their production at or below their Allowable Milk Marketings for that quarter.[245] The DPSPA 2010 would also decrease government expenditures on programs such as the Milk Contract Loss Program and price support programs that are currently implemented because the volatile milk prices would naturally steady.[246] Further, this program would not cost taxpayers significant amounts of money to operate.[247]

Additionally, the DPSPA 2010 can also be contrasted with other state taxes that have been imposed in the past.[248] Various state taxes have been implemented in order to confer a financial benefit to the state and many of those have been found to be unconstitutional.[249] The DPSPA

---

[241] E-mail from Andrew M. Novakovic, *supra* note 176.

[242] The cost of one quota is $25,000 divided by a gross income of $3,000 per cow equals about 8 years. While there are programs for new producers that are funded by the Dairy Farmers of Ontario, only ten new producer applicants are selected to receive assistance each year. Additionally, applicants must maintain twelve kilograms of their own quota at all times while they receive assistance. *See generally id.*; DAIRY FARMERS OF ONTARIO, *supra* note 222, at 22-23.

[243] STABLEDAIRIES.COM, *supra* note 81.

[244] *Id.*

[245] Compare the collection of the Market Access Fees to the Canadian quota system. In Canada, the quota fees that are collected belong to the government. *Id.*; DAIRY FARMERS OF ONTARIO, *supra* note 222, at 1.

[246] NICHOLSON, *supra* note 118, at 26, 32-33.

[247] *Id.* at 3.

[248] *See generally* STABLEDAIRIES.COM, *supra* note 81.

[249] "A cardinal rule of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268, 273 (1984) (holding that Hawaii's liquor tax exemptions violated the Commerce Clause because it had the purpose and effect of discriminating in favor of local commerce). *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994) (holding that Massachusetts' pricing order violates the Commerce Clause); Dean

2010 differs from these state taxes because it would apply equally to all states nationwide in order to stabilize the dairy market.[250] This nationwide application of the program will ultimately be more effective in curbing overproduction than state regulation because all 65,000 producers across the nation will be required to participate to achieve the same goal.[251]

Clearly, there is opposition to the DPSPA 2010, however this opposition is likely rooted in fear of governmental involvement and control over how much a dairy can and should produce.[252] This fear is more of an objection in principle than it is an assessment regarding the effectiveness of the program.[253] While there are some uncertainties with any program that has never been implemented, the DPSPA 2010 has been tested and has shown that it will curb overproduction and decrease market volatility. This program works to stabilize the market as a whole, whereas revenue insurance and forward contracts will only perpetuate the market volatility. Additionally, this program differs completely from the Canadian quota system and is not a tax because all of the dividends that are collected will be distributed back to producers as an incentive.

VIII. CONCLUSION

"The 'milk problem' is exquisitely complicated. . . .[it] is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government."[254] Overproduction of milk has always been a problem for the dairy industry because there are periods of seasonal overproduction and an inelastic supply response to an inelastic demand.[255] In an attempt to control and curb overproduction, the U.S. government has created various acts to

Milk Co. v. Madison, 340 U.S. 349, 356 (1951) (holding that a Madison, Wisconsin ordinance regulating the sale of milk and milk products violated the Commerce Clause); Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) (holding that California's milk marketing scheme that required some out of state purchases be made at a higher price than those purchases paid by California's processors is not exempt from the Commerce Clause).

[250] *See* STABLEDAIRIES.COM, *supra* note 81.

[251] *See generally id.*

[252] E-mail from Andrew M. Novakovic, *supra* note 176.

[253] *Id.*

[254] An Appellate Justice's opinion regarding the Agricultural Marketing Agreement Act of 1937 and of the problems specific to milk regulation. Queensboro Farms Products, Inc. v. Wickard, 137 F.2d 969, 974-75 (2d Cir. 1943).

[255] STEPHENSON, *supra* note 5, at 1.

control or incentivize producers to reduce their production.[256] These acts, however, have done little to actually reduce the amount of milk produced because they were either voluntary, designed to be temporary, or aimed at fixing prices instead of stabilizing the market.[257]

Currently, a new regulation has been created that will stabilize the dairy market and keep dairy facilities in business.[258] The DPSPA 2010 has been previously tested and will stabilize the volatile milk market.[259] This program is unique because it is unlike any program that has been implemented before; it is mandatory and indefinite.[260] The DPSPA 2010 is also flexible in many ways.[261] First, the Producer Board can make recommendations to the Secretary as they see fit, which allows the program is be modified to be as effective as possible.[262] Second, each dairy facility can choose whether or not to increase their production.[263] This allows dairy facilities to retain control over their own day-to-day operations; to satisfy their own goals for market production; and to ultimately stay in business.[264] Third, the DPSPA 2010 does not act as a significant barrier to the establishment of new dairy facilities.[265] This is unlike the Canadian quota system because, while the Canadian government has control over dairy production, it is virtually impossible to begin a new dairy facility or increase production.[266]

The Dairy Price Stabilization Program Act of 2010 should be enacted because it is the only program of its kind that will stabilize milk prices as a result of stabilizing production.[267] This program will stabilize the volatile milk prices and keep American dairy farmers in business.[268] Hopefully, this Comment encourages milk producers to continue to advocate for this legislation and promotes discussion among legislators in the House Agriculture Committee to turn this proposal into law.[269]

ASHLEY A. ALLRED

---

256 ERBA, *supra* note 7, at 1.
257 *See id.* at 16.
258 Rodriguez, *supra* note 75.
259 NICHOLSON, *supra* note 79, at 15.
260 Rodriguez, *supra* note 75; STABLEDAIRIES.COM, *supra* note 81.
261 *See* Vandenheuvel, *supra* note 83.
262 *Id.*
263 STABLEDAIRIES.COM, *supra* note 81.
264 *See id.*
265 Vandenheuvel, *supra* note 83.
266 STABLEDAIRIES.COM, *supra* note 81.
267 *See* Rodriguez, *supra* note 75.
268 *Id.*
269 *Id.*