The Pricing of Milk Under Federal Marketing Orders

by

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I. INTRODUCTION

"Experience before and since" the enactment of the federal legislation for the regulation of milk marketing "has disclosed that the 'milk problem' is exquisitely complicated." [1] The "factors of instability" which are peculiar to the fluid milk industry and "call for special methods of control" have their origin in many circumstances.[2] The explication of the "milk problem" is not compressible within the compass of this article, but the brief references, in this introductory section, to some of the characteristics of the fluid milk industry may be conducive to the understanding of the statutory provisions for the pricing of milk under the terms of a marketing order.[3]

The supply of milk is subject to seasonal fluctuations which, under normal conditions, are substantial.[4] The production of milk in the spring and summer months is from 50 per centum to 100 per centum greater than the production of milk in the autumn and winter months.[5] Although there is a pronounced seasonal variation in the production of milk, "milk consumption is about the same in all months" [6] subject, however, to daily fluctuations which require the industry to carry an operating reserve of approximately 20 per

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[1] Queensboro Farms Products v. Wickard, 137 F.2d 969, 974 (2d Cir. 1943).

[2] Nebbia v. New York, 291 U.S. 502, 517-518 (1934).

[3] The legal questions which arise in connection with a milk marketing order are "questions of law arising out of, or entwined with, factors that call for understanding of the milk industry." United States v. Ruzicka, 329 U.S. 287, 294 (1946).

[4] Brannan v. Stark, 342 U.S. 451, 460 (1952); United States v. Rock Royal Co-op., 307 U.S. 533, 549 (1939); Nebbia v. New York, 291 U.S. 502, 517 (1934).

[5] *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture*, 84th Cong., 1st Sess. ser. M, pts. 1 and 2, at 13-15, 58-59, 182-183, 249-251 (1955). See also, Barns v. Dairymen's League Co-op. Ass'n, 220 App. Div. 624, 627, 222 N.Y.S. 294, 296 (1927); BARTLETT, COOPERATION IN MARKETING DAIRY PRODUCTS 167-169 (1931); BENEDICT AND STINE, THE AGRICULTURAL COMMODITY PROGRAMS 445-446 (1956).

[6] U.S. DEP'T OF AGRICULTURE, MARKETING, 1954 YEARBOOK OF AGRICULTURE, 477. See also, BENEDICT AND STINE, THE AGRICULTURAL COMMODITY PROGRAMS 444-445 (1956).

centum.[7] The surplus milk cannot be satisfactorily stored for long periods of time, and if a metropolitan area is to have an adequate supply of milk in the fall and winter months the production of milk for that market in the spring and summer months must be in excess of the demand, during that time, on the fluid milk market. The seasonal surplus "must necessarily occur during those periods [*i.e.*, spring and summer] if there are to be enough cows to furnish the requisite supply at periods when the milk yield is less." [8]

The surplus milk which is produced for, but not disposed of on, the fluid milk market is generally marketed in manufacturing outlets for the processing of milk products, and the surplus milk is in competition with milk which is produced elsewhere at lower costs for manufacturing purposes.[9] Elaborate regulations have been prescribed by the health authorities with respect to milk which is produced for the fluid milk market,[10] but the surplus milk is disposed of to manu-

[7] *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture,* 84th Cong., 1st Sess. 183, 253-254, 259-260, 367 (1955). "Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. . . ." Nebbia v. New York, 291 U.S. 502, 517 (1934).

[8] Grandview Dairy v. Jones, 157 F.2d 5, 7 (2d Cir. 1946), *cert. denied,* 329 U.S. 787 (1946). See also, Brannan v. Stark, 342 U.S. 451, 460 (1952).

[9] United States v. Rock Royal Co-op., 307 U.S. 533, 550 (1939); U.S. DEP'T OF AGRICULTURE, MARKETING, 1954 YEARBOOK OF AGRICULTURE, 478; STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 114, REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, 16 (1933).

[10] Milk is easily contaminated, and serves as a culture medium in which pathogenic organisms may survive and multiply. Milk is highly perishable, and it is "a fertile field for the growth of bacteria." United States v. Rock Royal Co-op., 307 U.S. 533, 549 (1939). The sanitary codes which have been prescribed by the states or by the municipalities to preclude the marketing of impure milk are an exercise of the police power to protect the public health. Fischer v. St. Louis, 194 U.S. 361, 370 (1904); Lieberman v. Van De Carr, 199 U.S. 552, 558 (1905); St. John v. New York, 201 U.S. 633, 636-638 (1906); State v. Bunner, 126 W. Va. 280, 27 S.E.2d 823, 825-826 (1943); People v. Anderson, 355 Ill. 289, 189 N.E. 338, 341-344 (1934). To guard against diseases that are transmissible through fluid milk, pasteurization of the milk is generally required if the milk is to be marketed as fluid milk in a metropolitan area, and also the dairy cattle are inspected so as to exclude milk from cows that suffer from mastitis, tuberculosis, or Bang's disease. Nebbia v. New York, 291 U.S. 502, 516, 522 (1934); Mintz v. Baldwin, 289 U.S. 346, 349 (1933); Adams v. Milwaukee, 228 U.S. 572, 577-584 (1913); Koy v. Chicago, 263 Ill. 122, 104 N.E. 1104, 1105-1108 (1914); Pfeffer v. Milwaukee, 171 Wis. 514, 177 N.W. 850, 851 (1920); Hacker v. Barnes, 166 Wash. 558, 7 P.2d 607, 608-610 (1932); Nelson v. Minneapolis, 112 Minn. 16, 127 N.W. 445, 446-448 (1910); Dean Milk Co. v. Aurora, 404 Ill. 331, 88 N.E. 2d 827, 829-831 (1949); State v. Edwards, 187 N.C. 259, 121 S.E. 444, 445 (1924). A state or municipality is precluded, however, from adopting "a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce . . ." so as to create or invite "preferential trade areas destructive of the very purpose of the Commerce Clause." Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

facturers at a price which is substantially lower than the price on the fluid milk market.[11] The economic value of milk depends on the particular use made of it,[12] and the fluid milk market is the most profitable to the producers.[13]

The entire supply of milk which is approved by the health authorities for use as fluid milk in a particular marketing area is fungible or homogenous. There is no discernible basis for selecting out of the approved supply one producer's milk rather than that of another for sale on the fluid milk market, and also a particular producer's milk cannot be distinguished in a milk plant from that of another. All of the milk approved by the health authorities for fluid use in a particular marketing area is available for disposition on the fluid milk market.

> 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 milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor.[14]

The complexities of milk marketing center on the relations between the producers and the handlers or dealers who buy the milk from the producers and then sell it in the form of milk, cream, or milk products to the consumers.[15] "Regardless of whether milk is sold [by the producers] for manufacturing or for fluid use, it must be sold by a prearranged pricing procedure, as raw milk does not lend itself to dealing on an 'offer and acceptance' basis." [16] The price which producers receive for milk is generally arrived at on the basis of formulaic terms or "economic indicators" with respect to the value of milk according to its use.[17]

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[11] United States v. Rock Royal Co-op., 307 U.S. 533, 550 (1939); Stark v. Wickard, 321 U.S. 288, 295 (1944); Grant v. Benson, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956); Barns v. Dairymen's League Co-op Ass'n, 220 App. Div. 624, 222 N. Y. S. 294, 296 (1927); Colteryahn Sanitary Dairy v. Milk Control Com'n, 332 Pa. 15, 1 A.2d 775, 782 (1938); Rohrer v. Milk Control Board, 322 Pa. 257, 186 A. 336, 340 (1936); STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 114, REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, 16 (1933).

[12] *Ibid.*

[13] United States v. Rock Royal Co-op., 307 U.S. 533, 550 (1939).

[14] Nebbia v. New York, 291 U.S. 502, 517-518 (1934). See also, STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 114, REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, 16-17 (1933).

[15] Queensboro Farms Products v. Wickard, 137 F.2d 969, 974-975 (2d Cir. 1943).

[16] U.S. DEP'T OF AGRICULTURE, MARKETING, 1954 YEARBOOK OF AGRICULTURE, 481.

[17] *Ibid.*

The cooperative associations of producers developed the classified-use price plan as a basis for establishing the price which the producers should receive for their milk.[18] The genesis of the plan has been described as follows:

> These [cooperative] associations [of dairy farmers] found the problems of marketing and pricing milk extremely difficult. During the early periods these associations attempted to bargain with milk dealers for a flat price which would be applicable to all of the milk of their members. Flat prices for milk, however, had peculiarly unstabilizing effects upon the marketing of milk. Under the flat-price system each handler paid the same price regardless of the use he made of his milk.
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> Since it was not possible for a handler to calculate his daily requirements for fluid sales with preciseness, and it was even more difficult for the dairy farmer to regulate the production of his dairy herd to match the handler's sales, there normally was an excess of milk in fluid-milk plants over the daily fluid requirements. Handlers who had excess supplies usually reacted in one of two ways. They either took fluid sales from other handlers by offering the excess at reduced prices which in turn were passed back to farmers, or they refused to accept the full quantity of milk offered by farmers.
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> A factor which accentuated the pricing problems created by this lack of balance between sales and production was the enactment by health authorities in many large fluid-milk markets during the 1920's of more stringent sanitary regulations relating to milk produced for fluid use. To meet the requirements imposed in fluid markets producers had to invest considerable money in improving the milk-producing facilities and take additional care in sterilizing utensils, keeping barns clean, et cetera.
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> Producers who made such improvements for production of high-quality milk expected some compensation in the form of a premium over the prices paid for milk of a manufacturing grade. However, if the dealer handled all his producers' milk during the flush production months, he had to dispose of large quantities of surplus milk during these months. This milk had to be manufactured into products, such as butter and cheese, where it had a lower use value than it would have had as fluid milk or cream. The dealer could not pay the same price for the surplus milk which was used to produce these lower value products as he could pay for milk utilized as fluid milk.

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[18] Maryland and Virginia Milk Pro. Ass'n v. United States, 193 F.2d 907, 915-916 (D.C. Cir. 1951). See also, STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 114, REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, 109-110 (1933).

> Farmers, through their cooperative associations, devised a plan to encourage handlers to accept milk regularly from farmers who had made the investment required to produce high-quality milk, even in periods in which the handlers had no fluid outlets for some of the milk purchased. Through their cooperative associations, they worked out with dealers a system of differentiated prices. These were called classified price plans, and required the payment of a higher price to farmers for milk sold in fluid outlets than for milk processed and sold as a product like butter and cheese. These plans were in effect in a number of the largest markets in the country by about 1920. As an adjunct of these classified pricing plans, various kinds of pooling arrangements were also developed to distribute uniformly to producers the total class values paid by handlers.[19]

Although the cooperative associations of producers made substantial progress in their efforts to bring about the orderly marketing of milk, the success of their plan depended, in the main, upon participation by all groups in the market, and generally the cooperative associations were not able to obtain the "bases for an adequate control." [20] Some persons were inclined to reap the benefits of united action without having to bear the burdens.[21] In some instances nonmembers received more for their milk because they "did not share proportionately in the lower returns for surplus milk . . ." and did not bear any of the costs of the services "which benefited both members and nonmembers." [22]

The milk industry is of wide-reaching economic importance; the total farm value, per annum, of milk is approximately five billion

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[19] *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture,* 84th Cong., 1st Sess. 8 (1955).

[20] U.S. DEP'T OF AGRICULTURE, ECONOMIC BASES FOR THE AGRICULTURAL ADJUSTMENT ACT, 42-43 (1933). See also, 70 CONG. REC. 2432 (1929); NOURSE, DAVIS, AND BLACK, THREE YEARS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION, 222 (1937); *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture,* 84th Cong., 1st Sess. 8-9 (1955). "During the past fifty years, the dairymen of the New York milk shed have made great progress toward adequate organization for regulating and stabilizing the milk industry of the state. However, only about half the producers in the milk shed are now effectively organized." STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 114, REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE THE MILK INDUSTRY, 17-18 (1933).

[21] *Ibid.*

[22] Transcript of record, pp. 2150-2151, Grant v. Benson, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 1015 (1956). In addition, the cooperative associations were unable, in some instances, to audit the books or records of handlers so as to verify the classification of milk on the basis of its use. CHRISTENSEN AND SPENCER, CONDITIONS RESPONSIBLE FOR FEDERAL AND STATE REGULATION OF MILK PRICES; FARM ECONOMICS, DEP'T OF AGRICULTURAL ECONOMICS, NEW YORK STATE COLLEGE OF AGRICULTURE, No. 194, 5121 (1954).

dollars.[23] The problems of the industry "have long engaged the notice of the Congress, the state legislatures and the courts." [24] In view of the various "economic pressures," [25] statutes have been enacted in several states to authorize administrative agencies to establish the prices to be paid to producers for their milk.[26] It was held, however, in *Baldwin v. G. A. F. Seelig*[27] that a provision in a New York statute which prohibits the sale of milk imported from another state unless the price paid to the producers was one that would be lawful upon a like transaction in New York is invalid under the commerce clause in the Constitution of the United States. The Court said that:

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[23] U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS 1956, 375-377, 447. See also, Queensboro Farms Products v. Wickard, 137 F.2d 969, 974-975 (2d Cir. 1943).

[24] Benson v. Schofield, 236 F.2d 719, 720-721 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957). "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized. . . ." Hood & Sons v. Du Mond, 336 U.S. 525, 529 (1949).

[25] *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture*, 84th Cong., 1st Sess., 9 (1955). See also CHRISTENSEN AND SPENCER, *op. cit. supra* note 22, at 5118-5121.

[26] See Nebbia v. New York, 291 U.S. 502, 515 (1934); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 167-168 (1934); Baldwin v. G.A.F. Seelig, 294 U.S. 511, 518-519 (1935); Borden's Co. v. Ten Eyck, 297 U.S. 251, 262 (1936); Milk Board v. Eisenberg Co., 306 U.S. 346, 349 (1939); State Board of Milk Control v. Richman Ice Cream Co., 117 N.J.Eq. 296, 175 A. 796 (1934); State v. Newark Milk Co., 118 N.J.Eq. 504, 179 A. 116, 119-126 (1935); Rohrer v. Milk Control Board, 322 Pa. 257, 186 A. 336, 337-359 (1936); Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15, 1 A.2d 775, 777-784 (1938). The findings by the General Assembly of Pennsylvania in the enactment of the Milk Control Law in 1937 include, *inter alia*, the finding that milk "consumers are not assured of a constant and sufficient supply of pure, wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk. If this is not done, large numbers dispose of their herds or engage in milk strikes, and remaining producers supply unhealthful milk or milk of lower quality because of financial inability to comply with sanitary requirements and to keep vigilant against contamination. Public health is menaced when milk dealers do not or cannot pay a price to producers commensurate with the cost of sanitary production, or when consumers are required to pay excessive prices for this necessity of life." Pa. Sess. Laws 1937, Preamble, P.L. 417, para. 2.

[27] 294 U.S. 511 (1935). The New York metropolitan marketing area receives a substantial percentage of its milk from other states. The milk supply for that marketing area is obtained from producers "throughout a production area which includes portions of six states, and this milkshed extends more than 400 miles from the marketing area." 18 FED. REG. 6459 (1953). "The Secretary of Agriculture found that two-thirds of the milk produced for the New York marketing area actually moves in interstate commerce and that the remaining one-third produced within the State of New York was 'physically and inextricably intermingled' with the interstate milk; that all was handled either in the current of interstate commerce or so as to affect, burden, and obstruct such interstate commerce in milk and its products. . . ." United States v. Rock Royal Co-op., 307 U.S. 533, 551-553 (1939). See also, Titusville Dairy Products Co. v. Brannan, 176 F.2d 332, 336 (3rd Cir.), *cert. denied*, 338 U.S. 905 (1949). It was said in United States v. Wrightwood Dairy Co., 315 U.S. 110, 118 (1942), that approximately 60 per centum of the milk sold in the Chicago marketing area is produced in Illinois and approximately 40 per centum is produced in the neighboring states.

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.[28]

II. The Congressional Enactments for Milk Marketing Orders

The pricing of milk under a federal marketing order is authorized by the Agricultural Marketing Agreement Act of 1937,[29] which is a re-enactment, with amendments, of various provisions in the Agricultural Adjustment Act of 1933,[30] as amended, including the amendments in the Act of August 24, 1935.[31]

Certain sections of the Agricultural Adjustment Act of 1933 with respect to processing taxes were held invalid in *United States v. Butler*.[32] The remaining provisions of the act, as amended by the Act of August 24, 1935,[33] relative to marketing agreements and marketing orders were, however, separate and distinct from the sections which were invalidated in the *Butler* case, and the statutory provisions for marketing agreements and marketing orders continued in effect.[34] The legislative history of the Agricultural Marketing Agreement Act of 1937 shows that "these provisions [for marketing orders and marketing agreements] are and were intended to be effective independently of the production adjustment provisions" which were invalidated in the *Butler* case.[35] The statutory provisions in the Agricultural Adjustment Act of 1933, as amended, for marketing orders and marketing agreements were regarded by Congress as being

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[28] *Id.* at 522. See also, Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Milk Board v. Eisenberg Co., 306 U.S. 346 (1939).

[29] 50 Stat. 246 (1937), 7 U.S.C. §§ 601-602, 608a (5)-608d, 610(a)-610(c), 610(f)-610(j), 612, 614, 671-674 (1952 and Supp. IV, 1956). The Secretary of Agriculture is also authorized to enter into marketing agreements with handlers of milk. 7 U.S.C. § 608b (1952). An agreement, however, is inapplicable to persons who do not sign the agreement, whereas a milk marketing order is applicable to all of the handling transactions which are within its terms. The programs that are in effect with respect to the pricing of milk are established by means of marketing orders. *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture*, 84th Cong., 1st Sess. 9 (1955).

[30] 48 Stat. 31 (1933).

[31] 49 Stat. 750 (1935).

[32] 297 U.S. 1, 53-79 (1936).

[33] 49 Stat. 750 (1935).

[34] United States v. David Buttrick Co., 91 F.2d 66, 67-69 (1st Cir. 1937); Edwards v. United States, 91 F.2d 767, 789 (9th Cir. 1937); Whittenburg v. United States, 100 F.2d 520, 521 (5th Cir. 1939).

[35] H.R. Rep. No. 468, 75th Cong., 1st Sess. 2 (1937). See also, S. Rep. No. 565, 75th Cong., 1st Sess. 2-3 (1937).

within the plenitude of its power to regulate commerce, and by re-enacting and further amending these statutory provisions any question as to their separability, under the decision in the *Butler* case, was obviated.[36]

The act sets forth the purpose of price fixing under marketing orders,[37] the manner in which orders may be issued,[38] the terms and conditions which may be included in the orders,[39] and provides for their enforcement.[40] Provision is made in the statute for administrative relief and judicial review of administrative action.[41]

III. The Constitutionality of the Act and the Milk Marketing Orders

The statute is based on the commerce clause of the Constitution,[42] and it is a familiar exercise of the plenary power of Congress to regulate commerce.[43] A marketing order may be applicable only to the handling of any of the commodities, including milk, and the products thereof referred to in the act "as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof." [44]

The statute vests in the Secretary the full reach of the commerce

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[36] Various provisions in the Agricultural Adjustment Act of 1933 were incorporated by reference in the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246 (1937). "The adoption of an earlier statute by reference, makes it as much a part of the later act as though it had been incorporated at full length." Engel v. Davenport, 271 U.S. 33, 38 (1926). See also, Panama R. R. Co. v. Johnson, 264 U.S. 375, 391-392 (1924).

[37] 7 U.S.C. § 608c(18) (1952).

[38] *Id.* § § 608c(3)-(4), (8)-(9), (12), (19).

[39] *Id.* § § 608c(5), (7); 610(b)(2)(i).

[40] *Id.* § 608a(5)-(8), 608c(14); 610(c), (h).

[41] *Id.* § 608c(15)(A)-(B).

[42] *Id.* § § 608c(1), 610(j); U.S. Const. Art. I, § 8 cl. 3.

[43] United States v. Rock Royal Co-op., 307 U.S. 533, 568-571 (1939). The decision in United States v. Butler, 297 U.S. 1 (1936) "expressly reserved the question of whether the regulation of agriculture was within the commerce power," and subsequently the Supreme Court "decided the question in favor of the congressional power." Maneja v. Waialua Agricultural Co., 349 U.S. 254, 259 (1955). See also, United States v. Darby, 312 U.S. 100, 118 (1941); Wickard v. Filburn, 317 U.S. 111, 118 (1942); Mandeville Farms v. Sugar Co., 334 U.S. 219, 236 (1948); Shafer v. United States, 229 F.2d 124, 128-129 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956).

[44] 7 U.S.C. § § 608c (1)-(2) (1952). The term "interstate or foreign commerce," as defined in the Act, is broad and comprehensive. 7 U.S.C. § 610(j) (1952). In addition, commerce which directly affects interstate or foreign commerce is also within the ambit of the statute. 7 U.S.C. § 608c(1) (1952).

clause of the Constitution.[45] The power of Congress to regulate commerce is not confined to the regulation of commerce among the states, but "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." [46]

There are 68 milk orders in effect with respect to the pricing of milk,[47] and some of the orders are applicable in markets which are predominantly interstate in character, *e.g.*, the Boston marketing area and the New York metropolitan marketing area.[48] The power of Congress, however, to regulate a small amount of interstate commerce is as complete as its power to regulate a large amount.[49] A milk order is based on the finding that all of the milk which is regulated is in the current of interstate commerce or directly affects, burdens, or obstructs such commerce.[50]

Congress may provide in its regulation of commerce for such types or methods of regulation as are deemed to be appropriate,[51] including

[45] United States v. Wrightwood Dairy Co., 315 U.S. 110, 123 (1942). See also, Titusville Dairy Products Co. v. Brannan, 176 F.2d 332, 334-336 (3rd Cir.), *cert. denied*, 338 U.S. 905 (1949); Beatrice Creamery Co. v. Anderson, 75 F. Supp. 363, 365-367 (D.C. Kan. 1947); Balazs v. Brannan, 87 F. Supp. 119, 120-121 (N.D. Ohio 1949); Pacific Coast Dairy v. Department of Agriculture, 19 Cal.2d 818, 123 P.2d 442, 447 (1942).

[46] United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942). An activity which is "local" may, whatever its nature, be regulated by Congress "if it exerts a substantial economic effect on interstate commerce." Wickard v. Filburn, 317 U.S. 111, 125 (1942). See also, Shafer v. United States, 229 F.2d 124, 128-129 (4th Cir), *cert. denied*, 351 U.S. 931 (1956).

[47] Sixty-four milk orders are in 9 C.F.R. Part 900 (1955), but there has been a consolidation of two orders (22 FED. REG. 2150, 2825 (1957)) and the issuance of some additional orders since the compilation of the Code of Federal Regulations. 21 FED. REG. 5567 (1956), 7482 (1956); 22 FED. REG. 2527, 5919, 7455 (1957).

[48] The Boston market "obtains about 90% of its fluid milk from states other than Massachusetts." Hood & Sons v. Du Mond, 336 U.S. 525, 526 (1949). Approximately two-thirds of the milk produced for the New York metropolitan marketing area moves in interstate commerce. United States v. Rock Royal Co-op., 307 U.S. 533, 551-552 (1939). The marketing of milk in the New York metropolitan marketing area "has contacts at least with the entire national dairy industry." *Id.* at 550.

[49] United States v. Wrightwood Dairy Co., 315 U.S. 110, 123 (1942); Beatrice Creamery Co. v. Anderson, 75 F. Supp. 363, 365-367 (D.C. Kan. 1947); Balazs v. Brannan, 87 F. Supp. 119, 120-121 (N.D. Ohio 1949). See also, Connecticut Co. v. Power Comm'n, 324 U.S. 515, 535-536 (1945); Mabee v. White Plains Pub. Co., 327 U.S. 178, 181-184 (1946); Mandeville Farms v. Sugar Co., 334 U.S. 219, 229-244 (1948); Wickard v. Filburn, 317 U.S. 111, 118-129 (1942); Currin v. Wallace, 306 U.S. 1, 9-13 (1939); Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A.J. 823 (1955).

[50] See, *e.g.*, the decision with respect to the marketing order for the Southeastern Florida marketing area, 22 FED. REG. 5588 (1957).

[51] The power of Congress to regulate commerce "is as broad as the economic needs of the nation." American Power Co. v. SEC, 329 U.S. 90, 103-104 (1946). The wis-

the fixing of the minimum price which dealers or handlers must pay to producers for their milk.[52] The power of a state to fix prices for milk was upheld in *Nebbia v. New York*,[53] and the authority of the Congress over interstate commerce does not differ in extent or character from that of a state relative to its authority over intrastate commerce.[54] A sale by a producer to a dealer or handler of milk is a part of the flow of commerce,[55] and Congress is empowered, under the commerce clause, to undertake the stabilization of commerce through the process of price-fixing by an administrative agency.[56]

The use of an equalization pool or producer-settlement fund, as provided for in a milk order for a market-wide pool, is reasonably adapted to allow regulation of the marketing of milk and is not violative of the due process clause of the fifth amendment to the Constitution.[57] The fixing of prices is not an impingement on the due process clause even if the value of property is thereby reduced.[58] The fact that regulation based on the commerce clause "may demonstrably be disadvantageous" to a person is not enough to constitute a violation of the due process clause.[59] It has been pointed out many times that "the exercise of the federal commerce power is not dependent on its maintenance of the economic *status quo;* the Fifth Amendment is no protection against a congressional scheme of business regulation otherwise valid, merely because it disturbs the profitability or methods . . ." of a business concern or person subject to the regulation.[60]

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dom of federal regulation, the need for the regulation, and the effectiveness of the regulation are questions for Congress, not the courts. Northern Securities Co. v. United States, 193 U.S. 197, 350 (1904); Arizona v. California, 283 U.S. 423, 455-457 (1931); American Power Co. v. SEC, 329 U.S. 90, 106-107 (1946); Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 606, n. 1 (1950). "The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do." Wickard v. Filburn, 317 U.S. 111, 129 (1942).

[52] United States v. Rock Royal Co-op., 307 U.S. 533. 568-573 (1939).

[53] 291 U.S. 502, 521-539 (1934).

[54] United States v. Rock Royal Co-op., 307 U.S. 533, 568-573 (1939).

[55] *Id.* at 568-569.

[56] *Ibid.* Sunshine Coal Co. v. Adkins, 310 U.S. 381, 396 (1940). "Rate-making is indeed but one species of price-fixing." FPC v. Hope Gas Co., 320 U.S. 591, 601 (1944).

[57] United States v. Rock Royal Co-op., 307 U.S. 533, 572-573 (1939).

[58] FPC v. Hope Gas Co., *supra,* note 56; Bowles v. Willingham, 321 U.S. 503, 517-518 (1944).

[59] Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 618 (1950).

[60] American Trucking Assn's v. United States, 344 U.S. 298, 322, n.20 (1953).

Milk that is priced under a milk marketing order is at times in competition with milk, from the same production area, which is not priced by a milk marketing order.[61] There is, however, no requirement of uniformity in connection with the commerce power,[62] and the "Fifth Amendment does not require full and uniform exercise of the commerce power." [63] This legislation is notable, in that respect, for providing that the administrative agency may weigh relative needs and restrict the application of regulation to less than the entire field.

The criteria for the governance of the Secretary with respect to the issuance of a milk marketing order and the terms or provisions which may be included in an order are specified in the act, and there is no illegal delegation of authority.[64] It would have been impractical for Congress to undertake to foresee every contingency and development in this field in which "the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult." [65] Hence the Congress delineated the general policy to be followed, specified the public agency to administer the statute, and established the boundaries of the delegated authority. It is "not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the Congressional policy to infinitely variable conditions constitute the essence of the program." [66] Regulatory legislation is often applicable to "conditions involving details with which it is impracticable for the legislature to deal directly," [67] and to impose on Congress "the burdens of minutiae would be apt to clog the admin-

[61] United States v. Rock Royal Co-op., 307 U.S. 533, 565-567 (1939); United Milk Producers of New Jersey v. Benson, 225 F.2d 527, 528 (D.C. Cir. 1955).

[62] Currin v. Wallace, 306 U.S. 1, 14 (1939).

[63] Mabee v. White Plains Pub. Co., 327 U.S. 178, 184 (1946).

[64] United States v. Rock Royal Co-op., 307 U.S. 533, 574-578 (1939).

[65] The quotation, with respect to the fluid milk industry, is from Hood & Sons v. Du Mond, 336 U.S. 525, 529 (1949). "The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." American Power Co. v. SEC, 329 U.S. 90, 105 (1946).

[66] Lichter v. United States, 334 U.S. 742, 785 (1948). See also, National Broadcasting Co. v. United States, 319 U.S. 190, 225-226 (1943); Sunshine Coal Co. v. Adkins, 310 U.S. 381, 397-398 (1940); Currin v. Wallace, 306 U.S. 1, 15 (1939); New York Central Securities Co. v. United States, 287 U.S. 12, 24-25 (1932); Hampton & Co. v. United States, 276 U.S. 394, 409, 411 (1928); Field v. Clark, 143 U.S. 649, 692-694 (1892).

[67] Currin v. Wallace, 306 U.S. 1, 15 (1939).

istration of the law and deprive the [administrative] agency of that flexibility and dispatch which are its salient virtues." [68]

The statutory provisions with respect to approval of a marketing order by the specified percentage of producers, before the order may be made effective, do not involve a delegation of legislative authority.[69] Congress has exercised its legislative authority in prescribing the conditions in which regulation may be made effective, and one of the conditions is the requisite approval by the producers.[70]

IV. The Procedure Incident to the Issuance of an Order

A. Notice of Hearing.

The Secretary of Agriculture is authorized to hold a public hearing whenever he has "reason to believe" that the issuance of a marketing order with respect to milk or any other commodity or product subject to the act will tend to effectuate the declared policy of the act.[71] A marketing order may be proposed by any person, including the Secretary of Agriculture, and the proposed order should be filed in writing with the Department in accordance with the procedural regulations.[72] If it is concluded by the administrative agency, after such examination or investigation and consideration as may be warranted,[73] that there is reason to believe that the proposed regulation will tend to effectuate the declared policy of the act, the notice of hearing is issued by the agency and published in the Federal Register.[74]

The notice of hearing with respect to a proposed order (1) defines the scope of the hearing as specifically as may be practicable,

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[68] Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

[69] United States v. Rock Royal Co-op., 307 U.S. 533, 577-578 (1939).

[70] *Ibid.*; Currin v. Wallace, 306 U.S. 1, 16 (1939).

[71] 7 U.S.C. § 608c(3) (1952). The authority to issue a notice of hearing has been delegated to the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture. 7 C.F.R. § 900.3(b) (1955). An administrative decision to hold a hearing is within the principle that an administrative remedy must be exhausted before resort may be had to the courts. Myers v. Bethlehem Corp., 303 U.S. 41, 51-52 (1938); Miles Laboratories v. FTC, 140 F.2d 683, 684-685 (D.C. Cir.), *cert. denied*, 322 U.S. 752 (1944).

[72] 7 C.F.R. § 900.3(a) (1955).

[73] *Id.* § 900.3(a)-(b).

[74] *Id.* §§ 900.3(a)-(b), 900.4(b)(1). "Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons . . . if said notice shall be published in the Federal Register. . . ." 44 U.S.C. § 308 (1952). "General notice of proposed rule-making shall be published in the Federal Register. . . ." 5 U.S.C. § 1003(a) (1952).

(2) contains either the terms or the substance of the proposed regulatory order or a description of the subjects and issues involved, and (3) describes the industry, area, and class of persons to be regulated, and states the time and place of the hearing, and the place where copies of the proposed order may be obtained or examined.[75] The notice of hearing is adequate if it clearly discloses the purpose of the hearing[76] and specifies the time and place of the hearing.[77]

B. Hearings, Recommended Decisions, and Final Decisions.

A hearing with respect to a proposed marketing order for milk is a part of the "rule making" procedure under the terms of the Administrative Procedure Act.[78] The object of a hearing with respect to a proposed order for the regulation of milk marketing "is not only to afford the individuals [at the hearing] the opportunity of airing their objections to the proposed scheme of things, but is also to give the administrators the chance of obtaining information which might have been overlooked or otherwise not available to them." [79] In some instances hundreds of people are present at a hearing with regard to a proposed marketing order for milk, and each person is ". . . desirous of insuring the maximum protection to his own interests." [80] It has been said that if ". . . the equivalent of court proceedings were granted to each person, or even to groups, the hearing would be unwieldy and not susceptible to a satisfactory conclusion. Obviously, a more workable balance must be struck between administrative efficiency and the protection of individual rights." [81]

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[75] 7 C.F.R. § 900.4(a) (1955). See also 5 U.S.C. § 1003(a) (1952).

[76] United States v. Wrightwood Dairy Co., 127 F.2d 907, 910 (7th Cir. 1942). See also, Willapoint Oysters v. Ewing, 174 F.2d 676, 684-685 (9th Cir.), *cert. denied,* 338 U.S. 860 (1949).

[77] The selection of the "place" at which a hearing is to be held is a matter that is within administrative discretion. The regulative provision for designating the place of a hearing is similar to the statutory provision that "terms or sessions of courts of appeals shall be held . . . at the places listed below, and at such other places . . . as may be designated by rule of court . . ." and each court "may hold special terms at any place within its circuit." 62 STAT. 872 (1948), 28 U.S.C. § 48 (1952). See also, 1 STAT. 74 (1789); Matter of Moran, 203 U.S. 96, 103 (1906); Mace v. Berry, 225 S.C. 160, 81 S.E. 2d 276, 281 (1954).

[78] 5 U.S.C. § 1001(c) (1952). For a discussion of the difference between rule-making and adjudication, see Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908); *In re* Federal Water & Gas Corp., 188 F.2d 100, 104 (3d Cir.), *cert. denied,* 341 U.S. 953 (1951).

[79] United States v. Wrightwood Dairy Co., 127 F.2d 907, 910 (7th Cir. 1942).

[80] *Ibid.* There are approximately 500 handlers and 53,000 producers of milk for the New York-New Jersey milk marketing area. Market Administrator's Bulletin, New York-New Jersey Milk Marketing Area, Vol. 17, No. 9, 1, 3 (September, 1957).

[81] United States v. Wrightwood Dairy Co., 127 F.2d 907, 910 (7th Cir. 1942).

A Hearing Examiner appointed under the Administrative Procedure Act serves as the presiding officer at a hearing on a proposed marketing order.[82] The testimony at a hearing, on a proposed order, is under oath and is reported verbatim; the right of cross-examination applies to the extent necessary to a full and true disclosure of the facts; and documentary evidence may be received at the hearing.[83] Evidence is excluded, insofar as practicable, if the evidence is immaterial, irrelevant, or unduly repetitious, or ". . . is not of the sort upon which responsible persons are accustomed to rely."[84] Official notice is taken, on proper request, of such matters as are judicially noticed by the courts of the United States, and official notice is taken of technical, scientific, or commercial facts which are of established character.[85] The technical rules of evidence applicable in civil trials in court are not applicable in administrative hearings,[86] and the procedure, including the adduction of evidence, is more elastic and informal than in a court proceeding.[87]

Subsequent to the hearing, briefs and proposed findings and conclusions may be filed with the Hearing Clerk within the period of time specified by the Hearing Examiner.[88] A transcript of the hearing, as certified by the Hearing Examiner, is kept on file in the office of the Hearing Clerk in the Department and is available for examination as a public record.[89]

A recommended decision is prepared, subsequent to a hearing on

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"Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole." Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441, 445 (1915).

[82] 7 C.F.R. §§ 900.1(d), (m), 900.8(a) (1955); 12 FED. REG. 971 (1947); 60 STAT. 241 (1946), 7 U.S.C. § 1006 (1952).

[83] 7 C.F.R. §§ 900.8(d) (1), (4) (1955); 5 U.S.C. § 1006(c). See also, Southern Stevedoring Co. v. Voris, 190 F.2d 275, 277 (5th Cir. 1951).

[84] 7 C.F.R. § 900.8(d) (1) (1955). See also, NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938); 60 STAT. 241 (1946), 5 U.S.C. § 1006(c) (1952).

[85] 7 C.F.R, § 900.8(d) (5) (1955).

[86] FTC v. Cement Institute, 333 U.S. 683, 706 (1948); Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); Opp Cotton Mills Inc. v. Administrator, 312 U.S. 126, 155 (1941); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-143 (1940); Buckwalter v. FTC, 235 F.2d 344, 346 (2d Cir. 1956); Concrete Materials Corp. v. FTC, 189 F.2d 359, 362 (7th Cir. 1951); Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, 397 (2d Cir. 1943); NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938); WIGMORE, EVIDENCE § § 4a-4b (3d ed. 1940); Davis, ADMINISTRATIVE LAW § 149 (1951).

[87] Lambros v. Young, 145 F.2d 341, 343 (D.C. Cir. 1944).

[88] 7 C.F.R. § 900.9(b) (1955).

[89] 7 C.F.R. § 900.11 (1955).

a proposed milk marketing order, and the recommended decision by the Deputy Administrator is filed by the administrative agency in accordance with the requirements of the regulations.[90] The recommended decision includes, *inter alia*, (1) an explanation of the material issues of fact, law, or discretion presented on the record of the hearing, (2) proposed findings and conclusions with respect to the issues as well as the reasons or basis for the findings and conclusions, and (3) a proposed marketing order if an order is warranted on the basis of the hearing record.[91] The recommended decision is published in the Federal Register, and an opportunity is given to all interested persons to file exceptions to the recommended decision within the period of time specified in the notice of the recommended decision.[92]

After the consideration of the record, a final decision is made by the Secretary.[93] The final decision includes, *inter alia*, a statement of findings and conclusions by the Secretary as well as the reasons and basis therefor with respect to all of the material issues of fact, law, or discretion presented on the record,[94] and a ruling upon each exception filed to the recommended decision,[95] and the decision sets forth the marketing order if the Secretary finds upon the record that the order and all of its terms and provisions will tend to effectuate the declared policy of the act.[96] The marketing order which is thus approved by the Secretary is complete except for the effective date and the determinations with respect to handler and producer approval.[97]

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[90] 7 C.F.R. § 900.12 (1955); 5 U.S.C. § 1007 (1952).

[91] 7 C.F.R. § 900.12(b) (1955).

[92] *Id.* § 900.12(c). The filing of the recommended decision may be omitted if the Secretary finds on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission. 7 C.F.R. § 900.12(d) (1955).

[93] The Secretary has delegated, subject to some qualifications, to "the Under Secretary of Agriculture and each Assistant Secretary of Agriculture, severally, the authority to perform all duties and to exercise all the powers and functions which are . . ." vested in the Secretary. 18 FED. REG. 7498 (1953). The delegation to other officials in the Department does not, however, preclude the Secretary from exercising any of the powers, functions, or duties referred to in the delegation order. *Ibid.* This delegation order does not include the adjudicatory authority of the Secretary with respect to petitions under § 8c (15)(A) of the Agricultural Marketing Agreement Act of 1937. 7 U.S.C. § 608c(15)(A) (1952). See also, 5 U.S.C. § § 514b, 517 (1952); 67 STAT. 633 (1953); 18 FED. REG. 3219 (1953); Parish v. United States, 100 U.S. 500, 504 (1879).

[94] 5 U.S.C. § 1007 (1952).

[95] *Ibid.*

[96] 7 U.S.C. § 608c(4) (1952).

[97] 7 C.F.R. § 900.13a (1955).

C. *Findings.*

In addition to affording to all interested parties an opportunity for hearing, the administrative agency manifests, in its decision, a reasoned conclusion. An order regulating the handling of milk may be made effective by the Secretary only if he makes the various findings required by the act. A finding is required, on the basis of the evidence adduced at the hearing, that the order and all of its terms and conditions "will tend to effectuate the declared policy [of the act] with respect to such commodity." [98] If the parity price is not reasonable in view of certain factors specified in the act, a finding is also made, in the issuance of a milk order, that the parity price of milk as determined pursuant to section 2 of the act is not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect the market supply and demand for milk in the particular marketing area,[99] and that the minimum prices, under such order, "will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest." [100]

Findings are required with respect to whether the order meets the requisite approval on the part of the industry.[101] It is provided in the act that no order shall become effective, except as hereinafter explained, unless the handlers of at least 50 per centum of the volume of the particular commodity have signed a marketing agreement with provisions similar to those in the order and unless the order is approved by at least two-thirds or three-fourths of the producers—depending on whether the order provides for a market-wide pool or an individual handler pool—by number or volume.[102] If the requisite approval by the handlers is not obtained, the Secretary may nevertheless issue an order if he finds that the issuance of the order is the only practical means of advancing the interests of the producers, pursuant to the declared policy of the act, and if the issuance of the order meets with the requisite approval of the producers.[103]

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[98] 7 U.S.C. § 608c(4) (1952).

[99] *Id.* § 608c(18). See, *e.g.*, 22 FED. REG. 5919 (1957).

[100] *Ibid.* See also, United States v. Turner Dairy Co., 166 F.2d 1, 4 (7th Cir.), *cert. denied*, 335 U.S. 813 (1948).

[101] 7 U.S.C. § § 608c(8), (9) (1952).

[102] *Id.* § 608c(8). The approval by number or by volume on the part of producers relates to those producers who were engaged in that business during a representative period determined by the Secretary. *Ibid.*

[103] 7 U.S.C. § 608c(9) (1952); § 102 of the 1947 Reorganization Plan No. 1. 12 FED. REG. 4534 (1947).

For the purpose of ascertaining whether the issuance of an order is approved or favored by the producers the Secretary may conduct a referendum among producers, and the statutory requirements with respect to producer approval "shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required . . ." under the provisions of the act.[104] In arriving at a finding as to whether the requisite percentage of producers approve the issuance of the marketing order the Secretary considers the approval or disapproval "by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers." [105]

An additional finding is made by the Secretary to the effect that the order regulates the handling of milk in the same manner as specified in a marketing agreement, which was included within the scope of the hearing, and that the order is applicable only to persons in the respective classes of industrial or commercial activity specified in the marketing agreement.[106] A finding is also made that the milk and milk products within the regulatory scope of the order are in the current of interstate commerce or directly affect, obstruct, or burden interstate commerce in milk or its products.[107]

The findings need not be formal or in separately numbered paragraphs, and it is sufficient if the findings appear in the form of a statement in the report or order of the administrative agency.[108]

[104] 7 U.S.C. § 608c(19) (1952). This statutory provision, as to the referendal result, precludes any reliance on the rationale in Braden v. Stumph, 84 Tenn. 581, 582-593 (1886). Also, only producers who are affected by an order are entitled to participate in the referendum. H.P. Hood & Sons v. United States, 307 U.S. 588, 597-599 (1939); United States v. Wrightwood Dairy Co., 127 F.2d 907, 911 (7th Cir. 1942). See also, Benson v. Schofield, 236 F.2d 719, 723 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 976 (1957). "There is no authority in the courts to go behind this conclusion of the Secretary [as to producer approval in the referendum] to inquire into the influences which caused the producers to favor the resolution." United States v. Rock Royal Co-op., 307 U.S. 533, 559 (1939).

[105] 7 U.S.C. § 608c(12) (1952); H.P. Hood & Sons v. United States, 307 U.S. 588, 599 (1939). The findings required by the act need not be in the exact words of the statute. United States v. Wrightwood Dairy Co., 127 F.2d 907, 911 (7th Cir. 1942).

[106] 7 U.S.C. § 608c(10) (1952). See, *e.g.,* 22 FED. REG. 5919 (1957).

[107] See, *e.g.,* 22 FED. REG. 5919 (1957).

[108] Baltimore & O. R. Co. v. United States, 201 F.2d 795, 798 (3d Cir. 1953);

The findings by the Secretary include, under the terms of the Administrative Procedure Act, the reasons and basis for the findings with respect to all of the material issues of fact, law, or discretion presented on the record.[109] In some instances the reasons or basis for a finding may be definitely and fully stated in brief range.[110] Some issues, however, have their rootage in the complexities of milk marketing, and explicative analysis may be included in the statement of the reasons or basis for the findings.[111]

V. Procedure Incident to the Amendment of an Order

The pricing of milk is affected by circumstances of great variety and constant change. Price fixing, under a milk marketing order for a metropolitan marketing area, is not static but requires constant attention and frequent hearings with respect to proposed amendments.[112] The effectiveness of a milk marketing order depends upon its adaptability to the conditions affecting a particular marketing area and upon its "adjustment from time to time to meet changing conditions." [113]

The procedure and requirements relative to the issuance of an order are also applicable with respect to the issuance of an amendment to an order.[114]

Johnston Seed Co. v. United States, 191 F.2d 228, 230 (10th Cir. 1951); Norfolk Southern Bus Corp. v. United States, 96 F. Supp. 756, 759-760 (E.D. Va.), *aff'd per curiam*, 340 U.S. 802 (1950); Beard-Laney v. United States, 83 F. Supp. 27, 31 (E.D.S.C.), *aff'd per curiam*, 338 U.S. 803 (1949).

[109] 5 U.S.C. § 1007(b) (1952).

[110] An administrative agency is not required, however, in an etiological explanation to annotate to each statement or finding the evidence which supports it. United States v. Pierce Auto Lines, Inc., 327 U.S. 515, 529 (1946); Group of Investors v. Milwaukee R. Co., 318 U.S. 523, 538-539 (1943); Luckenbach S.S. Co. v. United States, 122 F. Supp. 824, 827-828 (S.D.N.Y.), *aff'd per curiam*, 347 U.S. 984 (1954).

[111] See, *e.g.*, 18 Fed. Reg. 6458-6465 (1953).

[112] *E.g.*, more than 200 changes were made in the regulatory provisions of the New York milk marketing order during the period from September 1938 through December 1949 and the changes were made on 53 different occasions. 18 Fed. Reg. 6459 (1953).

[113] S. Rep. No. 565, 75th Cong., 1st Sess., 3 (1937). See also, H. R. Rep. No. 468, 75th Cong., 1st Sess. 3 (1937).

[114] 7 U.S.C. § 608c(17) (1952). The hearing with respect to a proposed marketing order "shall not be less than 15 days after the date of the publication of the notice in the Federal Register . . ." unless it is administratively determined that an emergency exists which requires a shorter period of notice. 7 C.F.R. § 900.4(a) (1955). The act provides, however, that with respect to the notice of a hearing on a proposed amendment to an order the notice shall be given not less than three days prior to the date fixed for such hearing. 7 U.S.C. § 608c(17) (1952).

VI. Terms Which May Be Included in a Milk Marketing Order

The act outlines the provisions which may be included in a milk marketing order,[115] but the statutable provisions do not prescribe a rigid or inflexible method of establishing a minimum price for milk under a marketing order. Broad statutory standards for administrative use are a reflection of the necessities of modern legislation dealing with complex economic or social problems.[116] The Congress was not seeking to solve the divergent economic problems in the field of milk marketing by a code of specifics. The terms of an order "are largely matters of administrative discretion" and the details "are left to the Secretary and his aides." [117]

The terms in the act are applicable to diversified circumstances, and the facts in each situation must be appraised in order to formulate a view as to whether a particular provision, for inclusion in an order, is within the statutory authorization.[118] A general policy is revealed by the delineative terms in the statute, and the penumbral bounds of the statutory authorization cannot be determined, in a particular situation, by mere verbality as a matter of law.

The provisions in a milk order may be based on one or more of the terms and conditions outlined in the statute.[119] A milk order may provide for the classification of milk in accordance with the form in which it is used or in accordance with the purpose for which it is used, and a milk order may fix or provide a method for fixing a minimum price for each use classification.[120] A milk order may provide for the payment to all producers delivering milk to all handlers,

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[115] 7 U.S.C. §§ 608c (5), (7), (13), (18), 610(b) (2) (i) (1952).

[116] See, *e.g.*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-186 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398-400 (1940).

[117] Stark v. Wickard, 321 U.S. 288, 310 (1944). See also, Queensboro Farms Products Inc. v. Wickard, 137 F.2d 969, 977 (2d Cir. 1943).

[118] See, *e.g.*, Grant v. Benson, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); Waddington Milk Co. v. Wickard, 140 F.2d 97 (2d Cir. 1944); Queensboro Farms Products v. Wickard, 137 F.2d 969 (2d Cir. 1943).

[119] 7 U.S.C. §§ 608c(5), (7) (1952). Statutory language which is in the disjunctive should receive the normal disjunctive meaning. Gay Union Corporation v. Wallace, 112 F.2d 192, 196 (D.C. Cir.), *cert. denied*, 310 U.S. 647 (1940). The preclusive reference in 7 U.S.C. § 608c(5) against a milk marketing order containing any term or condition not referred to therein is necessarily qualified by other provisions in the act, *e.g.*, 7 U.S.C. § 610(b)(2)(i) (1952). All of the provisions in a statute, as well as the object and policy of the measure, are to be considered in arriving at the meaning of a particular provision. Labor Board v. Lion Oil Co., 352 U.S. 282, 288 (1957).

[120] 7 U.S.C. § 608c(5)(A) (1952).

under the order, of uniform minimum prices for all milk so delivered,[121] and that type of regulation is generally characterized as a market-wide pool. A milk order may, however, provide for an individual-handler pool whereby all producers and associations of producers delivering their milk to the same handler receive a uniform price for all of the milk delivered by them.[122] The act incorporates the methods of pooling and pricing milk which were employed by cooperative associations of producers prior to the enactment of this legislation.[123]

The statutory provisions with respect to minimum prices for a use classification of milk provide for variations or adjustments for (1) volume, market, and production differentials customarily applied by the handlers who are regulated by the order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of the milk or any use classification thereof is made to the handlers.[124] The uniform minimum price under an individual handler pool or under a market-wide pool are subject to variations or adjustments for (1) volume, market, and production differentials customarily applied by the handlers who are regulated by the order, (2) the grade or quality of the milk delivered, (3) the locations at which delivery of the milk is made, and (4) whatever variation or adjustment is appropriate, under the circumstances, equitably to apportion the total value of the milk purchased by a handler or by all handlers among producers and associations of producers on the basis of their marketings of milk during a representative period of time.[125] A milk order may include provisions for making adjustments in payments, as among handlers and producers who are also handlers, to the end that the total sums paid by each handler shall equal the value of the milk purchased by him under the terms of the act.[126]

The milk marketing orders provide for the payment of a uniform minimum price to the producers, under a market-wide pool or an individual-handler pool.[127] Various additions and subtractions are

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121 *Id.* § 608c(5)(B)(ii).

122 *Id.* § 608c(5)(B)(i).

123 S. REP. No. 1011, 74th Cong., 1st Sess., 9 (1935); H.R. REP. No. 1241, 74th Cong., 1st Sess., 9 (1935). See also, Maryland & Virginia Milk Pro. Ass'n v. United States, 193 F.2d 907, 915-916 (D.C. Cir. 1951).

124 *Supra* note 120.

125 7 U.S.C. § 608c(5)(B) (1952).

126 *Id.* § § 608c(5)(B)(ii), 608c(5)(C); United States v. Rock Royal Co-op., 307 U.S. 533, 571 (1939).

127 7 U.S.C. § 608c(5)(B) (1952).

made in computing the class prices and the uniform minimum price,[128] under a market-wide pool, but in brief the computation is as follows:

> The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions . . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk.[129]

An order for a market-wide pool provides for a producer-settlement fund.

> Each handler whose own total use value of milk for a particular delivery period, *i.e.*, a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.[130]

In view of the different situations in the various milk marketing areas there has been a wide variation in the methods used in fixing the classification or use prices for milk. A simple method has been used, for some purposes, whereby a differential is added to the prices paid for milk to produce manufactured products.[131] Some orders set forth formulaic provisions, based upon various economic factors, and these formulae govern in the preciation or determination of price for a use classification.[132]

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[128] See, *e.g.*, Grant v. Benson, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956); Grandview Dairy v. Jones, 157 F.2d 5 (2d Cir.), *cert. denied*, 329 U.S. 787 (1946); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); Green Valley Creamery v. United States, 108 F.2d 342 (1st Cir. 1939); 7 C.F.R. § § 927.40-927.50, 927.60-927.78 (1955); 22 FED. REG. 4649-4658 (1957).

[129] Grant v. Benson, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956). See also, United States v. Rock Royal Co-op., 307 U.S. 533, 571 (1939); Brannan v. Stark, 342 U.S. 451, 453-455 (1952); Grandview Dairy v. Jones, 157 F.2d 5, 6-7 (2d Cir.), *cert. denied*, 329 U.S. 787 (1946).

[130] *Ibid.*

[131] See, *e.g.*, 7 C.F.R. § 903.51(a)(1) (1955).

[132] See, *e.g.*, 7 C.F.R. § 904.48 (1956).

The elaborate provisions which are necessary, in some situations, for the classification and pricing of milk are manifested in one of the orders and the regulations thereunder which are published in 58 double-column pages of the Code of Federal Regulations,[133] and the program was recently the subject of an amended order that required 15 triple-column pages for its proclamation in the Federal Register.[134] The provisions in the various milk marketing orders relate to an infinite variety of circumstances,[135] and the statutory terms for the classification and pricing of milk are to be "given a practical regulatory significance" [136] so as to be applicable to the diversified problems of the industry.

The latitude of the act, with respect to the provisions in a milk order, is underscored by several statutory terms which expressly authorize a variety of provisions for inclusion in an order,[137] and in addition the act authorizes the inclusion, in a milk order, of terms and conditions which are incidental to, and not inconsistent with, the terms and conditions specified in the act for the classification and pricing of milk, and necessary to effectuate the other provisions in an order.[138] It was held in *United States v. Rock Royal Co-op.*,[139] that "provisions auxiliary to those definitely specified" in the act, for the classification and pricing of milk, may be included in an order. The incidental power includes all relevant and auxiliary powers necessary to carry into effect the primary power.[140] The auxiliatory provisions which may be based on the "incidental" authorization in the act must be "necessary" as well as "incidental," [141] but manifestly a showing that a provision is necessary does not preclude it from being incidental. The word necessary, in a remedial statute, does not mean indis-

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133 7 C.F.R. § § 927.1-927.500 (1955).

134 22 FED. REG. 4643-4659 (1957).

135 This regulatory program has been characterized as "an undertaking of monstrous difficulty." Dairymen's League Cooperative Ass'n v. Brannan, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949).

136 Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 94 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946).

137 7 U.S.C. § § 608c(5)(D), (E), (F), (7)(A), (C) (1952). There are, however, three types of provisions which are prohibited by the act. 7 U.S.C. § § 608c(5)(G), (10), (13) (B) (1952). See also, Kass v. Brannan, 196 F.2d 791 (2d Cir.), *cert. denied*, 344 U.S. 891 (1952); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 94 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946).

138 7 U.S.C. § 608c(7)(D) (1952).

139 307 U.S. 533, 576 (1939).

140 First National Bank v. National Exchange Bank, 92 U.S. 122, 127 (1875).

141 7 U.S.C. § 608c(7)(D) (1952).

pensable, essential, or vital.[142] The structure of the act shows that the three conjunctive conditions, *scil.*, incidental, necessary, and not inconsistent, are to be given meaning and significance, depending on the facts in a particular situation.[143]

The provisions in the act for the classification and pricing of milk are designed for application by the administrative agency to achieve the parity goal set forth in the statute,[144] or if the parity price is not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions which affect market supplies and demand for milk and its products in the particular marketing area, the terms of an order may provide for the establishment of such minimum prices, which dealers or handlers shall pay to producers for their milk, as the Secretary finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.[145] The broad objectives of the act are to be definitized, by the terms of an order, to meet the circumstances and needs in a particular marketing area.[146]

In addition to the classification and pricing terms in an order, provisions are included for the selection of an agency to exercise certain administrative powers and perform certain administrative duties.[147] The designated agency is authorized to administer the order, to issue rules and regulations to effectuate its terms and provisions, to receive, investigate, and report to the Secretary of Agriculture complaints of violations of the order, and to recommend to the Secretary amendments to the order.[148] A market administrator is designated as the intendant or agency to administer a milk marketing order.[149] The expenses of the market administrator are defrayed by means of assessments which are collected from the handlers who are regulated by the order.[150] The exaction of administrative assessments to cover

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142 Armour & Co. v. Wantock, 323 U.S. 126, 129-132 (1944); Borden Co. v. Borella, 325 U.S. 679, 682-684 (1945); Roland Co. v. Walling, 326 U.S. 657, 664 (1946).

143 See, *e.g.*, Grant v. Benson, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956), in which certain provisions in an order were held valid on the basis of the trichotomous terms in 7 U.S.C. § 608c(7)(D) (1952), whereas in Brannan v. Stark, 342 U.S. 451, 460 (1952) different provisions in another order were held invalid on the basis of the three terms in the statutory provision.

144 7 U.S.C. § 602 (1952).

145 7 U.S.C. § 608c(18) (1952).

146 *Hearings Before Subcommittee No. 4 of the House Committee on the Judiciary on* H.R. 4236, H.R. 6198, and H.R. 6324, 76th Cong., 1st Sess., ser. 13, at 161 (1939).

147 7 U.S.C. § 608c(7) (C) (1952). See also, *e.g.*, 7 C.F.R. § § 904.10-904.12 (1956).

148 *Ibid.*

149 *Ibid.*

150 7 U.S.C. § 610(b)(2)(i) (1952). See also, 7 C.F.R. § 904.72 (1956).

the expenses incurred by the market administrator, in performing the duties and exercising the powers incident to the administration of the order, is auxiliary to the regulation of commerce and is based on the commerce clause.[151]

The handlers who are subject to the regulatory provisions of an order are required to maintain books and records and to submit such information as may be necessary to enable the Market Administrator and the Secretary to determine whether the provisions of the order have been complied with by the handlers.[152] Information may also be required by the Secretary to determine "whether or not there has been any abuse of the privilege of exemption from the anti-trust laws." [153]

VII. Statutory Authorization for Federal-State Orders

The Secretary of Agriculture is authorized by the act to confer with and hold joint hearings with the duly constituted authorities of any state, and the Secretary is authorized to cooperate with the state officials and to issue orders "complementary to orders or other regulations issued by such authorities." [154] A state program, under some circumstances, may be deemed by the Secretary a sufficient reason for believing that no program is necessary under the federal act.[155]

In the event of regulation by a state and also regulation under the act of Congress, an effort should be made to maintain uniformity in the formulation and administration of the federal-state programs.[156]

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151 Monetary exactions may be obtained by virtue of an exercise of the power of Congress to regulate commerce. *Head Money Cases,* 112 U.S. 580, 595-596 (1884); Board of Trustees v. United States, 289 U.S. 48, 58-59 (1933). See also, Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 90-97 (1874); Varney v. Warehime, 147 F.2d 238, 245 (6th Cir.), *cert denied,* 325 U.S. 882 (1945); Combs v. United States, 98 F. Supp. 749, 754-756 (D. Vt. 1951).

152 See 7 C.F.R. §§ 904.30-904.38 (1956). Record keeping and reporting requirements are familiar provisions in statutes providing for the regulation of commerce. Baltimore & Ohio R. R. v. ICC, 221 U.S. 612, 620-623 (1911); United States v. Morton Salt Co., 338 U.S. 632, 647-651 (1950); Rodgers v. United States, 138 F.2d 992, 994-996 (6th Cir. 1943); Bartlett Frazier Co. v. Hyde, 65 F.2d 350, 351-352 (7th Cir. 1933). See also, United States v. Ruzicka, 329 U.S. 287, 288-289 (1946); United States v. Turner Dairy Co., 162 F.2d 425, 426-428 (7th Cir.), *cert. denied,* 332 U.S. 836 (1947); United States v. Turner Dairy Co., 166 F.2d 1 (7th Cir.), *cert. denied,* 335 U.S. 813 (1948); Panno v. United States, 203 F.2d 504, 510 (9th Cir. 1953).

153 7 U.S.C. § 608d(1) (1952).

154 7 U.S.C. § 610(i) (1952); Parker v. Brown, 317 U.S. 341, 352-359 (1943).

155 Parker v. Brown, 317 U.S. 341, 354 (1943).

156 It has been said that Congress was not enlarging the jurisdiction of the states "by authorizing them to regulate subjects which would have otherwise fallen within

The milk marketing order for the New York-New Jersey metropolitan marketing area is a joint federal-state program,[157] and the program is administered by a market administrator appointed under the federal statute and, also, under the state legislation.[158]

VIII. Suspension or Termination of an Order or a Provision in an Order

Some changes in a milk marketing order may be made effective without resorting to the amendatory process. The act provides that the effectiveness of an order or a provision in an order shall be suspended or terminated whenever the Secretary finds that it does not tend to effectuate the declared policy of the act.[159]

The Secretary is also required to terminate an order whenever he finds that "such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such . . . order, within the production area specified in such . . . order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such . . . order . . .," if the majority produced for market, during the representative period, more than 50 per centum of the volume of the commodity produced for market within the production area specified in the order or produced, during the representative period, more than 50 per centum of the volume of the commodity sold in the marketing area specified in the order.[160]

The authority of the Secretary to determine "a representative period" in connection with his conclusion as to whether the requisite percentage of producers favor the termination of an order is similar to his determination of "a representative period" for other purposes under the act[161] and pursuant to other statutes administered by him.[162] Wide discretion is, *ex necessitate*, vested in the Secretary with respect to the determination of a representative period to be used for

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the exclusive federal domain" but that Congress had in mind state programs which, under some circumstances, would parallel federal orders. Brief for the United States as Amicus Curiae, p. 46, Parker v. Brown, 317 U.S. 341 (1943).

157 3 Fed. Reg. 1945, 2100, 2102 (1938); 22 Fed. Reg. 4643 (1957).

158 18 Fed. Reg. 6458 (1953).

159 7 U.S.C. § 608c(16)(A) (1952).

160 *Id.* § 608c(16)(B).

161 *Id.* § § 608c(8)(A), (B), (9)(B).

162 See Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 608-614 (1950).

the purpose of ascertaining whether the termination of an order is favored by the requisite percentage of producers. There "is no calculus available for determining whether a base period for measurement is fairly representative," [163] and under a statutory provision of this character the Secretary is authorized to select such period as, in his judgment, is reasonably appropriate on the basis of the relevant facts.

IX. Adjudicatory Proceedings with Respect to the Validity of an Order, a Provision in an Order, or an Obligation Thereunder

Any handler who is subject to a milk marketing order "may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law . . .," and thereupon the handler, if adversely affected, is entitled (1) to a hearing with respect to the allegations in his petition, and (2) a decision by the Secretary.[164] The statutory proceeding before the administrative agency is the exclusive method whereby a handler may challenge the validity of an order, a provision in an order, or an obligation imposed on him pursuant to an order.[165] It is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." [166] In *United States v. Ruzicka*,[167] an enforcement action arising under the statute, the issue was whether a handler may resist in District Court a claim against him without

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[163] *Id.* at 612.

[164] 7 U.S.C. § 608c(15)(A) (1952).

[165] United States v. Ruzicka, 329 U.S. 287 (1946); La Verne Co-op Citrus Ass'n v. United States, 143 F.2d 415, 418 (9th Cir. 1944); Panno v. United States, 203 F.2d 504, 508-509 (9th Cir. 1953). In some cases, under a regulatory statute, this principle has not been applied even though it would have been applicable if it had been relied on by a litigant. *Compare* United States v. Rock Royal Co-op., 307 U.S. 533 (1939) *with* United States v. Ruzicka, 329 U.S. 287 (1946); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) *with* United States v. Tucker Truck Lines, 344 U.S. 33 (1952). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Webster v. Fall, 266 U.S. 507, 511 (1925).

[166] Myers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1938). See also, Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 439-448 (1907); Anniston Mfg. Co. v. Davis, 301 U.S. 337, 342-343 (1937); Macauley v. Waterman S. S. Corp., 327 U.S. 540, 544-545 (1946); Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 767-769 (1947); Miller v. United States, 242 F.2d 392, 395 (6th Cir. 1957), *cert. denied*, 26 U.S.L. Week 3117 (U.S. October 15, 1957) (No. 297).

[167] 329 U.S. 287 (1946).

previously having sought to challenge the claim by means of an administrative proceeding provided for in the act. In holding that the administrative remedy, defined in the statute, is the exclusive avenue for challenging the validity of an obligation imposed on a handler, it was said:

> To be sure, Congress did not say in words that, in a proceeding under § 8a(6) [of the act] to enforce an order, a handler may not question an obligation which flows from it. But meaning, though not explicitly stated in words, may be imbedded in a coherent scheme. And such we find to be the provisions taken in their entirety, as a means for attaining the purposes of the act while at the same time protecting adequately the interests of individual handlers . . . .
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> The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievance while steps for the protection of the industry as a whole go forward. . . .
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> . . . Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider noncompliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress . . . . That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests. . . .[168]

A petition under this section of the act, with respect to the validity of an order, a provision in an order, or an obligation imposed on a handler pursuant to an order, is required by the procedural regulations to evince, *inter alia*, all of the grounds "on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law . . . ." [169] Any such petition should be filed with the Hearing

[168] United States v. Ruzicka, 329 U.S. 287, 292-293 (1946).

[169] 7 C.F.R. § 900.52(b)(4) (1955).

Clerk in the United States Department of Agriculture.[170] An answer is filed to the petition, and the hearing is conducted by a Hearing Examiner under the Administrative Procedure Act.[171] The proceeding is adjudicatory or adversary in character,[172] and all relevant evidence, oral or written, may be adduced at the hearing and subpoenas may be issued by the Hearing Examiner to require the attendance and testimony of witnesses and to require the production of books, records, and other documentary evidence.[173]

Proposed findings of fact, conclusions, and an order are prepared by the Hearing Examiner, subsequent to the hearing, and the proposed decision is filed with the Hearing Clerk and served on the parties.[174] Exceptions may be filed to the proposed decision or report of the Hearing Examiner, and the Hearing Examiner may revise his report in the light of the exceptions.[175] The record is then transmitted to the Judicial Officer for final decision.[176] The final decision, including findings of fact and conclusions of law, is issued by the Judicial Officer, filed with the Hearing Clerk, and served on the parties.[177]

A proceeding of this character is not for the purpose of considering the desirability of an order or a provision in an order or to secure a determination with respect to whether a provision of a marketing order tends to effectuate the declared policy of the act.[178] To obtain the relief prayed for in an adjudicatory proceeding, the petitioner must demonstrate that the matter he complains of is not in accordance with law.[179] A milk marketing order has the force and effect of

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170 7 C.F.R. § 900.52(a) (1955).

171 7 C.F.R. § § 900.2(d), 900.52a, 900.55(b) (1955).

172 5 U.S.C. § § 1001(d), 1006, 1007 (1952).

173 7 C.F.R. § 900.55(c) (1955). The act incorporates, in this respect, certain provisions in the Federal Trade Commission Act. 7 U.S.C. § 610(h) (1955). Similarly, other regulatory statutes have incorporated those provisions in the Federal Trade Commission Act. See Woerth v. United States, 231 F.2d 822 (8th Cir. 1956).

174 7 C.F.R. § 900.64(c) (1955).

175 *Id.* § § 900.64(d), (e).

176 The Judicial Officer acts for the Secretary pursuant to authority delegated to him by the Secretary. 10 FED. REG. 13769 (1945); 11 FED. REG. 177A-233 (1946); 18 FED. REG. 3219, 3648 (1953); 19 FED. REG. 75 (1954). The delegation was originally authorized by Congress (54 STAT. 81-2, (1939), 5 U.S.C. § 516a-516d (1952)) as a result of Morgan v. United States, 298 U.S. 468 (1936) and Morgan v. United States, 304 U.S. 1 (1938), and is in accordance with the recommendation of the Attorney General's Committee on Administrative Procedure in Government Agencies. S. Doc. No. 8, 77th Cong., 1st Sess. 53 (1941).

177 7 C.F.R. § 900.67 (1955).

178 *In re* Roberts Dairy Company, 4 A.D. 84, 89 (1945).

179 *In re* College Club Dairy, 15 A.D. 367, 371-373 (1956).

law just as if the order were written into the statute itself, and any modification or exemption granted would necessarily have to rest upon a ruling that the order, a provision thereof, or an obligation imposed in connection therewith, is not in accordance with law.[180] A petitioner cannot maintain a vicarious complaint, and a petitioner, in order to have standing to maintain a proceeding, must be adversely affected.[181] Also the mere fact that the order was amended after the transactions which are contested in an adjudicatory proceeding does not in itself prove that the contested provisions in the order at the time of the transactions were invalid.[182] The statutory term "in accordance with law" is applicable, as the decisive standard, in an adjudicatory proceeding and also on judicial review of a decision by the Judicial Officer.[183]

X. Judicial Review of the Decisions of the Judicial Officer in Adjudicatory Proceedings

The statute provides for judicial review of a decision of the Judicial Officer in an adjudicatory proceeding, and the purpose of judicial review is to determine whether the decision of the Judicial Officer is "in accordance with law." [184] The United States District Court for the district in which the appellant is an inhabitant or has his principal place of business is vested with jurisdiction to review the decision of the administrative agency.[185] If the court in which review is appropriately sought determines that the decision by the Judicial Officer is not in accordance with law the court may remand the proceeding to the administrative agency with directions to make such ruling as the court determines is in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.[186]

Numerous decisions by the administrative agency, involving important issues, have been reviewed by the courts.[187] The familiar

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180 *Ibid.*

181 *Id.* at 377.

182 General Ice Cream Corp. v. Benson, 113 F. Supp. 107, 109 (N.D. N.Y. 1953), *aff'd,* 217 F.2d 646 (2d Cir. 1954).

183 7 U.S.C. § § 608c(15)(A),(B) (1952).

184 7 U.S.C. § 608c(15)(B) (1952).

185 *Ibid.*

186 *Ibid.*

187 See Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87 (8th Cir.), *cert. denied,* 329 U.S. 788 (1946); Dairymen's League Cooperative Ass'n v. Brannan, 173 F.2d 57 (2d Cir.), *cert. denied,* 338 U.S. 825 (1949); Titusville Dairy Products Co. v.

substantial evidence rule applies with respect to judicial review of the findings of fact by the Judicial Officer.[188] The administrative agency, under a regulatory statute of this type, is the judge of the facts, the credibility of witnesses, and the inferences to be drawn from the evidence.[189] Here, as in *Cardillo v. Liberty Mutual Co.*,[190] the question on judicial review is whether the ruling of the administrative agency is "in accordance with law," and the courts are not to set aside the inferences drawn by the administrative agency merely because an opposite inference is thought, on judicial review, to be more reasonable. The responsibility of selecting the means of achieving the legislative goal, under a regulatory statute, and the relationship between the remedy and policy are peculiarly matters for administrative competence.[191] It is the function of the Secretary, not of the courts, to devise an appropriate method for the classification and pricing of milk.[192]

An issue in an administrative proceeding may, if prejudicial error is disclosed,[193] be resolved on judicial review. A failure to present an issue in a rogatory proceeding, under a regulatory statute which properly provides for a hearing, precludes the presentation of the issue on judicial review.[194] Constitutional issues may be presented in an administrative proceeding and, on judicial review, the issues may be resolved.[195]

Brannan, 176 F.2d 332 (3d Cir.), *cert. denied,* 338 U.S. 905 (1949); Kass v. Brannan, 196 F.2d 791 (2d Cir.), *cert. denied,* 344 U.S. 891 (1952); Crowley's Milk Co. v. Brannan, 198 F.2d 861 (2d Cir. 1952).

188 Ogden Dairy Co. v. Wickard, 157 F.2d 445, 447 (7th Cir. 1946); Wawa Dairy Farms v. Wickard, 149 F.2d 860, 862 (3d Cir. 1945). See also, 5 U.S.C. § 1009(e) (1952); Universal Camera Corp. v. Labor Board, 340 U.S. 474, 476-491 (1951); O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 508 (1951); Swift & Co. v. United States, 343 U.S. 373, 382 (1952); Grant v. Benson, 229 F.2d 765 (D.C. Cir.), *cert. denied,* 350 U.S. 1015 (1955).

189 See Cella v. United States, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied,* 347 U.S. 1016 (1954); Great Western Food Distributors v. Brannan, 201 F.2d 476, 479 (7th Cir.), *cert. denied,* 345 U.S. 997 (1953).

190 330 U.S. 469, 477 (1947).

191 See American Power Co. v. SEC, 329 U.S. 90, 112 (1946); Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 614 (1950).

192 Waddington Milk Co. v. Wickard, 140 F.2d 97, 101 (2d Cir. 1944).

193 Only prejudicial error in an administrative proceeding is reversible error. United States v. Pierce Auto Lines, 327 U.S. 515, 530 (1946); Philadelphia Co. v. SEC, 177 F.2d 720, 725 (D.C. Cir. 1949); Union Starch & Refining Co. v. NLRB, 186 F.2d 1008, 1013 (7th Cir.), *cert. denied,* 342 U.S. 815 (1951).

194 United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Unemployment Comm'n v. Aragon, 329 U.S. 143, 155 (1946); United States v. Northern Pacific Ry., 288 U.S. 490, 494 (1933); Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 113 (1927); Spiller v. Atchison, T. & S. F. Ry. Co., 253 U.S. 117, 130-131 (1920).

195 Titusville Dairy Products Co. v. Brannan, 176 F.2d 332, 335 (3d Cir.), *cert.*

XI. Standing of Producers to Contest the Validity of Regulatory Provisions in a Milk Order

A milk marketing order is not applicable to a dairy farmer or producer in his capacity as a producer,[196] but producers may, in some circumstances, have such an interest in the operation of a marketing order as to be able to challenge, in a proceeding in court, the validity of the order or a provision in the order. It has been held that producers have a sufficient interest in the producer-settlement fund, under a marketing order, to enable them to assert, in a proceeding in court, the invalidity of a provision in the order whereby certain deductions are made from the producer-settlement fund prior to the final computation of the minimum price to be paid to producers for their milk.[197]

Producers, in order to have standing to contest a provision in an order, must show an injury or threat to a legal right of their own as contradistinguished from the general public interest in the administration of the act.[198] Mere loss of income or economic disadvantage as a result of governmental action, by itself, constitutes *damnum absque injuria*, and in that situation the complaining producers lack standing to maintain the action.[199]

XII. Enforcement Actions

The United States District Courts "are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order . . ." or regulation pursuant to the act.[200]

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denied, 338 U.S. 905 (1949); Beatrice Creamery Co. v. Anderson, 75 F. Supp. 363, 365-367 (D.C. Kan. 1947); Balazs v. Brannan, 87 F. Supp. 119, 120-121 (N.D. Ohio, 1949). See also, Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 553 (1954); Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953), *reversing* Jonco Aircraft Corp. v. Franklin, 114 F. Supp. 392 (N.D. Tex. 1953); United States v. Capital Transit Co., 338 U.S. 286, 291 (1949); Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 140-142 (1947); Anniston Mfg. Co. v. Davis, 301 U.S. 337, 345-346 (1937); Miller v. United States, 242 F.2d 392, 395 (6th Cir. 1957), *cert. denied*, 26 U. S. L. Week 3117 (U.S. Oct. 15, 1957) (No. 297).

196 7 U.S.C. § 608c(13)(B) (1952).

197 Stark v. Wickard, 321 U.S. 288, 302-311 (1944). See also, Brannan v. Stark, 342 U.S. 451 (1952); Grant v. Benson, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956).

198 Benson v. Schofield, 236 F.2d 719, 722-723 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957).

199 United Milk Producers of New Jersey v. Benson, 225 F.2d 527, 528-529 (D.C. Cir. 1955); Benson v. Schofield, 236 F.2d 719, 722 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957).

200 7 U.S.C. § 608a(6) (1952).

Promptness of compliance with an order is of pronounced importance in the administration of the program.[201] An injunction is an appropriate means for the enforcement of a regulatory measure.[202]

The pendency of a proceeding for an administrative hearing, with respect to the validity of an obligation imposed on a handler, "shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief . . ." pursuant to the statutory authority for enforcement actions.[203]

Criminal sanctions are imposed, under some circumstances, by the statute with respect to a handler who violates an order.[204] In a criminal proceeding in which a defendant is charged with having violated an order, the administrative order is presumptively valid and the defendant who failed to avail himself of the administrative remedy for testing the validity of the obligation imposed on him is precluded, in the criminal case, from asserting the invalidity of the obligation.[205]

XIII. Conclusion

It has been said that the "success of the operation of such Congressionally authorized milk control must depend on the effectiveness of its administration." [206] A part of the administration of the program relates to the enforcement of the regulatory provisions in the proceedings in court. Issues of basic legal importance have been resolved in establishing and maintaining the validity of the milk marketing orders.

Some of the orders have been in effect for approximately 20 years,[207] and during the period 1946-1955 "an increasing number of producer groups requested the assistance of federal milk orders in developing effective pricing and marketing programs." [208] There are

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201 United States v. Ruzicka, 329 U.S. 287, 293 (1946).

202 Shafer v. United States, 229 F.2d 124, 128 (4th Cir.), *cert. denied,* 351 U.S. 931 (1956).

203 7 U.S.C. § 608c(15)(B) (1952); United States v. Ruzicka, 329 U.S. 287, 294 (1946).

204 7 U.S.C. § 608c(14) (1952).

205 Panno v. United States, 203 F.2d 504, 508-509 (9th Cir. 1953). The principle has been applied in various cases under different statutes. See Yakus v. United States, 321 U.S. 414, 427-443 (1944); United States v. Corrick, 298 U.S. 435, 439-440 (1936); White v. Johnson, 282 U.S. 367, 373-374 (1931); Bradley v. Richmond, 227 U.S. 477, 485 (1913).

206 United States v. Ruzicka, 329 U.S. 287, 293 (1946).

207 *Hearings Before the Subcommittee on Dairy Products of the House Committee on Agriculture,* 84th Cong., 1st Sess. pt. 1 at 4 (1955).

208 *Id.* at 9.

68 milk marketing orders in effect,[209] and the number of orders increased more than 100 per centum during the period 1946-1955.[210] The volume of milk priced under milk marketing orders increased approximately 100 per centum during the period 1947-1956.[211] The wide economic importance of the program and the complexities incident to the classification and pricing of milk give emphasis to the observation by Mr. Justice Douglas that the "intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill . . ." of the persons who compose an administrative agency a matter of primary importance.[212]

[209] See note 47 *supra.*

[210] *Hearings, supra note* 207 at 9-10.

[211] U.S. DEP'T OF AGRICULTURE, DAIRY STATISTICS, STATISTICAL BULLETIN No. 218, AGRICULTURAL MARKETING SERVICE 353 (1957).

[212] United Public Workers v. Mitchell, 330 U.S. 75, 121 (1947). Opinion by Mr. Justice Douglas.