Agricultural Markting Act relating to member and nonmember business,[80] is without support here.

Section 70.8 also indicates that one may be a "nonmember" within this same provision[81] even when not a farmer. If one is not a farmer, he would have no appreciable need for the types of products here deemed "farm products." If a cooperative is permitted to haul products for him, presumably, then, at least some of these products would be *non*-"farm products". And a cooperative is allowed to haul such nonfarm-related products by the terms of section 70.3, within the same "necessary and incidental" test propounded by *Northwest*. Clearly, the Farm Credit Administration interprets this statute far more liberally that the Commission would apply it, and the Administration's interpretations are those of an agency whose very purpose is to identify those cooperatives falling within the statutory definitions.

"NECESSARY AND INCIDENTAL" APPLIED

The effect of the "necessary and incidental" test propounded by *Northwest* has been graphically demonstrated by the Commission. In December 1964, the Commission investigated Cache Valley Dairy Association.[82] The Commission found Cache Valley was a bona fide cooperative association but that it was backhauling nonagricultural products for nonmembers accounting for 2 percent of its total revenues. The Commission found that

> in considering the overall content of the statute, we believe that the limitation of the third part of section 1141j implies an affirmative corollary; namely, that an association's dealings with nonmembers shall be limited to farm products, farm supplies, and farm business services.[83]

It enjoined Cache Valley's nonmember backhauls, concluding

> that the transportation activities of a cooperative association partially excluded by section 203(b)(5) of the act are limited to that transportation which is designed to benefit directly or be functionally related to it's members' activities as producers of farm products and purchasers of farm supplies and/or farm business services.[84]

In 1965, the Ninth Circuit Court of Appeals reversed the district court judgment in *Northwest* and propounded the "necessary and incidental" test.[85]

In 1967, the Commission reconsidered its decision in *Cache Valley* in light of the *Northwest* ruling.[86] At the rehearing, the Commission stated that by the *Northwest* test,

> a cooperative which otherwise meets in all respects the requirements of the Marketing Act definition lawfully may transport non-farm-related traffic on a for-hire basis for nonmembers to the extent and only to the extent that such nonfarm-related transportation is shown to be, as a matter of fact, "incidental and necessary" to the effective performance of its primary farm-related functions specifically authorized by that act.[87]

The Commission found that Cache Valley was engaged in nonfarm backhauls only when it failed to have sufficient member backhaul business to fill its trucks, and nonmember backhauling accounted for only 2 percent of its total revenue. Application of the "necessary and incidental" test to these facts compelled a reversal of its previous ruling, and the exemption of Cache Valley.[88]

This ruling, however, was opposed in a vigorous dissent by Commissioner Bush, who expressed the opinion that the legislative intent of Congress had been greatly exceeded by *Northwest*.[89] In his belief, Congress would have changed the law had it desired that this result be achieved;

> [h]owever, until Congress passes legislation authorizing the transportation for nonmembers of a bona fide agricultural cooperative association—of commodities *other than* those transported by such cooperative for its members—we should continue to express our true understanding that the transporta-

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[80] 12 U.S.C. § 1141j(a) (1964).
[81] *Id.*
[82] Cache Valley Ass'n Investigation of Operations, 96 M.C.C. 616 (1964).
[83] *Id.* at 621.
[84] *Id.* at 622.
[85] 350 F.2d 252 (9th Cir.), *rev'g* 234 F. Supp. 496 (D. Ore. 1964).
[86] Cache Valley Dairy Ass'n Investigation of Operations, 103 M.C.C. 798.
[87] *Id.* at 799.
[88] *Id.* at 804.
[89] *Id.*