No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Writ of Certiorari Filed July 25, 2012
Certiorari Granted November 20, 2012

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UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

I, Edward T. Schafer, Secretary of the United States Department of Agriculture, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

In re: Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, et al.

Respondents

AMAA Docket No. 04-0002

Date	No.	PROCEEDINGS
04/01/2004	1	Complaint filed April 1, 2004 by AJ Yates, Administrator of Agricultural Marketing Service
		* * * *
04/14/2004	3	Respondents' Answer and Response to the Complaint filed April 14, 2004, by Marvin D. Horne and Laura Horne, Respondents
		* * * *
04/19/2004	5	Respondents' Motion to Dismiss filed April 19, 2004, by Marvin D. Horne and

Date	No.	PROCEEDINGS
		Laura Horne, Respondents
04/22/2004	6	Complainant's Opposition to Respondents' Motion to Dismiss filed April 22, 2004, by Frank Martin, Attorney for Complainant

* * * *

Date	No.	PROCEEDINGS
10/07/2004	18	Motion for Discovery and Summary Judgment with Prejudice in favor of Respondents (FAX) filed October 7, 2004, by Marvin Horne and Laura Horne, Respondents

* * * *

Date	No.	PROCEEDINGS
10/13/2004	20	Complainant's Opposition to Respondents' Motion for Discovery and Summary Judgment filed October 13, 2004, by Frank Martin, Attorney for Complainant

* * * *

Date	No.	PROCEEDINGS
10/25/2004	24	Order Denying Discovery and Motion for Summary Judgment filed October 25, 2004, by Victor W. Palmer, Administrative Law Judge

Date	No.	PROCEEDINGS
		* * * *
10/25/2004	27	Amended Complaint filed October 25, 2004, by Frank Martin, Attorney for Complainant
		* * * *
11/15/2004	32	Answer to Amended Complaint filed November 15, 2004, by Marvin Horne and Laura Horne, Respondents
		* * * *
01/21/2005	40	Amended Answer filed January 21, 2005, by David Domina, Attorney for Respondents
		* * * *
01/31/2005	46	Respondents' Second Amended Answer (FAX) filed January 31, 2005, by David Domina, Attorney for Respondents
		* * * *
03/04/2005	147	Transcript of Hearing held February 8, 2005, in Fresno, California Before: Honorable Victor W. Palmer,

Date	No.	PROCEEDINGS
		Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 7
03/04/2005	148	Transcript of Hearing held February 9, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 8 through 402
03/04/2005	149	Transcript of Hearing held February 10, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 403 through 863
03/04/2005	150	Transcript of Hearing held February 11, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 864 through 1017

* * * *

Date	No.	PROCEEDINGS
04/14/2005	50	Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof filed April 14, 2005, by Frank Martin, Attorney for Complainant

* * * *

05/17/2005	52	Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support filed May 17, 2005, by David Domina, Attorney for Respondents

* * * *

06/17/2005	55	Complainant's Reply Brief filed June 17, 2005, by Frank Martin, Attorney for Complainant

* * * *

08/03/2005	57	Order Authorizing Amendment of Complaint to Conform to the Evidence filed August 3, 2005, by Victor W. Palmer, Administrative Law Judge
08/10/2005	58	Second Amended Complaint filed August 10, 2005, by Lloyd

Date	No.	PROCEEDINGS
		C. Day, Administrator for Agricultural Marketing Service

* * * *

08/30/2005	63	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn, General Partner of Lassen Vineyards

* * * *

08/30/2005	65	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn

* * * *

08/31/2005	61	Answer to Second Amended Complaint (FAX) filed August 31, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn

* * * *

08/31/2005	67	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint (FAX) filed August 31, 2005, by David Domina, Attorney for

Date	No.	PROCEEDINGS
		Respondents
		* * * *
09/06/2005	69	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn
09/06/2005	70	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, General Partner of Lassen Vineyards
09/06/2005	71	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn
09/07/2005	72	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint filed September 7, 2005, by David Domina, Attorney for Respondents
		* * * *
05/23/2006	151	Transcript of Hearing held May 23, 2006, in Fresno, California Before: Honorable Victor W. Palmer,

Date	No.	PROCEEDINGS
		Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 262

* * * *

Date	No.	PROCEEDINGS
12/08/2006	120	Decision and Order filed December 8, 2006, by Victor Palmer, Administrative Law Judge

* * * *

Date	No.	PROCEEDINGS
01/04/2007	122	Respondent's Opening Brief On Appeal to Judicial Officer, USDA filed January 4, 2007, by David Domina, Attorney for Respondents
01/04/2007	123	Respondent's Notice of Appeal, Request for Oral Argument, and Appeal Petition to USDA Judicial Officer filed January 4, 2007, by David Domina, Attorney for Respondents

* * * *

Date	No.	PROCEEDINGS
02/15/2007	127	Complainant's Brief in Opposition to Respondents' Appeal of the ALJ's decision and Order filed February 15, 2007, by Frank Martin,

Date	No.	PROCEEDINGS
		Attorney for Respondents
		* * * *
03/27/2007	129	Respondent's Reply Brief on Appeal to Judicial Officer, USDA filed March 27, 2007, by David Domina, Attorney for Respondents
		* * * *
04/11/2008	132	Decision and Order filed April 11, 2008, by William G. Jenson, Judicial Officer
		* * * *
05/12/2008	137	Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer filed May 12, 2008, by Frank Martin, Attorney for Complainants
		* * * *
06/03/2008	139	Respondents' Opposition to Plaintiff's Petition to Reconsider filed June 3, 2008, by David Domina, Attorney for Respondents
		* * * *

Date	No.	PROCEEDINGS
06/19/2008	141	Order Seeking Clarification filed June 19, 2008, by William G. Jenson, Judicial Officer
07/11/2008	142	Administrator's Response to the Judicial Officer's Order Seeking Clarification filed July 11, 2008, by Frank Martin, Attorney for Complainant
08/04/2008	143	Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification filed August 4, 2008, by David Domina, Attorney for Respondents
		* * * *
09/18/2008	145	Order Granting Petition to Reconsider filed September 18, 2008, by William G. Jenson, Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Live System (Fresno)

CIVIL DOCKET FOR CASE #:
1:08-cv-01549-LJO-SMS

Horne, et al v. United States Department of Agriculture	Date Filed: 10/14/2008
Assigned to: District Judge Lawrence J. O'Neill	Date Terminated: 12/11/2009
Referred to: Magistrate Judge Sandra M. Snyder	Jury Demand: None
Case in other court: 9th Circuit Court, 10-15270	Nature of Suit: 891 Agriculture Acts
Cause: 18:4208(B) Agency Action Review	Jurisdiction: U.S. Government Defendant

Date	**No.**	**PROCEEDINGS**
10/14/2008	2	COMPLAINT *FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION* against United States Department of Agriculture by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards. Attorney Leighton, Brian C added. (Attachments: # 1 Exhibit JO's Decision and Order of

Date	No.	PROCEEDINGS
		91808)(Leighton, Brian) (Entered: 10/14/2008)

* * * *

Date	No.	PROCEEDINGS
12/18/2008	8	*DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE'S ANSWER* to COMPLAINT *FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION/BILL OF EQUITY; REVIEW OF USDA'S DECISION UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT* by United States Department of Agriculture. Attorney Hall, Benjamin E. added. (Hall, Benjamin) (Entered: 12/18/2008)

* * * *

Date	No.	PROCEEDINGS
08/28/2009	24	MOTION for SUMMARY JUDGMENT by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4 (LJO) before District Judge Lawrence

Date	No.	PROCEEDINGS
		J. O'Neill. (Leighton, Brian) (Entered: 08/28/2009)
08/28/2009	25	MEMORANDUM by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC in SUPPORT of 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 08/28/2009)
10/06/2009	26	MOTION for SUMMARY JUDGMENT by United States Department of Agriculture. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. (Attachments: # 1 Memorandum of Points and Authorities in Support of USDA's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, # 2 Statement of Undisputed Facts in Support of Cross-Motion for Summary Judgment, # 3 Response to Plaintiffs' Separate Statement of Undisputed Facts in Support of Motion for

Date	No.	PROCEEDINGS
		Summary Judgment) (Hall, Benjamin) (Entered: 10/06/2009)
		* * * *
11/03/2009	29	OPPOSITION by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT, 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/03/2009	30	RESPONSE by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/19/2009	31	REPLY by United States Department of Agriculture to RESPONSE to 26 MOTION for SUMMARY JUDGMENT. (Hall, Benjamin) (Entered: 11/19/2009)

Date	No.	PROCEEDINGS
		* * * *
12/11/2009	34	ORDER DENYING 24 Motion for Summary Judgment; GRANTING 26 Motion for Summary Judgment, signed by District Judge Lawrence J. O'Neill on 12/09/2009. CASE CLOSED (Martin, S) (Entered: 12/11/2009)
12/11/2009	35	JUDGMENT dated *12/11/2009* in favor of Defendant against Plaintiff pursuant to order (Martin, S) (Entered: 12/11/2009)
02/04/2010	36	NOTICE of APPEAL by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. (Attachments: # 1 Civil Appeals Docketing Statement and Service List/Representative Statement, # 2 Judgment, # 3 Ordering Denying Motion for Summary Judgment)(Leighton, Brian) (Entered: 02/04/2010)

General Docket

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 10-15270
Nature of Suit: 2891 Agricultural Acts
Marvin Horne, et al v. AGRI
Appeal From: U.S. District Court for Eastern California, Fresno
Fee Status: Paid

Docketed: 02/05/2010
Termed: 07/25/2011

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 0972-1: 1:08-cv-01549-LJO-SMS
Trial Judge: Lawrence J. O'Neill, District Judge
Date Filed: 10/14/2008

Date Order/Judgment:	**Date Order/Judgment EOD**:	**Date NOA Filed**:	**Date Rec'd COA**:
12/11/2009	12/11/2009	02/04/2010	02/04/2010

Date	**No.**	**PROCEEDINGS**
06/07/2010	7	Submitted (ECF) Opening brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 06/07/2010. [7362513] (BCL)

* * * *

Date	No.	PROCEEDINGS
07/21/2010	12	Submitted (ECF) Answering brief for review. Submitted by Appellee AGRI. Date of service: 07/21/2010. [7412395]--[COURT UPDATE: Attached corrected brief (footnotes). 07/22/2010 by RY] (BEH)

* * * *

Date	No.	PROCEEDINGS
09/03/2010	18	Submitted (ECF) Reply brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 09/03/2010. [7463717] (BCL)

* * * *

Date	No.	PROCEEDINGS
04/14/2011	24	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD. [7717243] (BG)
07/25/2011	25	FILED OPINION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and

Date	No.	PROCEEDINGS
		RONALD M. GOULD) AFFIRMED. Judge: MDH Authoring, FILED AND ENTERED JUDGMENT. [7831175] (RP)

* * * *

Date	No.	PROCEEDINGS
09/09/2011	30	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association petition for panel rehearing and petition for rehearing en banc (from 07/25/2011 opinion). Date of service: 09/08/2011. [7887818] (AB)

* * * *

Date	No.	PROCEEDINGS
11/21/2011	39	Filed (ECF) Appellee AGRI response to Order to set response by any party to anything, Order, Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/21/2011. [7974105].

Date	No.	PROCEEDINGS
		(KBC)
		* * * *
12/30/2011	43	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association reply to set response by any party to anything, for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 12/30/2011. [8016398]. (AB)
01/05/2012	44	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Defendant-Appellee shall file a surreply to Plaintiffs-Appellants' Reply Brief in Support of Petition for Panel Rehearing or Rehearing En Banc, filed with this court on December 30, 2011. The surreply shall specifically address, but is not limited to: (1) the relevance of Lion

Date	No.	PROCEEDINGS
		Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005), to the issues in this case; and (2) whether the Government, by claiming that the present case lies within the scope of Tucker Act jurisdiction, contradicts its previous position that Lion Raisins lies outside that scope. The surreply shall not exceed ten (10) pages, or 2800 words, and shall be filed within twenty-one (21) days of the filed date of this Order. [8020960] (SM)

* * * *

02/16/2012	47	Filed (ECF) Appellee AGRI reply to set response by any party to anything. Date of service: 02/16/2012. [8071323]. (KBC)
02/28/2012	48	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association Motion to file supplemental brief for petition for rehearing. Date of service: 02/28/2012. [8082388] (AB)

Date	No.	PROCEEDINGS
02/29/2012	49	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing En Banc is DENIED. [8085426] (SM)

* * * *

03/12/2012	52	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order. The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended. The full court was advised of the petition for rehearing en banc and no judge has requested a

Date	No.	PROCEEDINGS
		vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted for filing. [8098690] (RP)
03/12/2012	53	Filed amended opinion (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) [8098698] (RP)
03/20/2012	54	MANDATE ISSUED. (SR, MDH and RMG) [8111035] (LC)
06/04/2012	55	Received letter from the Supreme Court dated 06/01/2012. The application for an ext of time within which to file a petition for a writ of cert has been presented to Justice Kennedy, who on 6/1/12 extended the time to and including 7/25/12. Application No: 11A1125. [8206315] (RR)
08/01/2012	56	Received notice from the Supreme Court: petition for certiorari filed on 07/25/2012.

Date	No.	PROCEEDINGS
		Supreme Court Number 12-123. [8271870] (RR)
11/23/2012	57	Received notice from the Supreme Court. Petition for certiorari GRANTED on 11/20/2012. Supreme Court Number 12-123. [8412647] (RR)

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and	)	04-0002
Laura R. Horne, d/b/a	)	
Raisin Valley Farms, a partnership	)	
and d/b/a Raisin Valley	)	
Farms Marketing Association,	)	
also known as	)	
Raisin Valley Marketing, an	)	
unincorporated association	)	
	)	
And	)	
	)	
Marvin D. Horne,	)	
Laura R. Horne,	)	
Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq*. It was instituted by the United States Department of Agriculture's Administrator of the Agricultural

Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)). Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both

are attorneys with the Office of the General Counsel, United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Horne, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Horne, Laura R. Horne and Don Durbahn, on behalf of and doing business as Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in

reserve. Moreover, I have concluded that their violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of $731,500.

Findings of Fact

1. Marvin D. Horne is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Horne as "Raisin Valley Farms" which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world's raisins are produced (Tr. I, at 868-869). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at 2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the

partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D, Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Horne and Laura R. Horne indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Horne has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Horne and Laura R. Horne, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by the Del Rey Packing Company, a packer that would not take title to Raisin Valley Farms' raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither

a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to "toll packing", a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has "acquired" raisins within the meaning of the section, and thus Del Rey would:

> . . . be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.
>
> (RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Horne notified the Secretary of Agriculture that they were registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Horne was also specifically advised, on May 20, 2002, by the Administrator of Marketing and Regulatory Programs, AMS, in response to an e-mail and a letter Mr. Horne had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

> Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.
>
> (RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Horne requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Horne elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr. I, at 977). Contrary to the interpretive advice Marvin D. Horne had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Horne, together with his partners, Laura R. Horne, Don Durbahn, and the

late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Horne could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43). The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Horne and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes stamped with the handler number 94-101 that had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Horne to "attract the market of buyers" and allow them and other raisin growers to market their raisins together under the Hornes' protected trade name "Raisin Valley Farms" (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Horne conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II, at 50-51). When the sale was made without an outside broker, the grower's payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II, at 51-52). Mr. Horne acknowledged that Lassen Vineyards benefited under these arrangements from the fees that it received from growers for "the rental of its equipment" (Tr. II, at 52).

12. When Mr. Horne or a broker found a buyer who desired raisins, Mr. Horne contacted one of Raisin Valley Farms Marketing Association's members on a rotational basis (that included the Raisin Valley Farms and the growing operations of

Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard's packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer's trucks picked them up, left a bill of lading and when the buyer paid, the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. II, at 58-60).

13. On or about August 3, 2002, the respondents[1] submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14. From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial

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[1] As hereinafter used in the Decision and Order, "the respondents" refers to Marvin D. Horne; Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15. From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

16. During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17. During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18. During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19. During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20. During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was $745.00 a ton (CX-583). The respondents failed to pay $275,501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21. During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was $810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay $247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year 2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to

deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22. During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately $3,438.10 (CX-1-2, CX-171-582, Tr. I, at 76-79 and 217- 222).

23. During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately $5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24. The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).

3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b), by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin

Order (7 C.F.R. §989.73(d)), by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC $275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166

of the Regulations (7 C.F.R. § 989.166), by failing to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC $247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $3,438.10 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $5,951.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that require handlers to comply with commodity

inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

> Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders . . . .

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-Almond, Inc.*, 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F.3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection

challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc.*, 60 Agric Dec. 406, at 428 (2001) *citing, F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993),

In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg. 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (Ibid). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Horne, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what *acquire* means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning "...any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him....*Provided*...., That the term shall apply only to the handler who first acquires raisins.

> 7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing: inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F.R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not *acquire* raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining *acquire*. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104

S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from

> producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....
>
> 14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A. The man who performs the packing operation, who is the packer.
>
> Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?
>
> A. That is right.
>
> Q. Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

> A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?
>
> A. That is right.

Hearing transcript at 182-183, see Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the word *acquire* as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under *Chevron* the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Hornes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the

Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen. The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does exempt from a marketing order's regulation "any producer in his capacity as a producer" 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Horne had been specifically so advised by

letter, dated May 20, 2002, from the Administrator of AMS:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those committed by the respondents. See Calabrese, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of $1,100 for each

violation with "....each day during which such violation continues...deemed a separate violation...." (7 U.S.C. § 608c(14(B)).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of $651,200, $1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in reserve, and $80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. See Calabrese, *supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Horne, Laura R. Horne and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of $731,500, are further ordered to pay to the Raisin Administrative Committee $9,389.73 in assessments for crop years 2002-2003 and 2003-2004, and are further ordered to pay to the Raisin Administrative Committee $523,037 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of $731,500 made payable to "Treasurer of the United States" to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United

States Department of Agriculture, Washington, DC 20250-1417. Payments of the $9,389.73 for owed assessments, and of the $523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, DC
this 8th day of December, 2006

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

<table>
<tr><td>In re:

Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, a partnership and d/b/a Raisin Valley Farms Marketing Association, a/k/a Raisin Valley Marketing, an unincorporated association

and

Marvin D. Horne, Laura R. Horne, Don Durbahn, and The Estate of Rena Durbahn, d/b/a Lassen Vineyards, a partnership,

Respondents</td><td>)
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Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April 1, 2004, by filing a Complaint alleging that, during crop years 2002-

2003 and 2003-2004, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On October 25, 2004, the Administrator filed an Amended Complaint which made minor amendments to the Complaint. On August 10, 2005, with permission from Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], the Administrator filed a Second Amended Complaint. In the Second Amended Complaint, the Administrator made amendments to conform the Complaint to the evidence presented at the hearing conducted on February 9-11, 2005, as well as to add Raisin Valley Farms Marketing Association, also known as Raisin Valley Marketing, an unincorporated association, and Marvin D. Horne, Laura R. Horne, Don Durbahn, and the Estate of Rena Durbahn, a partnership, d/b/a Lassen Vineyards, as parties to the proceeding.

Under the Raisin Order, handlers[1] who first handle the raisins are required to: (1) obtain

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[1] The term "handler" means: (a) any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside the area; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) a producer who, in his capacity as a producer, blends raisins entirely of his own

inspections of raisins acquired or received (7 C.F.R. § 989.5 8(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee [hereinafter the RAC] (7 C.F.R. §§ 989.66, .166); (3) file accurate reports with the RAC (7 C.F.R. § 989.73); (4) allow access to records to verify the accuracy of the records (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80).

Marvin D. Horne and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue they did not *acquire* raisins within the meaning of the Raisin Order. They further argue they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006).

The ALJ held an oral hearing in Fresno, California, on February 9-11, 2005 (Tr. I), and May 23, 2006 (Tr. II). Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented the Administrator during the portion of the hearing conducted on February 9-

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production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture (7 C.F.R. § 989.15).

11, 2005. Babak A. Rastgoufard, Office of the General Counsel, United States Department of Agriculture, joined Mr. Martin during the May 23, 2006, portion of the hearing. David A. Domina and Michael Stumo, DominaLaw Group, Omaha, Nebraska, represented Mr. Horne and the other respondents.

On December 8, 2006, the ALJ issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[2] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the Raisin Order. The ALJ further found that Mr. Horne and partners violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments.

The ALJ concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 does not exempt farmers/producers who act as handlers from regulation under federal marketing orders. The ALJ further concluded that the violations by Mr. Horne and partners require the entry of an order directing them to pay the RAC assessments they have failed to pay and to pay the RAC the dollar equivalent of the

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[2] In this Decision and Order, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

raisins they failed to hold in reserve. Moreover, the ALJ concluded that the violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order. Pursuant to 7 U.S.C. § 608414)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, and Marvin D. Horne, Laura R. Horne, and Don Durbahn, a partnership, d/b/a Lassen Vineyards, filed a timely petition for review of the ALJ's Decision and Order and requested oral argument before the Judicial Officer. The request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed; thus, oral argument would appear to serve no useful purpose.

DECISION

Findings of Fact

Marvin D. Horne has been a farmer since 1969. Mr. Horne and his wife Laura R. Horne grow Thompson seedless grapes for raisins. Their grape-growing and raisin-producing activities operate under the registered trademark "Raisin Valley Farms." Raisin Valley Farms is one of the largest operations in the California valley where most of the world's raisins are produced (Tr. I at 868-69). Marvin D. Horne and Laura R. Horne also do

business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address in Kerman, California. (Tr. I at 873-74.)

During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business, as Lassen Vineyards, also in Kerman, California. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I at 870). In 2002, Lassen Vineyards started operating raisin packing plant equipment at the Kerman, California, location (Tr. I at 871-73).

In 1998, Marvin D. Horne and Laura R. Horne expressed an interest to the RAC about acting as a handler of California raisins under the Raisin Order (CX 94). In 1999, Marvin D. Horne and Laura R. Horne filed a fictitious name certificate in the Fresno (California) County Clerk's Office in which they adopted the name "Raisin Valley Farms" (CX 95, CX 96). Then, for crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne, under the Raisin Valley Farms' name, filed RAC-5 forms, notifying the RAC of their intention to handle raisins as a packer under the Raisin Order (CX 98, CX 100, CX 102). During this time-frame, Mr. Horne served 6 years as an alternate member of the RAC (Tr. I at 175; CX 103, CX 104).

Lassen Vineyards is a partnership formed in 1995 by Marvin D. Horne, Laura R. Horne, Don Durbahn, and the late Rena Durbahn. The partnership was created "to engaged [sic] in farming and any other farming related business." (RX 12 at 1.) The partnership owned land in Kerman, California, where it produced raisins and operated a raisin packing plant. Don Durbahn and Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son, supervised the packing activities at Lassen Vineyards (Tr. I at 879-80). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased to Lassen Vineyards by a partnership of Laura R. Horne and Rena Durbahn (Tr. I at 933-34).

In crop years 2002-2003 and 2003-2004, Lassen Vineyards operated the packing plant to process (i.e., to stem, sort, clean, grade, and package) California raisins for themselves and, for a fee, for other raisin producers (Tr. I at 962; Tr. II at 25-27). During this time, Lassen Vineyards charged producers 12 cents per pound to pack raisins and $5 for each pallet upon which the boxed raisins were stacked (Tr. II at 28, 44). The cost for labor and packaging materials was included in the fee charged (Tr. II at 30-31, 44, 48). All raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That number had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I at 964-65). When questioned, Mr. Horne indicated that the difference between Lassen Vineyards and a toll packer was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I at 979).

On numerous occasions, Mr. Horne exchanged communications with the United States Department of Agriculture and the RAC concerning the Raisin Order, including his responsibilities under the Raisin Order (CX 94, CX 105-CX 110; RX 91-RX 103, RX 105-RX 125, RX 127-RX 149). On March 15, 2001, Marvin D. Horne and Laura R. Horne, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the Raisin Order regarding volume regulation, quality control, payment of assessments to the RAC, and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by a packer that would not take title to Raisin Valley Farms' raisins (RX 95). On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, explained that under the scenario presented, Raisin Valley Farms would be neither a packer nor a handler, but that the custom packer would be both a packer and a handler. The Deputy Administer further explained that the custom packer "acquired" the raisins because it obtained physical possession of the raisins at a packing or processing plant. (7 C.F.R. § 989.17.) Furthermore, the custom packer would be "required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements." (RX 98.) The Deputy Administrator also provided Mr. Horne with portions of the 1949 proposed rule making and rule making hearing testimony discussing the treatment of this activity under the Raisin Order. The testimony establishes that the Raisin Order was intended to

treat such custom packers (also called toll packers) as handlers (RX 98).

In a number of these communications, the Agricultural Marketing Service clearly informed Mr. Horne that his proposed activities would make him a handler subject to the Raisin Order. In a January 18, 2002, letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California, Field Office of the Agricultural Marketing Service, told Mr. Horne that his proposed activities would make him a handler under the Raisin Order.

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to the Raisin Administrative Committee (RAC).

RX 100. On May 20, 2002, the Administrator responding to an e-mail and a letter sent by Mr. Horne stated:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and

> outgoing inspection), assessments, and reporting to the RAC.

RX 101. Marvin D. Horne expressly disregarded the United States Department of Agriculture's interpretations of the terms of the Raisin Order that he requested. Mr. Horne did not use the custom packing firm to process his raisins, but rather, he elected to establish a family-owned packing operation at Lassen Vineyards where he packed raisins for his family, and, for a fee, Lassen Vineyards packed raisins for other growers (Tr. I at 977-78). Contrary to the advice Mr. Horne received from the United States Department of Agriculture, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file accurate reports, and did not hold any raisins in reserve with respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I at 965-73).

During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also operated an unincorporated grower association named "Raisin Valley Farms Marketing Association." Mr. and Mrs. Horne created Raisin Valley Farms Marketing Association to "attract the market of buyers." (Tr. I at 876.) Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II at 55). Membership in Raisin Valley Farms Marketing Association allowed the raisin growers to market their raisins under the Hornes' trade name "Raisin Valley Farms" (Tr. I at 874-78).

When a Raisin Valley Farms Marketing Association member sold raisins through the Raisin

Valley Farms Marketing Association, the association collected the purchase price from the buyer and deducted Lassen Vineyards' fee for the packing services as well as an accounting fee for Raisin Valley Farms Marketing Association and a contribution for a fund to protect members from customers who fail to pay. If the sale was negotiated through a broker, Raisin Valley Farms Marketing Association deducted a brokerage fee. After all the deductions were taken, Raisin Valley Farms Marketing Association remitted the balance to the grower. (Tr. II at 50-52.) Mr. Horne acknowledged that Lassen Vineyards benefitted from the fees it received from Raisin Valley Farms Marketing Association members (Tr. II at 52).

When Raisin Valley Farms Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Farms Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower when to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged (Tr. II at 55-57). The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Farms Marketing Association has "a bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses

funds to Lassen Vineyards, the brokers, and the growers. (Tr. II at 58-60.)

On or about August 22, 2002, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC. Mr. Horne reported to the RAC that Raisin Valley Farms did not acquire any California raisins during the week ending August 3, 2002. (CX 62.) However, the record evidence shows that Raisin Valley Farms acquired more than 95,000 pounds of California raisins during this time period (CX 1, CX 2).

From September 5, 2003, to December 2, 2003, Laura Horne and/or Marvin Horne, on behalf of Raisin Valley Farms, submitted 13 inaccurate RAC-1 Forms, Weekly Report of Standard Raisin Acquisitions, to the RAC.[3] The Hornes reported to the RAC that they did not acquire any California raisins during this time period (CX 63-CX 75). However, the record evidence leads to the conclusion that they acquired substantial amounts of California raisins during this time period (CX 3-CX 56).

From August 1, 2003, to November 30, 2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC (CX 76-CX 79). Mr. Horne reported to the RAC that he did not ship or dispose of any California

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[3] Each of the forms has the number "59" written on the upper left of the form. The number "59" is a packer number assigned by RAC for internal control (Tr. I at 189). In addition, each form has "Raisin Valley Farms" shown as the originating fax machine identifier (CX 63-CX 75).

raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped substantial amounts of California raisins during this time period (CX 3-CX 56, CX 247-CX 273).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC (CX 80). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 82-CX 87).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC (CX 81). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 1, CX 2, CX 81-CX 87).

During crop year 2002-2003, Mr. Horne and partners failed to obtain incoming inspections of

California raisins on at least six occasions (CX 82-CX 87; Tr. I at 966-67).[4]

During crop year 2003-2004, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least 52 occasions (CX 3-CX 54, CX 56; Tr. I at 966-67).

During crop year 2002-2003, Mr. Horne and partners failed to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins (CX 82-CX 87, CX 88 at 2, CX 92 at 6). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners failed to pay $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to the RAC.

During crop year 2003-2004, Mr. Horne and partners failed to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins (CX 3-CX 56, CX 161). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). Therefore, for the 2003-2004 crop year, Mr. Horne and partners failed to pay $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC. For this crop year, the RAC

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[4] The record does not contain direct evidence that Mr. Horne and partners "received" raisins but there is ample evidence that they "packed-out" raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be "packed-out" unless they are received. Combine that conclusion with Mr. Horne's testimony that incoming inspections were not obtained leads to the holding that Mr. Horne and partners violated the Raisin Order by not obtaining incoming inspections on the raisins. (Tr. I at 966-67.)

issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX 136, RX 137).

During crop year 2002-2003, Mr. Horne and partners failed to pay assessments to the RAC of approximately $222.60. During crop year 2003-2004, Mr. Horne and partners failed to pay assessments to the RAC of approximately $5,819.63.

Mr. Horne and partners failed to allow access to their records to the United States Department of Agriculture (CX 154; Tr. I at 422-24).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting 13 inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. § 989.73(d)) by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an

inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on at least six occasions during crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on 52 occasions during crop year 2003-2004.

9. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins and by failing to pay to the RAC $9,742.93, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989,66, .166) by failing to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins and by failing to pay to the RAC $173,263.58, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $222.60 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $5,819.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow access to their records to the United States Department of Agriculture.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that resulted from a request of the California raisin industry. The industry made the request to the Secretary of Agriculture pursuant to the AMAA.

In response to the request for a marketing order, the United States Department of Agriculture held a hearing in Fresno, California, on December 13-16, 1948. Based on the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order. The recommendation included a rational basis for issuance of the Raisin Order and for its various provisions (14 Fed. Reg. 3083 (June 8, 1949)). Interested parties were given an opportunity to file written exceptions to the recommended decision. *Ibid.* Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8,

1949, found that the issuance of the Raisin Order, as set forth in the recommended decision, would effectuate the declared policy of the AMAA and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858, 3868 (July 13, 1949)). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when Mr. Horne and partners acted as first handlers of raisins.

Mr. Horne and partners raised 12 issues in their appeal. In issue 12, Mr. Horne and partners contend the ALJ erroneously allowed the Administrator to add parties after the hearing was substantially completed.

Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981), citing *Wyshak v. City National Bank*, 607 F.2d 824, 826 (9th Cir. 1979). However, the issue of amending a complaint by adding an additional party after the initial hearing raises concerns. The decision to amend a complaint is within the discretion of the trial judge, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) the futility of amendment. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994),

cert. denied, 516 U.S. 810 (1995), citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Mr. Horne and partners, in their appeal, did not raise bad faith, delay, or futility as reasons for denying the amendments. Therefore, those issues are not before me.

Prejudice is the most important factor when determining if an amendment should be allowed. *Zeneth Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). The amendment of a complaint should be denied when a party suffers "undue prejudice" because of the amendment. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). The determination whether there is sufficient prejudice to justify denying an amendment requires a balancing of the interests of the parties. The balancing

> entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1487 at 621-23 (2d ed. 1990).

For the reasons set forth below, I decline to reverse the ALJ's decision to allow the Administrator to amend the Complaint and add additional parties. First, and foremost, the decision to allow an amendment of a complaint lies within the discretion of the ALJ. Absent evidence that the ALJ abused

that discretion, the decision should stand. Mr. Horne and partners presented no argument to convince me that the ALJ abused his discretion. Furthermore, my own examination of the record convinces me that the ALJ's decision to allow the Administrator to add parties was correct.

The following transcript passage from Mr. Horne's counsel's opening statement at the hearing on February 9, 2005, shows Mr. Horne was warned about the possibility of the amendment.

> MR. DOMINA: Now, I want to return to the entities for just this brief moment. Lasson [sic] Vineyards, the partnership that consists of these two folks and Mrs. Horne's parents, own this pack-line. They own the equipment inside this partnership, a California general partnership Lasson [sic] Vineyards, that partnership is a stranger to this case. Lasson [sic] Vineyards—
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> ADMINISTRATIVE [LAW] JUDGE PALMER: I might give you a word of warning. I recall some decisions by the Judicial Officer, past decisions, reviewing our decisions, not mine particularly, but saying that you can amend these complaints as you go along and they may well amend it to include them.
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> MR. DOMINA: I'm aware of those decisions and I appreciate your comment.

Tr. I at 58-59. Furthermore, in the order authorizing the amendment to the Complaint adding parties, the ALJ made clear that "the new parties will be given the opportunity to present any evidence they believe is necessary to fully defend themselves from the amended complaint's allegations." (August 3, 2005, Order Authorizing Amendment of the Complaint To Conform To the Evidence.) The ALJ held five teleconferences with counsel between February 2006 and the hearing on May 23, 2006. At these teleconferences, the ALJ sorted out evidence, issues, and witness lists, issued subpoenas, and moved the hearing location at the request of Mr. Horne's counsel. On the morning of the hearing, additional off-the-record conferences resolved many of the issues prior to the hearing. On the afternoon of May 23, 2006, the ALJ presided over a hearing. Mr. Horne was the primary witness. At the conclusion of the hearing, there was no claim that the added parties needed more time to present their evidence (Tr. II at 261).

Although Mr. Horne and partners argue that the addition of the new parties should not have been allowed after the initial hearing, they must take significant responsibility for the Administrator's inability to identify all appropriate parties. On May 21, 2004, the ALJ set the date for the hearing as February 8-17, 2005, and ordered an exchange of witness lists, exhibit lists, and copies of exhibits. The ALJ ordered the Administrator to provide his documents by October 4, 2004. The Administrator filed his documents on September 20, 2004. The order also called for Mr. Horne and partners to provide their documents on November 15, 2004. The ALJ extended that deadline until December 15, 2004.

The record does not indicate that Mr. Horne and partners provided the documents in a timely fashion. On January 3, 2005, Mr. Horne was served with a subpoena duces tecum (CX 164) seeking records regarding his raisin operations. In response, Mr. Horne provided hearing exhibits RX 1-RX 152. Mr. Horne admitted he did not fully comply with the subpoena.[5] (Tr. I at 947.) Without Mr. Horne's records, the Administrator's inability to identify all the various intermingled entities involved in Mr. Horne's raisin operations before the initial hearing, is understandable.

Mr. Horne's business structure is confusing at best. There appear to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards. (Tr. II at 58-60, 123-24.)

Raisin Valley Farms is a partnership between Marvin D. Horne and his wife Laura (Tr. I at 868). Mr. Horne grows grapes and makes raisins under the Raisin Valley Farms name. The Raisin Valley Farms name is trademarked. (Tr. I at 869.) Lassen Vineyards is a partnership between Marvin Horne,

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[5] I note that in November 2002, the Agricultural Marketing Service issued an investigative subpoena seeking Mr. Horne's records (CX 154). Mr. Horne "refuse[d] to produce any records" sought by the investigative subpoena (RX 106; Tr. I at 432).

his wife Laura, and his father-in-law Don Durbahn.[6] (Tr. I at 869-70; RX 12.) Lassen Vineyards began as a farming operation, growing grapes and making raisins, adding a raisin packing facility on its property in 2002 (Tr. I at 870-71).

Another issue raised on appeal is Mr. Horne and partners' position that the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne showed no connection between his business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order —

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[6] The partnership also included Laura Horne's mother Rena Durbahn until Mrs. Durbahn passed away.

which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

In their appeal, Mr. Horne and partners question the constitutionally of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.[7]

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[7] Mr. Horne and partners suggest, at page 29 ¶ 102 of Respondents' Opening Brief On Appeal to Judicial Officer, USDA [hereinafter Respondents' Appeal Brief], that I might consider a "Rule 15(c)" proceeding the appropriate forum in which to address their constitutional argument. I need not address that question because, considering the results of the

The Raisin Order's provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin marketing order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

§ 989.17 Acquire.

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, came within each of these definitions during crop years 2002-2003 and 2003-2004. As such, they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling reserve tonnage regulation (7 C.F.R. §§ 989.66, .166); (3) file certified reports showing:

Evans case, conducting a "Rule 15(c)" proceeding would not alter the results.

inventory, acquisition, and other information required by the RAC to enable it to perform its duties (7 C.F.R. § 989.73); (4) allow the RAC access to inspect the premises, the raisins held, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessments to the RAC with respect to free tonnage acquired and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at

> the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?

> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

ALJ Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's

interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of — thus they "acquired" — raisins when a grower brought raisins to the facility.

I also must address Mr. Horne and partners' position that they did not process the raisins but merely leased equipment to producers who processed their own raisins. The argument defies common sense. Mr. Horne and partners own raisin processing equipment. Growers bring raisins to the facility for processing. The grower pays Mr. Horne and partners for use of the equipment not by the hour or day like most equipment leases but by the pound, i.e., the amount of product processed. That price includes supervision of the equipment by Mr.

Horne's son, whose salary is paid by the partnership. The price also includes other workers who are provided by a different, but interlocking, partnership consisting of two members of the Lassen Vineyards partnership, Mr. Horne's wife and mother-in-law. In addition, the "lease" price also includes all packing material (on which Mr. Horne's handler number has been imprinted). Furthermore, the grower "leasing" the equipment need not stay at the facility during the use of the equipment but can leave the location allowing Lassen Vineyards' employees to supervise the processing. Mr. Horne and partners can call what they do a "lease" or anything else they might want to call it, but the reality is that Mr. Horne and partners are processing/handling raisins.

Mr. Horne and partners argue the ALJ erred by failing to use a higher standard of proof than preponderance of the evidence (Respondents' Appeal Brief at 32-35). Reviewing their earlier filings before the ALJ, I found no suggestion to the ALJ that a higher standard of proof should be utilized. Absent such a suggestion to the ALJ, I am reluctant to reverse the ALJ's use of the preponderance of the evidence standard. However, to satisfy myself that the appropriate standard was applied, I reviewed the argument. I found the argument significantly lacking. While there are proceedings in which a greater standard is appropriate,[8] this proceeding is not one of them. Mr. Horne and partners did not demonstrate that a standard of proof higher than the

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[8] See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

preponderance of the evidence standard was appropriate. Therefore, I hold that the ALJ's use of the preponderance of the evidence standard was not error.

Mr. Horne and partners also argue the Administrator failed to meet his burden to prove the case by a preponderance of the evidence.[9] I disagree. I do not provide a laundry list of "fact[s] sought to be proved," but I note that I read the entire transcript and examined the evidence. The greater weight of that evidence leaves me with but one conclusion which is that Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order.

The Administrator alleges that Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) "by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access." (Second Amended Compl. at 5 ¶ 12.) Mr. Horne and partners deny this allegation stating "[t]here was no evidence of noncompliance with

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[9] Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not [citation omitted]. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. Black's Law Dictionary 1064 (5th ed. 1979).

subpoenas, information requests, or failure to fully comply with Government requests for data." (Respondents' Appeal Brief at 30 ¶ 104.) The record belies that claim showing that Mr. Horne failed to allow access as required by section 989.77 of the Raisin Order (7 C.F.R. § 989.77).

The Raisin Order makes clear that handlers shall provide access to their facilities and records, as follows:

§ 989.77 Verification of reports and records.

> For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53.

7 C.F.R. § 989.77.

On August 29, 2001, Maria Martinez Esguerra, a compliance officer for the Agricultural Marketing Service in the Fresno, California, office, was assigned to investigate whether Mr. Horne was packing and shipping raisins without obtaining inspections (Tr. I at 420). During the course of her investigation, Ms. Esguerra met with Mr. Horne and asked to review his raisin production, acquisition, sales, and

disposition records (Tr. I at 421). Mr. Horne told Ms. Esguerra "that he would not release any information without a subpoena." (Tr. I at 421.)

Ms. Esguerra's testimony continued:

> On May 14 I had prepared a subpoena, a request for a subpoena for the administrator. But my declaration here also stated basically in my conversation or interview with Mr. Horne to which he had admitted to me that he produced and packed organic raisins during the crop years 2000 and 2001.
>
> There were other questions that I had asked, and I'd asked him about if he had packed organic raisins in cellophane bags and he said he did. In fact he even showed us the sizes of those cello packaged raisins.
>
> They were in sizes 16 ounces, 8 ounce and 1.5 ounces. However, he disclosed to, he did - he refused to disclose any more information regarding his sales.
>
> He has raisin production and acquisition records, and sales and dispositions, but again he said he would not release any information without a subpoena.
>
> Following that we had a subpoena prepared, and on November 26 I receive that, and I subsequently served it to Mr. Horne on that same day.
>
> On December 9, I went back to the house of Marvin Horne on Modoc Avenue

> pursuant to that subpoena, and I asked if I could speak with him and he met me at the door. He told me why he will not produce any records for me to review.

Tr. I at 421-23. Ms. Esguerra was asked: "After you served Mr. Horne with the subpoena, did he produce any records?" She responded: "No, he did not." (Tr. I at 423-24.)

Ms. Esguerra's testimony demonstrates that she sought access to Mr. Horne and partners' records which she is authorized to do under the Raisin Order. Mr. Horne refused unless Ms. Esguerra obtained a subpoena. Even though a subpoena is not required under the Raisin Order, Ms. Esguerra obtained one (CX 154). When she presented the subpoena to Mr. Horn; he still refused to comply with the Raisin Order and give her access to the records. Therefore, I conclude Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by refusing to provide Ms. Esguerra access to their records.

There are three components of the Order in this Decision and Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order. First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

§ 989.166 Reserve tonnage generally.

> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. A handler who fails to deliver to the Committee, upon request, any reserve

> tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c). This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types.

7 C.F.R. § 989.166(c).

For the 2002-2003 crop year, Mr. Horne and partners packed out 98,550 pounds of raisins (CX 82-CX 87). Applying the shrinkage factor (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 105,000 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2).

Mr. Horne and partners' reserve obligation for that crop year was 49,350 pounds (.47 x 105,000 = 49,350). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to RAC (49,350 pounds divided by 2000 pounds per ton = 24.675 tons; 24.675 tons x $394.85 per ton equals $9,742.93).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)).[10] Therefore, for the 2003-2004 crop year, Mr.

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[10] The Agricultural Marketing Service calculated the 2003-2004 reserve obligation compensation using a producer price of $810 per ton. The record citation for this producer price is CX 93, the RAC marketing policy for the 2003-2004 crop year. The RAC marketing policy for the 2003-2004 crop year mentions a "probable price" at $810 per ton (CX 93 at 4). However, the interim final rule setting the Final Free and Reserve Percentages for the 2005-2006 crop year identifies the producer prices for the 2003-2004 crop year as $567 (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). The Administrator's Brief in Opposition to Respondents' Appeal of the ALJ's Decision and

Horne and partners owe $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2000 pounds per ton = 305.5795 tons; 305.5795 tons x $567 per ton equals $173,263.58).

The Raisin Order requires that each handler contribute to the costs associated with operating the RAC, as follows:

§ 989.80 Assessments.

> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Decision and Order, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 105,000 pounds of raisins. The reserve obligation for the 2002-2003 crop year was 47

Order was filed well after the date the producer prices were published in the Federal Register. The Administrator had an obligation to notify me that the original calculations were erroneous.

percent, therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for that crop year was 55,650 pounds (.53 x 105,000 = 55,650). Mr. Horne and partners' assessment obligation for the 2002-2003 crop year is $222.60 (55,650 pounds divided by 2000 pounds per ton = 27.825 tons; 27.825 tons x $8 per ton = $222.60).

The calculation of the assessment for the 2003-2004 crop year is complicated by the multiple varieties processed during that year, including varieties without reserve requirements. Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for both crop years is $6,042.23.[11]

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[11] The Administrator, as the party seeking enforcement of the Raisin Order, should have provided a better road map to calculate both the assessment and compensation for failing to deliver any reserve raisins to the RAC. The Administrator should have provided a specific formula for determining the

I find it necessary to briefly note that, although the Raisin Order requires payment of the assessment "upon demand" and the record contains no evidence of such demand for the 2002-2003 crop year, my decision ordering payment is appropriate. I conclude Mr. Horne and partners' failure to file accurate forms with the RAC noting the volume of raisins processed incapacitated the RAC ability to make the demand for payment of the assessment. The RAC 1999-2000 Analysis Report states:

> The documentation of deliveries, on an individual grower basis, establishes the database on which most other functions are based. This includes: the accountability of all raisin deliveries, responsibility of packers' administrative assessments, packers' reserve pool obligations and the basis upon which the RAC staff distributes reserve pool equity to the grower.

RX 70 at 8. Without the information to determine the amounts of payment, the RAC could not demand the payment. Now that I have calculated the amount of the administrative assessments and reserve pool obligations, those amounts are due and payable.

The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

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money owed as well as a record cite where each number utilized in the calculation of the money owed could be located.

§ 608c. Orders

. . . .

(14) Violation of order

> . . . .
>
> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

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[12] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA

In determining the amount of the civil penalty for violations of the Raisin Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 154-55 (1992), *aff'd sub nom. Balice v. USDA*, No. CV–F-92-5483–GEB (E.D. Cal. July 14, 1998), *printed in* 57 Agric. Dec. 841 (1998), *aff'd*, 203 F.3d 684 (9th Cir. 2000), *reprinted in* 59 Agric. Dec. 1 (2000).

I have reviewed the recommendation of the Administrator regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Mr. Horne and partners as these actions relate to the factors, including an examination of their tax returns (RX 13) to determine the impact of the violations on the revenue generated by the partners. I find that intentional violations of the Raisin Order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the

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(7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

raisins handled in reserve, and file specified reports are serious violations of both the AMAA and the Raisin Order. Furthermore, I find the violations by Mr. Horne and partners significantly increased the revenue generated by the partnership (RX 13). Therefore, I conclude a significant civil penalty is warranted to deter Mr. Horne and partners, as well as other handlers, from committing similar violations in the future.

As discussed in this Decision and Order, *supra*, I have found that Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms to the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar

equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow the Agricultural Marketing Service to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and

Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $6,042.23 for owed assessments and of the $183,006.51 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

Done at Washington, DC

April 11, 2008

/s/ William G. Jenson
William G. Jenson
Judicial Officer

[13] 7 U.S.C. § 608c(14)(B).

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Order Granting Petition To Reconsider

PROCEDURAL HISTORY

On December 8, 2006, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners

doing business as Lassen Vineyards,[1] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. The ALJ further found that Mr. Horne and partners violated the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments. Pursuant to 7 U.S.C. § 608c(14)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Mr. Horne and partners filed a timely petition for review of the ALJ's Decision and Order. On April 11, 2008, I issued a Decision and Order in which I found Mr. Horne and partners violated the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve California Natural Sun-dried Seedless raisins and by failing to pay to the Raisin Administrative Committee [hereinafter the RAC] the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003

[1] In this Order Granting Petition To Reconsider, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

and for crop year 2003-2004. Furthermore, I found that Mr. Horne and partners violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC for crop year 2002-2003 and for crop year 2003-2004. In total, I found that Mr. Horne and partners committed 673 violations of the Raisin Order. I ordered Mr. Horne and partners to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Horne and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer [hereinafter the Petition to Reconsider]. In the Petition to Reconsider, the Administrator alleged that the calculation of the assessments owed to the RAC by Mr. Horne and partners, as well as the calculations for the value of the raisins that Mr. Horne and partners failed to hold in reserve are not correct and should be modified. On June 3, 2008, Mr. Horne and partners filed Respondents' Opposition to Plaintiff's [sic] Petition to Reconsider [hereinafter Opposition to Petition to Reconsider]. In their Opposition to Petition to Reconsider, Mr. Horne and partners argue four issues:

1. The Administrator's Petition to Reconsider fails to meet the requirements of section 1.146(a)(3)

of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary [hereinafter the Rules of Practice] (7 C.F.R. § 1.146(a)(3));

2. The Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. The proposed reconsideration is inconsistent with the law; and

4. A custom or "toll" packer of raisins does not "acquire" raisins.

The Raisin Order mandates record keeping and reporting requirements that are necessary for the implementation of the Raisin Order (7 C.F.R. §§ 989.73, .77). Without such reports and without access to the documents that support these reports, it is difficult for the Agricultural Marketing Service [hereinafter AMS] and the RAC to properly determine the volume of raisins handled as well as the assessments and other monies due. Mr. Horne and partners failed to provide necessary documents until just before the second portion of the hearing on May 23, 2006.

I have spent considerable time examining the record in this proceeding. It appears that the document universe, entered into the record just prior to the second portion of the hearing, is likely missing some documents, while it contains duplicates of others. Determining exact volumes of raisins that

flowed through Mr. Horne and partners' facility is difficult.

On June 19, 2008, I issued an Order Seeking Clarification in which I ordered the Administrator to explain how he reached the total weights used in calculating the amounts owed by Mr. Horne and partners. On July 11, 2008, the Administrator filed Administrator's Response to the Judicial Officer's Order Seeking Clarification. The response provides guidance for me to use in determining the appropriate amounts owed by Mr. Horne and partners to the RAC for the assessments and for the dollar equivalent of California raisins that Mr. Horne and partners failed to hold in reserve. The Administrator's analysis explained how AMS reached the proposed assessment amounts and the amounts owed for raisins that Mr. Horne and partners failed to hold in reserve. The analysis contained a citation to each relevant exhibit noting the weight of the raisins sold on the invoice in the exhibit.

Finally, on August 4, 2008, Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. This filing was Mr. Horne and partners' opportunity to challenge the Administrator's numbers.

Mr. Horne and partners did not challenge any of the weights or calculations presented in the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, I find Mr. Horne and partners accept the Administrator's numbers as accurate and waive the opportunity to contest the numbers.

DISCUSSION

As I discussed in my April 11, 2008, Decision and Order, there are three components of the Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order (Decision and Order at 32-40). First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

§ 989.166 Reserve tonnage generally.

> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c).

This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

§ 989.166 Reserve tonnage generally.

> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. . . . The amount of compensation for any

> shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]

7 C.F.R. § 989.166(c).

Mr. Horne and partners argued in their Opposition to Petition to Reconsider that the Administrator's calculations cannot be confirmed by resort to the evidence (Opposition to Pet. to Reconsider at 2). Mr. Horne and partners' argument has some validity for the 2002-2003 crop year, in that, without additional clarification, the determination of the weight of the raisins handled by Mr. Horne and partners for the 2002-2003 crop year, is difficult. Because of this difficulty, I ordered the Administrator to clarify his calculations of the weight of the raisins. The Administrator's Response to the Judicial Officer's Order Seeking Clarification provides the necessary clarification. Mr. Horne and partners were given the opportunity to respond to the Administrator's clarifications. Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. However, in this submission, Mr. Horne and partners do not challenge the Administrator's numbers and the exhibits that support the numbers. Therefore, I find Mr. Horne and partners accept the Administrator's process for determining the weight of raisins handled as accurate and Mr. Horne and partners waive any

challenge to the Administrator's conclusions regarding the weight of the raisins.

The Administrator did not challenge my findings regarding the weight of the raisins handled by Mr. Horne and partners in the 2003-2004 crop year. Furthermore, Mr. Horne and partners did not challenge the numbers I used in calculating the reserve tonnage for the 2003-2004 crop year. Therefore, I find that the Administrator and Mr. Horne and partners accept, as accurate, the weights used by me in my April 11, 2008, Decision and Order for the 2003-2004 crop year.

The final component necessary for the calculation of the value of the raisins Mr. Horne and partners failed to hold in reserve is the "latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types." (7 C.F.R. § 989.166(c).) In my April 11, 2008, Decision and Order, I used the "producer price" to calculate the reserve payment requirement. The Administrator argues that the appropriate price is the "announced price" found in the January 10, 2003, letter to the RAC from the Raisin Bargaining Association (CX 583). In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that the "market price for free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations." The Administrator's "announced price" (CX 583 at 2) meets the Federal Circuit's definition of market price; therefore, I use the

"announced price" found in the January 10, 2003, letter as the price for calculating the value of the raisins that Mr. Horne and partners failed to hold in reserve.

In the 2002-2003 crop year, Mr. Horne and partners packed out 1,266,924 pounds of raisins (Exhibit B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification). Applying the shrinkage factor of 0.93857 (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 1,349,844.9769 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2-3). Mr. Horne and partners' reserve obligation for that crop year was 634,427.1392 pounds (.47 x 1,349,844.9769 = 634,427.1392). The announced price for raisins was $745 per ton (CX 583 at 2-3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $236,324.13 to the RAC for compensation for failing to deliver any reserve raisins to RAC (634,427.1392 pounds divided by 2,000 pounds per ton = 317.2136 tons; 317.2136 tons x $745 per ton equals $236,324.13).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Borne and partners' reserve obligation for the 2003-2004

crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The announced price for raisins was $810 per ton (CX 583 at 2-3). Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $247,519.40 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2,000 pounds per ton = 305.5795 tons; 305.5795 tons x $810 per ton equals $247,519.40). The total amount owed to the RAC by Mr. Horne and partners for failing to deliver any reserve raisins to RAC is $483,843.53.

The Raisin Order also requires that each handler contribute to the costs associated with operating the RAC, as follows:

§ 989.80 Assessments.

> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Order Granting Petition to Reconsider, *supra*, for the 2002-2003 crop year, Mr.

Horne and partners received 1,349,844.9769 pounds of natural seedless raisins. The reserve obligation for the 2002-2003 crop year was 47 percent; therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for natural seedless raisins in that crop year was 715,417.8378 pounds (.53 x 1,349,844.9769 = 715,417.8378). In addition, Mr. Horne and partners received 25,523.0198 pounds of other variety raisins. There was no reserve requirement for those raisins; therefore, all of those other variety raisins were subject to the assessment. Mr. Horne and partners' assessment obligation for the 2002-2003 crop year for natural seedless raisins is $2,861.67 (715,417.8378 pounds divided by 2,000 pounds per ton = 357.7089 tons; 357.7089 tons x $8 per ton = $2,861.67). The assessment obligation for the other varieties is $102.09 (25,523.0198 pounds divided by 2,000 pounds per ton 12.7615; 12.7615 tons x $8 per ton = $102.09). The total assessment owed for the 2002-2003 crop year is $2,963.76.

Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by

2,000 pounds per ton 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for the 2002-2003 crop year and the 2003-2004 crop year is $8,783.39.

The third monetary payment resulting from Mr. Horne and partners' violations of the Raisin Order are civil penalties. The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

> . . . .
>
> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's

> principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[2]

As neither Mr. Horne and partners nor the Administrator challenged the amount of the civil penalties imposed in my April 11, 2008, Decision and Order, those civil penalties stand. As discussed in my April 11, 2008, Decision and Order, I find Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC

[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(1)(vii) (2005)).

in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow AMS to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

Mr. Horne and partners did not seek reconsideration of my April 11, 2008, Decision and Order; however, they did file an Opposition to Petition to Reconsider. In their opposition, Mr. Horne and partners raised four points:

1. that the Administrator's Petition for Reconsideration fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3));

2. that the Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. that the proposed reconsideration is inconsistent with the law; and

4. that a custom or "toll" packer of raisins does not "acquire" the raisins.

Mr. Horne and partners argue that the Petition for Reconsideration failed to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), in that "there is no section of the Petition devoted to a description of errors made." (Opposition to Pet. to Reconsider at 1.) The Rules of Practice do not require a specific format for petitions to reconsider. The only requirement is that the "petition must state specifically the matters claimed to have been erroneously decided and the alleged errors must be briefly stated." (7 C.F.R. § 1.146(a)(3).) The Administrator's Petition to Reconsider clearly meets that requirement. It was

easy to discern, from the Petition to Reconsider, the errors that the Administrator claimed I made in my April 11, 2008, Decision and Order. I find that the Administrator's Petition to Reconsider meets the requirements of the Rules of Practice.

Next, Mr. Horne and partners claim "that the Administrator's suggested calculations cannot be confirmed by resort to the evidence." While I agree that the Administrator's filings do not present the image of clarity — which is why I ordered the Administrator to provide clarification — I found that I was able to follow the transactions identified in Exhibits A and B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, using Exhibits A and B to the Administrator's response, I was able to determine the volume of raisins that flowed through Mr. Horne and partners' facility and the tonnage of raisins that they failed to hold in reserve, as well as the assessments and the payments in lieu of reserve raisins that Mr. Horne and partners owed to the RAC.

Mr. Horne and partners' third point is that "the proposed reconsideration is inconsistent with the law." Mr. Horne and partners are challenging the constitutionality of the Raisin Order. As I discussed in my April 11, 2008, Decision and Order, I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983)

("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners' questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

As I discussed in my April 11, 2008, Decision and Order, the reference to Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) provides Mr. Horne and partners little solace. They argue that it exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing

Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order — which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

The final issue raised by Mr. Horne and partners is whether a custom or "toll" packer of raisins "acquires" the raisins, This issue was discussed in my April 11, 2008, Decision and Order. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

§ 989.17 Acquire.

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . Provided further, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, were first handlers who acquired raisins during crop years 2002-2003 and

2003-2004. Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture, both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision regarding the raisin growers' request for the Raisin Order, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were

> proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person

> who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

AU Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term “acquire” as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture’s interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to

have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of— thus they "acquired" — raisins when a grower brought raisins to the facility.

For the foregoing reasons, I grant the Administrator's Petition to Reconsider and issue the following Order.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $8,783.39 in assessments for crop years 2002-2003 and 2003-2004, and $483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $8,783.39 for owed assessments and of the $483,843.53 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Order Granting Petition To Reconsider in any district court of the United States in which they are inhabitants or have their principal place of business.[3]

Done at Washington, DC

September 18, 2008

/s/ William G. Jenson

William G. Jenson
Judicial Officer

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[3] 7 U.S.C. § 608(14)(B).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS and RAISIN VALLEY FARMS MARKETING ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN; and the ESTATE of RENA DURBAHN, d.b.a. LASSEN VINEYARDS, Plaintiffs,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.

CASE NO. CV–F–08–1549 LJO SMS. | Dec. 11, 2009.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs. 24, 26)

I. INTRODUCTION

Plaintiffs appeal an administrative decision of a defendant United States Department of Agriculture ("USDA") Judicial Officer ("JO") that imposed civil penalties and assessments for Plaintiffs' alleged violation of various provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA") and the order regulating the Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"). This appeal presents four issues on cross motions for summary judgment:

First, this Court considers Plaintiffs' challenge to the JO's opinion that Plaintiffs are "handlers" who "acquired" raisins and were therefore subject to the Marketing Order. Second, the Court considers whether the penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Third, the Court is asked to decide whether the Marketing Order's reserve requirement violates the Due Process Clause of the Fifth Amendment to the United States Constitution as a physical taking of Plaintiffs' property without just compensation. Finally, this Court determines whether the JO's decision to dismiss Plaintiffs' administrative petition was arbitrary, capricious, an abuse of discretion, and contrary to the law. Having read and reviewed the parties' arguments, and considering the administrative record and the applicable case law, this Court GRANTS summary judgment in favor of defendant USDA and against Plaintiffs.

II. BACKGROUND

A. Legal Framework

"The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products." *Lion Raisins, Inc. v. U.S.,* 416 F.3d 1356, 1358 (Fed. Cir. 2005) (*"Lion II"*), *citing Pescosolido v. Block,* 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them."

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 346 (1984). To accomplish this, the AMAA delegates authority to the Secretary of Agriculture to issue marketing orders regulating the sale and delivery of various commodities, including raisins. The Marketing Order was created in an effort to limit the supply of raisins on the open market, and thus, to stabilize prices. *See* 7 U.S.C. §§ 608c (1), (2), (6)(C).

The Marketing Order does not regulate raisin producers (i.e., growers, farmers). Instead, "handlers" of California raisins are subject to the requirements of the Marketing Order, 7 C.F.R. § 981.1 et seq. Handlers who acquire raisins are required, inter alia, to: (1) obtain USDA inspections of raisins acquired or received from growers, 7 C.F.R. § 989.58(d); (2) file accurate reports with the USDA's Raisin Administrative Committee ("RAC"), 7 C.F.R. § 989.73; and (3) allow access to records to verify the accuracy of the reports filed with the RAC. 7 C.F.R. § 989.77. The USDA may obtain injunctive relief, civil penalties, and criminal penalties against handlers who fail to comply with the regulatory provisions of the Marketing Order. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14).

The Marketing Order creates the RAC, a raisin industry group responsible for the administration of the Marketing Order. The RAC is composed of forty-seven members who represent different groups in the raisin industry, including thirty-five producers, ten handlers, one cooperative bargaining association, and one member of the public. The RAC is an agent of the federal government. Members of the RAC are nominated by the industry groups and appointed by the Secretary of Agriculture. 7 C.F.R. §§ 989.26, .29,

.30. The RAC receives no federal appropriations. To fund the RAC, handlers must pay an $8 per ton assessment for free tonnage raisins. 7 C.F.R. § 989.90. The assessments pay for approximately 50% of the administration costs of the RAC. 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

The Marketing Order is designed "to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective." *Parker v. Brown,* 317 U.S. 341, 368 (1943). To accomplish this goal, and as an additional way to fund the RAC, the Marketing Order contains a reserve requirement. The Marketing Order reserve requirement requires handlers to separate the raisins they receive or acquire from producers into "reserve tonnage" raisins for the benefit of the RAC and "free tonnage" raisins. Handlers may sell the free tonnage raisins on the open markets. The reserve tonnage is determined each year as a portion of the raisins that handlers buy from producers. Handlers are required to transfer the reserve tonnage to the RAC. 7 C.F.R. § 989.66, 989.166. While raisin producers hold an equity interest in the reserve tonnage, the RAC may sell or dispose of the reserve raisins in secondary, non-competitive markets. The RAC uses some of the proceeds to fund its administration. The RAC pays to the producers any net proceeds remaining after it has disposed of the crop year's reserve raisins. It generally takes a few years for the RAC to dispose of a crop year's reserve tonnage raisins.

B. Plaintiffs' alleged activities

Marvin D. Horne ("Mr. Horne") has been a raisin farmer since 1969. Administrative Record ("AR")

1646. Mr. Horne and his wife, Laura R. Horne ("Ms. Horne") (collectively "the Hornes") produce raisins under the name of Raisin Valley Farms. *Id.* AR 1646, 1732. Raisin Valley Farms is a California general partnership, with the Hornes as partners. The Raisin Valley Farms name was registered in 1999.

Mr. Horne determined to sell his Raisin Valley Farms raisins without the use of a packer or handler, because he felt that the packers and the RAC "were stealing [his] crop." AR 1676. Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system. Mr. Horne also exchanged several letters with the USDA in an effort to determine how he could market his raisins without becoming subject to the Marketing Order, as discussed in the relevant sections below. The focus of this action relates to the Hornes' activities during the 2002–2003 and 2003–2004 crop years,[4] when the Hornes implemented their plan to market raisins outside of the bounds of the Marketing Order.

Mr. Horne, a former alternate member of the RAC, became a vocal opponent of the Marketing Order. AR 954. Mr. Horne wrote multiple letters to the Secretary of Agriculture and to the RAC to complain about the Marketing Order. AR 6343–44; AR 2423. On April 23, 2002, the Hornes sent a letter to the Secretary of Agriculture and to the RAC asserting that they were registering as a handler "under protest" because:

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[4] The crop year for raisins begins on August 1 and ends on July 31 of the following year.

> we are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States. . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA. . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.

AR 2423. Thereafter, the USDA issued Plaintiffs handler number 94–101 in 2002.

In addition to growing raisins through Raisin Valley Farms, the Hornes entered into a partnership with Ms. Horne's parents, Don Durbahn ("Mr. Durbahn") and Rena Durbahn (collectively, "the Durbahns"), to create Lassen Vineyards. AR 1647–1850, 5550. Lassen Vineyards is a California general partnership between the Hornes and the Durbahns. Lassen Vineyards grows grapes and produces raisins. In addition to its grape growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package raisins in 2001.

The Lassen Vineyards raisin packing equipment and facilities were located on land owned by Lassen Vineyards. Mr. Durbahn oversaw the Lassen Vineyard raisin packing plant. Mr. Horne's son, Marvin Horne, Jr. ("Marvin") was the plant manager. The equipment at the plant operated by Lassen Vineyards cleaned, stemmed, sorted, and

packaged raisins throughout the 2002–2003 and 2003–2004 crop years. During this time, Lassen Vineyards packed Raisin Valley Farms and Lassen Vineyards raisins, and packed other farmer's raisins for a fee.

Raisins that were packed at Lassen Vineyards' plant were marketed and sold to wholesale customers by Raisin Valley Farms Marketing Association, an unincorporated association organized and operated by the Hornes ("Raisin Valley Marketing"), during crop years 2002–2003 and 2003–2004. AR 1652, 1996–97, 2117. Over 60 raisin growers joined Raisin Valley Marketing to gain volume selling power. Grower members of Raisin Valley Marketing sent their raisins to Lassen Vineyards' plant to be cleaned, stemmed, sorted, and packaged. According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers.

Lassen Vineyards charged a fee to Raisin Valley Marketing members, typically twelve cents per pound, to pack California raisins at the plant. Lassen Vineyards charged these growers an additional five dollars per pallet for raisins that were boxed and stacked. AR 1940–41, 1957. The packing fee covered the cost of the labor and packaging materials. AR 1942–44. The workers who operated the equipment were "leased" to Lassen Vineyards by Ms. Horne and Ms. Durbahn. AR 1710. The Lassen Vineyards

packing operation was supervised on a daily basis by Mr. Durbahn and Marvin, whose wages were paid by Lassen Vineyards. AR 1948–49.

Plaintiffs contend that during the 2002–2003 and 2003–2004 crop years: Lassen Vineyards was a "leasing company" that "rented" the equipment to other growers to clean, stem, and sort their own raisins and "leased" employees of the plant who operated the machinery; Mr. Durbahn did not process raisins as a handler, he oversaw the operation of a leased plant; Marvin managed the leased equipment; growers leasing the equipment from the Lassen Vineyards plant were assigned lot numbers to preserve the identity of their product; Lassen Vineyards never stored, purchased, controlled, acquired, or handled raisins; growers using the facilities engaged in the cleaning, stemming, sorting, grading, and packing function through leased employees and equipment; and lessees maintained right, title, ownership, and control of the raisins until they were sold to the consumer market. Plaintiffs maintain that they were exempt from the Marketing Order during the 2002–2003 and 2003–2004 crop years, because they were raisin growers, never acquired raisins, and were working within the Farmers to Consumers Direct Marketing Act.

In his testimony, Mr. Horne admitted that both Lassen Vineyards and Raisin Valley Farms acted as "packers" under the Marketing Order during the 2002–2003 and 2003–2004 crop years. AR 1761–62. Mr. Horne admitted that Raisin Valley Farms did not pay assessments, did not have incoming inspections performed, did not hold raisins in

reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years. AR 1743–45. When asked whether he held raisins in reserve, Mr. Horne replied, “No. They’re my raisins.” AR 1743. He admitted that his reports to the RAC disclosed “zero acquisitions.” AR 1744.

Mr. Horne admitted that for crop years 2002–2003 and 2003–2004, Lassen Vineyards operated a packing house on land with equipment owned jointly by the Hornes and the Durbahns. AR 1685. Mr. Horne further admitted that Lassen Vineyards did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years, because “they’re not acquired raisins.” AR 1747–51.

The USDA performed outgoing inspections on the raisins packed at Lassen Vineyards. AR 1745, 1747–48. During the hearing, the USDA introduced evidence that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. AR 740–51, 2186–2304, AR 2602–5512.

C. Administrator’s Proceedings against Plaintiffs

On April 1, 2004, AJ Yates, Administrator of the Agriculture of the Agriculture Marketing Service (“administrator”) filed a complaint before the Secretary of Agriculture against the Hornes, d.b.a. Raisin Valley Farms (collectively referred to as “Raisin Valley Farms”). AR 1–5. The administrator’s complaint alleged that Raisin Valley Farms was

"engaged in the business as 'handler' of California raisins" during the 2002–2003 and 2003–2004 crop years. AR 1. The administrator alleged that Raisin Valley Farms violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC, failing to hold inspections of incoming raisins, failing to hold raisins in reserve, failing to pay assessments, and failing to allow access to records. The administrator filed an amended complaint on October 25, 2004.

Raisin Valley Farms denied the allegations. In addition, Raisin Valley Farms filed an amended answer on January 21, 2005 asserting various affirmative defenses, including that the AMAA and the Marketing Order are unconstitutional; Raisin Valley Farms is not a handler and did not acquire physical possession of raisins within the meaning of the regulations; Raisin Valley Farms did not handle or acquire raisins of third-party producers that processed their raisins through equipment owned by Lassen Vineyards; and Raisin Valley Farms was not required to comply with the reporting, incoming inspection, and other requirements alleged in the amended complaint. AR 82–88.

A hearing on the administrator's action took place in front of the administrative law judge ("ALJ") between February 9–11, 2005. At the February 2005 hearing, Mr. Horne testified. After the hearing, and to conform the complaint to the evidence presented at the February 2005 hearing, the administrator moved to amend the complaint to include Raisin Valley Marketing and the Hornes and the Durbahns, doing business as Lassen Vineyards (collectively referred to as "Lassen Vineyards") as parties to the

administrative proceedings.[5] The ALJ granted the administrator's opposed motion to amend, and the second amended complaint was filed on August 10, 2005. Thereafter, a second hearing took place on May 23, 2006.

On November 1, 2006, the ALJ issued a decision and order finding that the Hornes and the Durbahns, "acting together as partners doing business as Lassen Vineyards" acted as first handlers of raisins and were subject to the Marketing Order. The ALJ found that Lassen Vineyards violated the AMAA and the Marketing Order, and ordered Lassen Vineyards (the Hornes and Mr. Durbahn), to pay the following, jointly and severally: (1) $731,500 in civil penalties; (2) $9,389.73 in assessments; and (3) $523,037 as the dollar equivalent of the raisins that Lassen Vineyards failed to hold in reserve.

Plaintiffs appealed the ALJ's decision to the JO on January 4, 2007. In its April 11, 2007 Decision and Order ("Initial Decision"), the JO found that Raisin Valley Farms *and* Lassen Vineyards committed the following violations of the Marketing Order:

1. Twenty violations of 7 C.F.R. 989.73 for filing inaccurate reporting forms to the RAC;

2. Fifty-eight violations of 7 C.F.R. § 989.58(d) for failure to obtain incoming inspections;

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[5] Ms. Durbahn died after the initial administrative action was filed but before Lassen Vineyards was added as a party to the administrative complaint. It is unclear from the record whether the Estate of Rena Durbahn was added as a party to the administrative proceedings, although the Estate of Rena Durbahn is a plaintiff in this action.

3. Two violations of 7 C.F.R. § 989.66 for failure to hold reserve raisins for crop year 2002–2003 and 2003–2004;

4. Two violations of 7 C.F.R. § 989.80 for failure to pay assessments to the RAC; and

5. One violation of 7 C.F.R. § 989.77 for failure to allow the Agricultural Marketing Service to have access to the records.

AR 665–706. The administrator sought reconsideration of the JO's Initial Decision, challenging the JO's calculations of the civil penalties and assessments. In its Order Granting Petition to Reconsider, issued September 18, 2008 ("Reconsideration Order"), the JO imposed the following penalties against Lassen Vineyards and Raisin Valley Farms, jointly and severally:

1. $202,600.00 as a civil penalty;

2. $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years; and

3. $483,843.53 for the alleged dollar equivalent of the California raisins Plaintiffs failed to hold in reserve for the 2002–2003 and 2003–2004 crop years.

AR 757–778.

D. Plaintiffs' Administrative Petition Against USDA

Plaintiffs filed an administrative petition on March 5, 2007 to challenge various Marketing Order regulations. Plaintiffs filed their administrative

petition pursuant to 7 U.S.C. § 608c(15)(A), a procedure created by the AMAA that expressly provides *handlers* an administrative procedure to challenge the Marketing Order. *See United Dairyman of Ariz. v. Veneman,* 279 F.3d 1160, 1164 (9th Cir. 2002). In moving to dismiss Plaintiffs' petition, the USDA argued, among other things, that since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers. The ALJ denied the USDA's motion to dismiss, reasoning that because the USDA investigated Plaintiffs, determined Plaintiffs were handlers, and initiated proceedings against Plaintiffs to establish they were handlers, Plaintiffs had jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The administrator appealed the ALJ's denial of its motion to dismiss. On February 4, 2008, the JO agreed with the administrator to rule that Plaintiffs lacked jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A).

On March 18, 2008, forty-three days after the JO's decision, Plaintiffs initiated an action in this Court to appeal the JO's decision. *Horne v. USDA,* CV–08–402 OWW SMS. The USDA moved to dismiss for lack of subject matter jurisdiction. On November 13, 2008, Judge Oliver W. Wanger granted the USDA's motion to dismiss, finding that Plaintiffs' appeal was untimely pursuant 7 U.S.C. § 608c(15)(B). Plaintiffs appealed Judge Wanger's decision to the Ninth Circuit Court of Appeals. That appeal remains pending.

E. Procedural History

On October 14, 2008, Plaintiffs[6] filed their complaint in this Court seeking declaration relief and review of the USDA's decision pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs moved for summary judgment on August 28, 2009. The USDA moved for summary judgment on October 6, 2009. Plaintiffs opposed the USDA's motion on November 3, 2009. The USDA opposed Plaintiffs' motion on November 19, 2009. As no party requested oral argument, this Court vacated the December 4, 2009 hearing by minute order on November 30, 2009.

III. STANDARD OF REVIEW

Plaintiffs challenge the JO's Initial Decision and Reconsideration Order pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). When reviewing an order under the APA, "[j]udicial review of an agency decision is narrow." *Balice v. USDA,* 203 F.3d 684, 689 (9th Cir. 2000). This Court may not weigh the evidence and

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[6] Plaintiffs are the Hornes, d.b.a. Raisin Valley Farms; the Hornes' unincorporated association Raisin Valley Marketing; and the Hornes, Mr. Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards. Although the JO's orders affect the Hornes, Mr. Durbahn, Lassen Vineyards, and Raisin Valley Farms, all plaintiffs collectively assert their arguments against the JO's orders. Accordingly, when referring to Plaintiffs' arguments, this Court's use of the term "Plaintiffs" refers to all of the named plaintiffs. When referring to "Plaintiffs" with regard to the JO's orders, the term "Plaintiffs" refers only to those plaintiffs affected by the JO's orders. To avoid confusion, this Court will use specific plaintiff names where practicable.

substitute its own findings for those of the agency. *Id.* According to the statute, this Court may set aside an agency decision only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency does not act in an arbitrary and capricious manner when it presents a "rational connection between the facts found and the conclusions made." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs,* 384 F.3d 1163, 1170 (9th Cir. 2004).

In an action for judicial review of an administrative decision, the burdens of persuasion and proof rest with the party challenging the ALJ's or JO's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1399 (9th Cir. 1994), *superceded on other grounds by statute, as recognized in M.L. v. Federal Way Sch. Distr.,* 341 F.3d 1052 n. 7 (9th Cir. 2003); *see also, Sorenson Communications, Inc. v. F.C.C.,* 567 F.3d 1215 (10th Cir. 2009) (in APA challenge of agency decision, burden is on petitioner to establish the action is arbitrary and capricious); *Transportation Workers Union of America, AFL–CIO v. Transportation Sec. Admin.,* 492 F.3d 471 (D.C. Cir. 2007) (on petition for review of order of administrative agency, petitioner bears the burden of production on appeal and must support each element of its claim to challenge order by affidavit or other evidence); *Save Our Heritage, Inc. v. F.A.A.,* 269 F.3d 49 (1st Cir. 2001) (those who assail an agency's findings or reasoning have the burden to identify the defects in evidence and the faults in reasoning.).

The APA authorizes this Court to set aside factual findings only if they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *Armstrong v. Comm'r*

of Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998); *Balice,* 203 F.3d at 689. Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood,* 487 U.S. 552, 565 (1988) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a scintilla but less than a preponderance." *Tidwell v. Apfel,* 161 F.3d 599, 601 (9th Cir. 1999). If the record supports more than one rational interpretation of the evidence, the Court will defer to the administrative officer's decision. *Bayliss v. Barnhart,* 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). Thus, in its review of a JO decision, the Court will not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378 (1989).

IV. DISCUSSION

A. Whether Plaintiffs are "handlers" who "acquired" raisins and are therefore subject to the Raisin Order

The JO found that Lassen Vineyards and Raisin Valley Farms were handlers who acquired raisins and, therefore, were subject to the Marketing Order during the 2002–2003 and 2003–2004 crop years. The JO further found that Lassen Vineyards and Raisin Valley Farms violated numerous provisions of the AMAA and Marketing Order. The parties do not dispute that a handler that acquires raisins is required to obtain incoming inspections, hold the designated amount in reserve, file reports with the RAC, allow access to records to verify the accuracy of

the reports, and pay assessments to the RAC. 7 C.F.R. §§ 989.58(d); 989.66; 989.166; 989.73; 989.77; and 989.90.

In this challenge to the JO's decision, Plaintiffs advance multiple theories that they were either not subject to the Marketing Order or qualified for an exemption. First, Plaintiffs claim that they were not subject to the Marketing Order because they were not handlers. Second, Plaintiffs contend that they were not subject to the Marketing Order because they did not acquire raisins. Third, Plaintiffs assert that prior USDA opinion letters to Plaintiffs support Plaintiffs' position that they would not be subject to the Marketing Order for their activities. Fourth, Plaintiffs argue that there is no evidence that any plaintiff was a handler. Fifth, Plaintiffs assert that the Marketing Order does not apply to lessors of packing equipment. Sixth, Plaintiffs argue that as raisin growers they were exempt from the Marketing Order. Seventh, Plaintiffs argue that the Farmer to Consumer Direct Marketing Act creates an applicable exemption to the Marketing Order. The Court considers, and ultimately rejects, each of Plaintiffs' arguments below.

1. Plaintiffs were "handlers"

Plaintiffs contend that the JO erred to conclude that they were handlers, because the substantial evidence demonstrates that they are raisin growers, not raisin handlers. A "handler" is:

> (a) any processor or packer; (b) any person who places, ships, or continues natural conditioned raisins in the current of commerce from within the

> area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. According to this definition, an entity is a handler if it is a packer. A "packer" is:

> any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided, That:* (a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

7 C.F.R. § 989.14 (emphasis in original). Thus, if Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant to the Marketing Order. Plaintiffs may also be handlers if they "place natural conditioned raisins in the current of commerce." 7 C.F.R. 989. § 15.

The evidence establishes that Lassen Vineyards stemmed, sorted, cleaned and packaged raisins. Thus, pursuant to 7 C.F.R. § 989.14, Lassen Vineyards was a handler of raisins. Substantial

evidence further establishes that Raisin Valley Farms contributed to the packing of raisins at the Lassen Vineyards plant, as discussed more fully below. Moreover, substantial evidence shows that Raisin Valley Farms placed raisins in the stream of interstate commerce. Accordingly, Raisin Valley Farms was a handler.

Plaintiffs argue, however, that as raisin producers, both Lassen Vineyards and Raisin Valley Farms are exempt from the definition of packer. Plaintiffs correctly point out that according to the definition, "[n]o producer with respect to the raisins produced by him . . . shall be deemed a packer if he or it sorts or cleans . . . such raisins in their unstemmed form." 7 C.F.R. § 989.14. Plaintiffs fail to demonstrate, however, that Lassen Vineyards or Raisin Valley Farms sorted or cleaned their raisins in an *unstemmed* form. The substantial evidence introduced by the USDA at the administrative hearing supports the JO's conclusion that Lassen Vineyards stemmed the raisins in addition to the other packing activities. In addition, Plaintiffs concede that the definition of handler within the Marketing Order "captured within its scope any producer who seeds, grades, packages, or stems raisins or places raisins into interstate commerce." Pl. Mem., 15 (referencing 7 C.F.R. §§ 989.14, 989.15). Accordingly, this exemption is inapplicable to Plaintiffs. Because the substantial evidence demonstrates that Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant, and subject, to the Marketing Order.

2. Plaintiffs "acquired" raisins

Plaintiffs contend that there is no evidence that they "acquired" raisins. Plaintiffs argue that the USDA "failed to produce any evidence of a single seller, or buyer, or evidence of consideration or of title transfer. It failed to prove a sale of goods as is required for a simple, ordinary case governed by the Uniform Commercial Code, and it offered no proof of any acquisition." Plaintiffs construe the term "acquire" to require a purchase and sale of goods as demonstrated by the transfer of title.

This Court agrees with the JO that Plaintiffs "arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term." AR 773. The Marketing Order defines "acquire" in the following way:

> "Acquire" means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station, operated by him: provided that a handler shall not be deemed to acquire raisins (including raisins produced or dehydrated by him) while: (a) he stores them for another person or as a handler-produced tonnage in compliance with the provisions of 989.58 & 989.70; (b) he reconditions them, or; (c) he has them in his possession for the purpose of inspection, and provided further, that the term shall apply only to the handler who first

acquires the raisins.

7 C.F.R. § 989.17. This definition is not ambiguous. Plaintiffs "acquire" raisins if they "obtain physical possession of raisins . . . at [the] packing or processing plant . . . operated by [them]." The definition cannot be interpreted reasonably to required a sale of goods under the UCC, as Plaintiffs argue. The plain and unambiguous definition of "acquire" requires "physical possession" at a packing facility; it does not require the transfer of legal title.

Reasonable inferences made from substantial evidence support the JO's conclusion that Plaintiffs acquired raisins. The JO noted: "The record does not contain direct evidence that Mr. Horne and partners 'received' raisins but there is ample evidence that they 'packed-out' raisins (CX 82–CX 87). Logic allows me to conclude that raisins cannot be 'packed-out' unless they are received." AR 677, n.4. Under the same sound logic, this Court finds that substantial evidence supports the JO's finding that Plaintiffs acquired raisins during the 2002–2003 and 2003–2004 crop years. The uncontroverted evidence demonstrates that Plaintiffs stemmed, sorted, cleaned and packaged raisins at Lassen Vineyard's plant. During the hearing, the USDA introduced evidence that Plaintiffs, in their operation of Lassen Vineyards and using Raisin Valley Farms' handler number stamp, "packed out" more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. This evidence supports the logical conclusion that Plaintiffs has physical possession of, and thus acquired, those raisins that they handled and packed out at Lassen Vineyards.

3. USDA Opinion Letters were Consistent with the JO's Decision

Plaintiffs contend that an April 23, 2001 letter from Robert Keeney of USDA–AMS Fruit and Vegetable Programs ("Keeney Letter") "should be dispositive of this case." The Keeney Letter reads:

> In your letter, you indicated that Raisin Valley Farms has entered into an agreement with Del Rey Packing Company (Del Rey) whereby Del Rey will "custom pack" all of Raisin Valley's organic raisin crop. Del Rey will perform "packer" functions on Raisin Valley Farms' raisins such as stemming, sorting, and seeding. Del Rey will also ensure that the raisins are inspected but will not take title to the raisins . . .
>
> [I]n this situation you described, you are correct that Raisin Valley Farms would be neither a packer nor a handler under the order.

AR 6316–17. Plaintiffs interpret this letter to opine that Raisin Valley Farms would not be a handler in the situation where Raisin Valley Farms uses a custom packer to pack its raisins, and would not be a handler under facts of this action. Plaintiffs argue that the USDA "cannot have it both ways, and be situational about when it will, and will not, treat one of the Respondents as a 'handler' or 'packer.'"

The USDA points out that Plaintiffs "omit any mention of the critical part of the [Keeney] letter and

misconstrue entirely its importance in this case." The Keeney Letter was a response to a March 15, 2001 letter that Plaintiffs wrote to the USDA in which Plaintiffs advised the USDA that "Raisin Valley Farms has entered into an arrangement whereby Del Rey Packing will 'custom pack' in 50 pound boxes the certified 100% organic raisin crop produced by Raisin Valley Farms." AR 6316–17. Plaintiffs further informed the USDA in their letter that:

> Raisin Valley Farms will not stem, sort, seed, or grade its organic raisin crop. That will be accomplished pursuant to the "custom packing" arrangement entered into between Raisin Valley Farms and Del Ray Packing. . . . Del Rey Packing will not take title, will not place any of Raisin Valley Farms' raisins in its inventory, and will not sell any portion of Raisin Valley Farms' organic raisin crop. It will merely "custom pack" on behalf of Raisin Valley Farms. As such, Raisin Valley Farms does not fall within the definition of a "packer" under ... the Raisin Marketing Order.

Id. Plaintiffs asked the USDA to "advise if your interpretation of . . . the . . . Marketing Order is inconsistent with the intent of the marketing program as interpreted by Raisin Valley Farms." *Id.* The Keeney Letter was written in response to Plaintiffs' March 2001 letter to address the hypothetical situation therein described. And while the Keeney Letter opines that Raisin Valley Farms would not be handler or packer under that

hypothetical situation, Plaintiffs omit the following key passage:

> Rather, Del Rey would be a packer and handler. Del Rey would acquire Raisin Valley Farms' raisins, and would further be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

AR 6316–17.

From this letter exchange, three points emerge. First, the USDA made clear that it would consider a custom or toll packer to be a handler that would be required to fulfill the Marketing Order obligations. The evidence supports, and Plaintiffs do not deny, that Lassen Vineyards performed "packer" functions on Raisin Valley Farms' raisins, such as stemming, sorting, and seeding. Thus, the USDA's opinion in the Keeney Letter is consistent with the JO's opinion; to wit, an entity that custom packs raisins is a handler and has a duty to meet the obligations under the Marketing Order.

Second, the Keeney Letter informed Plaintiffs that transfer of title was irrelevant to whether the custom packer was considered to be a handler under the Marketing Order. In their letter, Plaintiffs proposed that Del Rey will not place any of Raisin Valley Farms' raisins in its inventory, will not sell any portion of Raisin Valley Farms' organic raisin crop, and will not take title. Plaintiffs proposed that Del Rey would merely "custom pack" on behalf of Raisin Valley Farms. Under this scenario, the Keeney

Letter concluded that Del Rey would be a packer and handler subject to the provisions of the Marketing Order. Thus, Plaintiffs were on notice since 2001 that a packer acquires raisins even if there is no transfer of title.[7]

Third, Plaintiff's reliance on this hypothetical scenario is inapposite, because it describes a situation that is incongruent with the evidence. Plaintiffs hypothesized a situation in which they would perform none of the handler or packer functions. Instead, Raisin Valley Farms would pay an unrelated third-party (Del Rey) to stem, sort, seed and grade the raisins. Under this scenario, the raisin producer would not be a handler. As set forth above, however, Raisin Valley Farms and Lassen Vineyards collectively packed raisins during the 2002–2003 and 2003–2004 crop years, and charged others for that packing service. To the extent that Raisin Valley Farms and Lassen Vineyards produced raisins, they were not subject to the Marketing Order. But, to the extent that Raisin Valley Farms and Lassen Vineyards custom packed raisins for themselves and others, they were subject to the Marketing Order as handlers. The latter activities are the subject of this

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[7] Although the term "acquire" is unambiguous, this Court would defer to the USDA's interpretation of the meaning of the term if it were. *Barnhart v. Walton,* 535 U.S. 212, 218 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (To the extent that a regulation is ambiguous, the agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."). Here, the USDA consistently interpreted the meaning of the term "acquire" to include the scenario proposed, and ultimately pursued, by Plaintiffs.

action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however, the disposition of Plaintiffs' claims based on an accurate reading of this letter exchange and the evidence favors the USDA.

4. Evidence Supports Liability of both Lassen Vineyards and Raisin Valley Farms

In opposition to the USDA's summary judgment motion, Plaintiffs assert that the "USDA failed . . . to assert substantial specific facts as to each 'Respondent' (Plaintiffs herein) that would justify that that specific person or a specific entity was a 'handler' and a handler who 'acquired' raisins and thus subject to the substantial (in this case massive) penalties under the AMAA." The Court notes that the JO used the terms Raisin Valley Farms, Lassen Vineyards, Mr. Horne, and "Mr. Horne and partners" interchangeably in its Initial Decision. At different points of the opinion, the JO found that Raisin Valley, Lassen Vineyards, and "respondents" individually engaged in the handling of raisins and violated the Marketing Order. Ultimately, the JO imposed sanctions against both Raisin Valley Farms and Lassen Vineyards. In the Reconsideration Order, the JO refers to the respondents through the term "Mr. Horne and partners" only. AR 757–778. The JO's findings and orders depart from the ALJ's order that imposed sanctions against Lassen Vineyards only. Plaintiffs contend that there was no evidence presented that any entity handled, packed or acquired raisins.

While this Court finds that the evidence supports the ALJ's conclusion that Lassen Vineyards was the

handler of raisins and violated the Marketing Order, this Court will not disturb the JO's orders. For the following reasons, this Court finds that there is "such relevant evidence as a reasonable mind might accept as adequate to support" the JO's conclusion. *Pierce,* 487 U.S. at 565. Because the record supports more than one rational interpretation of the evidence, the Court will defer to the JO's decision, *Bayliss,* 427 F.3d at 1214 n.1, and will not substitute its judgment for the JO's opinion. *Marsh,* 490 U.S. at 378.

First, this Court agrees with the JO to find "Mr. Horne's business structure confusing at best." AR 685. As the JO explained:

> There appear [sic] to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards.

AR 685. The following findings of fact represent the interplay between the three entities:

> When Raisin Valley Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Marketing Association members

> inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged. The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Marketing Association has a "bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers.

AR 674–75. Moreover, the JO found that the confusion of the parties was caused, in significant part, by Mr. Horne's untimely and incomplete production of records. AR 684–85. The JO found that evidence established that the Plaintiffs "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. Based on Mr. Horne's testimony, in which he interchanged the entities, intermingling of funds, absence of separate bank accounts, and intermingling of duties between the entities, this Court finds that substantial evidence supports the JO's decision against both Raisin Valley

Farms and Lassen Vineyards.

Second, substantial evidence supports the JO's finding that Raisin Valley Farms took direct part in the handling and packing of raisins. The Hornes, under the name of Raisin Valley Farms, filed RAC–5 forms during the 2001–2002, 2002–2003, and 2003–2004 crop years, "notifying the RAC of their intention to handle raisins as a packer under the Raisin Order." AR 670. "All of the raisins packed by Lassen Vineyards in crop years 2002–2003 and 2003–2004 were packaged in boxes stamped with the handler number 94–101. That number had been assigned to Marvin D. Horne and Laura R. Horne" doing business as Raisin Valley Farms. AR 671. Because all of the raisins packed out of Lassen Vineyards were stamped with Raisin Valley Farms' handler number, it was not unreasonable to conclude that Raisin Valley Farms handled and acquired raisins.

5. Plaintiffs' were subject to the Marketing Order notwithstanding their "Lease" Arrangement

Plaintiffs contend that the Marketing Order regulates "[o]nly genuine handlers," and "does not reach equipment lessors." Plaintiffs describe the evidence as follows:

> Yes, there was evidence that Lassen Vineyards leased employees for the purpose of packing raisins and that it also leased equipment to farmers, including the Hornes and Durbahn [sic] so they can pack their own raisins but the Durbahns and Hornes were simply

> producers, not handlers, and Lassen Vineyards, acting as a lessor of labor and equipment and without putting raisins in the stream of interstate commerce or selling said raisins do not make them handlers, not packers, nor processors, nor is evidence of "acquiring" raisins.

Pl. Reply, 4:5–10. The Court finds that the JO correctly rejected Plaintiffs' arguments.

In his testimony, Mr. Horne testified that for a fee, his "family" packing operation "furnished equipment and employees to run the equipment." AR 1669. Lassen Vineyards owned the land, structures, and equipment of the packing plant. AR 1938–40. Lassen Vineyards did not have a separate bank account from the Hornes, Raisin Valley Marketing, or Raisin Valley Farms. AR 2034.

Substantial evidence adduced at the hearings demonstrate that Plaintiffs performed the functions of a handler. According to Mr. Horne's testimony, raisin producers paid Lassen Vineyards through Raisin Valley Marketing and Raisin Valley Farms to send their raisins "through the line; the cap stems are removed; the raisins are washed; they're vacuumed; substandard is removed; sticks, stems, rocks, and any . . . foreign material." AR 1668. The raisins at Lassen Vineyards then go:

> through an observation line where employees remove something that may not have been vacuumed out or a berry or raisin that may have mold on it. And from there, it goes into a scale where it's

> weighed and put into a box with liner—a food grade plastic liner. And the box is then put through taping machine, where it is sealed. And then it goes through another metal detector with a marking device that puts on the side of the box the date, the time packed, the packer number assigned to me, and the lot number of the grower or the customer.

AR 1669–70. Mr. Horne testified that his operation charged raisin producers a fee for the "use of the facility, the labor, the fiber, the plastic [used to package the raisins]." AR 1943. While Mr. Horne may characterize this arrangement as a lease, the evidence demonstrates that Plaintiffs were paid a fee to handle raisins that they had physical possession of in their packing plant, thus subjecting them to the Marketing Order.

Mr. Horne's testimony also revealed that the employees who operated Lassen Vineyards' equipment were employees of Plaintiffs, despite Mr. Horne's efforts to obscure this fact by creating another "leasing" agreement. It is undisputed that Mr. Durbahn supervised and Marvin managed the Lassen Vineyards plant. Plaintiffs assert that the raisin producers packed their own raisins or leased employees who were not associated with the partnership. However, there is no evidence that anyone other than employees of Lassen Vineyards worked at the plant. Moreover, the "leasing employer[s]" of the employees were Ms. Horne and Ms. Durbahn, and most of the employees worked on Lassen Vineyards land.

Legally and factually, Plaintiffs were handlers subject to the Marketing Order despite the "leasing" agreements. No language in the AMAA or Marketing Order provides an exemption for an entity that performs the functions of a handler under a leasing agreement. Plaintiffs fail to support their argument that lessors of labor and equipment are exempt from the Marketing Order. The substantial evidence establishes that Plaintiffs were handlers, notwithstanding the various entities and lease agreement arrangements. The evidence supports the JO's conclusion that Plaintiffs were playing "a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. The evidence further supports the JO's conclusion that "Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone else in the raisin industry who complied with the Raisin Order." AR 694.

6. Raisin producers are exempt from the Marketing Order in their capacity as producers, not in their capacity as handlers

Plaintiffs contend that as producers, they are exempt from the Marketing Order. As set forth above, the AMAA and the Marketing Order impose obligations on handlers, not producers. The AMAA specifically excludes producers from regulation pursuant to the Marketing Order. 7 U.S.C. § 608c(13)(B). More specifically, the AMAA provides that a marketing order does not apply to "any producer *in his capacity as producer.*" 7 U.S.C. § 608c(13)(B) (emphasis added).

The exemption of 7 U.S.C. § 608c(13)(B) applies to Raisin Valley Farms and Lassen Vineyards in their capacities as raisin producers, but does not provide an exemption from the Marketing Order in their capacities as handlers. "The language 'in his capacity as * * * ' limits the exemption [.]" *Acme Breweries v. Brannan,* 109 F. Supp. 116, 188 (N.D. Cal. 1952) (holding that hops producer was exempt from regulation as a producer under § 8c(13)(B) of the Act, but that it could be regulated as a handler since it did something to the hops other than grow them). Based on the express and explicit limiting clause, Plaintiffs are only exempt from the Marketing Order in their capacity as producers of raisins. *See Ideal Farms, Inc. v. Benson,* 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied,* 372 U.S. 965 (1963) ("Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a producer is exempt from regulation only in his capacity as a producer.") (citing 7 U.S.C. § 608c(13)(B)); *see also, United States v. United Dairy Farms Co-op. Ass'n,* 611 F.2d 488, 491 n. 7 (3rd Cir. 1979) ("producers who also function as handlers ... are subject to regulation under the milk marketing order); *Freeman v. Vance,* 319 F.2d 841, 842 (5th Cir. 1963) (same). As the administrator's action against Plaintiffs focuses on Plaintiffs' activities as handlers, the 7 U.S.C. § 608c(13)(B) exemption is inapplicable. *See Lion,* 416 F.3d at 1360 ("Although producers are not directly bound by the statute, 7 U.S.C. § 608c(13)(B), under the specific terms of the Raisin Marketing Order, all persons seeking to market California raisins out-of-state are deemed handlers and must comply with the Order.")

In opposition, Plaintiffs repeat the assertion that "noone at USDA advised the Plaintiffs that [their proposed activities] would violate the Marketing Order." To the contrary, the USDA advised Plaintiffs on *multiple* occasions that a raisin producer who performs handling functions upon his or her own crop is subject to the Marketing Order. Additionally, the administrator and the RAC advised Plaintiffs that their proposed activities would fall within the Marketing Order regulations. Accordingly, Plaintiffs' assertion is insincere at best.

In addition to the Keeney Letter above, the USDA sent Plaintiffs advisory letters to interpret the Marketing Order regulations as they relate to Plaintiffs' proposed activities. In a January 18, 2002 letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California Field Office of the AMS informed Mr. Horne that his proposed activities would make him a handler under the Marketing Order:

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal Marketing Order for California raisins. . . . As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspections), assessments, and reporting to the Raisin Administrative Committee.

AR 6329. On May 20, 2002, the administrator (AJ Yates) responded to an inquiry from the Hornes with

the following message:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations. . . . Those who pack raisins are handlers under the order.

AR 6330–31. A year later, the administrator reiterated this point in response to another letter from the Hornes. The administrator wrote: "You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate. Handlers who produce and handle raisin production are subject to marketing order requirements, including reserve requirements." AR 6373–74.

The RAC also advised Mr. Horne that he is not exempt from the Marketing Order as a producer if he handles raisins. On January 21, 2002, the RAC's Director of Compliance advised Mr. Horne in a letter that a handler is not exempt from the Marketing Order even if he or she is a producer. AR 2444–45. Notably, the Director of Compliance explained: "More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," and that those handler-producers comply with the Marketing Order's requirements. *Id.*

7. Farmer to Consumer Direct Marketing Act is inapplicable

Plaintiffs contend that they were exempt from the Marketing Order because their activities were in compliance with the Farmer to Consumer Direct Marketing Act, 7 U.S.C. § 3001 et seq. ("Farmer to Consumer Act"), passed by Congress forty years after the AMAA. Plaintiffs assert that the Farmer to Consumer Act is a "national policy that encouraged producers' circumvention of packers and middlemen." The Farmer to Consumer Act's statement of purpose declares:

> It is the purpose of this chapter to promote, through appropriate means, and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers. To accomplish this objective, the Secretary of Agriculture (hereinafter referred to as the "Secretary") shall initiate and coordinate a program designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.

7 U.S.C. § 3001. Plaintiffs argue that the JO erred to impose assessments and penalties of nearly $700,000 "for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed the Secretary to implement in 1976 through 7 U.S.C. § 3001."

The USDA contends that the JO correctly rejected Plaintiffs' argument that the Farmer to Consumer Act creates an exemption to the Marketing Order. The USDA argues that Plaintiffs may not rely on the Farmer to Consumer Act for two reasons. First, the USDA maintains that nothing in the language of the Farmer to Consumer Act creates an exemption to the Marketing Order. Second, the USDA asserts that Plaintiffs offered no evidence that their activities were within the meaning of the Farmer to Consumer Act. As discussed below, both of the USDA's arguments are meritorious.

Both the ALJ and the JO found Plaintiffs' argument related to the Farmer to Consumer Act "patently specious." AR 772. This Court agrees. The ALJ and JO concluded that the Farmer to Consumer Act does not exempt raisin producers from the requirements of the Marketing Order. In this appeal, Plaintiffs have failed to articulate why this conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The USDA points out that nothing in the language of the Farmer to Consumer Act creates an exception to the Marketing Order. Plaintiffs repeat their position that they are exempt from the Marketing Order pursuant to the Farmer to Consumer Act, but cite no authority to support their position. Without authority or argument to support their position, Plaintiffs fail to carry their burden to identify the fault in the JO's reasoning and conclusion. *See, Save Our Heritage, Inc.,* 269 F.3d 49. Accordingly, the JO's decision that the Farmer to Consumer Act does not exempt Plaintiffs from the requirements of the Marketing Order is not clearly erroneous.

Moreover, even if the Farmer to Consumer Act did create an exemption to the Marketing Order for raisin producers, Plaintiffs failed to establish that their activities fell within the Farmer to Consumer Act or its goals. The Farmer to Consumer Act defines "direct marketing" from farms to consumers as:

> the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers.

7 U.S.C. § 3002. Pursuant to this statutory definition, Plaintiffs would need to sell their raisins "directly to individual consumers" in marketplaces such as "roadside stands, city markets," farmer's markets, and the like to fall within the Farmer to Consumer Act. *Id.* Plaintiffs introduced no evidence to support their repeated claim that the raisins packed at Lassen Vineyards were sold directly to

consumers. To the contrary, the evidence submitted led the JO's reasonable conclusion that: "Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer–to–Consumer Direct Marketing Act." AR 772. As the USDA points out, the evidence introduced during the administrative hearing established that Plaintiffs' raisins were packaged in large cases (AR 1740–41) and sold in large quantities—often tens of thousands of pounds—to commercial food companies. E.g., AR 2458 (invoice from Raisin Valley Farms to New York candy company for 1,160 twenty-five-pound cases of raisins); AR 2724 (invoice to Canadian food company for 1,190 thirty-pound cases of raisins); AR 2732 (invoice to Pennsylvania nut products company for 1,400 thirty-pound cases of raisins); AR 2863 (invoice to baking company for 700 thirty-pound cases of raisins). Plaintiffs offer no evidence to refute these invoices and offer no evidence that Plaintiffs sold raisins directly to consumers. Accordingly, the substantial evidence of the administrative record supports the JO's conclusion that the Farmer to Consumer Act was inapplicable to Plaintiffs and their activities during the 2002–2003 and 2003–2004 crop years.

B. Whether the penalties imposed violate the Excessive Fines Clause of the Eighth Amendment

Plaintiffs contend that the assessments and penalties imposed by the JO violate the Excessive

Fines Clause of the Eighth Amendment to the United States Constitution. Plaintiffs argue that the imposition of "almost $700,000—for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed," is an excessive fine because: (1) the USDA cannot demonstrate "harm" from Plaintiffs' activities; (2) Plaintiffs' actions were in compliance with the Farmer to Consumer Act; and (3) Plaintiffs "used every available means to determine in advance whether or not what they anticipated and proposed doing was an alleged violation of the Marketing Order."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. The word "fine" within this amendment has been interpreted to mean "a payment to a sovereign as punishment for some offense." *United States v. Bajakajian,* 524 U.S. 321, 328 (1998) (quoting *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265 (1989)). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States,* 509 U.S. 602, 609–610 (1993) (emphasis deleted); *see also, Enquist v. Oregon Dep't of Agric.,* 478 F.3d 985, 1007 (9th Cir. 2007) (Excessive Fines Clause applies to a government action that constitutes a punishment for an offense). Pursuant to *Bajakajian, supra,* a fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." 524 U.S. at 334–35. "Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so,

whether the fine is 'excessive.'" *Enquist,* 478 F.3d at 1006 (citing *Bajakajian,* 524 U.S. at 334).

The JO imposed three distinct remedies against Plaintiffs: (1) an order to pay the RAC $483,843.53 pursuant to 7 C.F.R. § 989.166(c); (2) an order to pay the RAC $8,783.39 in assessments pursuant to 7 C.F.R. § 989.80(a); and (3) civil penalties in total of $202,600 pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs' Eighth Amendment arguments are the same for each of the three penalties and assessments, and Plaintiffs assert that the entire sum is unconstitutional. Nevertheless, this Court considers Plaintiffs' challenge as it applies to each remedy under each regulation to determine whether the Excessive Fines Clause applies and, if so, whether the fine was excessive.

When reviewing the JO's choice of sanctions, this Court is limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." *Balice,* 203 F.3d at 689 (citing *Farley & Calfee, Inc. v. U.S. Dep't of Agric.,* 941 F.2d 964, 967 (9th Cir. 1991)). This Court will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.,* 754 F.2d 804, 810 (9th Cir. 1984) (citing *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185–88 (1973)).

1. Reserve requirement compensation

The JO ordered Plaintiffs to pay $483,843.53 to the RAC, pursuant to 7 C.F.R. § 989.166(c), which reads:

> **Remedy in the event of failure to deliver reserve tonnage raisins.** A

> handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]"

Id. Pursuant to this regulation, the JO multiplied the quantity of the reserve raisins Plaintiffs failed to deliver for crop years 2002–2003 and 2003–2004 by the applicable average prices per ton to arrive at the total penalty. Plaintiffs do not challenge the JO's calculation of the fine. Rather, Plaintiffs argue that the penalty violates the Excessive Fines Clause because the USDA failed to demonstrate a harm in the amount of $483,843.53.

The USDA argues successfully that the Excessive Fines Clause is inapplicable to the penalty imposed based on 7 C.F.R. § 989.166(c), because the regulation is compensatory, not punitive. The plain language of the statute makes clear that this provision requires a handler who fails to deliver reserve raisins to *"compensate* the Committee *for the amount of the loss* resulting from his failure to deliver." 7 C.F.R. § 989.166(c) (emphasis added). Compensating the government for a loss serves a

remedial purpose, but is not punitive. *Bajakajian,* 524 U.S. at 328 (citing Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity")). By its terms, the penalty pursuant to 7 C.F.R. § 989.166(c) compensates the RAC for lost revenues and recovers the value that Plaintiffs failed to deliver into the reserve pool. Thus, the penalty imposed, which allows the USDA to recover from Plaintiffs the dollar equivalent of the California raisins that Plaintiffs failed to hold in reserve for crop years 2002–2003 and 2003–2004, is remedial rather than punitive. *See, One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237 (1972) (monetary penalty provides "a reasonable form of liquidated damages" to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Because 7 C.F.R. § 989.166(c) is a remedial provision, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.[8]

2. Assessment payment

The JO ordered Plaintiffs to pay $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years, pursuant to 7 C.F.R. § 989.80(a), which reads:

> Each handler shall, with respect to free tonnage acquired by him . . . pay to the [RAC], upon demand, his pro rata share

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[8] Even if the Excessive Fines Clause applies to the challenged regulation, the fine imposed by the JO does not violate the Eighth Amendment because the fine is not "excessive," as explained more fully *infra.*

> of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

The JO multiplied the established assessment rate of $8 per ton by the established free tonnages to determine the total assessments due for the 2002–2003 and 2003–2004 crop years. Plaintiffs do not challenge the JO's calculation of the assessments.

Similar to the challenge above, Plaintiffs argue that the JO's order to pay $8,783.39 was an excessive fine because the USDA failed to demonstrate harm. Plaintiffs argue that they were not handlers, were not subject to the Marketing Order, and the JO's order is a "post hoc vendetta against Plaintiffs" by the USDA to punish Plaintiffs for activities that comply with the Farmer to Consumer Act.

The USDA contends that the remedy under 7 C.F.R. § 989.80(a), like 7 C.F.R. § 989.166(c) discussed above, is compensatory. The USDA argues that the JO's order to pay $8,783.39 in assessments was designed to compensate the RAC for Plaintiffs failure to pay the assessments, as required by the Marketing Order. The USDA concludes that 7 C.F.R. § 989.80(a) is not subject to the Excessive Fines Clause.

The provision that requires handlers to pay assessment to the RAC, 7 C.F.R. § 989.80(a), is not punitive in nature; the assessments are levied to fund the RAC and its operations. *See Evans v. United States,* 74 Fed. Cl. 554, 557 (2006), *aff'd by Evans v. United States,* 250 Fed. Appx. 321 (Fed. Cir. 2007). As set forth above, the RAC receives no federal appropriations. The RAC is funded by the assessments levied on handlers pursuant to 7 C.F.R. § 989.80(a) and from the proceeds of sales of the reserve raisins withheld from the open market. *Evans,* 74 Fed. Cl. at 557 (citing 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82). Under this regulation, the Marketing Order requires all raisin handlers to pay assessments to the RAC to fund the RAC and its operations. The obligation to pay is automatic and is triggered by a handler's acquisition or receipt of raisins; it requires no culpability. *C.f., Bajakajian,* 524 U.S. at 328 (forfeiture of currency is punishment because it is a an "additional sanction . . . imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony"). Thus, assessments are not imposed on handlers as a punishment for an action. Because 7 C.F.R. § 989.80(a) a funding regulation that is not punitive in nature, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.

3. Civil Penalties

In addition to the compensatory assessments and penalties above, the JO imposed civil penalties totaling $202,600 against Plaintiffs pursuant to 7 U.S.C. § 608c(14)(B), which reads:

> Any handler subject to an order issued under this section . . . who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principle place of business. The validity of such order may not reviewed in an action to collect such civil penalty.

Neither party disputes that this provision is punitive in nature, designed to punish a handler who violates any provision of the Marketing Order. Thus, the civil penalty is a "fine" within the meaning of the Excessive Fines Clause.

Because the JO imposed a "fine" pursuant 7 U.S.C. § 608c(14) (B), this Court must determine whether the fine imposed was excessive. A fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Bajakajian,* 524 U.S. at 334–35. "Whether a penalty is grossly disproportionate calls for the application of a constitutional standard to the facts

of a particular case, and in that context, de novo review is appropriate." *Balice,* 203 F.3d at 698.

The JO found that Plaintiffs committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of 989.80 of the Raisin Order (7 C.F.R. § 989 .80) by failing to pay assessments to the RAC in crop year 2002–2003 and crop year 2003 and 2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) for failing to allow access to Plaintiffs' records.

To deter Plaintiffs from continuing to violate the Marketing Order, and to deter others from similar future violations, the JO concluded that the following civil penalties for these violations were "appropriate" and "sufficient": (1) $300 per violation for filing inaccurate reporting forms; (2) $300 per violation for the failure to obtain incoming inspections; (3) $300

per violation for failing to pay the assessments; (4) $300 per violation for failure to hold raisins in reserve; and (5) $1000 for the failure to allow access to records.

When determining whether fines are excessive, the Court first considers that "judgements about appropriate punishment for an offense belong in the first instance to the legislature." *Balice,* 203 F.3d at 699 (quoting *Bajakajian,* 524 U.S. at 336) (citing *Solem v. Helm,* 463 U.S. 277, 290 (1983)). The USDA points out that the civil penalties imposed by the JO fall well below the level authorized by Congress. As set forth above, Congress authorized civil penalties up to $1,000 for each violation. In addition, Congress mandated that "[e]ach day during which such violation continues shall be deemed a separate violation." 7 U.S.C. § 608c(14)(B). The JO found 673 separate violations, spanning over a two year period of time. Thus, the JO was authorized by statute to impose a civil penalty of no less than $673,000. The potential civil penalty calculation would be substantially larger if the JO imposed the maximum penalty of $1,100, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, and/or considered that each violation occurred over multiple days.[9] Considering the fine in total, $202,600 is not an excessive fine to punish 673 separate violations of the Marketing Order, when the JO could have imposed a fine of $673,000 or more. The JO imposed

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[9] As the JO noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, adjusted the civil monetary penalty that may be assessed under the AMAA. For each violation of a marketing order, the maximum civil penalty is $1,100. 7 C.F.R. § 3.91(b)(1)(vii).

a $300 fine for 672 violations, less than one-third of the amount authorized by statute. *C.f., Balice,* 203 F.3d 684 (finding that statutory maximum of $2,000 penalty for AMAA violation of almond marketing order was not an excessive fine for handler's failure to report, keep accurate records, and hold almonds in reserve). Accordingly, the Court finds that the $202,600 in civil penalties assessed on Plaintiffs by the JO pursuant to 7 U.S.C. § 608c(14)(B) is not "grossly disproportional to the gravity of the [plaintiffs'] offense[s]." *Bajakajian,* 524 U.S. at 334–35.

Plaintiffs contend that the fines are excessive because: (1) the USDA cannot demonstrate "harm" to anyone caused by Plaintiffs' activities; (2) Plaintiffs' actions complied with the Farmers to Consumers Direct Marketing Act; (3) Plaintiffs were not handlers and, therefore, not subject to the Marketing Act. Plaintiffs' second and third arguments have been discussed *infra,* and are unpersuasive and inapposite to this analysis. As to Plaintiffs' argument that would require the USDA to demonstrate harm, the Ninth Circuit rejected this argument in a case similar to the one at bar.

In *Balice,* almond handlers challenged penalties imposed under 7 U.S.C. § 608c(14) as constitutionally excessive because the violations resulted in "no harm to the Government and no harm to the industry." 203 F.3d at 699. The *Balice* almond handlers committed offenses similar to those committed by Plaintiffs, and the USDA imposed fines on them pursuant to 7 U.S.C. § 608c(14) for violating the record keeping, reporting, and reserve requirements of the Almond Marketing Order, 7

C.F.R. § 981.1 et seq, a marketing order similar to the Marketing Order governing Plaintiffs. In *Balice,* the appellant almond handlers argued that the JO's decision to increase the fine from $1000 per violation to $2000 without requiring the USDA to demonstrate harm was arbitrary and capricious. In rejecting the appellant's argument, the Ninth Circuit looked at the language of the statute and found that to require the USDA to demonstrate harm "would contravene the express terms" of the statute. *Balice,* 203 F.3d at 694. Similarly, the express terms of 7 U.S.C. § 608c(14) require the USDA to demonstrate that a handler violated the marketing order, but do not require any further demonstration. Accordingly, this Court "declines to accept [Plaintiffs'] suggestion that the USDA was required to show harm to the government before the JO could" impose a penalty pursuant to 7 C.F.R. § 989.166(c).[10] *Balice,* 203 F.3d at 694.

Moreover, Plaintiffs' arguments misrepresent Plaintiffs' conduct and culpability. As set forth above, the JO did not err to find that Plaintiffs were subject to the Marketing Order as handlers that acquired

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[10] For this reason, the USDA was also not required to demonstrate harm before ordering Plaintiffs to compensate the RAC for the failure to hold the reserve raisins pursuant to 7 C.F.R. 989.166(c). Pursuant to the regulation, the USDA shall recover the amount of the loss from a handler who fails to deliver reserve tonnage raisins to the RAC. 7 C.F.R. § 989.166(c). No language in the regulation requires the USDA to demonstrate harm, and Plaintiffs point to no authority to construe the regulation in this way. Because Plaintiffs' suggestion that 7 C.F.R. § 989.166(c) requires the USDA to demonstrate "harm" contravenes the express terms of the regulation, this Court rejects it.

raisins. Although they were handlers, Plaintiffs filed inaccurate reports, failed to obtain inspections, failed to hold raisins in reserve, and failed to allow access to records. As the Ninth Circuit explained in *Balice,* 203 F.3d at 699, these actions threaten to cause severe consequences to the entire industry:

> Balice willfully failed to maintain records for important transactions. . . . That violation largely frustrated the USDA's attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board's ability to set its economic policy.
>
> Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only $0.05 to $0.08 per pound, when the prevailing market price for the almonds was $1.40 per pound. That conduct not only resulted in an illegal profit of roughly $246,677, but it also undermined the Secretary's efforts to protect the stability of the almond market.

Similarly, the USDA has an important need to control the stability of the raisin market, as expressed in the AMAA and the Marketing Order. Like the actions of the *Balice* almond handlers, Plaintiffs' actions interfered with the RAC's ability to set its economic policy. Plaintiffs' introduction of the reserve raisins into the open market yielded illegal profits and could have resulted in market instability and a downward spiral in prices. Because of the

serious nature of the Plaintiffs' conduct, with its severe and far-reaching effects, this Court finds that a $300 fine is not an excessive amount for each of Plaintiff's violations, described above, and $1,000 is not an excessive fine for Plaintiffs' failure to allow access to their records. *See, Balice,* 203 F.3d 684; *Cole v. USDA,* 133 F.3d 803 (11th Cir. 1998) (holding that a $400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the over-supply of tobacco in the marketplace).[11]

C. Whether the reserve requirements violate the Fifth Amendment as a physical taking without just compensation

Plaintiffs argue that the reserve raisin program of the Marketing Order, 7 C.F.R. §§ 989.65–98, constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment to the United States Constitution. Plaintiffs assert, without citation, that the "elements necessary for a takings claim are present if (1) private property, (2) is taken, (3) for public use, (4) without just compensation." Pl. Memo, 20:3–4. Without citation, Plaintiffs argue that they "routinely evidenced and argued all these

[11] The instant action is distinguishable from the cases relied upon by the USDA in that the JO imposed both compensatory and civil penalties and assessments on Plaintiffs. In *Balice* and *Cole,* the JO imposed penalties pursuant to either one regulation or the other, but not both. Because Plaintiffs failed to raise this point, however, the Court need not address whether the distinction changes the Excessive Fines Clause analysis.

elements." Plaintiffs assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year. Plaintiffs contend that although Congress may take actions to regulate the industry, "[n]o court has ever held that the Commerce Clause trumps, eliminates, or eviscerates the Takings Clause in a physical takings case." Thus, "[w]hile Congress may allow the permanent deprivation of a citizens [sic] physical property, the government must pay fair market value." Plaintiffs conclude: "The government can't have it both ways: it can't refuse to pay just compensation, and then penalize, monetarily, Plaintiffs for refusing to transfer title and possession to the government." *Id.* at ll. 14–16.

As introduced above, the Marketing Order creates the raisin reserve requirement program. The purpose of the reserve requirement program is to control the supply of raisins in the domestic market and, accordingly, to regulate the price of the commodity. "By regulating the amount of raisins in this market, the USDA can, in effect, regulate the price at which raisins are sold domestically." *Lion Raisins, Inc. v. U.S.,* 58 Fed. Cl. 391, 394 (2003). Accordingly, the "primary focus" of the market control program is to "maximize return to the grower." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937,* 5 San Joaquin Agric. L. Rev. 3, 6 (1995).

The reserve requirement program is administered by the RAC. By February 15 of each crop year, the RAC must recommend to the USDA the portion of

the crop that should be made available to sale without restrictions ("free tonnage") and the portion that should be withheld from the market ("reserve tonnage"). 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations, and after obtaining the approval of two-thirds of California raisin producers, or of producers of two-thirds of raisins "produced for market, the USDA promulgates a regulation fixing the percentages of "reserve tonnage" and "free tonnage" raisins. 7 U.S.C. §§ 608c(8) (A)-(B), 9(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. In *Lion III,* the court explained the reserve requirement program as follows:

> Free-tonnage raisins may be disposed of by the handler in any marketing channel. Producers receive immediate payment from handlers, at the field market price, for the free-tonnage raisins. The market price for the free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations. Producers are not paid immediately for reserve raisins. Reserve-tonnage raisins are held by handlers for the account of the reserve pool, which is operated by the RAC. *Lion I,* 58 Fed. Cl. at 394. Reserve raisins are sold, as authorized by the RAC, in non-competitive outlets, such as school lunch programs. *Id.;* 7C.F.R. §§ 989.65–67. The statute provides for "the equitable distribution of

> the net return derived from the sale [of reserve pool raisins] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). The RAC is charged with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. § 989.67(d)(1). Since the mid–1990's, the RAC has been using the reserve pool to support an industry export program that effectively blends down the cost of exported California raisins thereby allowing handlers to be price-competitive in export markets where prices are generally lower than the domestic market.

416 F.3d at 1360.

The Marketing Order requires handlers to separate raisins into two sets of bins—one for "free tonnage" and one for "reserve tonnage." 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). "The reserve raisins are not warehoused in any central location, but rather stored by handlers on their own premises, and are released for sale per the instructions of the RAC." *Lion III,* 416 F.3d at 1360. Title to the "reserve tonnage" portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4). In exchange, "[p]roducers are entitled by regulation to an equitable distribution of the net proceeds from the

RAC's disposition of the 'reserve tonnage' raisins." *Evans,* 74 Fed. Cl. at 557.

In crop year 2002–2003, the free tonnage was 53% and the reserve tonnage was set at 47% of a producer's crop. The RAC sold the 2002 reserve pool for $970 per ton in 2004. None of the money the RAC received was paid back to the raisin producers. For the 2003–2004 crop year, the reserve tonnage was set at 30%.[12]

It is undisputed that every year, through the reserve requirement program, the RAC takes title to a significant portion of a California raisin producer's crop. The Court must determine here whether, as Plaintiffs argue, this constitutes a "physical taking" of their property by the government that requires just compensation under the Fifth Amendment. The federal government is liable in a Taking Clause suit for the actions of the RAC, as its agent. *Lion III,* 416 F.3d 1356. The issue of what constitutes a "taking" is a federal question governed by federal law. *Johnson v. U.S.,* 479 F.2d 1383 (Fed. Cir. 1973). To determine the meaning of "property," and what property rights exist under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977).

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005). The Fifth Amendment is

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[12] The reserve tonnage percentage changes each year, sometimes radically. For example, the reserve tonnage portion was 62.5% in 1983 and 17.5% in 2005.

designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking. *Id.* Here, the RAC takes title to Plaintiffs' reserve tonnage through the AMAA and the Marketing Order by operation of Congress's power to regulate the raisin industry through the Commerce Clause authority. *See United States v. Rock Royal Co–Op., Inc.,* 307 U.S. 533, 569, 572 (1939) (upholding AMAA as constitutional under the Commerce Clause and rejecting Fifth Amendment due process and taking contentions, because "the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, [and therefore] it might permit the movement on terms of pool settlement here provided."); *see also, Evans,* 74 Fed. Cl. at 559 (discussing *Rock Royal*). Congress's power to regulate commerce, however, "does not immunize the federal government from a takings claim under the Fifth Amendment." *Evans,* 74 Fed. Cl. at 560. Thus, "the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Id.* (citing *Yancey v. United States,* 915 F.2d 1534, 1540 (Fed. Cir. 1990)).

The question presented to this Court is whether the transfer of title on the reserve tonnage raisins is a *physical* taking that requires compensation. The federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.,* 379 F.3d 1363 (Fed. Cir.), *cert. denied,* 545 U.S. 1139 (2004). *Norman v. U.S.,* 63

Fed. Cl. 231 (2003), *aff'd,* 429 F.3d 1081, *cert. denied,* 547 U.S. 1147 (2003). The distinction between a "physical" taking and a "regulatory" taking is significant. *See, Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003) (payment of compensation is required whenever the government acquires private property for a public but the text of the Just Compensation Clause contains no comparable reference to a regulatory taking). Whereas an invasion of a person's physical property will be considered a physical taking, a "taking" is less likely to be found when a party challenges the government's interference with a property interest that arises from some public program that adjusts benefits and burdens of economic life to promote the common good. *Sadowsky v. City of New York,* 732 F.2d 312 (2nd Cir. 1984). Moreover, while physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427 (1982), not all regulatory takings are. *See, Outdoor Graphics, Inc. v. City of Burlington,* 103 F.3d 690 (8th Cir. 1996) (Whether particular restriction amounts to taking depends on economic impact of regulation on claimant, extent to which regulation has interfered with distinct, investment-backed expectations, and character of government regulation.). With this distinction in mind, this Court turns to Plaintiffs' argument that the reserve requirement constitutes a physical taking.

One other court has considered the issue at bar.[13] In *Evans,* 74 Fed. Cl. 554, the Court of Federal

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[13] For other takings claims related to the raisin Marketing Order, *see Lion Raisins v. U.S.,* 58 Fed. Cl. 391 (2003) (Lion I);

Claims considered whether the transfer of title to the reserve tonnage raisins constituted a physical taking. The *Evans* court noted that under California law, the plaintiffs "unquestionably held title to their raisins grown in their fields." 74 Fed. Cl. at 563. The court found that at the time the raisins become subject to regulation under the Marketing Order (when the handler acquires the raisins), "the producers acquired in exchange personal property consisting of cash (for the 'free tonnage' raisins) and an equitable interest in the net proceeds of the 'reserve tonnage' raisins." *Id.* The court understood this transfer, required under the Marketing Order, to render plaintiffs the following property interests: "Plaintiff producers retained a property interest in the raisins, and they retained a property interest in the proceeds from the raisins." The *Evans* court concluded that the transfer of reserve tonnage raisins was not a physical taking, because:

> although the RAC gains title to some of the raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their rains would have. There is no physical invasion of property (citations omitted) . . . nor is there any "direct appropriation of property." (citations omitted). Instead, the government is the recipient of a portion of the raisins that plaintiffs

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Lion Raisins v. U.S., 57 Fed. Cl. 435 (2003) (Lion II); and *Lion Raisins v. U.S.,* 416 F.3d 1356 (2005) (Lion III).

> shipped to handlers subject to the marketing order.

74 Fed. Cl. at 563. In addition, the *Evans* court concluded that plaintiffs had no property interest in their reserve tonnage raisins. Without a property interest in the raisins, the Takings Clause was not implicated. The Court opined that "if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds from the disposition of the 'reserve tonnage.'" *Id.* at 564. The court's conclusion that plaintiffs have no property interest in the reserve tonnage raisins is based on the following:

> In essence, plaintiffs are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket.

Id.

This Court agrees, in part, with the *Evans* ruling to find that the transfer of title to the reserve tonnage does not constitute a *physical* taking. A physical taking generally occurs occur when there is a physical occupation of a person's property by the government. *Norman v. U.S.,* 63 Fed. Cl. 231, *aff'd,* 429 F.3d 1081, *cert. denied,* 547 U.S. 1147 (2003); *Yee v. City of Escondido,* 503 U.S. 519 (1992) physical taking occurs only where the government requires a

landowner to submit to the physical occupation of his land). By contrast, a "regulatory taking" in violation of the Takings Clause may occur when government action, although not encroaching upon or occupying private property, goes too far and still amounts to a taking. *Anaheim Gardens v. U.S.,* 444 F.3d 1309 (Fed. Cir. 2006); *Norman,* 63 Fed. Cl. 231 (a regulatory taking occurs when a regulation deemed necessary to promote the public interest so imposes on the owner's property rights that, in essence, it effectuates a taking); *Allain–Lebreton Co. v. Department of Army, New Orleans Dist., Corps of Engineers,* 670 F.2d 43 (5th Cir. 1982) (Where there is no physical invasion of or physical damage to a plaintiff's property by the government, the government can be held responsible for a taking only when its own regulatory activity is so extensive or intrusive as to amount to taking.) Thus, while it is not necessary that the government actually take physical possession of property in order for there to be a "taking," a physical invasion must take place for there to be a physical taking, which includes a physical taking requires a "permanent physical occupation" on one's land. *Ridge Line, Inc. v. U.S.,* 346 F.3d 1346 (Fed. Cir. 2003); *see also, e.g., Loretto,* 458 U.S. at 421 (cable television company's installation of its cable facilities on plaintiff's property). In *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), the Supreme Court explained the distinction:

> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real

> property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CA TV Corp.,* 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.,* at 415, 260 U.S. 393, 43 S.Ct. 158.

Id. at 617. According to the *Palazzolo* court, "government actions [that] do not encroach upon or occupy property yet still affect and limit" use of property are "regulatory taking[s]." *Id.*

Here, Plaintiffs do not demonstrate a physical taking of their raisins by the government. The RAC gains title of Plaintiffs' reserve tonnage raisins by operation of the federal regulation of the Marketing Order. The government does not physically invade Plaintiffs' land to take the raisins, nor does the government take physical possession of the raisins. The reserve tonnage remains in the possession of the handlers. Moreover, the transfer of title is not absolute. Plaintiffs retain an equity interest in their reserve tonnage raisins. Based on these considerations, this Court finds that Plaintiffs have failed to establish that reserve raisin program of the

Marketing Order constitutes a physical taking. *See, Cienega Gardens v. U.S.,* 331 F.3d 1319 (Fed. Cir. 2003) (Loss of 96% of possible rate of return on investment was "compensable regulatory taking" under Fifth Amendment, for precluding participants in government program from prepaying their mortgages after 20 years, and barring them from unregulated rental market and other more lucrative property uses); *c.f., Rose Acre Farms, Inc. v. U.S.* 559 F.3d 1260 (Fed. Cir. 2009) (egg producer did not suffer a compensable regulatory taking when, due to USDA's salmonella regulations, approximately 43% of its table eggs were diverted to the breaker egg market, thus reducing those eggs' market value by approximately 10%).[14] Because there is no physical taking, Plaintiffs' Fifth Amendment claim fails.[15]

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[14] Although the USDA relies on rulings related to other marketing orders to argue that Plaintiffs have no property interest in their raisins, this Court notes the distinctions between the Raisin Marketing Order and the marketing orders of other commodities. Unlike most of the other marketing orders, the raisin marketing order "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans,* 74 Fed. Cl. at 558. Thus, the government taking under the raisin Marketing Order is distinct and must be considered on its own facts.

[15] Although Plaintiffs do not establish a physical takings claim, Plaintiffs are not without recourse. In addition to a regulatory takings claim, and as fully explained in *Evans,* Plaintiffs have at least three other legal theories they could present to challenge the reserve requirement. 74 Fed. Cl. at 564–65.

D. Whether the JO's dismissal of Plaintiffs' administrative petition was arbitrary, capricious, and contrary to the law

Plaintiffs attempt to challenge the JO's February 8, 2007 order on Plaintiffs' administrative petition fails, as this Court lacks subject matter jurisdiction to consider Plaintiffs' claim. As a Court of limited jurisdiction, this Court must consider whether subject matter jurisdiction exists and dismiss an action if jurisdiction is lacking. *Southern Pacific Transportation Co. v. City of Los Angeles,* 922 F.2d 498, 502 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 382 (1991); *see also,* Fed. R. Civ. P. 12(h) (3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Plaintiffs' appeal of the JO's dismissal of Plaintiffs' administrative petition is barred by the statute of limitations. The statutory provision for judicial review of a ruling on a petition to modify a marketing order is 7 U.S.C. 608c(15)(B), which provides:

> The District Courts of the United States . . . in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, *provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.*

This statute is jurisdictional. *See, Kingman Reef Atoll Investments, L.L.C. v. U.S.,* 541 F.3d 1189, 1996 (9th Cir. 2008); *see also, John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 128 S.Ct. 750, 753–56,

169 L.Ed.2d 591,(2008). Thus, this Court only has jurisdiction to review a handler's 7 U.S.C. § 608c(15)(B) appeal if that appeal is filed within twenty days. The JO issued its decision on February 4, 2008. Plaintiffs initiated this action on October 14, 2008. Accordingly, Plaintiffs' untimely challenge is barred by the statute of limitations and this Court lacks jurisdiction to consider it. *See United States v. Bravo–Diaz,* 312 F.3d 995, 997 (9th Cir.2002) ("It is fundamental to our system of government that a court of the United States may not grant relief absent a constitutional or valid statutory grant of jurisdiction.").[16] Because this Court lacks jurisdiction over Plaintiffs' cause of action related to the 7 U.S.C. 608c(15)(B) petition, this Court must dismiss it, and cannot reach the merits of the parties' arguments.

VI. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS defendant USDA's summary judgment motion and DENIES Plaintiffs' summary judgment motion. The clerk of court is DIRECTED to enter judgment in favor of defendant USDA and against Plaintiffs and to close this action.

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[16] In addition, Plaintiffs' challenge to the JO's dismissal of Plaintiffs' administrative petition is the subject of a separate action. In that separate action, Plaintiffs' claims were dismissed as untimely. Plaintiffs' appeal of that dismissal order is currently pending.

IT IS SO ORDERED.

Dated: December 9, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE, ET AL.,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

JUDGMENT IN A CIVIL CASE

CASE NO: **1:08–CV–01549–LJO–SMS**

XX –– Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 12/11/2009

Victoria C. Minor
Clerk of Court

ENTERED: **December 11, 2009**

by: /s/ S. Martin
Deputy Clerk

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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<td>MARVIN D. HORNE AND LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee.</td>
<td>No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS

OPINION</td>
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Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011

Before: Stephen Reinhardt, Michael Daly Hawkins,
and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as

amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949. Farmers Marvin and Laura Horne ("the Hornes"[17]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders

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[17] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, inter alia, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

[1] To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[18] regulating

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[18] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two-thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of

the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[19] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[20] and do not

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the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

[19] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[20] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but

apply to any producer "in his capacity as a producer."[21] 7 U.S.C. §§ 608c(1), 608c(13)(B).[22] Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's

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does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

[21] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[22] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker,* 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown,* 317 U.S. 341 (1943).

crop. *See* Parker, 317 U.S. at 363-64.[23] Like many other fruit and vegetable orders issued under the AMAA,[24] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[25] *see*

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[23] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[24] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[25] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one

7 C.F.R. §§ 989.35, 989.36—recommends the "reserve- tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale

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represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

[of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents,

Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[26] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen

[26] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the- record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[27]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

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[27] The Hornes do not challenge the JO's calculation of these figures.

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[28] On cross-motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th

[28] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their toll-packing business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.,* 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[2] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation

only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See*, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

Does the Raisin Marketing Order's reserve requirement program constitute a physical, per se taking of the Hornes' personal property without just compensation, in violation of the Fifth Amendment? *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just

compensation."). We join the Court of Federal Claims, which not long ago decided this exact question, in holding it does not. *See Evans*, 74 Fed. Cl. at 562-64; *cf. Cal-Almond, Inc. v. United States,* 30 Fed. Cl. 244, 246-47 (1994) (rejecting a takings claim against a similar reserve program under the almond marketing order).

The Fifth Amendment Takings Clause does not itself authorize the taking of private property, nor does it prohibit the government from doing so. Instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.,* 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see*, *e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[3] In its earliest days, the Takings Clause was thought to apply only to "direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (internal

quotation marks and brackets omitted), *i.e.,* "physical takings." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). Over the years, its reach has extended to accommodate the modern reality that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982) (surveying evolution of the takings doctrine). Most takings challenges to governmental regulations must undergo an ad hoc, fact-intensive inquiry focusing on (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Only in two situations does the Supreme Court recognize that regulatory action *per se* "goes too far" in frustrating property rights, *Mahon*, 260 U.S. at 415: first, "where government requires an owner to suffer a permanent physical invasion of her property[,] however minor," *Lingle*, 544 U.S. at 538; *see*, *e.g.,* *Loretto*, 458 U.S. at 438 (compensation required where state law forced landlords to permit cable companies to install cable facilities occupying one and one-half square feet of rooftops); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (same for imposition of navigational servitude upon private marina); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (same for physical invasions of airspace); and second, where government regulation "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015 (emphasis added)

(compensation required where state law barring construction of any permanent habitable structures on beachfront property rendered land parcels "valueless"). When government action results in such a "total regulatory taking[ ]," *id.* at 1026, as opposed to a mere "partial regulatory taking[ ]," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002), a property owner is categorically entitled to compensation, without resort to the usual case-specific inquiry.

[4] The Hornes, however, do not claim that the Raisin Marketing Order effects a regulatory taking, partial or total. Instead, they insist we need look no further than the RAC's annual "direct appropriation" of their reserve-tonnage raisins to conclude this is a classic *physical* taking. Though the simplicity of their logic has some understandable appeal—their raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC "takes" some of their raisins, at least in the colloquial sense—their argument rests on a fundamental misunderstanding of the nature of property rights and instead clings to a phrase divorced from context.

It is undisputed that the Fifth Amendment guarantees compensation for the taking not only of real property but also of personal property and even intangible property. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (same for trade secrets). No one suggests the government could come onto the Hornes' farm

uninvited and walk off with forty-seven percent of their crops without offering just compensation, even if the seizure itself were justified (for example, as a wartime measure). *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (government's wartime seizure and operation of a coal mine to prevent a national coal miners' strike constituted a compensable taking). Certainly, that government action is authorized does not immunize it from a takings claim; indeed, the Takings Clause *presupposes* that the government has taken lawfully. *Lingle*, 544 U.S. at 543; *see Kaiser Aetna*, 444 U.S. at 172 (no "blanket exception" to the Takings Clause simply because Congress has acted under lawful authority). If the Raisin Marketing Order authorized an uninvited, forcible taking of the Hornes' crops, there is no question that the government would have "a categorical duty to compensate the [Hornes], regardless of whether the interest that is taken constitutes an entire parcel [i.e., all their crops,] or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (internal citation omitted).

[5] But a forcible taking is not what the Raisin Marketing Order accomplishes. Far from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation. The Secretary of Agriculture did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the

Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Raisin Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order).

In rejecting a claim that a local mobile home rent control ordinance amounted to a physical taking of park owners' property interest, the Supreme Court similarly explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). Emphasizing that the "'element of required acquiescence is at the heart of the concept of occupation,'" *id.* (*quoting FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)), the Court explained that the mobile park owners had no physical takings claim because they voluntarily rented their land to mobile home owners and thus acquiesced in the regulation not under government compulsion but of their own accord, *id.* at 527-28. This same logic was used to defeat a takings challenge to a statute authorizing the public disclosure of private data submitted by applicants as a condition on registering their pesticides. *See Ruckelshaus*, 467 U.S. at 1007. Even though the applicants had a recognized interest in their intellectual property, the Supreme Court reasoned that "a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking," so long as

the disclosure condition was rationally related to a legitimate government interest and the applicant was made aware of the condition in advance. *Id.*

[6] There are, of course, limits to what conditions the government can constitutionally impose. The government "may not require a person to give up a constitutional right—[for example,] the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385. Thus, where the government conditioned the grant of a coastal development permit on the granting of a public easement bearing no nexus to the original purpose of the building restriction, the Supreme Court held that the government could not avoid paying compensation simply by shoehorning a taking into an unrelated exercise of its police powers. *Nollan*, 483 U.S. at 837; *see also Dolan*, 512 U.S. at 395 (holding that city could not require development permit applicant to grant a public pathway easement where there was no reasonable relationship between the proposed development and the condition imposed). Here, however, the condition imposed is rationally related to the government's legitimate interest in controlling the supply of raisins on the domestic market so as to prevent price destabilization and corollary effects on the economy, and the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market.

Nevertheless, the Hornes insist their so-called "voluntary" subjection to the Raisin Marketing Order is in fact the product of a Hobson's choice, for they

have no economically viable alternative to selling their raisins and therefore must suffer the complete and total taking of a designated percentage of their raisins under compulsion. Their argument is founded on an erroneous belief that they have a property right to "market their [raisins] free of regulatory controls," *Cal-Almond*, 30 Fed. Cl. at 246, and is unavailing.

Admittedly, the Raisin Marketing Order's expansive definition of "handler," which includes anyone who "packs" raisins for sale even if the raisins are sold exclusively within the state of California, renders its regulatory reach less escapable than the marketing order at issue in *Wallace*, which did not apply to walnuts sold within the state of production. *See Wallace*, 98 F.2d at 989. Nonetheless, we noted in *Wallace* a "distinction between the direct appropriation of property and the destruction of property values in the exercise of governmental power," *id.*, observing that the regulation would remain valid "[e]ven if the [c]ompany were able to show . . . that the only alternative to making delivery to the [government] of surplus walnuts or their 'credit value' would be to go out of business," *id.* at 990.

[7] This seemingly draconian result flows from the long-standing notion that "some [property] values are enjoyed under an implied limitation and must yield" to the government's regulatory powers. *Mahon*, 260 U.S. at 413. The implied restrictions on our property rights "are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community," *Ruckelshaus*, 467 U.S. at 1007 (internal quotation

marks and citations omitted). Our takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," *Lucas*, 505 U.S. at 1027, and not every restriction on our use of property amounts to a compensable taking.

Although the Fifth Amendment, as previously discussed, protects real and personal property alike, the personal property "bundle of rights" is not coextensive with the bundle comprising real property, as they are informed by different background principles. *See id.* at 1027-30. Consequently, the same government action may effect a taking when applied to one type of property but not the other. Whereas a regulation depriving a landowner of "*all* economically beneficial uses" of his land effects a categorical taking, *see Lucas*, 505 U.S. at 1019 (emphasis in original), the same may not necessarily be true of a regulation banning the sale of a commercial product, *see*, *e.g., Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (holding that prohibition on sale of eagle feathers was not a taking); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (upholding sales ban on nonintoxicating alcoholic beverages against takings challenge); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (upholding ban on sale of all liquor, including liquor lawfully manufactured before passage of the statute). While the total deprivation of beneficial use of land carries a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, 505 U.S. at 1018, when it comes to personal property, "the State's traditionally high degree of control over commercial

dealings" ought to put a property owner on notice "of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)," *id.* at 1027-28. Thus, although the right to sell their raisins is a significant one, it is but one "strand" in the Hornes' bundle, and even the destruction of that single strand would not amount to a taking without undergoing Penn Central ad hoc review. *See Andrus*, 444 U.S. at 65-66 ("significant restriction . . . imposed on one means of disposing of the artifacts" does not amount to a taking); *see also Rock Royal*, 307 U.S. at 572 ("As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, . . . it might permit the movement on terms of pool settlement . . . .").

[8] In any event, the Raisin Marketing Order does *not* destroy that strand and does *not* deny raisin farmers all economically beneficial use of their raisins, for the regulation does not ban the sale of raisins altogether but only requires the delivery to the RAC of a certain percentage of raisins prepared for market. The Hornes insist the regulation effects a total taking of those reserve-tonnage raisins, but they ignore the Supreme Court's repeated admonition that we must consider the regulation's impact on "the parcel as a whole" rather than "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.,* 438 U.S. at 130-131 & n.27; *accord Tahoe-Sierra,* 535 U.S. at 327. For example, where a statute required coal companies to leave unmined fifty percent of their coal beneath certain structures to prevent land

subsidence, the Supreme Court found no taking, reasoning that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

[9] Accordingly, the Hornes' argument that they have suffered a complete and total taking of their reserve-tonnage raisins is squarely foreclosed by case law, for the relevant parcel here is the entirety of their annual crop, not the individual raisins destined for the reserve pool. Even if in absolute terms they number in the billions, the reserve-tonnage raisins are but a designated percentage of a producer's total annual crop handled for sale in the domestic market. Furthermore, the Hornes have put forth no evidence that the Raisin Marketing Order "makes it impossible for [them] to profitably engage in their business." *Id.* at 485. We imagine it would be difficult for the Hornes to gather such evidence, given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for the Hornes' free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market.

[10] The Hornes have suffered no compensable *physical* taking of any portion of their crops, and thus the Fifth Amendment poses no obstacle to the Secretary's enforcement of the Raisin Marketing Order against them. Because the Hornes do not advance the alternative theory that the Raisin Marketing Order effects a regulatory taking, we leave that question for another day.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[11] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency,* 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[12] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not pa*id*. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . ."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf.* $273,969.04, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was

consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[13] The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.,* 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for

"judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[29] In light of these factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[30]

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[29] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[30] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). See 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to "take their case to the Secretary for a reevaluation of the [Raisin Marketing] Order and the regulations, for although the [Raisin Marketing] Order and the regulations are lawful, plaintiffs and other producers may prevail upon the Secretary to change them in order to better achieve the purpose behind the [AMAA]." *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975), *aff'd sub nom. Prune Bargaining Ass'n v. Bergland*, 571 F.2d 1132 (9th Cir. 1978) (per curiam); *see* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. Finding no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, the summary judgment of the district court is **AFFIRMED**.

NO. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California (O'Neill, J.)
Civil Action No. 1:08-cv-01549-LJO-SMS

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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September 8, 2011

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INTRODUCTION

This case presents the important question whether the federal government may — without complying with the just compensation requirement of the Fifth Amendment to the United States Constitution — physically take a substantial percentage of a farmer's annual raisin crop as a condition for the farmer receiving permission to sell the remainder of his crop on the market.

Under federal Department of Agriculture ("USDA") regulations, "handlers" of raisins are required on a yearly basis to set aside a portion of their raisin crop — known as "reserve-tonnage" raisins — "for the

account" of a committee established by the Department. The committee, known as the Raisin Administrative Committee ("RAC"), then (1) disposes of the reserve-tonnage raisins as it sees fit — often by setting them aside to be sold at a price below the cost of production to the federal government for school lunch and other nutritional programs — and (2) sets compensation for producers as it sees fit. In the two years relevant to this case (2002-2003 and 2003-2004), federal law required handlers to set aside 47 percent and 30 percent of the producer's crop, respectively, as reserve-tonnage raisins. For the 2003-2004 year, the RAC has to this date determined that compensation for reserve-tonnage raisins should be set at precisely zero dollars — *i.e.*, producers are to receive no compensation for the USDA's appropriation of almost one-third of their crop. For the 2002-2003 year, the RAC set a compensation price that is below the cost of producing raisins.

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. At its uncontroversial core, the Clause categorically requires just compensation for a permanent physical "invasion" or "occupation" of property, however minor that invasion may be, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and guarantees compensation not only for the taking of real property, but also personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). There is no dispute here that the raisins are personal property under applicable law.

The panel in this case nevertheless failed to invalidate the Raisin Marketing Order because it determined that no physical taking occurs under the regulatory scheme — and that no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Panel Op. (hereafter, "Op.") at 9470 (attached at Tab A). The United States Supreme Court has squarely rejected this very argument. In *Loretto*, the Court held that a cable installation pursuant to a New York law providing that a landlord must permit a cable television company to install its cable facilities upon private property was a physical taking for which just compensation is due under the Fifth Amendment. *See* 458 U.S. at 421. In seeking to defend the law at stake in *Loretto*, the cable company argued that no physical taking had occurred because "the law applies only to buildings used as rental property" and is therefore "simply a permissible regulation of the use of real property." *Id.* at 438-39. Justice Marshall, writing for the Court, flatly rejected this claim:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [Defendant's] broad "use-dependency" argument proves too much. For example it would allow the government to require a landlord to devote a substantial portion of his

> building to vending and washing machines, with all the profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17. The Court notably did not characterize the taking at stake in *Loretto* as a regulatory taking simply because a commercial landlord could avoid the regulation by ceasing to rent his property.

The same analysis applies here. The regulation requiring Petitioners to turn over 47 percent and 30 percent of their property "for the account of" a government committee cannot be recharacterized as a regulatory taking simply because a farmer may supposedly avoid the regulation by ceasing to sell his raisins. The holding in *Loretto* is squarely on point and contradicts the panel's holding. This case thus falls within the uncontroversial core of the Takings Clause. It does not involve regulations that merely control the use of a person's property and thereby reduce its value, as in the Supreme Court's "regulatory takings" cases. It is not even a "physical occupation" case, where the government's agent enters the land, but the owner is otherwise free to enjoy all the other sticks in the bundle of property ownership. Instead, the government takes title to Petitioners' property and uses it for governmental

purposes, such as school lunches, without any pretense of providing the constitutionally mandated compensation. This case cries out for rehearing, either by the panel or the *en banc* Court.

BACKGROUND

A. The Agricultural Marketing Agreement Act of 1937 and the Raisin Marketing Order.

Under the Depression-era Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*. ("AMAA"), USDA heavily regulates certain segments of California's agricultural economy, including the raisin industry. Pursuant to the Act, USDA promulgated the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California. *See* 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"). The Order, which was first adopted in 1949, establishes a food product reserve program.

The Department has promulgated marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006) (collecting orders). The Raisin Marketing Order, however, is different from these other marketing orders in two crucial respects: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.*; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

Under the Order, the RAC and USDA must establish certain raisin tonnage requirements, known as "reserve-tonnage" and "free-tonnage" percentages, which vary from year to year. *Id.* §§ 989.66, 989.166. The percentages are established by (and thus unknown to raisin producers until) February 15 of each crop year, much after producers have expended substantial resources for the production and harvest of their crop for the year. *Id.* §§ 989.21, 989.54(d). Once the percentages are set, "handlers" of raisins must set aside the "reserve-tonnage" requirement "for the account" of the RAC. *Id.* §§ 989.65, 989.66(a), (b)(1). The RAC may require the delivery of the reserve-tonnage raisins to anyone chosen by the RAC to receive them. *See id.* § 989.66(b)(4). Or the RAC may sell reserve-tonnage raisins to handlers for resale in export markets, *see id.* §§ 989.67(c)-(e), or it may simply direct that they be sold or disposed of by direct sale or gift to United States agencies, *see id.* § 989.67(b)(2), foreign governments, *see id.* § 989.67(b)(3), or charitable organizations, *see id.* § 989.67(b)(4).

B. Petitioners and the 2002-2003 and 2003-2004 Raisin Crops.

Marvin and Laura Horne are farmers. They are part of the large raisin industry in California, which produces 99.4 percent of the United States' and 40 percent of the world's raisin crop. Since 1969, they have produced raisins in Fresno and Madera Counties in California. They operate Raisin Valley Farms, a California general partnership, and the Raisin Valley Farms Marketing Association, a California unincorporated association. Along with Laura Horne's father, Don Durbahn, and the Estate

of Rena Durbahn, they also operate Lassen Vineyards, a California general partnership.

Believing themselves not to be "handlers" subject to the Raisin Marketing Order and AMAA, Petitioners did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. In those two years, USDA required farmers like Petitioners to turn over 47 percent and 33 percent of their raisin crop. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table10.pdf. Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins for its own programs in those years alone. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table06.pdf.

C. Procedural History.

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action against Petitioners, claiming that they had violated the AMAA by purportedly failing to comply with the Raisin Marketing Order's various requirements. According to the USDA, Petitioners, who are producers of raisins, became "handlers" subject to the reserve requirements upon their marketing of their own produced raisins. An Administrative Law Judge in the USDA agreed. On appeal from that decision, a USDA Judicial Officer found Petitioners liable for various regulatory violations. Of particular relevance here, the Judicial Officer determined that Petitioners violated 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years.

The Judicial Officer then ordered certain forfeitures and penalties for Petitioners' failure to acquiesce in the USDA's taking of their property. Specifically, the Judicial Officer ordered Petitioners to pay $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years. 7 C.F.R. § 989.54(b). The Judicial Officer also ordered Petitioners to pay $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), and an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B).

Petitioners filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c. Petitioners challenged USDA's imposition of civil forfeitures, penalties, and assessments for their failure to comply with the reserve requirements, among the other asserted regulatory infractions, contending in relevant part that the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool is an uncompensated *per se* taking in violation of the Fifth Amendment. Petitioners also argued that (1) they are producers, not handlers, subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment's Excessive Fines Clause. The district court granted summary judgment for the USDA. *See Horne v. Dep't of Agriculture*, No. CV-F-08-1549, 2009 WL 4895362 (E.D. Cal. Dec. 11, 2009).

Petitioners appealed, but on July 25, 2011, a panel of this Court affirmed the judgment in its entirety. In doing so, the panel admitted that the argument that a farmer must receive just compensation for a government appropriation of raisins "has some understandable appeal." Op. at 9469. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel acknowledged that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation." *Id.* at 9469-70. The panel nevertheless concluded that USDA "did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale." *Id*. at 9470. This timely petition follows.

ARGUMENT

REHEARING IS WARRANTED BECAUSE THE PANEL OPINION CONFLICTS WITH BINDING PRECEDENT ON IMPORTANT QUESTIONS OF LAW.

It is well-settled that a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth [Amendment]." *Loretto*, 458 U.S. at 421. The panel opinion affirming the grant of summary judgment in the government's favor turns this principle of takings law on its head. The panel

attempts to shoehorn this case into the forgiving constitutional test applicable to regulatory takings, which applies when regulations limit a property owner's use of his or her property. But this is not a regulatory takings case. It is an out-and-out compelled transfer of ownership. The government demands that raisin producers give a government committee ownership over a hefty proportion of the producers' crop, and the committee uses the raisins for its own purposes (such as for federal school lunch programs). The Takings Clause was adopted precisely to protect against such compelled transfers of property.

1. The principles of takings law applicable to this case are straightforward and uncontroversial. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. That principle applies with equal force where a property owner could avoid the taking by ceasing to rent (or sell) his property, because an owner's ability to sell property "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at 439 n.17. By contrast, when the government merely regulates the use of property, compensation is required only if the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g.*, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978).

For both real and personal property, "possession, control, and disposition are . . . valuable rights that inhere in the property." *Phillips*, 524 U.S. at 170; *Hodel v. Irving*, 481 U.S. 704, 717 (1987); *see also Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987) (holding that the Takings Clause protects the right to build on real property from excessive land-use regulation). Even though the government may in some circumstances have the authority to prohibit the sale of personal property, "it is crucial" for the constitutionality of such a prohibition that property owners "retain the rights to *possess* and transport their property." *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (emphasis added).

The Eleventh Circuit's application of these principles in *Gulf Power* is instructive. Like *Loretto*, *Gulf Power* squarely conflicts, and cannot be reconciled, with the panel's reasoning. The Eleventh Circuit rejected the argument that a telecommunications provision did not effect a physical takings because plaintiffs "could avoid the effect of the Act by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court flatly explained, "this argument is foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The same result is warranted here, for the same reason. Indeed, a panel of this Court has previously reached the same holding, albeit in a case later abrogated on other grounds by the Supreme Court. *See Hall*, 833 F.2d at 1277-78 (holding that *Loretto*

"gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business"), *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26.

2. The panel opinion ignores *Loretto*'s categorical holding regarding *physical* takings, instead analogizing this case to two cases involving *regulatory* takings, *Yee* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *See* Op. at 9471. According to the panel, *Yee* and *Ruckelshaus* stand for the proposition that property owners have "no physical takings claim" where "they *voluntarily*" engage in activity and "thus acquiesce[] in the regulation not under government compulsion but of their own accord." *Id.* As a result, in the panel's view, because Petitioners voluntarily sell raisins, they have acquiesced in the government's appropriation of half their harvest under *Yee* and *Ruckelshaus*.

But neither case says that. *Yee* did not involve a compelled transfer of ownership to the government, but merely a rent control scheme, which is a classic economic regulation. *See* 503 U.S. at 524-25. The petitioners, owners of a mobile home park, attempted to cast the ordinance as a "physical occupation" on the ground that the renters occupied their land and were the beneficiaries of a wealth transfer. The Supreme Court responded, logically enough, that because the mobile home park owners voluntarily leased space to the renters, they could not claim that the physical occupation was caused by the government. As the Court put it, the rent control ordinance was not a physical taking because, unlike the law in *Loretto*, it did not "*require*[] the landowner to submit to the physical occupation of his land," *id.*

at 527, although "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," *id.* at 528. The only governmentally-imposed restriction was the rent control. Here, by contrast, a government agency actually takes title to Petitioners' property and does not pay just compensation for it.

The *Yee* Court's statements that "Petitioners voluntarily rented their land to mobile home owners" and "Petitioners' tenants were invited by petitioners, not forced upon them by the government" thus have no application this case. *Id.* at 527-28. These statements do not purport to give the government free reign over the mobile home park so long as its owners "voluntarily" engaged in the mobile home business. Nothing in *Yee*, for example, suggests that the government could require mobile home park owners to devote some portion of their land to government office space or to free housing for the public. To the contrary, *Yee* not only reaffirmed the holding in *Loretto*, but also reaffirmed the *very language* in footnote 17 of *Loretto* that squarely contradicts the panel's holding. *See id.* at 531-32 (quoting footnote 17 with approval); *see also Cwynar v. City & Cnty. of San Francisco*, 90 Cal. App. 4th 637, 658 (2001) (observing that *Yee* "expressly affirmed" this holding in *Loretto*). As *Yee* explained, "Had the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." 503 U.S. at 532.

No less importantly, *Yee*'s statement that a "different case would be presented were the statute . . . to compel a landowner over objection . . . to refrain in perpetuity from terminating a tenancy" makes little sense under the panel's interpretation of the case. Why, under the panel's interpretation, could the government not force mobile park owners to "refrain in perpetuity from terminating a tenancy" given that those owners had voluntarily chosen to engage in the business? The fact that the panel's interpretation of *Yee* creates an internal contradiction within the opinion abundantly confirms that the panel's interpretation is wrong.

Nor does *Ruckelshaus* support the panel's holding. Indeed, no party in *Ruckelshaus* even suggested that the appropriation at issue there — which involved a statute requiring disclosure of a trade secret — was a physical taking. The Court did not mention the concept of physical takings or cite *Loretto*. There is thus no indication that the Court intended to upend the clear holding that it had announced in *Loretto* only two years earlier. To the contrary, *Ruckelshaus* turned upon the Court's holding that "Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential," 467 U.S. at 1006, a test that has no application in the context of *per se* takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Panel's observation that "the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market" is therefore entirely misplaced. Op. at 9472. *Ruckelshaus* is inapposite.

3. In addition to its mistaken reliance on *Yee* and *Ruckelshaus*, the panel opinion fails to recognize that the proposition that a regulation may deprive an owner of all economically beneficial uses of his personal property does *not* support compelled transfer of personal property from an owner to the government. The panel opinion cites *Andrus* for this proposition *see* Op. at 9473, but *Andrus* says the opposite. In upholding a regulation that prohibited the sale of eagle feathers under an environmental statute (thereby depriving the feathers' owners of their ability to earn any money from those feathers), *Andrus* said that "[t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts." 444 U.S. at 65. The Court's opinion thus upheld the government's ability to prohibit the sale of an article, not the government's ability to appropriate an article for its own use. As the Court emphasized, "it is crucial that appellees retain the rights to *possess* and transport their property." *Id.* at 66 (emphasis added).

By contrast, here, as the panel opinion recognizes, the Department's regulations deprive Petitioners of their right to possess, or to use in any meaningful sense, their own property. Indeed, those regulations require Petitioners to relinquish title of the reserve-tonnage raisins to the RAC — precisely the scenario that the Court in *Andrus* took pains to distinguish. Unlike *Andrus*, this case involves not only a prohibition on sale (of a product, eagle feathers, that no owner makes investments to produce), but a forced transfer of property in whose production

Petitioners, and other raisin farmers, invest millions of dollars.

It is therefore utterly irrelevant that the Raisin Marketing Order "does not deny raisin farmers all economically beneficial use of their raisins," because it allows farmers to keep some portion of their raisin crop in any given year. Op. at 9474. This principle has no application in the context of *per se* takings. As the Supreme Court has explained, "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). That is why courts "do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* at 323. On this issue, too, the panel opinion ignores directly controlling precedent, relying instead on a strained analogy to cases addressing regulations that reduced the economic value of property. But the panel opinion cites no case allowing the government to "take" a percentage of a person's property in the form of a transfer of title from the person to the government.

4. At the end of the day, it is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any

compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce. Indeed, the panel opinion forthrightly acknowledges that its holding leads to a "seemingly draconian result" for independent farmers such as the Petitioners here. Op. at 9472.

More broadly, the principle announced in the panel opinion has sweeping ramifications for the stability of property rights within this Circuit. Under the panel opinion, almost every physical taking of property can be recharacterized as a regulatory taking, because almost every kind of property is owned for use in some fashion. Thus, under the panel opinion, the government can require a manufacturer of microchips to turn over 50 percent of its manufactured goods for government use, if the manufacturer sells those chips in interstate commerce. The government can require a landlord to turn over half of his real property for use as government office space, if the property is rented. This is precisely the parade of horribles that the Supreme Court sought to avoid by adopting the *per se* physical takings rule in *Loretto*. *See* 458 U.S. at 439 n.17 (rejecting the cable company's argument in part because "[i]t would even allow the government to requisition a certain number of apartments as permanent government offices"). The physical takings doctrine announced in *Loretto* — which is at the very core of the Takings Clause — is all but a dead letter if the Raisin Marketing Order is constitutional and the government may require a

farmer to hand over fifty percent of a crop as an entry fee to participation in the market.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

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September 8, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE,
D.B.A. RAISIN VALLEY
FARMS, A PARTNERSHIP, AND D.B.A. RAISIN
VALLEY FARMS
MARKETING ASSOCIATION, A.K.A. RAISIN
VALLEY MARKETING, AN UNINCORPORATED
ASSOCIATION; MARVIN D. HORNE; LAURA R.
HORNE; DON DURBAHN, AND THE ESTATE OF
RENA DURBAHN, D.B.A.
LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND SUMMARY

The Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §§ 601 *et seq.*, was enacted during the Depression, with the objective of helping farmers obtain a fair value for their products. *See Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture, farmers, and the "handlers" who market agricultural goods, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly

system for marketing them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). To achieve these goals, the Secretary promulgates "marketing orders" that regulate the sale of commodities that are particularly vulnerable to market fluctuations. The marketing order for raisins was issued in 1949, following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton. *See* Op. 9461 n.7. The order stabilizes prices by providing for the establishment of annual reserve pools, determined by each year's crop yield, thus decreasing the supply of raisins on the open domestic market. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65.

The marketing order regulates "handlers" of California raisins — i.e., the entities that process raisins for market distribution. Under the order, handlers set aside a "reserve pool" that may not be sold on the open domestic market. The reserve pool is managed by a committee of industry-nominated representatives appointed by the Secretary. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. Every year, the committee reviews the crop yield and recommends to the Secretary what portion should be withheld from the open market. *See id.* §§ 989.54(d), 989.65. If the recommendation is approved by two-thirds of farmers (or by the farmers who produced two-thirds of the crop) and the handlers of at least fifty percent of the crop, the Secretary promulgates a regulation fixing the percentage of "reserve" raisins for that year. 7 U.S.C. §§ 608c(8), (9)(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. All reserve raisins are delivered to the committee, which may then sell them in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4). Farmers receive

direct payment, at a pre-negotiated field market price, for the raisins made available for sale on the open market. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005). For the reserve raisins, farmers receive an equity interest which entitles them to an equitable distribution of the net proceeds from the reserve pool sales. *See* 7 C.F.R. § 989.66(h).

In 2002, plaintiffs undertook a production scheme that they believed would allow them to sell raisins without becoming "handlers" subject to the marketing order, thus side-stepping the regulatory framework described above. Disagreeing with plaintiffs' characterization of their business, the Administrator of the United States Department of Agriculture ("USDA") Agricultural Marketing Service initiated an enforcement action against plaintiffs, alleging numerous statutory and regulatory violations. Plaintiffs were found liable for, among other things, failing to comply with the reserve requirements, and ordered to pay over $600,000 in fines and assessments. *See* Op. 9464-65.

Plaintiffs filed suit in the United States District Court for the Eastern District of California, seeking review of the agency's final decision pursuant to 7 U.S.C. § 608c(15)(B). Plaintiffs argued that the agency erred in concluding that plaintiffs were "handlers" subject to the AMAA and raisin marketing order. Plaintiffs also argued that the imposed fines violated the Eighth Amendment, and that the raisin reserve requirement constitutes a per se, physical taking of property without just compensation, in violation of the Fifth Amendment.

The district court granted summary judgment in favor of the government, and a unanimous panel of this Court affirmed. Plaintiffs now seek rehearing with respect to the panel's rejection of their Takings Clause claim.

The panel's decision sets forth the narrow and correct holding that the raisin reserve program did not subject plaintiffs to a "physical, per se taking" for which they are automatically entitled to compensation.

Although not before the panel, a serious jurisdictional problem exists with respect to plaintiffs' taking claim which at the very least counsels against rehearing en banc. Where, as here, the individual asserting a government taking may seek compensation under the Tucker Act, the claim must be brought in the Court of Federal Claims in the first instance.

Plaintiffs have also failed to identify any basis for reconsidering the panel's decision on the merits. Plaintiffs' petition turns almost entirely on their assertion that their claim is controlled by the "per se, physical taking" rule announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In so arguing, plaintiffs gloss over crucial differences between this case and *Loretto*, which involved the permanent physical occupation of land owned by the plaintiff. Neither the Supreme Court nor this Court nor any other court of appeals has suggested that a physical, per se taking may be found with regard to personal property that the government never attempted to physically possess, and for which the plaintiff had no historically rooted expectation of an unfettered property right.

Moreover, more recent Supreme Court decisions make clear that the *Loretto* rule does *not* apply to regulations that condition particular uses of private property on the transfer of some portion of that property to the government. And the panel's decision is consistent with over seventy years of federal court decisions rejecting takings challenges to the agricultural supply controls promulgated under the AMAA, including a recent decision by the Court of Federal Claims reaching exactly the same conclusion as the panel with regard to the raisin reserve requirement, *see Evans v. United States*, 74 Fed. Cl. 554 (2006).

Finally, plaintiffs have failed to explain why the raisin marketing order effectuates an unconstitutional taking when the order is promulgated (and approved by a vote of producers and handlers) for the express purpose of *increasing* the amount of money plaintiffs and other raisin farmers receive for their products.

ARGUMENT

In general, whether a regulatory requirement constitutes a compensable taking turns on a fact-intensive inquiry considering (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *See Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Plaintiffs have not attempted to demonstrate a regulatory taking pursuant to these factors. Instead, plaintiffs argue that the raisin reserve program should be deemed a "per se, physical" taking

pursuant to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), categorically entitling them to compensation regardless of the factors above. This Court correctly rejected that argument, and plaintiffs have provided no basis for rehearing of that decision.

The USDA has not physically taken or attempted to physically take plaintiffs' raisins, and has no plans to physically take plaintiffs' raisins in the future. Plaintiffs' suit challenges the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme controlling the sale of California raisins on the open domestic market. Plaintiffs are free to challenge that regulatory scheme as unconstitutional under the Takings Clause, but they misunderstand how such a challenge should proceed and the manner in which it must be analyzed.

1. As an initial matter, it is does not appear that plaintiffs have asserted a takings claim that this Court has jurisdiction to adjudicate. The Supreme Court has explained that the Fifth Amendment does not prohibit the government from taking private personal property, but instead "places a condition on the exercise of that power," *First English Evangelical Lutheran Church of Glendale v. Los Angeles Co.*, 482 U.S. 304, 314 (1987), namely that the government "provide[] an adequate process for obtaining compensation," *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Congress has provided that compensation process through the Tucker Act, 28 U.S.C. § 1491, which allows parties to bring suit seeking compensation from the government for a taking in the United States Court of Federal Claims. *See Ruckleshaus v.*

Monsanto Co., 467 U.S. 986, 1016 (1984). Accordingly, a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises v. Apfe*l, 524 U.S. 498, 520 (1998) (plurality opinion).

Nothing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order, and plaintiffs therefore "clearly are entitled" to bring such a claim. *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997); *see also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990). Where, as here, the complaining party may seek compensation for the alleged taking pursuant to the Tucker Act, "[a] takings claim is premature until the plaintiffs have exhausted their rights under [that] Act. This restriction is jurisdictional. The simple fact is that we have no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred." *Consejo de Desarrollo Economico de Mexicali v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007) (internal quotation omitted); see also *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003).

Plaintiffs contend that their refusal to comply with the regulatory scheme was justified as a "self help" measure against an unconstitutional taking of their property. Appellants' Br. 6. As just explained, however, the government does not violate the Fifth Amendment when it takes private property, so long as it provides a process for obtaining just compensation. If plaintiffs believed that their

compliance with the raisin marketing order would result in a taking of their property, their recourse was to seek compensation for that taking in the Court of Federal Claims.

Indeed, the Court of Federal Claims already adjudicated exactly such a claim in *Evans v. United States*, 74 Fed. Cl. 554 (Ct. Fed. Cl. 2006). To be sure, plaintiffs might prefer to avoid *Evans'* holding that the raisin reserve requirement should be analyzed as a regulatory taking rather than a per se taking. But plaintiffs cannot properly ask this Court to decide the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking were it not compensable under the Tucker Act. This Court has "no authority" to speculate about such matters. *See Bay View*, 105 F.3d at 1286.

Although this jurisdictional issue was not presented to the panel, it is "well-established . . . that the parties may not waive subject-matter jurisdiction and that, therefore, such a claim may be raised at any point in the litigation." *Escobar Ruiz v. INS*, 813 F.2d 283, 286 n.3 (9th Cir. 1987); *see also, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998). At the very least, this issue counsels strongly against rehearing en banc of the merits question raised in plaintiffs' petition.

2. As the panel unanimously recognized, plaintiffs' takings argument also fails on the merits. The centerpiece of plaintiffs' petition is that the panel did not correctly apply the standard for per se, physical takings announced in *Loretto*. The plaintiff in *Loretto* challenged a law requiring a landlord to permit cable companies to install facilities on rental

buildings. *See* 458 U.S. at 423. Under these circumstances, the Supreme Court held, "[the] permanent physical occupation [of plaintiff's building] is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* At 432.

Plaintiffs' argument for rehearing turns entirely on their characterization of the *Loretto* rule as a "categorical holding regarding *physical* takings" that applies to their claim. Pet. 14. But *Loretto* involved the permanent physical occupation of an indivisible piece of land to which the plaintiff had title. Describing its decision as "very narrow," the Court specifically tied its holding to the "historically rooted expectation" that property owners have an exclusive right to occupy their land, and that any interference with that right will be compensated. *Loretto*, 458 U.S. at 441; *see also, e.g.*, *id.* at 430 n.7 ("Early commentators viewed a physical occupation of real property as the quintessential deprivation of property."); *id.* at 427 ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."). Neither *Loretto*'s language nor its reasoning governs this case.

First, plaintiffs' assertion of a "permanent physical occupation" strains the phrase beyond its meaning. Even if the government had actually taken title to plaintiffs' raisins, the government would not have "physically occup[ied]" the raisins. *See* Black's Law Dictionary 1184 (9th ed. 2009) (defining "occupation" as "the possession, control, or use of real property"). Given that plaintiffs *kept* the raisins at issue, they

cannot possibly claim that their challenge is to a permanent, physical occupation within the meaning of *Loretto*. At most, they seek an *extension* of *Loretto* to their claim, based on the fact that the raisins are physical property. But such an extension would make no sense in a case where the plaintiffs cannot demonstrate that the government actually attempted to take their property without compensation. Plaintiffs in this case challenge a fine they incurred because they sold their raisins on the open domestic market without complying with the applicable regulatory regime. Plaintiffs cannot demonstrate that they are owed compensation for a physical taking, because no physical taking ever occurred. And they cannot demonstrate that they lawfully resisted an unconstitutional taking, because the Tucker Act provided plaintiffs with a vehicle for obtaining any compensation to which they may have been entitled, had they complied with the regulatory regime.

Moreover, even if plaintiffs had presented this Court with a claim for an actual taking of their physical property without compensation, an extension of *Loretto* would be inappropriate because plaintiffs cannot demonstrate any "historically rooted expectation of compensation" for the conduct they challenge. *Loretto*, 458 U.S. at 441. As the Supreme Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." The Court has specifically recognized "the State's traditionally high degree of control over commercial dealings" involving

personal property, *id.* at 1027, an observation that is nowhere more apt than in the context of agricultural commodities. The government's extensive use of price and supply controls to stabilize particular agricultural markets dates back to the Depression, and the raisin marketing order itself has been in place for over sixty years. *See* Op. 9458, 9461. Plaintiffs could not have entered the raisin industry with the expectation that they would be able to freely market their raisins without regard to this regulatory regime, and they certainly could not have expected that they would be able to enjoy the artificially inflated prices created by the raisin reserve program without participating in that program themselves.

Plaintiffs do not cite a single Supreme Court or Ninth Circuit case applying the *Loretto* rule to personal property, let alone to personal property that the government never attempted to possess, and for which the plaintiff had no reasonable expectation of an unfettered property right. Although some other courts of appeals have found particular personal property takings to constitute "physical, per se takings," they have only done so in cases that arguably fit within *Loretto*'s reasoning and language. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), for example, the D.C. Circuit agreed with former President Nixon that the government's possession of his presidential papers constituted a per se, physical taking. In so holding, the court of appeals did not hold that *all* personal property falls under the *Loretto* rule, but that the rule need not "be limited to real property." *Id.* at 1285. In President Nixon's case, the government had actually taken "complete possession" of his papers, *id.* at 1271

(internal quotation omitted), contrary to the expectation "since the beginning of the Republic," that a President's papers are his private property, *id.* at 1276-84.

Likewise, in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit applied *Loretto* to a statute requiring utility companies to provide cable companies with access to their telephone poles and related facilities. The court of appeals explained that under the applicable statute, "a utility has no choice but to permit a cable company or telecommunication carrier to permanently occupy physical space on its poles, ducts, conduits, and rights-of-way." *Id.* at 1328. "Such a permanent, physical occupation of property," the court concluded, "falls squarely within the *Loretto* rule." *Id.* at 1329. The court also noted that although the utilities' use of their poles, ducts, and conduits had always been highly regulated, the mandatory access provisions were new. *Id.* at 1326-27, 1330. The court explained that "the fact that property was taken for a public use to begin with does not mean that it may be taken again for another public use without the payment of just compensation to its owner." *Id.* at 1329.

Gulf Power does not "squarely conflict," Pet. 13, or even obliquely conflict, with the panel's decision in this case. Plaintiffs here challenge a fine that was imposed on them because they sold raisins on the open domestic market without complying with a regulatory scheme that has been in place for over sixty years. In contrast to *Nixon* and *Gulf Power*, the government did not "occupy" or even attempt to *take* plaintiffs' property, and the fines that the

government imposed were fully consistent with historical expectations.

Plaintiffs also assert a conflict with *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987). *Hall*, however, was expressly abrogated by the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992). This Court held in *Hall* that an ordinance requiring owners of mobile home parks to give unending leases to tenants constituted a physical taking of their property. *Hall*, 833 F.2d at 1276. Plaintiffs cite *Hall* for the proposition that a taking may be "per se" even if the property owner can avoid it by "'going out of business,'" and then plaintiffs suggest that the decision was "abrogated on other grounds." Pet. 13-14 (quoting *Hall*, 833 F.2d at 1277-78). But that holding is exactly what the Supreme Court rejected in *Yee*. As the Supreme Court explained, the *Yee*s "relied almost entirely on *Hall* . . . which had held that a similar mobile home rent control ordinance effected a physical taking." *Yee*, 503 U.S. at 525. The Court held, however, that, contrary to *Hall*, an ordinance of this sort did *not* constitute a physical taking, because it was conditioned on the choice to enter a particular market. The Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527-29.

3. Plaintiffs' request for rehearing should be denied not only because they fail to identify any way in which the panel's decision conflicts with Supreme Court or court of appeals precedent, but also because the legal rule that they advocate has already been rejected by the Supreme Court. Plaintiffs' position is

that because the raisin marketing order hinges their ability to sell raisins on their participation in the raisin reserve program, the order effectuates a "direct appropriation" of their property by the government. From their perspective, the regulatory regime is no different than the government "com[ing] onto the Hornes' farm uninvited and walk[ing] off with forty-seven percent of their crops." Op. 9469-70; Pet. 10. But the Supreme Court has made clear that this distinction is of enormous significance. In *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), the plaintiffs challenged a decision by the California Coastal Commission to grant the plaintiffs permission to rebuild their house only if they transferred to the public an easement across their beachfront property. Although the easement would have resulted in a direct transfer of property, the Court did *not* treat it as a per se, physical taking under *Loretto*. Instead, the Court analyzed the easement as a type of regulatory taking, entitling the plaintiffs to compensation only because there was no "essential nexus" between the easement and the building permit. The Court noted that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831. However, because the Commission instead required the easement as part of a "land-use regulation," *id.* At 834, the Court engaged in a more searching inquiry of its purposes.

Likewise, in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court declined to apply the *Loretto* rule to

a city ordinance that conditioned approval of the plaintiff's building permit on a dedication of a portion of her property to a public greenway and bike path. *Id.* at 387. Similar to *Nollan*, the Court noted that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication," the taking would have been unquestionable. *Id.* at 384. But, because the land transfer was instead a conditional regulatory requirement, whether or not it constituted a compensable taking turned on whether "the required dedication [was] related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Nollan and *Dolan* make clear the analytical distinction between a direct appropriation of physical property and a regulation that conditions particular uses of private property on the transfer of some portion of that property to the government. While either type of action may constitute a taking entitling the property owner to compensation, only a direct appropriation of property triggers the per se, physical taking rule announced in *Loretto*.

3. Although they have identified no actually conflicting decision of the Supreme Court or any court of appeals, plaintiffs contend that the panel has authorized an unprecedented intrusion into the commercial activities of business owners, with "sweeping ramifications for the stability of property rights within this Circuit." Pet. 21. Plaintiffs' fears are considerably overstated, particularly given the longstanding consistency of the federal courts in

upholding agricultural supply controls under the AMAA against takings challenges.

Indeed, this Court rejected a virtually identical takings claim over seventy years ago in *Wallace v. Hudson-Duncan,* 98 F.2d 985 (9th Cir. 1938). The plaintiff in *Wallace* challenged the walnut marketing order's requirement that producers contribute a percentage of their walnuts to a control board or provide economic consideration in lieu of such walnuts as a condition for selling walnuts in interstate commerce. *Id.* at 987. This Court rejected the plaintiff's takings claim, holding that the marketing order did not effectuate a "direct appropriation" of the plaintiff's property, but instead was a regulatory condition. *Id.* at 989. Every federal court to consider the issue since then has also rejected the notion that the price and supply controls promulgated under the AMAA implicate the Fifth Amendment. *See*, *e.g., Cal-Almond, Inc. v. United States,* 30 Fed. Cl. 244, 247 (1994); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). The panel's decision in this case is modest by comparison, holding only that plaintiffs failed to demonstrate a "per se" taking, while leaving open the possibility that the raisin marketing order effectuates a compensable regulatory taking. Far from revolutionary, this is exactly the same conclusion reached by the Court of Federal Claims five years ago in *Evans v. United States*, 74 Fed. Cl. 554 (2006).

4. A final point counseling against rehearing is plaintiffs' failure to put forth any evidence or explanation as to how the raisin reserve requirement has a negative financial impact on their business. Plaintiffs cannot substantiate their claim of an

unconstitutional taking without demonstrating that the raisin reserve program causes them financial loss. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-36 (2003). As the panel noted, it likely would be quite difficult for plaintiffs to gather such evidence, "given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for [plaintiffs'] free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market." Op. 9475. Plaintiffs sought to enjoy the higher prices resulting from that regulatory regime without bearing any of the burdens that go along with the benefits of the raisin price support program. Plaintiffs may wish to circumvent the system, but they cannot demonstrate that the government engaged in a "per se, physical taking" when it fined them for doing so.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

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[CERTIFICATE OF COMPLIANCE AND
CERTIFICATE OF SERVICE OMITTED

No. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California (O'Neill, J.)
Civil Action No. 1:08-cv-01549-LJO-SMS

REPLY BRIEF IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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December 30, 2011

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INTRODUCTION

The Government's Opposition brief ("Opp.") to Plaintiffs' Petition for Rehearing ("Pet.") makes little attempt to defend the panel's reasoning and instead puts forward an array of new arguments never before raised in this litigation. The Government now contends that this Court lacks jurisdiction to address Plaintiffs' takings claim; that the physical takings doctrine does not apply to personal property; and that the taking at stake in this case should be analyzed under the test for mitigation measures in the land-use context. None of these new arguments has merit.

Indeed, the Opposition confirms the importance of this case for property rights within this Circuit. The Government boldly asserts the constitutional power:

- To take goods without compensation from a producer as a condition for the producer's participation in the marketplace;

- To assert, as the purpose for its taking, that it has somehow boosted the price of the producer's remaining goods; and

- To use the goods for any purpose it sees fit, including school lunch programs, without paying the producer for them.

Plaintiffs respectfully submit that these consequences are precisely what the Fifth Amendment was intended to foreclose. Accordingly, for the reasons explained in the Petition and elaborated upon below, this case cries out for rehearing, either by the panel or the *en banc* Court.

ARGUMENT

I. The Government's Newly Minted Jurisdictional Argument Lacks Merit And Is Inconsistent With the Government's Prior Interpretation Of The AMAA.

For the first time in this litigation, the Government asserts that this Court lacks jurisdiction to adjudicate Plaintiffs' takings claim. Opp. 6-8. According to the Government's new position, the Tucker Act vests exclusive jurisdiction over the claim in the United States Court of Federal

Claims. This newly minted argument conflicts not only with cases interpreting the Agricultural Marketing Agreement Act of 1937 ("AMAA"), *see, e.g.*, *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005), but also with the Government's prior position in other cases.

1. It is well-settled, as the Government recognizes, that Congress may "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). Such withdrawal occurs, for example, when Congress enacts a "specific and comprehensive scheme for administrative and judicial review." *Lion Raisins*, 416 F.3d at 1372.

The AMAA creates such a "specific and comprehensive scheme" for "handlers" of raisins. Any "handler" who violates a marketing order is subject to fines and penalties in a final order of the Department of Agriculture, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. § 608c(14)(A)-(B). A "handler" may also bring a pre-enforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." *Id.* § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." *Id.* § 608c(15)(B). Taken together, these provisions make clear that handlers must bring challenges to marketing orders and enforcement decisions in U.S. district courts, not

in the Federal Court of Claims under the Tucker Act.

Case law supports this interpretation. In *Lion Raisins*, a raisin producer brought a Tucker Act claim alleging (in relevant part) that the Raisin Administrative Committee ("RAC") had taken its storage bins without just compensation. *Id.* at 1370. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Federal Court of Claims lacked jurisdiction over this claim. The court noted that section 608c(15) "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA" and "vests the district courts with jurisdiction to review the Secretary's decision." *Id.* The court held that "the takings claim may not be brought against the government because the statute provides for an administrative remedy and for judicial review in district court." *Id.* at 1358; *see also* Wright & Miller, *Federal Practice & Procedure* § 3657 & n.33.

Indeed, *the Government itself* urged the Federal Circuit to adopt this holding. As the court observed, "[d]uring oral argument, counsel for the United States acknowledged that [plaintiff] has an administrative remedy and may file a section 608(c)(15)(A) petition seeking redress for the RAC's alleged actions." 416 F.3d at 1371. The court specifically asked the Government's counsel whether she would represent, "speaking with the authority of the Secretary of Agriculture, that the Secretary reads this statute broadly enough to encompass claims of the sort involved in the bin case?" *Id.* at 1371 n.12 (quoting the oral argument transcript). Counsel for the Government

unequivocally responded "Yes." *Id.* The instant case demonstrates why the court was wise to demand assurance on this point, because otherwise the Government could play the game of claiming that district courts have jurisdiction when handlers attempt to use the Tucker Act to challenge a taking, and claiming the case falls under the Tucker Act when handlers sue in district court.

In *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938), this Court addressed a takings clause challenge to a walnut marketing order in a posture comparable to this case. The plaintiff, a handler, sought a "declaratory decree" under section 608c(15) that the walnut marketing order resulted in a taking of its private property. *See id.* at 986-87 & n.1, 989-91. This Court addressed the claim on the merits. Although the Government incorrectly cites *Wallace* as a case in which "this Court rejected a virtually identical takings claim," Opp. 17, it fails to recognize that, in order to resolve the takings claim, this Court must have asserted jurisdiction over it.

In the face of these precedents, the Government's statement that "[n]othing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order" is difficult to comprehend. Opp. 7. By providing district court jurisdiction for both pre-enforcement and post-enforcement orders, the AMAA displaces the Tucker Act. It is equally difficult to comprehend what the Government means when it asserts that it is improper for Plaintiffs to ask this Court to decide "the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking

were it not compensable under the Tucker Act." Opp. 8. There is nothing hypothetical about the question. Plaintiffs challenge an attempt by the Government to seek the monetary equivalent of the raisins that the Raisin Marketing Order, on the Government's interpretation, required them to hand over. It makes no sense for the Government to ask this Court to uphold its order requiring Plaintiffs to pay the monetary equivalent, and then demand that they file a second suit under the Tucker Act to recover their money in the form of just compensation for the taking. This is not a suit seeking money damages, nor a suit to enjoin a taking; it is an administrative appeal from an agency order on the ground that it constitutes a taking. *See Apfel*, 524 U.S. at 521-22. In such a case, where a separate "claim for compensation would entail an utterly pointless set of activities," the Tucker Act does not apply. *Id.* at 520 (quotation marks omitted).

The Government cites several cases from the federal courts of appeals and a single case from the Court of Federal Claims. But the cases are inapposite. The court of appeals cases do not involve the specific review provisions available under 608c, but rather statutory schemes that — in contrast to the AMAA — lack any specialized review procedure. And the Court of Federal Claims case addresses a takings claim that could not be brought using the specialized procedures set forth in section 608c. In *Evans v. United States*, 74 Fed. Cl. 554 (2006), the plaintiffs were not handlers and therefore were not subject to the review procedures of section 608c. *See id.* at 555. The court made this very point: "As producers, plaintiffs are specifically excluded from

the Agricultural Marketing Act's scope, 7 U.S.C. § 608c(13)(B), and administrative remedies are limited to handlers, 7 U.S.C. § 608c(15)." *Id.* at 564. The Government is thus wide of the mark in its assertion that "the Court of Federal Claims already adjudicated exactly such a claim" — and in its accusation that Plaintiffs have brought their claim in the Ninth Circuit because they "prefer to avoid" the Court of Claims' jurisprudence. Opp. 8. The Government itself brought this enforcement action under section 608c(14) against Plaintiffs in the Department of Agriculture. Having done so, the Government is in no position to fault Plaintiffs for requesting review in this Court using the very appeal processes established in the AMAA.

2. In a variation on its jurisdictional argument, the Government contends that Plaintiffs may not bring post-enforcement takings challenges to marketing orders at all. The Government raises this issue as part of its jurisdictional argument, *see* Opp. 6 (arguing that Plaintiffs cannot challenge "the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme"); *see id.* at 6-8, and as part of its merits argument, *see id.* at 10. In neither instance does the Government cite any case law supporting its position. And for good reason: the argument is groundless — whether characterized as jurisdictional or merits.

The facts of this case amply illustrate why the Government's position is meritless. Here, because Plaintiffs did not believe themselves to be handlers subject to the Raisin Marketing Order, they did not believe they were required to set aside the reserve-tonnage requirement to give the RAC. The

Government then initiated an enforcement action under section 608c(14) against Plaintiffs in the USDA. The USDA disagreed with Plaintiffs' interpretation of the term "handler," determined that they are subject to the Raisin Marketing Order, and ordered Plaintiffs to pay the alleged dollar equivalent of the disputed raisins for the relevant crop years. According to the Government's new position, Plaintiffs forever waived their Takings Clause challenge to the Raisin Marketing Order because they did not believe themselves to be subject to that Order in the first place. There is no basis in law or logic to limit post-enforcement Takings Clause challenges in this manner. If a government order would be an unconstitutional taking, the victim of the taking cannot be fined the value of his property for refusing to comply, without opportunity to challenge the constitutionality of the underlying order.

3. Even if, however, there were (as the Government now claims) "a serious jurisdictional problem" with Plaintiffs' takings claim, Opp. 3, it would be reason to grant Plaintiffs' rehearing petition, not deny it. The panel affirmed on the merits. A dismissal of Plaintiffs' takings claim for lack of jurisdiction would require a different disposition of the case — dismissal rather than affirmance on the merits, with the opportunity for plaintiffs to take their case to a court with jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Up until its most recent filing with this Court, the Government repeatedly agreed that this Court and the District Court had jurisdiction over Plaintiffs' takings claim. It would be manifestly unjust for this Court to

allow the Government to preserve its victory on the merits by arguing that the panel was wrong to exercise jurisdiction.

II. The Government's Arguments That Plaintiffs Have Not Established A Takings Claim Lack Merit.

A. Plaintiffs Have Established A Physical Taking Under *Loretto*.

As explained in the Petition for Rehearing, the Supreme Court has squarely held that a person's right to participate in the market "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). The Government studiously ignores this holding, instead making two arguments for *Loretto*'s inapplicability. First, the Government argues that the physical takings doctrine does not apply to personal property, but only to real property. Opp. 9-14. Second, the Government argues that later Supreme Court cases have *sub silentio* overruled this holding of *Loretto*. Opp. 14-16. Both are meritless.

1. The Government's Argument That *Loretto* Does Not Apply To Personal Property Is Meritless.

The Government fails to cite a single case supporting its lead argument — made for the first time in this litigation in its Opposition — that the *per se* doctrine of *Loretto* does not apply to personal property. Even Magna Charta provided that King could not "take grain or other chattels of any one without immediate payment." Magna Charta, ch.

28, *reprinted in* 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971). The first treatise on the United States Constitution, published in 1803, observed that the Takings Clause was enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, BLACKSTONE'S COMMENTARIES app. at 305-06 (1803). The government's expropriation of raisins to use in school lunches raises the same issue.

Moreover, the Supreme Court has, albeit in *dicta*, included personal property within the category of property subject to the *per se* taking rule. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). And *Loretto* itself relied on scholarship applying the physical takings doctrine to personal property. *See* 458 U.S. at 427 n.5.

Lower court precedent is to the same effect. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the Government argued that "the *per se* takings doctrine applies only to the physical occupation of *real* property," reasoning (as here) that "the holding of *Loretto* is a narrow one." *Id.* at 1284. Judge Edwards, writing for the court, declared unequivocally that "[t]he argument fails for want of authority or logic." *Id.* "[T]he actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Id.*; *see also id.* at 1285 ("One may be just as permanently and completely dispossessed of personal property as of real property. Any

distinction along these lines would be purely artificial.").

The Government scrambles unsuccessfully to distinguish *Nixon*. It asserts that "the court of appeals did not hold that *all* personal property falls under the *Loretto* rule," because the Government in that case "had actually taken 'complete possession' of [presidential] papers contrary to the expectation 'since the beginning of the Republic,' that a President's papers are his private property." Opp. 12 (quoting *Nixon*, 978 F.2d at 1271, 1276-84).

That is a sheer rewriting of the opinion. The reference in the opinion to longstanding "expectations" addressed who is the owner of presidential papers. One might think the Nation who paid his salary, rather than the individual, owns the papers, but the historical expectation to the contrary resolved that issue. Upon determining that President Nixon owned the papers, the D.C. Circuit applied the *per se* taking doctrine to personal property without any balancing or analysis of expectation interests. *See* 978 F.2d at 1284-85. Because no one — not even the Government — has questioned that a farmer owns his crops, the first stage in the *Nixon* analysis is not at issue here. What matters is the second stage: an unequivocal holding that the doctrine of *per se* takings applies to personal property, whether it be raisins or rune stones.

2. The Government's Argument That The Supreme Court Has *Sub Silentio* Overruled *Loretto* Is Meritless.

The Government next argues that the holding in *Loretto* on which we rely has subsequently "been rejected by the Supreme Court" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), two land-use cases. But the Government points to no language in either *Nollan* or *Dolan* that could be interpreted as overruling *Loretto*, nor does it cite any authority extending *Nollan* and *Dolan* outside the land-use context.

In *Nollan* and *Dolan*, the Supreme Court considered "takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005). "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Id.* The Court, however, noted that it has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'" — which, the Court explained, required that the regulation further the same government interest that would furnish a valid ground for denial of the permit. *See Nollan*, 483 U.S. at 834. To be permissible

without compensation, a condition on a land-use permit that would otherwise constitute a taking must be a mitigation measure both directly related and proportionate to the injury the public suffers from the grant of the permit. *Dolan*, 512 U.S. at 391. Thus, in *Nollan*, a lateral easement arguably would have mitigated the public's loss of access to the beach caused by the permitted construction, but a horizontal easement along the beach did not, and was therefore a taking that required compensation.

A wealth of precedents limits *Nollan* and *Dolan* to the land-use context. *See, e.g.*, *Lingle*, 544 U.S. at 547 ("We have not extended [the *Nollan*/*Dolan*] standard 'beyond the special context of [land-use] exactions.") (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (same)); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. Apr. 18, 2011) ("The Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property."); *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1099 (8th Cir. 2011) ("*Nollan* only applies to land-use exactions."). The Government simply fails to acknowledge these cases.

Indeed, the Eleventh Circuit in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), and this Court in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *abrogated on other grounds*, *Yee v. City of Escondido*, 503 U.S. 519 (1992), applied *Loretto*'s *per se* rule to the Government's attempt to condition a property-owner's right to participate in the marketplace on a requirement that the owner physically transfer some portion of his property to

the government. Those decisions are directly applicable here, and controlling.

The Government claims that *Gulf Power* does not "even obliquely conflict" with the panel's interpretation of *Loretto*, Opp. 13, but asserts only two irrelevant grounds as a possible distinction. First, the Government claims that *Gulf Power* is distinguishable because "Plaintiffs here challenge a fine that was imposed on them" due to their alleged noncompliance with the Raisin Marketing Order's requirement that they turn over their property to the RAC. This is just a reiteration of the Government's argument that Plaintiffs may not bring a post-enforcement takings challenge. As explained above, this argument has no merit. *See supra* pp. 8-9. Second, the Government argues that the "fines that the government imposed were fully consistent with historical expectations." Opp. 13. But *Gulf Power* contains no discussion of a party's "investment-backed expectations," because no such analysis is relevant in the context of physical takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Opposition abundantly confirms that *Gulf Power* conflicts with the panel's decision.

The Government also argues that, in *Yee*, the Supreme Court rejected this Court's holding in *Hall* that *Loretto* "gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business." 833 F.2d at 1277-78, *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26. But the Government simply ignores our argument that "*Yee* did not involve a compelled transfer of ownership to

the government, but merely a rent control scheme, which is a classic economic regulation." Pet. 14-17. It also conveniently disregards the Supreme Court's reaffirmance in *Yee* of the very footnote in *Loretto* that the Government claims the Supreme Court has subsequently repudiated. *See* 503 U.S. at 531-32 (approving of *Loretto*'s footnote 17).

B. It Is Irrelevant That The Government's Stated Purpose Is To Raise Prices For Raisin Growers.

Finally, the Government appears to argue that uncompensated takings of property cannot fall within the Fifth Amendment if the regulation's "express purpose" is to increase the "amount of money plaintiffs and other raisin farmers receive for their products." Opp. 5, 18. The Supreme Court has rejected that argument. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court noted:

> [In *Loretto*,] we held that a property right was taken even when infringement of that right arguably increased the market value of the property at issue. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'

Id. at 170 (citations omitted).

Even assuming for sake of argument that a properly designed program removing a certain portion of the crop from the market might increase crop prices, this provides no justification for the Government taking title to the unmarketed portion of every farmer's raisin crop and using it for the federal school-lunch program and other governmental purposes. *Cf. Dolan*, 512 U.S. at 392-93 (although an open-space requirement would mitigate increased water run-off, this provided no justification for requiring the landowner to open his land to the public for recreation). Indeed, this aspect of the marketing order program is counterproductive to the ostensible price-raising purpose. Rather than taking the reserve-tonnage raisins off the market, the Government uses the raisins for economically beneficial purposes as it sees fit, thereby ensuring that the supposed "increase in prices through scarcity" does not occur. As in *Nollan*, the condition that the Government imposes on Plaintiffs "utterly fails to further the end advanced as the justification." 483 U.S. at 837.

In light of these uncontested facts, it is truly remarkable for the Government to assert that Plaintiffs have failed "to put forth any evidence or explanation as to how the raisin reserve requirement has a negative financial impact on their business." Opp. 18. What more is there to say? The Government sought to take $483,843.53 worth of raisins over the two year period in question. It is commonly accepted that having one's property taken and used by someone else, without compensation, has a "negative financial impact" on business. The Government's assertion

that Plaintiffs must make some further showing defies common sense.

C. The Panel Opinion's Reasoning Has Dramatic Consequences For Property Rights In This Circuit.

As explained in the Petition for Rehearing:

> [I]t is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce.

Pet. 20. In response to these observations, the Government claims that "Plaintiffs' fears" about the panel opinion's consequences for property rights "are considerably overstated." Opp. 17. But the Government fails to dispute that Plaintiffs accurately describe the logical consequences of the panel opinion. It appears that Plaintiffs' "fears" — as described above and in their Petition — are well-founded indeed.

Rather than disputing Plaintiffs' observations about the panel opinion's logical consequences, the Government argues that, notwithstanding these consequences, this Court may take comfort that

courts have "uph[eld] agricultural supply controls under the AMAA against takings challenges." Opp. 17. But the Government cites only a single published opinion (the Federal Court of Claims' 2006 opinion in *Evans*) upholding the Raisin Marketing Order in the face of a Takings Clause challenge, which makes the panel the first Article III or appellate court to have upheld the Order. As *Evans* explained, the Raisin Marketing Order "stands out from most of its counterparts" and is "stricter." 74 Fed. Cl. at 558, 562. There is, in short, no longstanding line of precedents upholding the Order.

More notably still, even in upholding the Raisin Marketing Order, both this Court and the Federal Court of Claims described the provisions of the Order as "draconian." *Evans*, 74 Fed. Cl. at 555; Op. at 9472. There is thus a general recognition — shared by all, save (it appears) the Government — that the property appropriation the Order imposes on independent raisin farmers, like Plaintiffs, is dramatic and unique. Plaintiffs respectfully submit that such "draconian" results should not be imposed without this Court's having addressed the weighty issues that Plaintiffs have raised in their Petition.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

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December 30, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE,
D.B.A. RAISIN VALLEY
FARMS, A PARTNERSHIP, AND D.B.A. RAISIN
VALLEY FARMS
MARKETING ASSOCIATION, A.K.A. RAISIN
VALLEY MARKETING, AN UNINCORPORATED
ASSOCIATION; MARVIN D. HORNE; LAURA R.
HORNE; DON DURBAHN, AND THE ESTATE OF
RENA DURBAHN, D.B.A.
LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

SURREPLY IN OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Plaintiffs do not contest that the Tucker Act, 28 U.S.C. § 1491(a), vests exclusive jurisdiction over takings claims in the United States Court of Federal Claims. Instead, they argue that the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15) ("AMAA"), withdraws Tucker Act jurisdiction over their particular takings claim, thus allowing them to assert that challenge in this suit. But the AMAA's administrative and judicial review provisions apply only to handlers. The raisins set aside for reserve under the regulatory scheme belong to producers, and therefore any takings claim that plaintiffs assert is in their capacity as producers, not handlers. When

a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative and judicial review provisions do not apply.

Lion Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005) involved wholly distinguishable claims. Lion, a producer-handler, asserted takings claims arising out of the alleged failure of the Raisin Administrative Committee ("RAC") to fulfill its statutory obligation to distribute reserve pool proceeds among producers, as well as its regulatory obligation to compensate handlers for expenses incurred in storing reserve raisins. The Federal Circuit found neither claim cognizable under the Tucker Act because takings claims cannot be premised on regulatory or statutory violations, and because Lion had not actually asked the agency for compensation for its storage expenses. *See id.* At 1369-72. It is with respect to the storage expenses only that the Federal Circuit held, and the government agreed, that the AMAA required Lion to seek equitable restitution from the agency under section 608c(15) of the Act rather than *see*king compensation directly in the Court of Federal Claims. Neither the Federal Circuit nor the government suggested that the AMAA withdraws Tucker Act jurisdiction where, as here, the plaintiff asserts a Fifth Amendment takings claim rather than a claim that the RAC failed to comply with its statutory or regulatory obligations.

Plaintiffs' merits argument fares no better. Plaintiffs cannot demonstrate that the regulatory regime effectuates a per se, physical taking, as evidenced by plaintiffs' inability to point to any actual appropriation of their property by the

government. Plaintiffs' suit challenges fines imposed on plaintiffs because they voluntarily chose to sell raisins on the open domestic market without complying with a regulatory regime that was put in place to stabilize the prices that plaintiffs and other raisin producers receive for their crop. While plaintiffs are free to challenge that regime as effectuating a compensable regulatory taking, they fall far short of establishing that they suffered the sort of physical taking that automatically entitles a property owner to compensation.

ARGUMENT

1. Plaintiffs do not dispute that the Tucker Act vests the United States Courts of Federal Claims with exclusive jurisdiction over takings claims. Instead, plaintiffs argue that they may assert their takings challenge in this suit because the AMAA withdraws Tucker Act jurisdiction over takings claims by handlers. *See* Rh'g Reply ("Reply") 2-3. But any takings claim asserted by plaintiffs arises in their capacity as producers, not handlers. As plaintiffs repeatedly acknowledge, although handlers are tasked with responsibility for sorting the raisins, it is producers who own the raisins set aside for reserve and who receive no direct payment when title to a portion of their crop is transferred to the RAC. *See, e.g.*, Rh'g Pet. 5-6 (describing the raisin reserve program as "effect[ing] a direct transfer of title of a *producer's* 'reserve tonnage' raisins to the government) (emphasis added); *id.* at 11 (asserting that "[t]he government demands that raisin *producers* give a government committee ownership over a hefty proportion of the producers' crop")

(emphasis added). Plaintiffs have not argued that the regulatory regime results in a government taking of any property belonging to handlers.

To be sure, the enforcement order that plaintiffs challenge in this suit was imposed on them in their capacity as handlers, and thus required administrative exhaustion under the AMAA. Plaintiffs do not contend, however, that that order effectuates a taking, nor could they; the order simply imposes penalties on plaintiffs for failing to comply with the regulatory scheme. Instead, plaintiffs argue that the raisin reserve program effectuates an unconstitutional taking of property from producers, thus justifying their refusal to comply with the regulatory obligations imposed on handlers. But as the Supreme Court and this Court have repeatedly held, a takings challenge against the federal government is "premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985); *see also*, *e.g., Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

Nothing in the AMAA precludes plaintiffs from alleging in the Court of Federal Claims that the raisin reserve program injures them in their capacity as producers by subjecting them to a taking of their crop without compensation. In determining whether a particular claim brought by a producer-handler is subject to the AMAA's administrative and judicial review scheme, "the crucial question is whether a producer-handler is bringing suit in its capacity as a

producer or as a handler." *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006). Courts have consistently recognized that when a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative exhaustion and judicial review requirements do not apply. *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dept. of Agriculture*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer"); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003); *Dairylea Co-op., Inc. v. Butz*, 504 F.2d 80, 82-83 (2d Cir. 1974).[1]

With respect to their takings claim, then, plaintiffs are situated exactly like the plaintiff raisin producer whose takings claim was adjudicated by the Court of Federal Claims in *Evans v. United States*, 74 Fed. Cl. 554 (2006). And where, as here, a takings claim *may*

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[1] This Court has recognized that by including in the AMAA a comprehensive administrative and judicial review scheme for handlers but not producers, Congress divested courts of authority to entertain producer challenges to marketing orders where their interests are already represented by handlers. *See, e.g., United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1164-67 (9th Cir. 2002). But no handler would have standing to assert a takings claim based on the raisin reserve requirement because the transfer of property occurs exclusively between the RAC and producers. And any producer-handler asserting such a claim would be doing so in its capacity as a producer. *See* supra p. 3. Plaintiffs' takings challenge thus falls outside the category of producer claims for which the AMAA precludes judicial review. *See Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) (allowing a producer to challenge an alleged infringement of a "definite personal right[ ]" under a milk marketing order).

be brought in the Court of Federal Claims, the Tucker Act *requires* that the claim be brought in that court. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion) (a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute").[2]

2. Plaintiffs misapprehend both the Federal Circuit's holding and the government's position in *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005). Lion, a raisin producer-handler, asserted two takings claims under the Tucker Act. First, in its capacity as a producer, Lion alleged that it was entitled to compensation because the RAC had, in violation of its statutory and regulatory obligations, used reserve pool proceeds to finance future export programs rather than distributing them among the producers who had an equitable interest in those proceeds. *Id.* at 1361. Second, in its capacity as a handler, Lion alleged that it was entitled to compensation because the RAC, in violation of its regulatory and contractual obligations, failed to reimburse Lion for several thousand raisin bins that belonged to Lion and were not returned after they were used to ship reserve

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[2] *Wallace v. Hudson-Duncan Co.*, 98 F.2d 985 (9th Cir. 1938), does not suggest otherwise. The plaintiff in that case was a walnut handler who brought a takings claim based on a marketing order that allegedly effectuated a taking of the plaintiff's property in its capacity as a handler. *See id.* at 987. This Court's adjudication of that claim in no way indicates that the AMAA withdraws Tucker Act jurisdiction over takings claims brought by producer-handlers in their capacity as producers.

raisins pursuant to the RAC's instructions. *Id.*; *see also Evans*, 74 Fed. Cl. at 558-59 (explaining that Lion asserted its reserve pool claim in its capacity as a producer and its bins claim in its capacity as a handler).

The Federal Circuit held that neither claim was cognizable under the Tucker Act because the law is "clear that a claim premised on a regulatory [or statutory] violation does not state a claim for a taking." *Id.* at 1369-70. Moreover, the court of appeals explained, with respect to the bin claim, the agency's regulations specifically obligated the RAC to compensate handlers for expenses incurred in storing and handling reserve raisins. Accordingly, Lion was free to seek equitable restitution via the administrative review process provided in the AMAA. *Id.* at 1371-72.

It is in this context *only* that the Federal Circuit held, and the government agreed, that "the takings claim may not be brought against the government because the statute provides for an administrative remedy." Reply 4 (quoting *Lion*, 416 F.3d at 1358); *see also Lion*, 416 F.3d at 1371 n.12 (quoting government counsel as agreeing that Lion could file a section 608c(15)(A) petition with respect to "claims of the sort *involved in the bin case*") (emphasis added). The Federal Circuit did not hold, as plaintiffs suggest, that the Court of Federal Claims lacked jurisdiction over Lion's claims simply "because [Lion] was a 'handler' under the AMAA." Reply 3-4.

Plaintiffs' takings claim is wholly distinct from those in *Lion*. Plaintiffs do not allege that the raisin reserve requirement is contrary to any statutory or regulation provision, nor do they argue that any

statutory or regulatory provision entitles them to compensation for any raisins they reserve. Their takings claim rests solely on the view that the raisin reserve requirement entitles producers to compensation under the Fifth Amendment. That is precisely the sort of claim that Congress intended the Tucker Act to govern. Indeed, *Lion* expressly contemplates Tucker Act jurisdiction over takings claims against the RAC premised on the Fifth Amendment rather than the RAC's alleged failure to comply with its statutory, regulatory, or contractual obligations. Although the government had argued that the United States could not be held liable for an alleged taking by a non-appropriated funds instrumentality ("NAFI") such as the RAC, the Federal Circuit rejected that argument, holding that "[t]he RAC is an agent of the United States, and the United States may properly be sued in the Court of Federal Claims for any takings that are allegedly consummated by the acts of its agent." *Lion*, 416 F.3d at 1368; *see also id.* at 1358 ("[T]he Court of Federal Claims has jurisdiction over takings claims against the United States based on the actions of the RAC."). And nothing in the decision supports plaintiffs' assertion that their status as handlers is sufficient in itself to preclude Tucker Act jurisdiction; if that were true, the Federal Circuit would have dismissed Lion's claims on that basis alone rather than considering in detail whether administrative remedies were available for the takings Lion alleged.

3. Plaintiffs' final jurisdictional argument is that they must be allowed to assert their takings challenge now before this Court because they were not previously aware that the raisin reserve program

applied to them, and therefore this suit presents the only opportunity they had to present the claim. Reply 8-9. It is unclear why plaintiffs believe that their purported misunderstanding about their regulatory obligations would have any bearing on this Court's jurisdiction, nor do they provide any support for their contention that "post-enforcement Takings Clause challenges" fall under a never before identified exception to the Tucker Act's exclusive jurisdiction over takings claims. Reply Br. 9.

In any event, the record below establishes that beginning a year before the time period for which the USDA imposed fines on plaintiffs, the agency repeatedly notified plaintiffs that their business model rendered them handlers under the raisin marketing order. *See* Appellee's Br. 6-13. If plaintiffs had chosen at that point to comply with the regulatory regime, they could have avoided paying fines while also seeking compensation in the Court of Federal Claims for the portion of their crop placed in reserve. To be sure, for the reasons already explained by this Court, *see* Op. 9467-75, and in *Evans*, 74 Fed. Cl. at 554, plaintiffs' claim lacks merit and would be properly denied in the Court of Federal Claims just as it was denied here. The government's point is simply that the Tucker Act vests the Court of Federal Claims with exclusive jurisdiction to adjudicate the claim.

4. Plaintiffs' Reply repeats their argument that the RAC subjected them to a per se, physical taking without compensation, but does not overcome the critical problem with their claim: the RAC never actually took or even attempted to take possession of plaintiffs' raisins. The absence of any appropriation

of physical property in this case is not a technicality arising from the procedural posture of plaintiffs' claim. Plaintiffs cannot point to an actual transfer of their raisins to the government because the regulatory regime they challenge does not effectuate a physical taking. As this Court explained, "[f]ar from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation." Op. 9470. And even after plaintiffs chose to sell raisins on the open domestic market, the government did not "come onto the Hornes' farm uninvited and walk off with . . . their crops." *Id.* at 9469-70. Plaintiffs brought this suit to appeal fines they incurred for failing to comply with a regulatory regime specifically designed to stabilize prices for the commodity that plaintiffs voluntarily chose to sell. Plaintiffs' takings challenge to those fines falls squarely within the category of claims that must be adjudicated under the *Penn Central* factors for determining whether a regulatory requirement constitutes a compensable taking. *See Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978) (considering the economic impact of the regulation on the claimant, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action).

This Court did not hold, nor has the government argued, that plaintiffs are precluded from bringing any takings challenge to the regulatory regime. The Court simply held that plaintiffs failed to demonstrate that they suffered a physical taking of

their crop within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See* Op. 9475. If plaintiffs wish to challenge the raisin reserve program as effectuating a compensable regulatory taking, they are free to do so in the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

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[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership, Plaintiffs - Appellants, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant - Appellee.	No. 10-15270 D.C. No. 1:08-cv-01549-LJO-SMS Eastern District of California, Fresno ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing *En Banc* is DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership, *Plaintiffs-Appellants*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendant-Appellee*.	No. 10-15270 D.C. No. 1:08-cv-01549-LJO-SMS Eastern District of California, Fresno ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order.

The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

No further petitions for rehearing or rehearing en banc will be accepted for filing.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership, *Plaintiffs-Appellants,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendant-Appellee.*	No. 10-15270 D.C. No. 1:08-cv-01549-LJO-SMS AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011
Amended March 12, 2012

Before: Stephen Reinhardt, Michael Daly Hawkins, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

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Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq*. ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949.

Farmers Marvin and Laura Horne ("the Hornes"[3]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168,

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[3] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, *inter alia*, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[4] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on

[4] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[5] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[6] and do not

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[5] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[6] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

apply to any producer "in his capacity as a producer."[7] 7 U.S.C. §§ 608c(1), 608c(13)(B).[8]

Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's

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[7] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[8] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

crop. *See Parker*, 317 U.S. at 363-64.[9] Like many other fruit and vegetable orders issued under the AMAA,[10] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[11] *see* 7 C.F.R. §§ 989.35,

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[9] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[10] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[11] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one

989.36—recommends the "reserve tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale

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represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

[of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents,

Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[12] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen

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[12] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the-record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[13]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

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[13] The Hornes do not challenge the JO's calculation of these figures.

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[14] On cross-motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th

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[14] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their tollpacking business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[1] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation

only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See, e.g., Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

The Hornes argue that, even if they are handlers subject to the Raisin Marketing Order's provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an

uncompensated *per se* taking in violation of the Fifth Amendment.

[2] The Fifth Amendment Takings Clause does not prohibit the government from taking private property; instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As a preliminary matter, we must decide whether we have jurisdiction over the Hornes' takings claim.

[3] As we explained in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; "it must simply 'provide an adequate process for obtaining compensation.'" *Id.* at 1285 (quoting W*illiamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194

(1985)). The Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Thus, a takings claim against the federal government must be brought there in the first instance, "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Here, the government contends that the takings claim before us is premature because the Hornes have yet to avail themselves of Tucker Act process available to them in the Court of Federal Claims. The Hornes, however, argue that the AMAA withdraws Tucker Act jurisdiction for takings challenges to AMAA marketing orders and enforcement actions, and that the claim is therefore properly before us.

[4] Section 8c(15) of the AMAA, 7 U.S.C. § 608c(15), "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA; requires that the Secretary [of Agriculture] grant a hearing and make a ruling on petitions brought by handlers; and vests the district courts with jurisdiction to review the Secretary's decision." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005). The case law the Hornes cite makes clear that when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section 8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements. *See id.* at 1370-71 (holding that raisin producer-

handler asserting a takings claim "only in its capacity as a handler" could effectively bring that claim in section 8c(15) proceedings and that a handler "may not seek compensation in the Court of Federal Claims under the guise of a takings claim for what is essentially a challenge to invalid agency action"); *see also United States v. Ruzicka*, 329 U.S. 287, 292-93, 295 (1946) (holding that a handler's challenges to a marketing order could only be raised using the special statutory procedure provided by section 8c(15)); *cf. Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (asserting jurisdiction over a handler's claim that a walnut marketing order resulted in a taking of its private property).

[5] However, the takings claim before us is brought by the Hornes not in their capacity as handlers but in their capacity as producers; the Hornes allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers' takings claims, nor is it subject to section 8c(15)'s administrative exhaustion requirements. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) (distinguishing suits brought in producer-handlers' capacity as producers from suits brought in their capacity as handlers); *Ark. Dairy-Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust [section 8c(15) process] before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer.") (citations omitted).

[6] Nothing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation. Thus, they may bring the takings claim there under the Tucker Act. And since they *may* bring a Tucker Act claim, they are *required* to bring it before we can properly adjudicate the takings issue. *See Bay View*, 105 F.3d at 1285 ("The Tucker Act . . . [is] an implicit promise by Congress to pay compensation for all takings of private property for public purposes. . . . Thus, appellants' takings claim is premature until they have availed themselves of the process provided by the Tucker Act.") (internal quotation marks and citations omitted).

[7] *Bay View* makes clear that we lack jurisdiction to address the merits of the Hornes' takings claim where Congress has provided a means for compensation. The Hornes' takings argument therefore fails.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[8] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[9] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee,

upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . ."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id*. § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf. $273,969.04*, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[10] The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also*

United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[15] In light of these

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[15] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or

factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[16]

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to pursue a takings claim in the Court of Federal Claims or attempt to impress upon the Secretary the need for reevaluation of the Raisin Marketing Order. *See* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. We find no

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regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[16] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, and indeed lack jurisdiction to find such an infirmity on takings grounds until the Hornes avail themselves of Tucker Act process in the Court of Federal Claims. The summary judgment of the district court is **AFFIRMED.**

28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or

against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

7 U.S.C. § 608c

§ 608c. Orders

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as “handlers”. Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, 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. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by

the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant

to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production

area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence

introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Terms--Milk and its products

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect

under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$3.24
New York-New Jersey	3.14
Middle Atlantic	3.03
Georgia	3.08
Alabama-West Florida	3.08
Upper Florida	3.58
Tampa Bay	3.88
Southeastern Florida	4.18
Michigan Upper Peninsula	1.35
Southern Michigan	1.75
Eastern Ohio-Western Pennsylvania	1.95
Ohio Valley	2.04
Indiana	2.00
Chicago Regional	1.40
Central Illinois	1.61
Southern Illinois	1.92
Louisville-Lexington-Evansville	2.11
Upper Midwest	1.20
Eastern South Dakota	1.50
Black Hills, South Dakota	2.05
Iowa	1.55
Nebraska-Western Iowa	1.75
Greater Kansas City	1.92
Tennessee Valley	2.77
Nashville, Tennessee	2.52
Paducah, Kentucky	2.39
Memphis, Tennessee	2.77
Central Arkansas	2.77
Fort Smith, Arkansas	2.77
Southwest Plains	2.77
Texas Panhandle	2.49
Lubbock-Plainview, Texas	2.49
Texas	3.28
Greater Louisiana	3.28
New Orleans-Mississippi	3.85
Eastern Colorado	2.73
Western Colorado	2.00

Southwestern Idaho-Eastern Oregon	1.50
Great Basin	1.90
Lake Mead	1.60
Central Arizona	2.52
Rio Grande Valley	2.35
Puget Sound-Inland	1.85
Oregon-Washington	1.95

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the

individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any 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., [(e) omitted] and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including 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 at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding

calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the

case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used

only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to--

(i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;

(ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and

(iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

(K) **(i)** Notwithstanding any other provision of law, milk produced by dairies--

(I) owned or controlled by foreign persons; and

(II) financed by or with the use of bonds the interest on which is exempt from Federal income tax under section 103 of Title 26;

shall be treated as other-source milk, and shall be allocated as milk received from producer-handlers for the purposes of classifying producer milk, under the milk marketing program established under this chapter. For the purposes of this subparagraph, the term "foreign person" has the meaning given such term under section 3508(3) of this title.

(ii) The Secretary of Agriculture shall prescribe regulations to carry out this subparagraph.

(iii) This subparagraph shall not apply with respect to any dairy that began operation before May 6, 1986.

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(M) Minimum Milk Prices for Handlers

(i) Application of minimum price requirements

Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

(ii) Covered milk handlers

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a

producer-handler or producer operating as a handler) that--

(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of April 11, 2006);

(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

(iii) Obligation to pay minimum class prices

For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

(iv) Certain handlers exempted

Clause (i) does not apply to--

(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on April 11, 2006);

(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

(III) a handler (otherwise described in clause (ii)) for any month during which--

(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or

(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

(N) Exemption for Certain Milk Handlers

Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131 shall be exempt during any month from any

minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

(O) Rule of Construction Regarding Producer-Handlers

Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

(6) Terms--Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be

equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden,

obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within

the meaning of subsection (5) of section 608a of this title.

(H) providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide

for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable

to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to

citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a

representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider 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 the 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.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less

than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the

United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an 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 praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in

accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) **(i)** Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of

Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or 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 marketing agreement or order, within the production area specified in such marketing agreement or 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 marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an

order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and timeframes for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish--

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall--

(I) issue a notice providing an action plan and expected timeframes for completion of the hearing not more than 120 days after the date of the issuance of the notice;

(II) **(aa)** issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within

the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5 to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if--

(i) the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and

(ii) the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall--

(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;

(ii) consider the most recent monthly feed and fuel price data available; and

(iii) consider those prices in determining whether or not to adjust make allowances.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors,

insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, 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 such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the

Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing 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 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

7 C.F.R. § 989.11

§ 989.11 Producer.

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: *Provided*, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

7 C.F.R. § 989.15

§ 989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his

capacity as a dehydrator, blends raisins entirely of his own manufacture.