No. _____

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 8, 2014

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

RULE 14.1(b) STATEMENT

Petitioners are 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; the Estate of Don Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

This case presents the important question of whether the federal government can seize ownership, each year, of a large portion of a farmer's raisin crop without paying the just compensation required by the Takings Clause of the Fifth Amendment. This Court has already held, unanimously, that Petitioners have the right to assert their just compensation rights in federal court. On remand, the same panel of the Ninth Circuit denied their claim on the merits.

As the Court is aware from the earlier phase of this litigation, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside portions of the raisins they obtain from raisin producers, and to transfer ownership of those raisins to the government. In the two years at issue in this case, 2002-2003 and 2003-2004, the USDA required transfer of 47 percent and 30 percent of each producer's crop, respectively. Raisin handlers who do not comply — including Petitioners here — face large fines.

Confiscation of property ownership implicates the Fifth Amendment's categorical rule of just compensation. And yet the USDA hardly even pretends to offer just compensation in return for that appropriation. The USDA paid farmers like the Hornes nothing at all for their 2003-2004 raisins, and less than the cost of production for their 2002-2003 raisins.

The regulations at issue are, in short, a textbook case of an uncompensated taking. Nonetheless, the Ninth Circuit rejected Petitioners' claims for the *third* time, and the second time on the merits, each

time based on different rationales. The panel's newest set of rationales conflicts with this Court's governing precedents, creates multiple conflicts with other appellate courts, and threatens a dramatic curtailment of property rights generally.

In this iteration of the case, the panel offered three reasons for determining that Petitioners are not entitled to just compensation. *First*, the panel reasoned that the categorical takings rule for seizures of property applies only to *real* property, not to personal property (like raisins). *Second*, the panel concluded that even if that categorical rule could have applied to raisins, it does not apply here because the USDA theoretically offers raisin handlers something in return (never mind that the return is often nothing at all). *Third*, the panel compounded those errors by treating the USDA's regulations as a use restriction, subject only to a balancing test that had heretofore been used only in the context of land-use permitting. None of those steps is consistent with this Court's takings doctrine, and each one creates deep splits in the caselaw that call for immediate resolution.

The conflicts between the Ninth Circuit's decision and the holdings of this Court and other federal courts are more than enough to justify this Court's intervention, for a second time, in the government's treatment of raisin production. But what is truly shocking is the evisceration of Takings Clause doctrine that the Ninth Circuit's holdings imply. If it were really true that the government *never* faces a "categorical duty" of just compensation (*see Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012)) when it takes ownership of a

person's movable property, and that it can escape the duty simply by offering a discretionary possibility of partial payment in return, the just-compensation requirement for physical takings — which has been the core of the Takings Clause's protections for more than 200 years — is essentially a dead letter. No less disturbing is the notion that whenever a person wishes to use his property in commerce, the government can demand its cut, subject only to a balancing test. But today, astonishingly, that is the law in the Ninth Circuit.

The Ninth Circuit's restrictions on the Takings Clause's categorical protection against government appropriation of property cannot be allowed to stand. This Court should grant review and reverse.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 750 F.3d 1128. Pet.App. 1a. This Court's opinion is reported at 133 S. Ct. 2053. Pet.App. 242a. This Court's opinion reversed an earlier opinion of the court of appeals reported at 673 F.3d 1071. Pet.App. 220a. That opinion of the court of appeals itself superseded the court of appeals' original decision which was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. Pet.App. 191a, 260-61a. The opinion of the district court is unpublished, and is electronically reported at 2009 WL 4895362. Pet.App. 125a.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. Pet.App. 1a. On July 16, 2014, Justice Kennedy extended the time for filing a

petition for certiorari to and including September 8, 2014 (No. 14A44). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 1331.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and 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"), are reproduced in the appendix to this petition. *See* Pet.App. 262a-372a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Framework

Under the AMAA, the USDA regulates the sale of certain agricultural products, including raisins, through the use of "marketing orders." *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product "reserve" programs under which farmers must set aside a specified portion of their crop "for the account of" the federal government. *Id.* at 557.

This case involves what what one court has described as the most "draconian" of these marketing order schemes — the marketing order for California raisins, which constitute approximately 99 percent of the United States' and 40 percent of the world's raisin production. Pet.App. 225a n.7; *Evans*, 74 Fed. Cl. at 555. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two primary ways: "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." *Evans*, 74 Fed. Cl. at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do not command a specified majority or super-majority, *see* 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to a revote of raisin producers since its first adoption in 1949.

The marketing order applies only to "handlers" of raisins, a term defined at 7 C.F.R. § 989.15. Raisin farmers sell their crop to handlers, who process, pack, and sell the raisins to consumers. Under the Order, the Raisin Administrative Committee ("RAC"), an agent of the USDA, establishes yearly raisin tonnage requirements, known as "reserve tonnage" and "free tonnage" percentages. §§ 989.66, 989.166. The percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d). Once the percentages are fixed, handlers of raisins must set aside the "reserve

tonnage" requirement "for the account" of the RAC. §§ 989.65, 989.66(a), (b)(1). Handlers pay producers only for the free-tonnage raisins. *Evans*, 74 Fed. Cl. at 557. Handlers pay nothing to producers for the reserve-tonnage raisins that they transfer to the government. *Id.* The AMAA provides that any "handler" who violates a marketing order may be subject to fines and penalties in a final USDA order. 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c).

Once it has control of the reserve-tonnage raisins, the RAC may require their delivery to anyone chosen by the RAC to receive them, 7 C.F.R. § 989.66(b)(4), may obtain loans using reserve-tonnage raisins as security, § 989.66(g), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies, foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4). When the RAC sells its reserve-tonnage raisins, it uses the proceeds to fund its own administrative costs as well as to provide export subsidies to favored handlers. Unexpended proceeds, if any, must be remitted to producers on a pro rata basis. 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.53(a), 989.66(h).

In the two years relevant to this case, 2002-2003 and 2003-2004, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. *See* RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Sept. 3, 2014). Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of

raisins in those two years. *See id.* at 20. In 2002-2003, the farmers who produced those raisins were paid well below the cost of production (and considerably less than fair market value). *See* RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Sept. 3, 2014). In 2003-2004, the government paid nothing at all for the 38.5 million pounds of raisins that it took and used. *See id.* at 23; *see also id.* at 55.

B. The Hornes' Attempt To Comply Without Suffering Confiscation Of Their Raisins

The Hornes and the Durbahns (hereinafter "the Hornes" or "Petitioners") are independent farmers in Fresno and Madera Counties in California. Pet.App. 247a. Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. Pet.App. 33a, 247a.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin Marketing Order, which they regard as "stealing [their] crop." Pet.App. 129a. As they explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." Pet.App. 130a, 247a n.3. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would allow them to comply with the law without having to set aside reserve raisins for the RAC. Pet.App. 247a. The

Hornes purchased their own equipment for processing and packing raisins. Pet.App. 247a. Instead of selling their crop to a traditional handler, they processed the raisins on their own equipment and sold them directly to wholesale customers such as food-processing companies and bakeries, eliminating the middle-man. Pet.App. 247a. Because the obligations of the Raisin Marketing Order apply only to "handlers," the Hornes believed they would not be required to disgorge the "reserve" portion of their raisin crop to the RAC. Pet.App. 247a.

The Hornes also allowed some 60 of their neighbors to lease this equipment for their own raisins. Pet.App. 247a. Under this arrangement, the other producers would lease the Horne's equipment for a per-ton fee. The Hornes and their neighbors coordinated sales through the "Raisin Valley Farms Marketing Association," which connected prospective purchasers with producers on a rotational basis. Pet.App. 38a. Purchasers would pay the Raisin Valley Farms Marketing Association, which would then disburse payment to the producers, less the rental fee for use of the equipment. Pet.App. 38a-39a, 130a-131a. Accordingly, the producers who used the Hornes' equipment received full market price for their raisins, without having portions of their crop segregated and turned over to the government.

Because they believed this business model would avoid application of the reserve requirement, the Hornes did not set aside reserve-tonnage raisins for 2002-2003 and 2003-2004, the two years relevant to this case, for either their own raisins or those of

other producers who leased their equipment. Pet.App. 132a-133a, 248a.

C. Proceedings Below

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that Petitioners violated the AMAA. Pet.App. 30a-31a, 248a. According to the Administrator, because all producers who sell any portion of their crop are effectively "handlers" subject to the Order, the Hornes became handlers by marketing their own raisins. Pet.App. 31a, 248a.

A USDA Administrative Law Judge ("ALJ") agreed. Pet.App. 32a-33a, 249a. The ALJ reasoned that the requirement that Petitioners hand over their raisins to the USDA without compensation "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." Pet.App. 45a. The Hornes were also held responsible as handlers of raisins produced by other producers — who had, again, sold their raisins for full price — on the theory that the Hornes had "acquired" the raisins from those farmers within the meaning of the Marketing Order when the raisins arrived at the Hornes' processing facility. Pet.App. 47a-50a, 52a; *see also* Pet.App. 84a. Thus, the Hornes personally were fined the monetary equivalent of all the raisins processed in their facility. Pet.App. 53a-54a. None of the fine was imposed on the other producers, who received full value for their crop.

On appeal, a USDA Judicial Officer ("JO") affirmed. Pet.App. 98a-99a, 122a-123a. As to Petitioners' takings claim, the JO claimed that he

had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." Pet.App. 78a; *but see United States v. Ruzicka*, 329 U.S. 287, 294 (1946) (challenges under the AMAA "formulated in constitutional terms ... in the first instance must be sought from the Secretary of Agriculture").

Of relevance here, the JO determined that, as "handlers," Petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. Pet.App. 97a-98a. The JO ordered Petitioners to pay $483,843.53, the dollar equivalent of the withheld raisins for the 2002-2003 (634,427 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 (hereafter, the "dollar equivalent" component of the fine). Pet.App. 109a-110a, 123a; 7 C.F.R. § 989.54(b). The JO also ordered Petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). Pet.App. 98a, 122a. The remaining $25,000 is not at issue in this petition. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which also are not at issue here. Pet.App. 112a, 123a.

It is important to emphasize that Petitioners bore the entirety of both the dollar equivalent and penalty components of the fine, and that the fine covered both Petitioners' own raisins and those allegedly "acquired" from their neighbors who used

Petitioners' equipment. The other producers received full market value for their crop and were not charged any part of the fine.

Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under Section 608c(14)(B). They contended, *inter alia*, that the requirement that they contribute a portion of their raisin crop to the government is an unconstitutional taking. The District Court granted summary judgment for the USDA. Pet.App. 189a-190a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety, holding that no taking occurs under the regulatory scheme — and 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." Pet.App. 208a. After Petitioners filed a rehearing petition, the government argued — for the first time — that the court lacked jurisdiction over the takings issue. On March 12, 2012, the panel filed a substitute opinion dismissing Petitioners' claims for lack of jurisdiction. Pet.App. 236a, 241a.

The Hornes petitioned this Court for certiorari, which this Court granted. On June 10, 2013, this Court unanimously reversed the Ninth Circuit and remanded for the Ninth Circuit to reconsider Petitioners' arguments on the merits. The panel ordered supplemental briefing addressing the Supreme Court's opinion and relevant new authority, and heard argument, but on May 9, 2014 it issued a

third opinion affirming the district court, once again on the merits.

The panel first considered whether the Raisin Marketing Order effects a per se taking of Petitioners' property for which just compensation is categorically required. It held that the Order did not do so, for two reasons: (1) because the per se takings rule applicable when the government takes possession of property extends only to *real* property and does not "govern controversies involving personal property" such as raisins, Pet.App. 20a, and (2) because "the Hornes did not lose all economically valuable use of their personal property," retaining benefit flowing from use of the raisins by the RAC and a contingent right to the proceeds set by the RAC. Pet.App. 20a-21a.

Rather than applying a per se takings analysis, the panel explicitly treated the Raisin Marketing Order as a restriction on the Hornes' use of their raisins in commerce and considered whether the Raisin Marketing Order satisfied the "'nexus and rough proportionality'" rule applied to land-use exactions under this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet.App. 22a-23a. The Court found that it did, holding that there is "a sufficient nexus between the means and ends of the Marketing Order" and that "[t]he structure of the reserve requirement is at least roughly proportional … to Congress's stated goal of ensuring an orderly domestic raisin market." Pet App. 29a. The panel therefore concluded that the Raisin Marketing Order "do[es] not constitute a taking under the Fifth Amendment." Pet.App. 29a.

According to the panel, "it is to Congress and the Department of Agriculture to which the Hornes must address their complaints." Pet.App. 29a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The core protection of the Takings Clause is the categorical rule that private property is shielded from government *acquisition* without just compensation. When the government "takes possession" of property, it must pay the owner — full stop. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116-17 (1951).

The Raisin Marketing Order, because it mandates a transfer of ownership of raisins from growers and handlers to the federal government's designee without payment of fair market value, obviously violates that rule. By the same token, as this Court recently reaffirmed, so do the dollar equivalent and penalty components of the fine imposed on Petitioners. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"); *Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (holding that fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause); *Village of Norwood v. Baker*, 172 U.S. 269, 293 (1898) (holding that governmental assessment of monetary value of property that the government sought to take is itself a taking). The contortions the panel undertook in order to avoid treating the Raisin Marketing Order as a categorical taking violate

settled law; set the Ninth Circuit at odds with other federal courts; and work a fundamental injustice that threatens to devastate not only Petitioners, but all manner of United States property owners.

The panel's holding rests on three fundamental misinterpretations of the Takings Clause. *First*, contrary to this Court's own cases and the holdings of at least five courts of appeals, the panel held that per se physical takings are limited to real property and not to personal property. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (applying Takings Clause to money earned as interest on an interpleader fund). *Second*, the panel held that the Hornes had not suffered a per se taking because they benefit from the Raisin Marketing Order and retain a theoretical right to any residual proceeds of the reserve raisins (even if they were zero). In effect, the panel held that by providing *less* than just compensation to a property owner, the government can avoid the per se compensation rule altogether. *Third*, the panel treated the government's taking of title to the reserve-tonnage raisins as a mere restriction on the Hornes' use of the raisins in commerce, directly contradicting this Court's explicit holding, reaffirmed recently in *Koontz*, that a seizure of ownership can never be justified in such terms. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982); *see also Koontz*, 133 S. Ct. at 2594-95 ("Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."); *Webb's*, 449 U.S. at 163 (a "forced contribution to general government revenues" is more than a mere restriction on use).

Each of these errors has the effect of converting forced transfer of property ownership to the government into something less: a mere regulatory act, subject only to a weak balancing test. Under the panel's reasoning, the government could structure virtually any taking — even an explicit confiscation of title and possession — as uncompensable regulation, effectively eviscerating the per se takings rule that has protected property rights in the United States for centuries. This Court must not allow that to remain the law without review. In light of the panel's errors, and its disturbing implications for property rights, this Court should grant the petition for certiorari.

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CATEGORICAL REQUIREMENT OF JUST COMPENSATION FOR PROPERTY EXPROPRIATED BY THE GOVERNMENT DOES NOT APPLY TO PERSONAL PROPERTY.

The first reason the panel provided for avoiding application of the categorical taking doctrine was that the categorical rule does not apply to "controversies involving personal property," such as raisins, but only to real property, Pet.App. 20a, *even when the government takes possession of personal property for itself*. The government must, in other words, pay just compensation for a seizure of one's house, but it can take away one's car, furniture, refrigerator, books, silver, and clothes subject only to balancing tests applicable to regulatory takings. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438

U.S. 104 (1978). For all of that property, the central bulwark of the Fifth Amendment is gone.

Neither in its merits briefing nor its supplemental briefing below did the government argue such a position. It is not clear whether the government endorses this part of the court's holding, which contradicts longstanding practice of the federal government. At any rate, the notion that personal property may be expropriated without compensation conflicts with the precedents of this Court and other federal circuits, and marks a complete departure from how the Takings Clause has been understood for centuries.

A. The Panel's Decision Splits From This Court's Cases And Multiple Federal Circuits.

In holding that government appropriation of personal property is never categorically subject to the Takings Clause's just-compensation requirement, the panel contradicted a long line of this Court's cases holding that government confiscation of personal property constitutes a per se taking just as surely as taking possession of real property. This Court has, for example, categorically required compensation for taking "fixtures," including removable "trade fixtures," on the ground that "[a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 383-84 (1945) (discussing taking from a tenant); *United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) ("An authorized declaration of taking or a requisition will put realty *or personalty* at the disposal of the United

States for 'just compensation.'") (emphasis added). Many other cases decided before the modern regulatory takings regime existed at all applied categorical takings rules to personal property, and even to intangible property such as intellectual property rights. *See United States v. Russell*, 80 U.S. 623, 628 (1871) (federal seizure of use of steamboats during the Civil War); *United States v. Palmer*, 128 U.S. 262, 271 (1888) (federal use of a patent); 2-5 Nichols on Eminent Domain § 5.03(5)(d) (Matthew Bender, 3d ed.) ("Compensation must be paid to all owners who have had their tangible personal property taken as a result of eminent domain."). This Court has never, to Petitioners' knowledge, distinguished between real and personal property in situations where the government seizes ownership.

More recently, this Court has applied the per se taking rule when the government seizes fungible personal property such as money. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, this Court applied a per se analysis to appropriation of interest in an interpleader fund. 449 U.S. 155 (1980). As the Court explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164. Even a bondholder's contractual rights "are a form of property and as such may be taken for a public purpose *provided that just compensation is paid*," *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (emphasis added), as is the intangible "going-concern value" of a business, *see Kimball Laundry Co. v. United States*, 338 U.S. 1, 10 (1949).

This Court recently made the same point in a slightly different way in *Koontz v. St. Johns River Water Management District,* 133 S. Ct. 2586, 2598-99 (2013). In that decision, the Court addressed the question of whether a taking of money could constitute the kind of per se taking that triggers application of land-use exaction analysis. The Court held that it could: "[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest … , a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. 2586, 2600 (2013) (alteration omitted) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). This case falls precisely within that description.

The panel's decision also creates a circuit split with at least five federal circuits. In *Nixon v. United States*, the United States "argue[d] that the per se takings doctrine applies only to the physical occupation of real property," and so was inapplicable to the papers of President Richard Nixon. 978 F.2d 1269, 1284 (D.C. Cir. 1992). The court rejected that argument in no uncertain terms as "fail[ing] for want of authority or logic." *Id.* As the D.C. Circuit explained, "the 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.* Imposing a distinction between personal and real property "would be purely artificial," for "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Finding that a per se taking of the presidential papers had occurred, the court concluded that "the constitutional remedy of just compensation is required," and

remanded "for a determination of compensation due." *Id.* at 1287.

Other circuits have applied a per se takings rule in cases where the government takes ownership of property other than land. In *Cerajeski v. Zoeller*, the Seventh Circuit held that a State's "confiscation" of interest in a bank account was a taking for which compensation was categorically owed. 735 F.3d 577, 580, 583 (7th Cir. 2013). In reaching that conclusion, the court analogized the taking to a neighbor who occupies an apple orchard and physically takes the apples. *Id.* at 580; *see also Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation."). Similarly, in *Anderson v. Spear*, the Sixth Circuit held that a law requiring political campaigns to turn over leftover contributions to the State after an election was a physical taking automatically requiring just compensation. 356 F.3d 651, 668-69 (6th Cir. 2004) (citing, *e.g.*, *Brown*, 538 U.S. 216). Decades ago, the Fifth Circuit applied a per se taking analysis to a federal appropriation of Lee Harvey Oswald's "personal effects," *Porter v. United States*, 473 F.2d 1329, 1331 (5th Cir. 1973), and the Tenth Circuit applied it to a taking of fish farmed on condemned land, *see United States v. Corbin*, 423 F.2d 821, 824 (10th Cir. 1970). *See also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment) ("Limiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law.").

The panel's decision to carve out exceptions to the per se taking rule when the government takes property other than real property brushes aside more than a century of this Court's jurisprudence, and creates an unbridgeable split among federal circuits. When it comes to actual appropriations of property, the kind of property involved — real or personal, tangible or intangible, fungible or infungible — has no significance; the Fifth Amendment's per se takings analysis protects them all.

B. The Panel's Decision Is Inconsistent With The History Of The Takings Clause.

A just-compensation requirement applicable to seizures of personal property was woven into the fabric of takings law long before the adoption of the Fifth Amendment. Even the 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). In the colonial era, Section 8 of the Massachusetts Body of Liberties (1641) protected personal property *alone* from uncompensated takings. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995).

Founding-era evidence demonstrates that protection for personal property was a *primary* purpose of the Takings Clause. The "founding generation" enacted the Takings Clause in large part because of their concern with "the appropriation of private property to supply the army during the Revolutionary War." Jed Rubenfeld, *Usings*, 102

Yale L.J. 1077, 1122 (1993); *see also* John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 *The Founders' Constitution* 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987). The first treatise on the United States Constitution, published in 1803, confirms 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).

Aside from evidence of the Clause's purpose, there would have been no doubt at the time of adoption that the term "property" in the Takings Clause includes personal property. Samuel Johnson's dictionary defined property, most relevantly, as "[r]ight of possession," "[p]ossession held in one's own right," and [t]he *thing* possessed." 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) (emphasis added). Noah Webster defined property as "[a]n estate, *whether in lands, goods or money*," and even included as examples of property "the productions of [one's] farm or … shop[.]" Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added). Shortly after the adoption of the Bill of Rights, James Madison likewise wrote that "a man's land, *or merchandize, or money* is called his property," and is entitled to various protection including that "none shall be taken directly even for public use without indemnification to the owner." James Madison, *Property* (1792), *reprinted in* 14 *The Papers of James*

Madison 266-68 (R. Rutland ed., 1977) (emphasis added; second emphasis omitted).

Subsequent commentators concurred that the protection against uncompensated appropriations of property — the only type of taking recognized before the development of regulatory takings doctrine — applied to all types of property, including personal property. "In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*[.]" John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 53 (2d ed. 1900). Likewise Thomas Cooley, who wrote in his influential treatise that "[t]he property which the Constitution protects is *anything of value which the law recognizes as such*." Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880) (emphasis added).

The inescapable conclusion is that the panel's exclusion of personal property from the Takings Clause's protection against uncompensated appropriations abandons the Clause's historical moorings.

C. The Panel's Rationale Misconstrues *Loretto* And *Lucas*.

The Ninth Circuit did not acknowledge *any* of this history or contrary authority in concluding that the government's acquisition of title to personal property is not a per se physical taking. Instead, the panel tried to evade all of it simply by distinguishing *Loretto* — as if the per se rule for physical takings were a function of that case alone. *See* Pet.App. 20a. Needless to say, distinguishing *Loretto* does not dispose of the rule. And even on the panel's own

reasoning, there is no escaping the fact that the rule applies just as fully to personal property as to any other kind of property.

Although *Loretto* happened to involve real property, neither its holding nor its reasoning was so limited. *See Nixon*, 978 F.2d at 1284. What the *Loretto* Court actually said was that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 458 U.S. at 426. In portions of its opinion ignored by the panel below, the Court left no question that governmental confiscation of personal property is a classical taking as well. Quoting one scholar who had "accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence," the Court agreed that "'one incontestable case for compensation … seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space *or a thing* which theretofore was understood to be under private ownership.'" *Id.* at 427 n.5 (emphasis added) (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967)).

The panel attempted to distinguish *Loretto* in various ways, none of them even passably convincing. One was that most (though not all) of the *Loretto* Court's precedents involved real property. Pet.App. 20a; *but see Loretto*, 458 U.S. at 435 (citing *General Motors*, 323 U.S. 373). True, but irrelevant; many per se takings cases before and since *Loretto*

involved personal property. Nor does it matter that the *Loretto* Court also pointed out that physical occupations are subject to "relatively few problems of proof." Pet.App. 20a (quoting *Loretto*, 458 U.S. at 437). An appropriation of personal property is not subject to serious factual disputes either, *see* Lewis, *Eminent Domain* § 53 ("In regard to personal property, no question can ordinarily arise."), least of all here, where a transfer of title is required by regulation. This Court has found effective government possession of property where proof is much harder. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (per se taking caused by airplane overflights). According to the panel, *Loretto*'s citation of "[t]he placement of a fixed structure on land or real property" as an "example" of a per se taking demonstrates that the case has a "narrow reach" that does not "extend" to personal property. Pet.App. 20a (emphasis omitted). But it can hardly be that when this Court illustrates its holding with an example, it impliedly excludes other possible examples.[1]

Nor does the panel's reliance on this Court's references to personal property in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),

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[1] The panel also cited *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), for the proposition that "[t]he per se analysis has not typically been employed outside the context of real property," overlooking that this Court, in reviewing the Ninth Circuit's decision in that case, stated that a per se analysis was appropriate for money, the form of personal property at issue. *Brown*, 538 U.S. at 235.

support its conclusion. *Lucas* was a *regulatory* takings case, meaning that it involved a restriction on use of property rather than an acquisition of ownership. Its contribution to this Court's takings jurisprudence was to make clear that a taking occurs not only in cases of "physical invasion," but *also* "where regulation denies all economically beneficial or productive use of land" — in other words, that certain land-use regulations are treated *like* physical invasions. *Id.* at 1016. It may well be that this special rule for regulatory takings rarely applies to personal property, even when such property loses all value. *Id.* at 1027-28. But it hardly follows that the classical case of per se takings should be limited to real property simply because a category of regulatory takings usually is. On the contrary, it is surpassingly strange to interpret a case expanding protections against regulatory takings as *sub silentio* gutting the Takings Clause's core protection against uncompensated takings of ownership of property.

Interpreting *Lucas* to limit the scope of the per se rule for physical takings also contradicts this Court's rule that physical and regulatory takings doctrines are separate. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). In fact, this Court has explained that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002). By applying *Lucas* to justify limiting *Loretto* to real property, the panel did exactly what this Court said it must not do.

The panel's reliance on *Lucas* also creates another split with other federal courts. At least two circuits have followed this Court's reasoning in *Tahoe-Sierra* that "[t]he lines of precedent for per se and regulatory takings are separate and distinct." *R & J Holding Co. v. Redevelopment Auth. of the Cnty. of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1365 & n.6 (Fed. Cir. 2012). The Ninth Circuit thus stands apart from other circuits in treating physical and regulatory takings doctrines as interchangeable.

II. THE NINTH CIRCUIT ERRED IN TREATING THE CONTINGENT POSSIBILITY OF LESS-THAN-JUST COMPENSATION, SET AT THE GOVERNMENT'S DISCRETION, AS A REASON NOT TO REQUIRE JUST COMPENSATION.

The panel's holding rests also on a second, independent misinterpretation of the Takings Clause. Not only did the panel hold that government appropriation of personal property is never a per se taking, but that appropriation of property — even of real property, evidently — is a per se taking *only* if it deprives the owner of "*all* rights associated with the [property]." Pet.App. 21a-22a. (emphasis added). Here, the panel reasoned, because the Hornes retained a theoretical right to residual proceeds of the reserve raisins (and an "equitable stake" in the benefits resulting from their confiscation, Pet.App. 21a), there was no per se taking. The government does not appear to have urged the panel to adopt that position, any more than the first.

In so holding, the panel confused, for a second time, the separate categories of physical and regulatory takings. The question whether a purported taking deprives the owner of all the property's valuable uses arises in the context of *regulatory* takings, where the property owner retains title. When a regulatory taking does so, it is treated *as if* the government had actually taken possession of the property. *See Lucas*, 505 U.S. at 1016. But that has no bearing on how a Court should treat a taking of actual ownership and possession. This Court has been explicit that in cases where the government takes possession of property, a court "*do[es] not ask* whether [the appropriation] deprives the owner of all economically valuable use[.]" *See Tahoe-Sierra*, 535 U.S. at 323 (emphasis added). If the government took one acre of a 100-acre parcel to build a post office, it could not avoid just compensation on the ground that it left the owner 99 of his acres. Nor could it avoid paying fair market value by reserving to the owner a contingent interest in the acre, worth less than fair market value (and maybe zero).

The panel's reasoning splits from Supreme Court and at least two federal circuit decisions making clear that even when the government "only partially impair[s]" ownership and possession of property, "in the physical taking jurisprudence *any* impairment is sufficient." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (emphasis added) (per se taking for government diversion of water); *see also Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (per se taking for requirement that electrical utilities allow telecommunications carriers access to their physical

networks). If a "partial impairment" of ownership triggers a categorical right to compensation, it cannot also be that, as the Ninth Circuit panel held, there is no categorical taking when some economically valuable interest in the property remains.

Loretto makes the same point. In *Loretto*, where the government required apartment building owners to permit installation of cable boxes, 458 U.S. at 422, an economically valuable use of the building remained. The specific property taken — rectangular areas of a building's exterior about the side of a breadbox — retained the obvious economically valuable use of sealing the building from the elements. Yet this Court held that the physical occupation of the property was a categorical taking requiring compensation nonetheless. *Id.* at 438 & n.16.

Besides conflicting with decisions of other courts, the panel's approach renders the just-compensation requirement incoherent. The panel did not reach the question of just compensation, and in fact specifically disclaimed any holding that Petitioners' interest in the reserve-tonnage raisins constituted just compensation. Pet.App. 22a n.16. In effect, the panel's holding means that the minimal-to-nonexistent financial compensation offered under the Marketing Order makes categorical takings rules inapplicable. That conflicts with the rule that the question of just compensation is independent from whether a particular kind of taking occurred. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 303 (existence of a regulatory taking is a "different and prior question" separate from compensation).

The effect of the panel's blurring of those questions is that by offering *inadequate* compensation for an assumption of ownership, a government can evade the categorical compensation requirement — and potentially avoid paying just compensation at all. If that is so, then the government has a roadmap for using procedural gamesmanship to escape per se takings rules and compensation requirements in nearly every case. Unlike the panel's first error, this rule sweeps across all types of property, real and personal alike, such that even if the government takes one's house, it is not categorically responsible for compensation so long as it offers a near-worthless IOU at the time it acts. If *that* is true, the Takings Clause's categorical takings rules are all but a dead letter, to be implicated only by acts by government agencies too unsophisticated to avoid them.

III. THE NINTH CIRCUIT CONTRADICTED THIS COURT AND SPLIT FROM OTHER CIRCUITS BY TREATING THE GOVERNMENT'S ACQUISITION OF THE RESERVE TONNAGE RAISINS AS A MERE CONDITION ON USE.

Rather than treat the government's acquisition of title to the reserve raisins as categorical taking, the panel did something unprecedented. It first "h[e]ld that the reserve requirement constitutes a use restriction on the Hornes' personal property[,] and then analogize[d] that use restriction to the land use permitting context." Pet.App. 22a-23a. Applying a "'nexus and rough proportionality'" test, Pet.App. 22a-23a, which this Court developed in the "special context" of land-use permitting, *Lingle*, 544 U.S. at

538, the panel determined that the Raisin Marketing Order does not effect a taking at all, Pet.App. 29a.[2] That analysis contradicts the law of this Court and the decisions of the Eleventh Circuit, Federal Circuit, and Oregon Supreme Court, all of which have rejected the argument that physical takings can be recast as use restrictions.

In holding that there was a physical taking in *Loretto*, this Court addressed the government's argument that installing facilities on private property was "simply a permissible regulation of the use of real property." 458 U.S. at 438-39. Justice Marshall flatly dismissed that assertion:

> 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. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the

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[2] The panel asserted that the United States "urge[d]" that approach. Pet.App. 23a. That is not so. On the contrary, the United States argued at length in its Ninth Circuit supplemental brief that the land-use permitting test does *not* apply. *See* U.S. Supp. Br. 8 ("[T]he marketing order is not a land-use permit application process."); *id.* at 8-12 (discussing *Koontz*). The United States only suggested in the alternative, in a single paragraph, that the test would be satisfied *if it did* apply. *Id.* at 12. Once again, the panel's *sua sponte* use of yet another approach that no party recommended illustrates how far it stretched to protect the Raisin Marketing Order.

> government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all 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.

This Court specifically reaffirmed that holding when evaluating use restrictions on land permits. In such cases, this Court "began with the premise that, had the government simply appropriated the easement in question, [it] would have been a per se physical taking" like *Loretto*. *Lingle*, 544 U.S. at 546 (discussing *Nollan* and *Dolan*); *see also Koontz*, 133 S. Ct. at 2594-95, 2598-99. To say that such an appropriation of land was "'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831. As the Court reiterated just two Terms ago, when "the government commands the relinquishment of funds linked to a specific, identifiable property interest" — like the raisins here — "a per se takings approach is the proper mode of analysis under the Court's precedent." *Koontz*, 133 S. Ct. at 2600 (alteration and quotes omitted).

Following this Court's lead, the Eleventh Circuit, Federal Circuit, and Oregon Supreme Court have

refused to treat seizures of title as use restrictions. In *Gulf Power*, the Eleventh Circuit addressed a government requirement that utility companies provide telecommunications carriers and cable companies with access to their property. In holding that the requirement was a physical taking like the one in *Loretto*, the Eleventh Circuit rejected the argument that the mandatory-access provision is a permissible "regulatory condition" of use that the electric utilities could "avoid ... by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court explained, that argument was "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 Federal Circuit rejected the same argument in *Casitas Municipal Water District*. There, the government required a water-control project to physically and permanently divert a portion of the water it had beneficial use of so that the government could operate a "fish ladder" to preserve an endangered species. Concluding that this was a physical taking automatically requiring just compensation, the court rejected the government's argument that its requirement "was merely a use restriction on a natural resource, and therefore governed by the regulatory taking jurisprudence." 543 F.3d at 1293. The "restriction of use cases cited by the government" were simply inapplicable because "this case involves physical appropriation by the government." *Id.* at 1294. Like the Hornes' confiscated raisins, "[t]he water, and [the owner's] right to use that water, is forever gone." *Id.* at 1296.

Similarly, in *GTE Northwest, Inc. v. Public Utility Commission of Oregon*, the Oregon Supreme Court addressed a statute requiring certain telecommunications providers to allow other providers to install "equipment, software, and databases" on their property. 900 P.2d 495, 503 (Or. 1995) (internal quotation omitted). In holding that this was a physical taking requiring compensation, the court rejected the argument that "when the state has the power to forbid a particular use of property, it may, as the price of permitting that use, require the owner to submit to *a physical invasion* of that property as long as there is a substantial nexus between the governmental purpose and the invasion." *Id.* at 505. Applying *Loretto*, the court explained that the fact that "an industry is heavily regulated, and [] a property owner acquired the property knowing that it is heavily regulated, do[es] not diminish a physical invasion to something less than a taking." *Id.* at 504.

The panel thus confused seizure of ownership of property, imposed as a condition on engaging in business, with a mere limitation on property use. It may well be that if the USDA merely limited the amount of a crop that a farmer can sell, that would be a use restriction. But the Raisin Marketing Order is not of this description. As described by the Court of Claims in *Evans*, 74 Fed. Cl. at 558, "the raisin marketing order stands out from most of its counterparts" in that it requires handlers to "transfer title" over reserve raisins to the government, for the government's own use and sale.

The panel justified equating this physical transfer of raisins with a use restriction by citing *Wallace v.*

Hudson-Duncan & Co., 98 F.2d 985 (9th Cir. 1938), which long predates this Court's decisions in *Loretto*, *Nollan*, *Lingle*, and *Koontz* and does not survive them. The panel also analogized this case to ones involving *regulatory* takings. *See Yee v. City of Escondido*, 503 U.S. 519, 524-25 (1992) (rent control ordinance); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984) (data confidentiality). That yet again collapses this Court's longstanding distinction between regulatory and physical takings. *See supra* p. 24-25.

In fact, *Yee* reaffirmed both *Loretto*'s holding and the *very language* that squarely contradicts the panel's holding. *See* 503 U.S. at 531-32 (quoting *Loretto*'s footnote 17 with approval). As *Yee* explained, "[h]ad 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." *Id.* at 532. And *Yee* reaffirmed that the government's categorical duty of just compensation when it "actually takes title" to property is "distinct" from its duty to compensate when it "merely regulates the use of property." *Id.* at 522; *see also GTE Nw.*, 900 P.2d at 505 (citing *Yee* for the premise that transfer of title is a physical taking entirely distinct from use restrictions like those in *Nollan* and *Dolan*).

The damage done by the panel's analytical confusion is already starting to spread to other courts, albeit thus far only in dictum. In *R & J Holding*, the Third Circuit discussed the district court and first panel decision in this case, expressing in *dicta* the view that the panel's use restriction

theory (which the panel has now resurrected) provided a "sound[] analytical framework." 670 F.3d at 431. With little analysis beyond citation to the Ninth Circuit decision, the Third Circuit approved in passing the panel's view that "in order to participate in the world of raisin marketing, growers must surrender a portion of their crop as an entrance fee." *Id.* It is important that this Court intervene before these analytical errors become established in the law of other circuits.

The panel sought to downplay the practical impact of its holding by noting that the Hornes "can avoid the reserve requirement of the Marketing Order by ... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." Pet.App. 25a-26a. That is cold comfort to life-long raisin farmers who have every right to pursue their lawful calling without suffering expropriation of their crops.

It also obscures the true reach of the panel's holding that the government need not pay just compensation when it physically takes *some* portion of an owner's personal property in exchange for allowing the owner to use that property in commerce, just so long as the government does not take the *entire* property. There is no end of circumstances where the government could deprive property owners of "possessory and dispositional control," Pet.App. 23a n.18, 25a, subject only to analysis applicable to use restrictions rather than a categorical compensation requirement. *See, e.g.*, *Loretto*, 458 U.S. at 439 n.17 (rejecting the defendant's argument in part because "[i]t would even allow the

government to requisition a certain number of apartments as permanent government offices").

The panel's decision ultimately stands for the proposition that if the government allows us to do business, it can take our property as a condition. Not since the barons prevailed at Runnymede has that been the law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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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-01569-LJO-SMS OPINION

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

Argued and Submitted
February 14, 2014—San Francisco, California

Filed May 9, 2014

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

Opinion by Judge Hawkins

COUNSEL

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OPINION

HAWKINS, Senior Circuit Judge:

To ensure stable market conditions, the Secretary of Agriculture, administering a complex regulatory program, requires California producers of certain raisins to divert a percentage of their annual crop to a reserve. The percentage of raisins diverted to the reserve varies annually according to that year's crop output. Subject to administrative and judicial review, the Secretary can impose a penalty on producers who fail to comply with the diversion program. The program's goal is to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike. The diverted raisins are sold, oftentimes in

noncompetitive markets, and raisin producers are entitled to a pro rata share of the sales proceeds less administrative costs. In some years, this "equitable distribution" is significant; in other years it is zero.

Eschewing any Commerce Clause or regulatory takings theory, Plaintiffs-Appellants Marvin and Laura Horne ("the Hornes") challenge this regulatory program and, in particular, the Secretary's ability to impose a penalty for non-compliance, as running afoul of the Takings Clause of the Fifth Amendment.[1] Specifically, the Hornes argue Defendant-Appellee the Department of Agriculture ("the Secretary"), charged with overseeing the diversion program, works a constitutional taking by depriving raisin producers of their personal property, the diverted raisins, without just compensation. The Secretary defends the constitutionality of the reserve requirement. Concluding the diversion program does not work a constitutional taking on the theory advanced by the Hornes, we affirm the judgment of the district court.[2]

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[1] 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).

[2] In doing so, we note the Court of Federal Claims has also upheld the constitutionality of this regulatory program. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 F. App'x. 321 (Fed. Cir. 2007) (unpub.).

FACTUAL AND PROCEDURAL BACKGROUND

A

Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This surge in prices 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." *Parker v. Brown*, 317 U.S. 341, 364 (1943); *see id.* at 363–64 & nn.9–10; *see also Zuber v. Allen*, 396 U.S. 168, 174–76 (1969) (describing market conditions). *See generally Daniel Bensing, The Promulgation of 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) (describing the history of the AMAA and the structure of the regulatory program it authorizes).

This market upheaval pervaded the entire agriculture industry, prompting Congress to enact the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), to bring consistency and predictability to the Nation's agricultural markets. Pursuant to the AMAA, the Department of Agriculture implemented the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"), in 1949 in direct response to the market conditions described in *Parker*.

The Marketing Order ensures "orderly" market conditions by regulating raisin supply. 7 U.S.C. § 602(1). The Secretary has delegated to the Raisin Administrative Committee ("RAC") the authority to set an annual "reserve tonnage" requirement, which is expressed as a percentage of the overall crop.[3] *See* 7 C.F.R. §§ 989.65–66. The remaining raisins are "free tonnage" and can be sold on the open market. The reserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. *Id.* at § 989.67(a). To smooth the supply curve's valleys, reserved raisins are released when supply is low. By varying the reserve requirement annually, the RAC can adapt the program to address changing growing and market conditions. 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 the annual crop, respectively.

The operation of the Marketing Order turns on a distinction between "producers" and "handlers." A "producer" is a "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. By contrast, included in the definition of a "handler," *id.* at 989.15, is any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages

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[3] 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 represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, and 989.30.

raisins for market as raisins," *id.* at 989.14.[4] Raisin producers convey their entire crop to a handler, receiving a pre-negotiated field price for the free tonnage. *Id.* at § 989.65. Handlers, who sell free tonnage raisins on the open market, bear the obligation of complying with the Marketing Order by diverting the required percentage of each producer's raisins to "the account of the [RAC]." *Id.* § 989.66(a). Handlers must also prepare the reserved raisins for market, and the RAC compensates them for providing this service. *Id.* at § 989.66(f).

The RAC tracks how many raisins each producer contributes to the reserve pool. When selling the raisins, the RAC has a regulatory duty to sell them in a way that "maxim[izes] producer returns." *Id.* at § 989.67(d)(1). The RAC, which receives no federal funding, finances its operations and the disposition of reserve raisins from the proceeds of the reserve raisin sales. Whatever net income remains is disbursed to producers, who retain a limited equity interest in the RAC's net income derived from reserved raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h).

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[4] Specifically, any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" is a "packer" of raisins, and all packers are handlers. 7 C.F.R. §§ 989.14 & 989.15. These definitions apply only to activities taking place within "the area," which simply refers to the State of California. *Id.* at § 989.4.

Additionally, any producer who sorts and cleans his own raisins in their unstemmed form is not a packer with respect to those raisins. 7 C.F.R. § 989.14.

B

Dissatisfied with what they view as an out-dated regulatory regime, the Hornes set out to restructure their raisin operation such that the Marketing Order would not operate against them. Put another way, the Hornes came up with a non-traditional packing program which, in their view, the Secretary had no authority to regulate. Instead of sending their raisins to a traditional packer, against whom the reserve requirement of the Marketing Order would clearly operate, the Hornes purchased their own handling equipment to clean, stem, sort, and package raisins. The Hornes then performed the traditional functions of a handler with respect to the raisins they produced. The Hornes believed that, by cleaning, stemming, sorting, and packaging their own raisins, they would not be "handlers" with respect to the raisins they produced. In addition, the Hornes performed the same functions for a number of other producers for a per-pound fee. Similarly, by not acquiring title to the raisins of other producers but rather charging those producers a per-pound fee, the Hornes believed they did not fall within the regulatory definition of "handler" with respect to the third-party producers' raisins. With this set-up, the Hornes believed the requirements of the Marketing Order would not apply to them, relieving them of the obligation to reserve any raisins.[5]

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[5] The government contends the Hornes lack standing to assert a takings defense with respect to raisins they never owned, i.e., raisins produced by third parties. The government concedes the Hornes have standing to assert a takings defense with respect to raisins they produced themselves.

C

The Secretary disagreed with the Hornes and applied the Marketing Order to their operation with respect to the raisins grown both by the Hornes and by third-party producers. At the end of protracted administrative proceedings, a U.S.D.A. Judicial Officer found the Hornes liable for numerous regulatory violations and imposed a monetary penalty of $695,226.92.[6] The Hornes then sought review of that final agency action in federal district court pursuant to 7 U.S.C. § 608c(14)(B). In district court, the Hornes alleged they were not "handlers" within the meaning of the regulation and further alleged the agency's order violated the Takings

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We decline to decide what rights under California law a non-title holder has to challenge the "taking" of property in his possession. *See Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th Cir. 2011) (holding that for the takings claim "whether a property right exists . . . is a question of state law") (emphasis omitted). Here, it is enough to note the Hornes clearly have standing to assert a taking defense with respect to the raisins they produced themselves, entitling them to a decision on the merits for at least that property. Because we rule against the Hornes on the merits, we need not further address the standing issue.

[6] The Judicial Officer ordered the Hornes to pay (1) $8,783.39 in overdue assessments for the 2002–03 and 2003–04 crop years, (2) $483,843.53 as the dollar equivalent for the raisins not held in reserve, and (3) $202,600 as a civil penalty for failure to comply with the Marketing Order. The overdue assessments in their entirety and $25,000 of the civil penalty were imposed for violations of the Marketing Order unrelated to the reserve requirement. *See, e.g.,* 7 C.F.R. § 989.73 (requiring handlers to file certain reports); *id.* at § 989.77 (requiring handlers to allow the Agricultural Marketing Service access to records). The balance of the penalty and assessments pertain directly to the Hornes' failure to reserve raisins.

Clause and the Eighth Amendment's prohibition against excessive fines. The district court granted summary judgment in favor of the Secretary on all counts. *See Horne v. U.S. Dep't of Agric.*, No. CV-F-08-1549 LJO SMS, 2009 WL 4895362 (E.D. Cal. filed Dec. 11, 2009).

The Hornes appealed to this court. We affirmed the district court with respect to the Hornes' statutory claims, holding that even if the AMAA's definitions of "handler" and "producer" are ambiguous, the Secretary's application of the Marketing Order to the Hornes was neither arbitrary nor capricious, and it was supported by substantial evidence. *Horne v. U.S. Dep't of Agric.,* 673 F.3d 1071, 1078 (9th Cir. 2011) ("Horne I"). We also affirmed the district court's grant of summary judgment in favor of the Secretary on the Eighth Amendment claim. *Id.* at 1080–82. And we held we lacked jurisdiction over the Fifth Amendment claim. Specifically, we held the Hornes brought their takings claim as producers rather than handlers. Because the AMAA did not in our view displace the Tucker Act with respect to a producer's claim, we held that jurisdiction over the takings claim fell with the Court of Federal Claims rather than the district court. *Id.* at 1078–80.

The Hornes sought and the Supreme Court granted certiorari with respect to the jurisdictional issue. Reversing our judgment on that issue alone, the Supreme Court held (1) the Hornes brought their takings claim as handlers, and (2) the Hornes, as handlers, may assert a constitutional defense to the underlying agency action in district court. *Horne v. Dep't of Agric.,* 133 S. Ct. 2053, 2061, 2062 (2013).

(The Supreme Court reserved the question of whether the Hornes could have sought relief in the Court of Federal Claims, instead holding only that handlers could obtain judicial review in district court. *Id.* at 1062 n.7.)[7] The Supreme Court remanded for a determination of the merits of the Hornes' takings claim, which, having received supplementary briefing and additional oral argument, we now decide.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment in a case involving a constitutional challenge to a federal regulation. *Ariz. Life Coal., Inc. v. Stanton,* 515 F.3d 956, 962 (9th Cir. 2008); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).

STANDING

The Secretary contends the Hornes lack standing to challenge the portion of the penalty attributable to the sale of any raisins produced by third-party firms, then handled by the Hornes (the "third-party raisins"). The Secretary argues the Hornes never

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[7] Because the Hornes' certiorari petition only challenged our disposition of the Hornes' Fifth Amendment claim, *Horne I* is the final judgment of the Hornes' Eighth Amendment and statutory claims. Accordingly, because the statutory claims are no longer at bar, the Hornes concede they no longer challenge the Judicial Officer's imposition of $8,783.39 in overdue assessments or the related $25,000 in civil penalties. The Hornes' challenge is confined to the remaining dollar value equivalent and its attendant civil penalty (hereinafter, "the penalty"), because these are directly traceable to the Hornes' failure to reserve raisins. *See supra* n.5.

owned these raisins and so cannot challenge their seizure.[8] We find this argument unpersuasive.

As the Supreme Court made clear, the injury suffered by the Hornes is not the obligation to reserve raisins for the RAC (which, of course, the Hornes did not do), but rather to pay the penalty imposed for the Hornes' failure to comply with the Marketing Order. *Horne*, 133 S. Ct. at 2061 n.4. Thus, the government's contention that the Hornes would not have standing to challenge a government seizure of the third-party raisins (a seizure which, of course, never happened) is irrelevant to the standing inquiry here.[9]

Instead, we analyze whether the Hornes have standing to challenge the penalty. A monetary penalty is an actual, concrete and particularized injury-in-fact. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) (citing *Cent. Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d

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[8] The Secretary concedes the Hornes have standing to challenge the remainder of the penalty.

[9] Additionally, we doubt the government's contention that the Hornes would lack standing to challenge a seizure of property they held in bailment. In an analogous situation, we have held that individuals lacking an ownership interest in a given piece of property have standing to challenge the seizure of that property. *See United States v. $191,910 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir. 1994) ("In order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest."), *superseded on other grounds by statute as stated in United States v. $80,180.00*, 303 F.3d 1182, 1184 (9th Cir. 2002). In any event, because we hold the Hornes have established standing as the subjects of the penalty, we need not confront this question.

1531, 1537 (9th Cir. 2006)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The need to pay a penalty is obviously traceable to its imposition, and a favorable merits determination in this litigation would redress the Hornes' alleged injury, thereby satisfying the Lujan requirements. *See Lujan*, 504 U.S. at 560–61. We thus hold the Hornes have standing to bring this constitutional challenge.

CONSTITUTIONAL CLAIM

The Takings Clause does not prohibit the government from taking property for public use; rather, it requires the government to pay "just compensation" for any property it takes. U.S. Const. amend. V. Thus, a takings challenge follows a two-step inquiry. First, we must determine whether a "taking" has occurred; that is, whether the complained-of government action constitutes a "taking," thus triggering the requirements of the Fifth Amendment. If so, we move to the second step and ask if the government provided just compensation to the former property owner. *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).

However, before turning to the first step of this formula, we must address a threshold issue and identify precisely which property was allegedly taken from the Hornes.

A

The Hornes declined to comply with the reserve requirement of the Marketing Order; at no time did the Hornes, either as producers or as handlers, ever

physically convey raisins to the RAC. Instead, the Secretary imposed the penalty on the Hornes for their failure to comply with the Marketing Order. In general, the imposition and collection of penalties and fines does not run afoul of the Takings Clause. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2601 (2013) (listing cases). Here, however, the Hornes link the Secretary's imposition of a penalty to a specific governmental action they allege to be a taking. In effect, the Hornes argue the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement.

We agree that the penalty cannot be analyzed without reference to the reserve requirement, and we find *Koontz* instructive on this point. In *Koontz*, a permitting agency refused to grant a developer a building permit until the developer funded offsite environmental impact mitigation works. 133 S. Ct. at 2593. The developer sued, arguing the permitting agency's conditions for obtaining a permit violated the "nexus and rough proportionality" rule of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[10] The Supreme Court of Florida declined to apply *Nollan* and *Dolan*, because in those cases the permitting agencies granted the relevant permit subject to a condition subsequent. The Florida court did not believe *Nollan* and *Dolan* would apply to situations in which the permitting agency refused to issue a permit until the permittee met a condition precedent. The Supreme Court reversed, holding the

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[10] We discuss *Nollan* and *Dolan* in more detail in Section D.

distinction between conditions precedent and subsequent constitutionally irrelevant in this context. *See id.* at 2596.

Relevant to this case, *Koontz* confronts the issue of how to analyze a takings claim when a "monetary exaction," rather than a specific piece of property, is the subject of that claim. *Koontz* distinguished *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1988), by noting that in *Koontz*, "unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Koontz*, 133 S. Ct. at 2599; *accord id.* at 2600 ("The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."). This direct linkage between the monetary exaction and the piece of land guided the Court to invoke the substantive takings jurisprudence relevant to the *land* for the purpose of determining whether the related *monetary exaction* constituted a taking. *Id.*

Here, the Secretary specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty. There is no question the monetary exaction is linked to specific property because the Judicial Officer's order requires the Hornes to repay the market value of the unreserved raisins (plus an additional penalty for non-compliance). Because the Marketing Order is structured in this way, we follow *Koontz* to analyze the constitutionality of the penalty imposed on the Hornes against the backdrop of the reserve

requirement. If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does imposition of the penalty. *See id.* at 2596 (discussing the unconstitutional conditions doctrine).[11]

B

We return to the task of determining whether the imposition of the penalty for failure to comply with the reserve requirement constitutes a taking. A "paradigmatic taking" occurs when the government appropriates or occupies private property. *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 537 (2005). *Lingle* gives as an example of this sort of taking the government's wartime seizure of a coal mine. *Id.*; *see United States v. Pewee Coal Co.,* 341 U.S. 114, 115–16 (1951). Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of "paradigmatic taking."

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[11] Contrary to the Hornes' suggestion, however, we read *Koontz* only to say this much. The Hornes argue *Koontz* somehow substantively altered the doctrinal landscape against which we evaluate takings claims. We disagree. *Koontz* simply clarifies the range of takings cases in which *Nollan* and *Dolan* provide the rule of decision. See 133 S. Ct. at 2598 (declining to address merits of petitioner's claim under *Nollan* and *Dolan*); *id.* at 2602–03 (declining to alter or overrule the holdings of *Nollan* and *Dolan*).

Instead, we must enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence. Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1945), the Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable . . . ." *Lingle*, 544 U.S. at 538. In general, regulatory takings are analyzed under the ad hoc framework announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking.[12]

Since *Mahon*, the Supreme Court has identified three "relatively narrow categories" of regulations which work a categorical, or per se, taking. Each category has a paradigmatic or representative case. *Lingle*, 544 U.S. at 538.[13] The representative case of the first category, *Loretto v. Teleprompter Manhattan*

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[12] Similarly, the Hornes concede the AMAA and Marketing Order fall within Congress's Commerce Clause authority. However, that a governmental action is authorized by the Commerce Clause does not immunize it from the requirements of the Takings Clause. *Lingle*, 544 U.S. at 543; *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979).

[13] We read *Lingle* to elevate the land use exaction cases to a third category on par with permanent physical invasions and complete economic deprivation regulations. 544 U.S. at 538 ("Outside these two categories (*and* the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City*.") (citation omitted and emphasis added).

CATV Corp., 458 U.S. 419, 427–38 (1982), holds that permanent physical invasions of real property work a per se taking. The second, represented by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), teaches that regulations depriving owners of all economically beneficial use of their real property also work a per se taking. The third line of cases, represented by *Nollan* and *Dolan*, articulate a more nuanced rule. Together, *Nollan* and *Dolan* hold that a condition on the grant of a land use permit requiring the forfeiture of a property right constitutes a taking *unless* the condition (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process. If those two conditions are met, then the imposition of the conditional exaction is not a taking.

We must determine which analytical framework provides the proper point of departure for our inquiry into whether a taking has occurred here. The Hornes see a direct analogy between *Loretto's* occupation of land for the purpose of installing an antenna and the Marketing Order's reserve requirement. The Secretary argues *Nollan* and *Dolan* provide better guidance to evaluate the constitutionality of what the Secretary characterizes as a use restriction on raisins. We must first identify which of the categorical takings case lines, if any, the Marketing Order implicates. Second, we must apply that case line's substantive law to determine whether a taking has occurred.

C

Loretto applies only to a total, permanent physical invasion of real property. Two independent reasons

assure us that the Marketing Order does not fall within the "very narrow" scope of the *Loretto* rule, 458 U.S. at 441: First, the Marketing Order operates on personal, rather than real property, and second, the Marketing Order is carefully crafted to ensure the Hornes are not completely divested of their property rights, even with respect to the reserved raisins.

1

The Marketing Order operates against personal, rather than real, property. Because the Takings Clause undoubtedly protects personal 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), this distinction does not mean the Takings Clause is inapplicable. But, as the Supreme Court stated in *Lucas*, the Takings Clause affords less protection to personal than to real property:

> [O]ur "takings" jurisprudence . . . has traditionally been 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. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied

> limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware 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). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027–28.

Lucas uses comparative language to make clear the Takings Clause affords more protection to real than to personal property. While the precise contours of these differing levels of protection are not entirely sharp, *Lucas* suggests the government's authority to regulate such property without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or "commercial," concerns. Indeed, it is clear the holding of *Lucas* is limited to cases involving land. The sentence which rejects the State's contention that "the State may subsequently eliminate all economically valuable use" of the *Lucas*'s property

begins with the phrase "[i]n the case of land" and is expressly contrasted against commercial personal property, over which the government exerts a "traditionally high degree of control." *Id.* at 1028.

The real/personal property distinction also undergirds *Loretto*. Justifying its bright-line rule, *Loretto* states "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on *land or real property* is an obvious fact that will rarely be subject to dispute." 458 U.S. at 437 (emphasis added). This example underscores the narrow reach of *Loretto*. In reaching its decision, the Court discussed the evolution of its takings jurisprudence, citing virtually only cases pertaining to real property. *See id.* at 427–37. And because the case unquestionably (and solely) concerned real property, the *Loretto* Court did not have occasion to consider the occupation of personal property. Given the Court's later discussion of personal property in *Lucas*, we see no reason to extend *Loretto* to govern controversies involving personal property. *See also Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), *aff'd sub nom., Brown v. Legal Found. of Wash.,* 538 U.S. 216 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").

2

Equally importantly, the Hornes did not lose all economically valuable use of their personal property. Unlike *Loretto*, which applies only when *each* "'strand' from the 'bundle' of property rights" is

"chop[ped] through . . . taking a slice of every strand," 458 U.S. at 435, the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). The Hornes essentially call this right meaningless because the equitable distribution may be zero.[14] But, the equitable distribution is not zero in every year, and even in years with a zero distribution, there are gross proceeds from the sale of the reserved raisins; it just so happens that in those years, those gross proceeds are not greater than the operating expenses of the RAC.

Here, we pause to focus on the RAC's structure and purpose, as well as the benefits it secures for producers such as the Hornes. The RAC is governed by industry representatives including producers and handlers.[15] Its purpose is to stabilize market conditions for raisin producers. Thus, the Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins. In light

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[14] The parties dispute whether there was a distribution for the crop years in question and, if so, the value of that distribution. We do not consider this dispute material to the question of whether a taking occurred because the distribution reflects net revenue. For the reasons we give, we focus on the gross revenue generated by the reserve raisin pool.

[15] In fact, Mr. Horne has been an alternate member, though never a voting member, of the RAC.

of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers receive no equitable distribution of the RAC's net profits.[16]

For these reasons, the Hornes' reliance on *Loretto* is unavailing. *Loretto* specifically preserves the state's "substantial authority" and "broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441. Here, the reserved raisins are not permanently occupied; rather, their disposition, while tightly controlled, inures to the Hornes' benefit. Coupled with *Lucas's* distinction between real and personal property, this assures us the diversion program does not work a per se taking.[17]

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[16] We must clarify that we do not hold the RAC's market intervention constitutes "just compensation" for a taking. Because we hold no taking occurs, we do not conduct a just compensation inquiry. We discuss the RAC's purpose and organization solely to show that the Hornes' rights to the reserved raisins, even if diminished by the Marketing Order, are not extinguished by it.

[17] Nor would the Hornes fare any better under a *Lucas* theory. *Lucas* plainly applies only when the owner is deprived of all economic benefit of the property. 505 U.S. at 1019 & n. 8. If the property retains any residual value after the regulation's application, *Penn Central* applies. *Id.* The equitable stake, even in years where there is no monetary distribution, is clearly not valueless, and thus *Lucas* does not apply.

D

Instead of looking to *Loretto* for the rule of decision here, the Secretary urges us to apply the "nexus and rough proportionality" rule of *Nollan* and *Dolan* to this case, asking us in essence to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context. We believe this approach is the most faithful way to apply the Supreme Court's precedents to the Hornes' claim.[18]

In *Nollan*, the California Coastal Commission conditioned the grant of a permit to build a beachfront home on the landowner's surrender of an easement along the coastal side of the property in order to link two public beaches by a publically accessible path. 483 U.S. at 828. However, the Commission's proffered reason for imposing this condition was to mitigate the diminished "visual access" to the ocean from the *non*-coastal edge of the property caused by the *Nollan*'s proposed improvement. *Id.* at 828–29. The Supreme Court held there was no "nexus" between the exaction-by-condition and the Commission's asserted state interest, then held that, absent such a nexus, the imposition of the condition was a taking. *Id.* at 837.

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[18] We do not mean to suggest that all use restrictions concerning personal property must comport with *Nollan* and *Dolan*. Rather, we hold *Nollan* and *Dolan* provide an appropriate framework to decide this case given the significant but not total loss of the Hornes' possessory and dispositional control over their reserved raisins.

Dolan provides us the analytical framework to apply in cases where a legitimate nexus exists between the asserted state interest and the proposed exaction. In *Dolan*, a landowner sought permits to enlarge and improve her commercial property. As in *Nollan*, the permitting agency approved the permit subject to certain conditions. First, the agency required the dedication of certain creek-side land for the purpose of mitigating the increased water run-off that could potentially occur as a result of the landowner's plan to pave a parking lot. Second, the agency required the dedication of a 15-foot strip of land to be used for a pedestrian and bicycle pathway, the purpose of which was to mitigate the increased traffic flow spawned by the proposed commercial development. 512 U.S. at 380. *Dolan* held there was an appropriate nexus between the state's legitimate interests and the proposed exactions. *Id.* at 387–88.

But *Dolan* also held the proposed means and the ends in question were not "roughly proportional[]" to each other and thus the permit as issued constituted a taking. *Id.* at 391; *see id.* at 394–96. While not reducible to mathematical certainty, the *Dolan* "rough proportionality" requirement does require a permitting agency to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. Thus, the distillate of the *Nollan*/*Dolan* rule appears to be this: If the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government's imposition of the condition *also* constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly

proportional to the specific interest the government seeks to protect through the permitting process.

We apply the *Nollan*/*Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process. At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' 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 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); *see also Yee v. City of Escondido,* 503 U.S. 519, 527–28 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking where park owners voluntarily rented their land and thus acquiesced in the regulation); *cf. Ruckelshaus*, 467 U.S. 986, 1070 (1994) ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

Moreover, there are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other. All involve a conditional exaction, whether it be the granting of an easement, as in *Nollan*; a transfer of title, as in *Dolan*; or the loss of possessory and dispositional

control, as here. All conditionally grant a government benefit in exchange for an exaction. And, critically, all three cases involve choice. Just as the *Nollan*s could have continued to lease their property with the existing bungalow and Ms. *Dolan* could have left her store and unpaved parking lot as they were, the Hornes, too, can avoid the reserve requirement of the Marketing Order by, as the Secretary notes, planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins. Given these similarities, we are satisfied the rule of *Nollan* and *Dolan* governs this case.

1. The Nexus Requirement

We now turn to the nexus requirement and ask if the reserve program "further[s] the end advanced as [its] justification." *Nollan*, 483 U.S. at 837. Unquestionably, the AMAA aims to "establish and maintain . . . orderly marketing conditions for agricultural commodities," 7 U.S.C. § 602(1), as well as to keep consumer prices stable, *id.* at § 602(2). By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions. The government represents (and the Hornes do not dispute) that by smoothing the peaks and valleys of the supply curve, the program has eliminated the severe price fluctuations common in the raisin industry prior to the implementation of the Marketing Order, making market conditions predictable for industry and consumers alike. On this basis, the Marketing Order satisfies the *Nollan* nexus requirement.

2. The Rough Proportionality Requirement

Dolan does not require a "precise mathematical calculation," instead obliging the permitting agency only to make an "individualized determination" that the condition imposed is "related both in nature and extent to the impact" of the permittee's activity. *Dolan*, 512 U.S. at 391. The Marketing Order meets this requirement. The percentage of raisins to be reserved is revised annually to conform to current market conditions. While *Dolan* does not require a "mathematical calculation," neither does it prohibit the RAC from imposing a condition stated mathematically, i.e., as a percentage. Indeed, here the RAC's imposition of the reserve requirement is not just in "rough" proportion to the goal of the program, but in more or less *actual* proportion to the end of stabilizing the domestic raisin market.[19] By annually modifying the "extent," *id.*, of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer's ability to compete while reducing to the producer's benefit the potential instability of this particular market.

Nor do we believe *Dolan*'s command that the condition imposed be "individualized" presents a problem here. As *Dolan* made clear, it was an adjudicative, not a legislative, decision being reviewed. 512 U.S. at 835. Individualized review

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[19] The Hornes do not challenge the adequacy or fairness of the RAC's decision to set the 2002–03 and 2003–04 reserve tonnage requirements at forty-seven percent and thirty percent, respectively. In other words, the Hornes' challenge is to the program itself, not the details of its implementation in the crop years at issue.

makes sense in the land use context because the development of each parcel is considered on a case-by-case basis. But here, the use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool. At bottom, *Dolan*'s individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect. The Marketing Order accomplishes this goal by varying the reserve requirement annually in accordance with market and industry conditions. Given that raisins are fungible (as opposed to land, which is unique), we think this is enough to ensure the means of the Marketing Order's diversion program is at least roughly proportional to its goals.[20]

CONCLUSION

While the Hornes' impatience with a regulatory program they view to be out-dated and perhaps disadvantageous to smaller agricultural firms is understandable, the courts are not well-positioned to effect the change the Hornes seek, which is, at base, a restructuring of the way government regulates raisin production. The Constitution endows Congress, not the courts, with the authority to

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[20] We reiterate that we analyze the Hornes' challenge to the monetary penalty through the lens of the Marketing Order's reserve requirement because the monetary penalty is pegged directly to the extent of the Hornes' non-compliance with the Order, as measured by the ton and market value of the raisins. Accordingly, we hold the Secretary's imposition of the penalty satisfies any requirement *Koontz* may impose that we independently analyze the monetary exaction under *Nollan* and *Dolan*.

regulate the national economy. *See United States v. Rock Royal Co-op, Inc.,* 307 U.S. 533, 572 (1939). Accordingly, it is to Congress and the Department of Agriculture to which the Hornes must address their complaints. The courts are not institutionally equipped to modify wholesale complex regulatory regimes such as this one.

Instead, our role is to answer the narrower question of whether the Marketing Order and its penalties work a physical per se taking. We hold they do not. There is a sufficient nexus between the means and ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raisin market. We reach these conclusions informed by the Supreme Court's acknowledgment that governmental regulation of personal property is more foreseeable, and thus less intrusive, than is the taking of real property. This, coupled with our observation that the Secretary has endeavored to preserve as much of the Hornes' ownership of the raisins as possible, leads us to conclude the Marketing Order's reserve requirements—and the provisions permitting the Secretary to penalize the Hornes for failing to comply with those requirements—do not constitute a taking under the Fifth Amendment.

AFFIRMED.

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. Horn; 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)0, 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 <u>to have or obtain physical possession</u> 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

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Victor W. Palmer
Administrative Law Judge

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	)	

Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April I, 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 production in the course of his usual and customary practices of

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 9-11, 2005. Babak A. Rastgoufard, Office of the

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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).

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 All 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 raisins they failed to hold in reserve. Moreover, 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.

All 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 raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped

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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).

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]

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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

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 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

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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.)

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 All'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 ALI Absent evidence that the All abused that discretion, the decision should stand. Mr. Horne and partners presented no argument to convince me that the All 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—
>
> 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.
>
> 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 All 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 All 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, 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).

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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).

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

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 — 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]

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

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

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: 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 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.

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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).

[9] Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in

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 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:

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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).

§ 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. 1 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. 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).

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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 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.

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 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]

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

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

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.

§ 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]

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

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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 (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)).

> [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 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

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[13] 7 U.S.C. § 608c(14)(B).

April 11, 2008

William G. Jenson
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
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	)	04-0002
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 and for crop year 2003-2004. Furthermore, I found

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[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.

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

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the

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[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)).

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 1 agree that the Administrator's filings do not present the image of clarity — which is why I ordered the Administrator to provide clarification —1 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]

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[3] 7 U.S.C. § 608414)(B).

Done at Washington, DC

September 18, 2008

William G. Jenson
Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

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:

> we are growers that will pack and market our raisins. We reserve our rights under

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

> 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.

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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.

> § 989.58(d) for failure to obtain incoming inspections;
>
> 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.

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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.

§ 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 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 action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however,

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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.

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 "no one 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 of the expenses ... which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year ... Such

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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.*

> 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 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

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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).

$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 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:

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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.

> 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 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

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[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.

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 11, 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 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

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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.

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 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

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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); *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).

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 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]

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

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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.

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.

IT IS SO ORDERED.

Dated: December 9, 2009

/s/Lawrence J. O'Neill
United States District Judge

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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.

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

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-01569-LJO-SMS 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

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"[1]) 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, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal

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[1] 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).

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[2] 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 the open market, either through marketing

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[2] 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).

allotments or reserve pools, *see id.* § 608c(6).[3] 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,[4] and do not apply to any producer "in his capacity as a producer."[5] 7 U.S.C. §§ 608c(1), 608c(13)(B).[6] Any

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[3] 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).

[4] 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.

[5] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of

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 crop. *See* Parker, 317 U.S. at 363-64.[7] Like many

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grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[6] 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).

[7] 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

other fruit and vegetable orders issued under the AMAA,[8] 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,[9] *see* 7 C.F.R. §§ 989.35, 989.36—recommends the "reserve-

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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.

[8] 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).

[9] 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 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.

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 [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.[10] 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 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

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[10] 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.

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[11]) 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).

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).[12] On cross-

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

[12] 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.*

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 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

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U.S. Dep't of Agric., 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

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).

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).

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.

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).

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.*

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.

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 . . . .").

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).

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.

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.").

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.").

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).

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.[13] In light of these factors, we cannot say the district court erred in

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[13] 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.

finding the penalties consistent with the Eighth Amendment.[14]

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

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[14] 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.

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**.

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

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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"[1])

[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley

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, 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

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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).

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[2] 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 the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[3] The

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[2] 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).

[3] 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,

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,[4] and do not apply to any producer "in his capacity as a producer."[5] 7 U.S.C. §§ 608c(1), 608c(13)(B).[6]

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).

[4] 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.

[5] 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.

[6] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was

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 crop. *See Parker*, 317 U.S. at 363-64.[7] Like many

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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).

[7] 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

other fruit and vegetable orders issued under the AMAA,[8] 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,[9] *see* 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

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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.

[8] 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).

[9] 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 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.

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 [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.[10] 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 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

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[10] 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.

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[11]) 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).

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).[12] On cross-motions for summary judgment, the district court

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

[12] 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).

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 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).

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.

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.

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.

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).

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).

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).

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.").

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.").

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).

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.[13] In light of these factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[14]

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[13] 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.

[14] 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 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 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.**

SUPREME COURT OF THE UNITED STATES

No. 12–123

MARVIN D. HORNE, ET AL., PETITIONERS v.
DEPARTMENT OF AGRICULTURE

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

[June 10, 2013]

JUSTICE THOMAS delivered the opinion of the Court.

Under the Agricultural Marketing Agreement Act of 1937 (AMAA) and the California Raisin Marketing Order (Marketing Order or Order) promulgated by the Secretary of Agriculture, raisin growers are frequently required to turn over a percentage of their crop to the Federal Government. The AMAA and the Marketing Order were adopted to stabilize prices by limiting the supply of raisins on the market. Petitioners are California raisin growers who believe that this regulatory scheme violates the Fifth Amendment. After petitioners refused to surrender the requisite portion of their raisins, the United States Department of Agriculture (USDA) began administrative proceedings against petitioners that led to the imposition of more than $650,000 in fines and civil penalties. Petitioners sought judicial review, claiming that the monetary sanctions were an unconstitutional taking of private property without just compensation. The Ninth Circuit held that petitioners were required to bring their takings claim in the Court of Federal Claims and that it

therefore lacked jurisdiction to review petitioners' claim. We disagree. Petitioners' takings claim, raised as an affirmative defense to the agency's enforcement action, was properly before the court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers. Accordingly, we reverse and remand to the Ninth Circuit.

I

A

Congress enacted the AMAA during the Great Depression in an effort to insulate farmers from competitive market forces that it believed caused "unreasonable fluctuations in supplies and prices." Ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 602(4). To achieve this goal, Congress declared a national policy of stabilizing prices for agricultural commodities. *Ibid.* The AMAA authorizes the Secretary of Agriculture to promulgate marketing orders that regulate the sale and delivery of agricultural goods. § 608c(1); *see also Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984) ("The Act contemplates a cooperative venture among the Secretary, 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"). The Secretary may delegate to industry committees the authority to administer marketing orders. § 608c(7)(C).

The AMAA does not directly regulate the "producer[s]" who grow agricultural commodities, § 608c(13)(B); it only regulates "handlers," which the

AMAA defines as "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities. § 608c(1). Handlers who violate the Secretary's marketing orders may be subject to civil and criminal penalties. §§ 608a(5), 608a(6), and 608c(14).

The Secretary promulgated a marketing order for California raisins in 1949.[1]1 See 14 Fed. Reg. 5136 (codified, as amended, at 7 C.F.R. pt. 989 (2013)). In particular, "[t]he Raisin Marketing Order, like other fruit and vegetable orders adopted under the AMAA, [sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc. v. United States,* 416 F.3d 1356, 1359 (CA Fed. 2005). The Marketing Order defines a raisin "handler" as "(a) [a]ny processor or packer; (b) [a]ny person who places . . . raisins in the current of commerce from within [California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins . . . into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions]." 7 C.F.R. § 989.15.

The Marketing Order also established the Raisin Administrative Committee (RAC), which consists of 47 members, with 35 representing producers, ten representing handlers, one representing the cooperative bargaining associations, and one member

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[1] The AMAA also applies to a vast array of other agricultural products, including "[m]ilk, fruits (including filberts, almonds, pecans and walnuts . . . , pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, . . . tobacco, vegetables, . . . hops, [and] honeybees." § 608c(2).

of the public. See § 989.26. The Marketing Order authorizes the RAC to recommend setting up annual reserve pools of raisins that are not to be sold on the open domestic market. See 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d) and 989.65. Each year, the RAC reviews crop yield, inventories, and shipments and makes recommendations to the Secretary whether or not there should be a reserve pool. § 989.54. If the RAC recommends a reserve pool, it also recommends what portion of that year's production should be included in the pool ("reserve-tonnage"). The rest of that year's production remains available for sale on the open market ("free-tonnage"). §§ 989.54(d), (a). The Secretary approves the recommendation if he determines that the recommendation would "effectuate the declared policy of the Act." § 989.55. The reserve-tonnage, calculated as a percentage of a producer's crop, varies from year to year.[2]

Under the Marketing Order's reserve requirements, a producer is only paid for the free-tonnage raisins. § 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. § 989.66(f). The RAC may then sell the reserve-tonnage raisins to handlers for resale in overseas markets, or may alternatively direct that they be sold or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs. § 989.67(b). The reserve pool sales proceeds are used to finance the RAC's

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[2] In 2002–2003 and 2003–2004, the crop years at issue here, the reserve percentages were set at 47 percent and 30 percent of a producer's crop, respectively. See RAC, Marketing Policy & Industry Statistics 2012, p. 28 (Table 12).

administrative costs. §989.53(a). In the event that there are any remaining funds, the producers receive a pro rata share. 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). As a result, even though producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited interest in the net proceeds of the RAC's disposition of the reserve pool.

Handlers have other duties beyond managing the RAC's reserve pool. The Marketing Order requires them to file certain reports with the RAC, such as reports concerning the quantity of raisins that they hold or acquire. § 989.73. They are also required to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports, § 989.77, to obtain inspections of raisins acquired, § 989.58(d), and to pay certain assessments, § 989.80, which help cover the RAC's administrative costs. A handler who violates any provision of the Order or its implementing regulations is subject to a civil penalty of up to $1,100 per day. 7 U.S.C. § 608c(14)(B); 7 C.F.R. §3.91(b)(1)(vii). A handler who does not comply with the reserve requirement must "compensate the [RAC] for the amount of the loss resulting from his failure to . . . deliver" the requisite raisins. § 989.166(c).

B

Petitioners Marvin and Laura Horne have been producing raisins in two California counties (Fresno and Madera) since 1969. The Hornes do business as Raisin Valley Farms, a general partnership. For more than 30 years, the Hornes operated only as raisin producers. But, after becoming disillusioned with the AMAA regulatory scheme,[3] they began looking for ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes devised a plan to bring their raisins to market without going through a traditional handler. To this end, the Hornes entered into a partnership with Mrs. Horne's parents called Lassen Vineyards. In addition to its grape-growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package the raisins from Raisin Valley Farms and Lassen Vineyards. It also contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee. The Hornes' facilities processed more than 3 million pounds of raisins *in toto* during the 2002–

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[3] The Hornes wrote the Secretary and to the RAC in 2002 setting out their grievances: "[W]e 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." App. to Pet. for Cert. 60a.

2003 and 2003–2004 crop years. During these two crop years, the Hornes produced 27.4% and 12.3% of the raisins they processed, respectively.

Although the USDA informed the Hornes in 2001 that their proposed operations made them "handlers" under the AMAA, the Hornes paid no assessments to the RAC during the 2002–2003 and 2003–2004 crop years. Nor did they set aside reserve-tonnage raisins from those produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for packing services. They also declined to arrange for RAC inspection of the raisins they received for processing, denied the RAC access to their records, and held none of their own raisins in reserve.

On April 1, 2004, the Administrator of the Agriculture Marketing Service (Administrator) initiated an enforcement action against the Hornes, Raisin Valley Farms, and Lassen Vineyards (petitioners). The complaint alleged that petitioners were "handlers" of California raisins during the 2002–2003 and 2003–2004 crop years. It also alleged that petitioners violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC and failing to hold inspections of incoming raisins, retain raisins in reserve, pay assessments, and allow access to their records. Petitioners denied the allegations, countering that they were not "handlers" and asserting that they did not acquire physical possession of the other producers' raisins within the meaning of the regulations. Petitioners also raised several affirmative defenses, including a claim that the Marketing Order violated the Fifth Amendment's prohibition against taking property without just compensation.

An Administrative Law Judge (ALJ) concluded in 2006 that petitioners were handlers of raisins and thus subject to the Marketing Order. The ALJ also concluded that petitioners violated the AMAA and the Marketing Order and rejected petitioners' takings defense based on its view that "handlers no longer have a property right that permits them to market their crop free of regulatory control." App. 39 (citing *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 246–247 (1994)).

Petitioners appealed to a judicial officer who, like the ALJ, also found that petitioners were handlers and that they had violated the Marketing Order. The judicial officer imposed $202,600 in civil penalties under 7 U.S.C. § 608c(14)(B); $8,783.39 in assessments for the two crop years under 7 C.F.R. § 989.80(a); and $483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for the two crop years under § 989.166(c). The judicial officer believed that he lacked "authority to judge the constitutionality of the various statutes administered by the [USDA]," App. 73, and declined to adjudicate petitioners' takings claim.

Petitioners filed a complaint in Federal District Court seeking judicial review of the USDA's decision. See 7 U.S.C. § 608c(14)(B). The District Court granted summary judgment to the USDA. The court held that substantial evidence supported the agency's determination that petitioners were "handlers" subject to the Marketing Order, and rejected petitioners' argument that they were exempt from the Marketing Order due to their status as "producers" under § 608c(13)(B). No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, *15 (ED Cal., Dec. 11,

2009). Petitioners renewed their Fifth Amendment argument, asserting that the reserve-tonnage requirement constituted a physical taking. Though the District Court found that the RAC takes title to a significant portion of a California raisin producer's crop through the reserve requirement, the court held that the transfer of title to the RAC did not constitute a physical taking. See *id.*, at *26 ("'[I]n essence, [petitioners] 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 admissions ticket'" (quoting *Evans v. United States,* 74 Fed. Cl. 554, 563–564 (2006))).

The Ninth Circuit affirmed. The court agreed that petitioners were "handlers" subject to the Marketing Order's provisions, and rejected petitioners' argument that they were producers, and, thus exempt from regulation. 673 F.3d 1071, 1078 (2012). The court did not resolve petitioners' takings claim, however, because it concluded that that it lacked jurisdiction to do so. The court explained that "a takings claim against the federal government must be brought [in the Court of Federal Claims] in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Id.*, at 1079 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)). The court recognized that 7 U.S.C. § 608c(15) provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA, and it agreed 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 [60]8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements." 673 F.3d, at 1079. But, the Ninth Circuit determined, petitioners brought the takings claim in their capacity as producers, not handlers. *Id.*, at 1080. Consequently, the court was of the view that "[n]othing 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." *Ibid.* This availability of a Federal Claims Court action thus rendered petitioners' takings claim unripe for adjudication. *Ibid.*

We granted certiorari to determine whether the Ninth Circuit has jurisdiction to review petitioners' takings claim. 568 U.S. ___, 133 S. Ct. 638 (2012).

II

A

The Ninth Circuit's jurisdictional ruling flowed from its determination that petitioners brought their takings claim as producers rather than handlers. This determination is not correct. Although petitioners argued that they were producers—and thus not subject to the AMAA or Marketing Order at all—both the USDA and the District Court concluded that petitioners were "handlers." Accordingly, the civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as "handlers." If petitioners' argument that they were producers had prevailed, they would not have been subject to *any* of

the monetary sanctions imposed on them. See 7 U.S.C. § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer").

It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity. Petitioners argue that it would be unconstitutional for the Government to come on their land and confiscate raisins, or to confiscate the proceeds of raisin sales, without paying just compensation; and, that it is therefore unconstitutional to fine petitioners for not complying with the unconstitutional requirement.[4] See Brief for Petitioners 54. Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*. The Ninth Circuit confused petitioners' statutory argument (*i.e.*, "we are producers, not handlers") with their constitutional argument (*i.e.*, "assuming we are

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[4] The Ninth Circuit construed the takings argument quite differently, stating that petitioners believe the regulatory scheme "takes reserve-tonnage raisins belonging to producers." 673 F.3d 1071, 1080 (2012). When the agency brought its enforcement action against petitioners, however, it did not seek to recover reserve-tonnage raisins from the 2002–2003 and 2003–2004 crop years. Rather, it sought monetary penalties and reimbursement. Petitioners could not argue in the face of such agency action that the Secretary was attempting to take raisins that had already been harvested and sold. Instead, petitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking.

handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment").[5]

The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order.

B

The Government argues that petitioners' takings-based defense was rightly dismissed on ripeness grounds. Brief for Respondent 21–22. According to the Government, because a takings claim can be pursued later in the Court of Federal Claims, the Ninth Circuit correctly refused to adjudicate petitioners' takings defense. In support of its position, the Government relies largely on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Brief for Respondent 21–22 ("Just compensation need not 'be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking'" (quoting *Williamson County*, 473

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[5] The Government notes that petitioners did not own most of the raisins that they failed to reserve and argues that petitioners would have no takings claim based on those raisins. See Brief for Respondent 19. We take no position on the merits of petitioners' takings claim. We simply recognize that insofar as the petitioners challenged the imposition of monetary sanctions under the Marketing Order, they raised their takings-based defense in their capacity as handlers. On remand, the Ninth Circuit can decide in the first instance whether petitioners may raise the takings defense with respect to raisins they never owned.

U.S., at 194)). In that case, the plaintiff filed suit against the Regional Planning Commission, claiming that a zoning decision by the Commission effected a taking of property without just compensation. *Id.*, at 182. We found that the plaintiff 's claim was not "ripe" for two reasons, neither of which supports the Government's position.

First, we explained that the plaintiff 's takings claim in *Williamson County* failed because the plaintiff could not show that it had been injured by the Government's action. Specifically, the plaintiff "ha[d] not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property." *Id.*, at 186. Here, by contrast, petitioners were subject to a final agency order imposing concrete fines and penalties at the time they sought judicial review under § 608c(14)(B). This was clearly sufficient "injury" for federal jurisdiction.

Second, the *Williamson County* plaintiff 's takings claim was not yet ripe because the plaintiff had not sought "compensation through the procedures the State ha[d] provided for doing so." *Id.*, at 194. We explained that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.*, at 194–195 (internal quotation marks and alteration omitted). Stated differently, a Fifth Amendment claim is premature until it is clear that the Government has both taken property and denied just compensation. Although we often refer to this consideration as "prudential 'ripeness,'" *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003, 1013 (1992), we have recognized that it is not, strictly speaking, jurisdictional.[6] See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, ___, and n.10, 130 S. Ct. 2592, 2610 and n.10 (2010).

Here, the Government argues that petitioners' takings claim is premature because the Tucker Act affords "the requisite reasonable, certain, and adequate provision for obtaining just compensation that a property owner must pursue." Brief for Respondent 22. In the Government's view, "[p]etitioners should have complied with the order, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, . . . sought compensation as producers in the Court of Federal Claims for the alleged taking." *Id.*, at 24–25. We disagree with the Government's argument, however, because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative "reasonable, certain, and adequate" remedial scheme through which petitioners (as handlers) must proceed before obtaining review of their claim under the AMAA.[7]

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[6] A "Case" or "Controversy" exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.

[7] That is not to say that a producer who turns over her reserve-tonnage raisins could not bring suit for just compensation in the Court of Claims. Whether a producer could bring such a claim, and what impact the availability of such a claim would have on petitioners' takings-based defense, are questions going to the

The Court of Federal Claims has jurisdiction over Tucker Act claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). "[A] claim for just compensation under the Takings Clause 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*, 524 U.S., at 520 (plurality opinion); see also *United States v. Bormes*, 568 U.S. ___, ___, 133 S. Ct. 12, 17 (2012) (where "a statute contains its own self-executing remedial scheme," a court "look[s] only to that statute"). To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must "examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States v. Fausto*, 484 U.S. 439, 444 (1988).

Under the AMAA's comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to §§ 608c(15) (A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that "any handler" subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. See *United States v. Ruzicka*, 329 U.S. 287, 294 (1946). Once the Secretary issues a ruling, the federal district court where the "handler is an inhabitant, or has his principal place of business" is

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merits of petitioners' defense, not to a court's jurisdiction to entertain it. We therefore do not address those issues here.

"vested with jurisdiction . . . to review [the] ruling."[8] § 608c(15)(B). These statutory provisions afford handlers a ready avenue to bring takings claim against the USDA. We thus conclude that the AMAA withdraws Tucker Act jurisdiction over petitioners' takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not "premature" when presented to the Ninth Circuit.

C

Although petitioners' claim was not "premature" for Tucker Act purposes, the question remains whether a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14). We hold that it may. The AMAA provides that the handler may not be subjected to an adverse order until he has been given "notice and an opportunity for an agency hearing on the record." § 608c(14)(B). The text of § 608c(14)(B) does not bar handlers from raising constitutional defenses to the USDA's enforcement action. Allowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the

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[8] Petitioners filed an administrative petition before the Secretary in March 2007 pursuant to § 608c(15)(A) challenging the Marketing Order and its application to them. The USDA argued that they had no standing to file the petition because they had not admitted that they were handlers. The judicial officer granted the USDA's motion to dismiss the petition for lack of jurisdiction. Petitioners filed a complaint in District Court, but the court dismissed it as untimely. The Ninth Circuit affirmed. See *Horne v. Dept. of Agriculture*, 395 Fed. Appx. 486 (2010).

incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding. See *Eastern Enterprises*, *supra*, at 520. We see no indication that Congress intended this result for handlers subject to enforcement proceedings under the AMAA. Petitioners were therefore free to raise their takings-based defense before the USDA. And, because § 608c(14)(B) allows a handler to seek judicial review of an adverse order, the district court and Ninth Circuit were not precluded from reviewing petitioners' constitutional challenge. The grant of jurisdiction necessarily includes the power to review any constitutional challenges properly presented to and rejected by the agency. We are therefore satisfied that the petitioners raised a cognizable takings defense and that the Ninth Circuit erred in declining to adjudicate it.

III

The Ninth Circuit has jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners, in their capacity as handlers, violated the Fifth Amendment. The judgment of the Ninth Circuit is reversed, and the

case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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.

7 U.S.C. § 608a - Enforcement of chapter

(1) to (4) Omitted

(5) Forfeitures

Any person exceeding any quota or allotment fixed for him under this chapter by the Secretary of Agriculture and any other person knowingly participating or aiding in the exceeding of such quota or allotment shall forfeit to the United States a sum equal to the value of such excess at the current market price for such commodity at the time of violation, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

(7) Duties of United States attorneys; investigation of violations by Secretary; hearings

Upon the request of the Secretary of Agriculture, it shall be the duty of the several United States attorneys, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe

that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this chapter, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) Cumulative remedies

The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity.

The term "person" as used in this chapter includes an individual, partnership, corporation, association, and any other business unit.

* * *

7 U.S.C. § 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.

* * *

(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.

* * *

(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. § 989.1 - Secretary

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture to whom authority has heretofore been delegated or to whom authority may hereafter be delegated, to act in his stead.

7 C.F.R. § 989.2 - Act

Act means Public Act No. 10, 73d Congress, as amended, and as re-enacted and amended by the Agricultural Marketing Act of 1937, as amended (sections 1-19, 48 Stat. 31, as amended, 7. U.S.C. 601-674)

7 C.F.R. § 989.3 - Person

Person means an individual, partnership, corporation, association, or any other business unit.

7 C.F.R. § 989.4 - Area

Area means the State of California.

7 C.F.R. § 989.5 - Raisins

Raisins means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the

grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

* * *

7 C.F.R. § 989.7 - Golden Seedless Raisins

Golden Seedless raisins means raisins, the production of which includes soda dipping, sulfuring, and artificial dehydration.

7 C.F.R. § 989.8 - Natural Condition Raisins

Natural condition raisins means raisins the production of which includes sun-drying or artificial dehydration but which have not been further processed to a point where they meet any of the conditions for "packed raisins", as defined in § 989.9.

7 C.F.R. § 989.9 - Packed Raisins

Packed raisins means raisins which have been stemmed, graded, sorted, cleaned, or seeded, and placed in any container customarily used in the marketing of raisins or in any container suitable or usable for such marketing. Raisins in the process of being packed or raisins which are partially packed shall be subject to the same requirements as packed raisins.

7 C.F.R. § 989.10 - Varietal Types

Varietal types means raisins generally recognized as possessing characteristics differing from other raisins in a degree sufficient to make necessary or desirable separate identification and classification. Varietal types are the following: Natural (sun-dried) Seedless, Dipped Seedless, Golden Seedless, Muscats (including other raisins with seeds), Sultana, Zante Currant, Monukka, and Oleate and Related Seedless: *Provided*, That the Committee may, subject to approval of the Secretary, change this list of varietal types.

7 C.F.R. § 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. § 989.12 - Dehydrator

Dehydrator means any person who produces raisins by dehydrating grapes by artificial means.

7 C.F.R. § 989.13 - Processor

Processor means any person who receives or acquires natural condition raisins, off-grade raisins, other failing raisins or raisin residual material and uses them or it within the area, with or without other ingredients, in the production of a product other than raisins, for market or distribution.

7 C.F.R. § 989.14 - Packer

Packer means any person who, within the area, 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;

(b) Any dehydrator shall be deemed to be a packer, with respect to raisins dehydrated by him, only if he stems, cleans with water subsequent to such dehydration, seeds or packages them for market as raisin;

(c) The committee may, with the approval of the Secretary restrict the exceptions as to permitted cleaning if necessary to cause delivery of sound raisins; and

(d) No person shall be deemed a packer by reason of the fact he repackages for market (with or without additional preparation) packed raisins which, in the

hands of a previous holder, have been inspected and certified as meeting the applicable minimum grade standards for packed raisins.

7 C.F.R. § 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.

7 C.F.R. § 989.16 - Blend

Blend means to mix or commingle raisins.

7 C.F.R. § 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*, That a handler shall not be deemed to acquire any raisins (including raisins produced or dehydrated by him) while:

(a) He stores them for another person or as handler-produced tonnage in compliance with the provisions of §§ 989.58 and 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. § 989.18 - Committee

Committee means the Raisin Administrative Committee established under § 989.26.

* * *

7 C.F.R. § 989.20 - Ton

Ton means a short ton of 2,000 pounds.

7 C.F.R. § 989.21 - Crop Year

Crop year means the 12–month period beginning with August 1 of any year and ending with July 31 of the following year.

7 C.F.R. § 989.22 - District

District means any one of the geographical areas referred to in § 989.26, and designated in the rules and regulations.

7 C.F.R. § 989.23 - File

File means transmit or deliver to the Secretary or committee, as the case may be, and such act shall be deemed to have been accomplished at the time:

(a) Of actual receipt by the Secretary or committee in the event of personal delivery;

(b) Of receipt at the office of the telegraph company, in case submission is by telegram; or

(c) Shown by the postmark, in case submission is by mail.

7 C.F.R. § 989.24 - Standard raisins, off-grade raisins, other failing raisins, and raisin residual material

(a) Standard raisins means raisins which meet the then effective minimum grade and condition standards for natural condition raisins.

(b) Offgrade raisins means raisins which do not meet the then effective minimum grade and condition standards for natural condition raisins: *Provided*, That raisins which are certified as off-grade raisins shall continue to be such until successfully reconditioned or become "other failing raisins."

(c) Other failing raisins means any raisins received or acquired by a handler, either as standard raisins

or off-grade raisins, which are processed to a point where they qualify as packed raisins but fail to meet the applicable minimum grade standards for packed raisins.

(d) Raisin residual material means defective raisins, stemmer waste, sweepings, and other residue accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins.

7 C.F.R. § 989.25 - Part and subpart

Part means the order regulating the handling of raisins produced from grapes grown in California, and all rules, regulations, and supplementary orders issued thereunder. This order regulating the handling of raisins produced from grapes grown in California shall be a subpart of such part.

7 C.F.R. § 989.26 - Establishment and membership

A Raisin Administrative Committee is hereby established consisting of 47 members of whom 35 shall represent producers, 10 shall represent handlers, 1 shall represent the cooperative bargaining association(s) and 1 shall be a public member. The producer members shall be selected as follows:

(a) Producer members representing the cooperative marketing association(s) shall be members of such association(s) engaged in the handling of raisins, each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and those members shall be equal to the

product, rounded to the nearest whole number, obtained by multiplying 35 by the ratio the cooperative marketing association(s) raisin acquisitions are to the acquisitions of all handlers during the preceding crop year.

(b) Producer members representing cooperative bargaining association(s) shall be members of such associations, and the number of those members shall be equal to the product, rounded to the nearest whole number, obtained by multiplying 35 by the ratio the raisins acquired by handlers from bargaining association members are to the total acquisitions of all handlers during the preceding crop year.

(c) All other producer members who shall not be members of a cooperative bargaining association(s), cooperative marketing association(s) engaged in the handling of raisins which acquired 10 percent or more of the total acquisitions during the preceding crop year, nor sold for cash to cooperative marketing association(s), shall represent all producers not defined in paragraph (a) or (b) of this section and shall be selected in the number and, when appropriate, for the districts as designated in the rules and regulations.

(d) The handler members shall be divided into two groups and include the following:

(1) Handler members shall be selected from and represent cooperative marketing association(s) engaged in the handling of raisins each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and the number of those members shall be equal to the product, rounded to the nearest whole number,

obtained by multiplying 10 by the ratio of the cooperative marketing association(s) raisin acquisitions are to the total acquisitions of all handlers during the preceding crop year.

(2) The remaining handler members shall be selected from and represent all other handlers, which would include all independent handlers and small cooperative marketing association(s) who acquired less than 10 percent of the total raisin acquisitions during the preceding crop year. Handler nominees for this group shall be nominated by all handlers in the group in a manner determined by the Committee, with the approval of the Secretary, and specified in the rules and regulations.

(e) The "cooperative" bargaining association'(s) member shall be selected from the cooperative bargaining association(s). The public member shall be nominated by the Committee and selected by the Secretary as public member.

(f) For each member of the Committee there shall be an alternate member who shall have the same qualifications as the member for whom he is an alternate.

* * *

7 C.F.R. § 989.35 - Powers

The committee shall have the following powers:

(a) To administer the terms and provisions of this part;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To recommend to the Secretary amendments to this part; and

(d) To receive, investigate, and report to the Secretary complaints of violations of this part.

7 C.F.R. § 989.36 - Duties

The committee shall have, among others, the following duties:

(a) To act as intermediary between the Secretary and any producer, packer, dehydrator, processor or cooperative bargaining association;

(b) To investigate compliance and to use means available to it to prevent violations of this part;

(c) To keep minutes, books, and other records, which shall clearly reflect all of its acts and transactions, and such minutes, books, and other records shall be subject to examination by the Secretary at any time;

(d) To investigate and assemble data on the production, handling and market conditions with respect to raisins;

(e) To submit to the Secretary such available information with respect to raisins and grapes as he may request, and such other information as the committee may deem desirable and pertinent;

(f) To select from among its members a chairman and other officers, and to adopt such rules and regulations for the conduct of its business as it may deem advisable;

(g) To appoint or employ such other persons as it may deem necessary, and to determine the salaries and define the duties of each such person;

(h) To cause the books of the committee to be audited by certified public accountants at least once each year, or at such other times as the committee may deem necessary or as the Secretary may request, and the report of each such audit shall show, among other things, the receipts and expenditures of funds, and at least two copies of each such audit shall be submitted to the Secretary;

(i) To prepare quarterly statements of its financial operations and make such statements, together with the minutes of its meetings, available at the office of the committee for inspection by producers, handlers and dehydrators;

(j) To give reasonable advance notice of the times, places, and purposes of its meetings by mail or other appropriate means to each member and alternate member and such notice shall be given as widespread publicity as is practicable;

(k) To conduct meetings for the purpose of making nominations for membership on the committee and the certifying of nominations made for such purposes to the Secretary;

(l) To establish, with the approval of the Secretary, such rules and procedures relative to administration of this subpart as may be consistent with the provisions contained in this subpart and as may be necessary to accomplish the purposes of the act and the efficient administration of this subpart.

* * *

7 C.F.R. § 989.38 - Procedure

The Committee shall meet at the call of the chairman, or vice-chairman when acting as chairman, or at the call of any three members. All decisions of the Committee reached shall be by majority vote of the members present. All votes shall be cast in person and a quorum must be present. The presence of 25 members shall be required to constitute a quorum. The Committee shall give to the Secretary the same notice of meetings of the Committee as it gives to its members.

* * *

7 C.F.R. § 989.53 - Research and development

(a) General. The Committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving marketing research and development and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of raisins in domestic and foreign markets. These projects may include, but need not be limited to those designed to:

(1) Improve through research the accuracy of raisin production estimates;

(2) Improve through research the preparation for market, sanitation, quality, condition, storability, processing, or packaging of raisins;

(3) Ascertain through research the factors affecting acceptance of raisins by manufacturers or consumers;

(4) Promote the marketing, distribution, or consumption of raisins in domestic and foreign markets by collecting data thereon, consulting with members of the trade, and making the information available to producers, handlers, and exporters; and

(5) Promote the marketing, distribution, or consumption of raisins in foreign markets through the use of merchandising programs.

The expense of any such project relating solely to free tonnage raisins shall be paid from funds collected pursuant to § 989.80. The expense of any such project relating solely to reserve tonnage raisins shall be paid from the sale proceeds of such raisins. If any such project encompasses both free tonnage and reserve tonnage raisins, such as one which is designed to promote the consumption in export outlets of raisins generally on a long-term basis, the expense of the project may be allocated between the assessment fund and the pool fund.

(b) Creditable expenditures. The Committee, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion, including paid advertising, that promotes the sale of raisins, raisin products, or their use. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising.

(c) Criteria. Before any project involving marketing promotion, including paid advertising, and the crediting of the handler's pro rata expense

assessment obligation of handlers is undertaken pursuant to this section, the Secretary after recommendation by the Committee, shall approve appropriate criteria to effectively regulate such activity.

7 C.F.R. § 989.54 - Marketing policy

<Text of subsection (a) suspended in Part June 9, 1989.>

(a) Trade demand. On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by the Committee shall be announced by

the Committee in accordance with paragraph (h) of this section.

(b) Preliminary percentages. On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall estimate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: *Provided*, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the estimated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) Interim percentages. Prior to February 15, the Committee may modify the preliminary free and reserve percentages to release less than the trade demand.

(d) Final percentages. No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) Factors. When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and off-grade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to § 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) Modification. In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show such modification and the basis therefor.

<Text of subsection (g) suspended in Part effective Sept. 29, 1997.>

(g) Reserve tonnage to sell as free tonnage. On or before November 15 of the crop year, the Committee shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior

year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate. At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more

than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) Publicity. The Committee shall promptly give reasonable publicity to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator, handler, or cooperative bargaining association representative. The Committee shall notify handlers, dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

7 C.F.R. § 989.55 - Regulation by the Secretary

Whenever the Secretary finds, from the recommendation and supporting information supplied by the Committee or from other available information, that to designate final free and reserve percentages for any varietal type of standard raisins acquired by handlers, during the crop year will tend to effectuate the declared policy of the Act, the Secretary shall designate such percentages. In the event the Secretary finds that suspension or termination of any percentages computed by the Committee or designated by the Secretary tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such percentages.

7 C.F.R. § 989.56 - Raisin Diversion Program

(a) Announcement of program. On or before November 30 of each crop year, the committee shall hold a meeting to review production data, supply data, demand data, including anticipated demand to all potential market outlets, desirable carryout inventory, and other matters relating to the quantity of raisins of all varietal types. When the committee determines that raisins exist in the reserve pool in excess of projected market needs for any varietal type, it may announce the amount of such tonnage eligible for diversion during the subsequent crop year. At the same time, the committee shall determine and announce to producers, handlers, and the cooperative bargaining association(s) the allowable harvest cost to be applicable to such diversion tonnage. A production cap of 2.75 tons of

raisins per acre shall be established for any production unit approved for participation in a diversion program. The committee, with the approval of the Secretary, may recommend, at the same time that the diversion tonnage for that season is announced, a change in the production cap for that season's diversion program of less than 2.75 tons per acre for any production unit approved for the diversion program.

(b) Voluntary diversion. No producer shall be required to participate in any raisin diversion program.

(c) Issuance of diversion certificates. After the committee announces a raisin diversion program, any producer may divert grapes of the producer's own production and receive from the committee a diversion certificate in accordance with the applicable rules and regulations. Such certificates may only be submitted by producers to handlers in accordance with applicable rules and regulations. Diversion certificates issued by the committee shall apply to a specific production unit and shall be equal to the creditable fruit weight, not to exceed the production cap established pursuant to paragraph (a) of this section, of such raisins produced on such unit during the prior crop year or the last prior crop year eligible for such diversion: *Provided*, That in the case of a production unit, or partial production unit, removed from production through vine removal or other means established by the committee, the committee may issue a diversion certificate in an amount greater than the creditable fruit weight of the raisins produced therein or the production cap applicable.

(d) Redemption of diversion certificates. Handlers may redeem diversion certificates for reserve pool raisins. To redeem a certificate, a handler must present the diversion certificate to the Committee and pay the Committee an amount equal to the harvest cost it has established, plus an amount equal to the payment for receiving, storing, fumigating, handling, and inspecting reserve tonnage raisins specified in § 989.401 for the entire tonnage represented on the certificate. Upon receipt of the diversion certificate, the Committee shall note on the certificate that it is cancelled.

(e) Implementation of the program. The Committee shall establish, with the approval of the Secretary, such rules and regulations as may be necessary for the implementation and operation of a raisin diversion program.

* * *

7 C.F.R. § 989.58 - Natural condition raisins

(a) Regulation. No handler shall acquire or receive natural condition raisins which fail to meet such minimum grade and condition standards as the committee may establish, with the approval of the Secretary, in applicable rules and regulations: *Provided*, That a handler may receive raisins for inspection, may receive off-grade raisins for reconditioning and may receive or acquire off-grade raisins for use in eligible non-normal outlets: *And provided further*, That a handler may acquire natural condition raisins which exceed the tolerance established for maturity under a weight dockage

system established pursuant to rules and regulations recommended by the committee and approved by the Secretary. Nothing contained in this paragraph shall apply to the acquisition or receipt of natural condition raisins of a particular varietal type for which minimum grade and condition standards are not applicable or then in effect pursuant to this part.

(b) Changes in minimum grade and condition standards for natural condition raisins. The committee may recommend to the Secretary changes in the minimum grade and condition standards for natural condition raisins of any varietal type and may recommend to the Secretary that minimum grade and condition standards for any varietal type be added to or deleted. The committee shall submit with its recommendation all data and information upon which it acted in making its recommendation, and such other information as the Secretary may request. The Secretary shall approve any such change if he finds, upon the basis of data submitted to him by the committee or from other pertinent information available to him, that to do so would tend to effectuate the declared policy of the act.

(c) Publicity and notice. The committee shall give prompt and reasonable publicity to producer, dehydrators, and handlers of each recommendation submitted by it to the Secretary and of each regulation issued by the Secretary. Notice of such regulation shall be given to all handlers by registered or certified mail.

(d) Inspection and certification.

(1) Each handler shall cause an inspection and certification to be made of all natural condition

raisins acquired or received by him, except with respect to: (i) An interplant or interhandler transfer of offgrade raisins as described in paragraph (e)(2) of this section, unless such inspection and certification are required by rules and procedures made effective pursuant to this amended subpart; (ii) an interplant or interhandler transfer of free tonnage raisins as described in § 989.59(e); (iii) raisins received from a dehydrator which have been previously inspected pursuant to paragraph (d) (2) of this section; (iv) any raisins for which minimum grade and condition standards are not then in effect; (v) raisins received from a cooperative bargaining association which have been inspected and are in compliance with requirements established pursuant to paragraph (d)(3) of this section; and (vi) any raisins, if permitted in accordance with such rules and procedures as the committee may establish with the approval of the Secretary, acquired or received for disposition in eligible nonnormal outlets. The handler shall be reimbursed by the committee for inspection costs incurred by him and applicable to pool tonnage held for the account of the committee. Except as otherwise provided in this section, prior to blending raisins, acquiring raisins, storing raisins, reconditioning raisins, or acquiring raisins which have been reconditioned, each handler shall obtain an inspection certification showing whether or not the raisins meet the applicable grade and condition standards: *Provided*, That the initial inspection for infestation shall not be required if the raisins are fumigated in accordance with such rules and procedures as the committee shall establish with the approval of the Secretary. The handler shall submit or cause to be submitted to the committee a copy of

such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

(2) The committee may, in accordance with rules and procedures established with the approval of the Secretary, authorize handlers to receive or acquire natural condition raisins which have been produced by any dehydrator by dehydrating grapes by artificial means and have been inspected and certified on his premises. In the event there shall have been compliance with committee requirements, any handler who receives or acquires such inspected and certificated raisins shall be deemed to have satisfied the requirements contained in paragraph (d)(1) of this section with respect to inspection and certification of natural condition raisins received or acquired by him.

(3) The committee may, in accordance with rules and the procedures established with the approval of the Secretary, authorize handlers to receive or acquire without further inspection and certification, natural condition raisins, standard or offgrade, which have been inspected, certified and held, in compliance with committee requirements, at a

receiving station of a cooperative bargaining association.

(e) Off-grade raisins.

(1) Any natural condition raisins tendered to a handler which fail to meet the applicable minimum grade and condition standards may: (i) Be received or acquired by the handler for disposition, without further inspection, in eligible non-normal outlets; (ii) be returned unstemmed to the person tendering the raisins; or (iii) be received by the handler for reconditioning. Off-grade raisins received by a handler under any one of the three described categories may be changed to any other of the categories under such rules and procedures as the committee, with the approval of the Secretary, shall establish. No handler shall ship or otherwise dispose of off-grade raisins which he does not return to the tenderer, transfer to another handler as provided in paragraph (e)(2) of this section, or recondition so that they at least meet the minimum standards prescribed in or pursuant to this amended subpart, except into eligible non-normal outlets.

(2) Off-grade raisins may be transferred from the plant of the handler where received to another plant of his or to that of another handler within the State of California under such rules and procedures as the committee, with the approval of the Secretary, shall establish to safeguard the objectives of this part.

(3) Each handler shall, while holding any off-grade raisins, store them separate and apart from other raisins and the off-grade raisins shall be stored in accordance with disposition and reconditioning categories. The committee with the approval of the

Secretary may prescribe rules and procedures for the storage of the raisins.

(4) If the handler is to acquire the raisins after they are reconditioned, his obligation with respect to such raisins shall be based on the weight of the raisins (if stemmed, adjusted to natural condition weight) after they have been reconditioned. If, after such reconditioning, such raisins meet the minimum standards but are no longer natural condition raisins, any handler who acquires such raisins shall meet his reserve tonnage obligations from natural condition standard raisins acquired by him.

(5) The committee shall establish, with the approval of the Secretary, such additional rules and procedures as may be necessary to insure adequate control of off-grade raisins, including, but not limited to, the reconditioning of off-grade raisins, the disposition and use of unsuccessfully reconditioned raisins, and the disposition and use of residual matter from reconditioning operations.

(f) Blending. No handler shall blend raisins except:

(1) Incidental to reconditioning raisins as permitted under rules and procedures established by the committee, with the approval of the Secretary;

(2) blending standard raisins with standard raisins; or

(3) blending raisins which meet the minimum grade standards for packed raisins with other raisins which meet such standards.

7 C.F.R. § 989.59 - Regulation of the handling of raisins subsequent to the acquisition by handlers

(a) Regulation. Unless otherwise provided in this part, no handler shall: (1) Ship or otherwise make final disposition of natural condition raisins unless they at least meet the effective and applicable minimum grade and condition standards for natural condition raisins; or (2) ship or otherwise make final disposition of packed raisins unless they at least meet such minimum grade standards established by the committee, with the approval of the Secretary, in applicable rules and regulations or as later changed or prescribed pursuant to the provisions of paragraph (b) of this section: *Provided*, That nothing contained in this paragraph shall prohibit the shipment or final disposition of any raisins of a particular varietal type for which minimum standards are not applicable or then in effect pursuant to this part. *And provided further*, That a handler may grind raisins, which do not meet the minimum grade standards for packed raisins because of mechanical damage or sugaring, into a raisin paste.

(b) The committee may recommend changes in the minimum grade standards for packed raisins of any varietal type and may recommend to the Secretary that minimum grade standards for any varietal type be added or deleted. The committee shall submit with its recommendation all data and information upon which it acted in making its recommendation, and such other information as the Secretary may request. The Secretary shall approve any such

change if he finds, upon the basis of data submitted to him by the committee or from other pertinent information available to him, that to do so would tend to effectuate the declared policy of the act.

(c) Publicity and notice. The committee shall give prompt and reasonable notice to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each recommendation submitted by it to the Secretary and of each regulation issued by the Secretary. Notice of such regulation shall be given to all handlers of record by registered or certified mail.

(d) Inspection and certification. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time

as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

(e) Inter-plant and inter-handler transfers. Any handler may transfer from his plant to his own or another handler's plant within the State of California any free tonnage raisins without having had such raisins inspected as provided in paragraph (d) of this section. The transferring handler shall transmit promptly to the committee a report of such transfer, except that transfers between plants owned or operated by the same handler need not be reported. Before shipping or otherwise making final disposition of such raisins, the receiving handler shall comply with the requirements of this section.

(f) Disposition of offgrade raisins, other failing raisins, and raisin residual material in eligible nonnormal outlets. Any offgrade raisins, except those returned unstemmed to the tenderer or successfully reconditioned, and any raisin residual material which may be received or acquired by a handler or accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins, shall be disposed of or marketed by the handler, without further inspection, in eligible nonnormal outlets: *Provided*, That no packer shall be precluded from recovering raisins from such accumulations or acquisitions: *Provided further*, That whenever the Secretary concludes, on the basis of a recommendation of the committee, that to specify one or more nonnormal outlets as ineligible for any class of such receipts, acquisitions, or accumulations will tend to effectuate the declared policy of the act, he shall specify such ineligible outlets and prohibit the shipment thereto or final

disposition therein of such class by handlers as well as the receipt and use thereof by processors: *And provided further*, That no processor who is a distiller shall be precluded from receiving or using for distillation (1) the standard raisins which subsequently fail to meet the said applicable standards, (2) the raisin residual material accumulated from processing standard raisins, or (3) the raisin residual material referable to the standard raisin equivalent recovered in reconditioning; and any handler may ship such raisins and raisin residual material to such processor. The Committee shall establish, with the approval of the Secretary, such rules and procedures as may be necessary to insure adequate control over the off-grade raisins, other failing raisins, and raisin residual material subject to this paragraph. Such rules may include a requirement that the disposition and use of all or any class of off-grade raisins, other failing raisins, or raisin residual material be confined to the area. The provisions of this paragraph are not intended to excuse any failure to comply with all applicable food and sanitary rules and regulations of city, county, State, Federal, or other agencies having jurisdiction.

(g) Exemption of experimental and specialty packs. The committee may establish, with the approval of the Secretary, rules and procedures providing for the exemption of raisins in experimental and specialty packs from one or more of the requirements of the minimum grade standards of this section, together with the inspection and certification requirements if applicable.

7 C.F.R. § 989.60 - Exemption

(a) Notwithstanding any other provisions of this amended subpart, the committee may establish, with the approval of the Secretary, such rules and procedures as may be necessary to permit the acquisition and disposition of any off-grade or reserve pool raisins, free from any or all regulations, for uses in non-normal outlets.

(b) The committee may establish, with the approval of the Secretary, such rules and procedures as may be necessary to exempt from any or all regulations raisins produced in southern California (i.e., the counties of Riverside, Imperial, San Bernardino, Ventura, Orange, Los Angeles, and San Diego) and disposed of for distillation, livestock feed, or by export in natural condition to Mexico.

(c) The committee may designate such raisins as it deems appropriate for production, processing, and marketing research and development. The period of such designation shall be for not more than five years unless extended by the committee. The volume which may be acquired by all handlers shall not exceed 500 natural condition tons annually for each designated project, unless increased by the Secretary upon a recommendation of the committee. Such designated raisins may be acquired and disposed of free from those regulations specified by the committee. In any crop year, when the total industry acquisitions of the designated raisins exceed 500 natural condition tons or a larger quantity approved by the Secretary upon a recommendation of the committee, the exemption shall not apply.

7 C.F.R. § 989.61 - Above parity situations

The provisions of this part relating to minimum grade and condition standards and inspection requirements, within the meaning of section 2(3) of the act, and any other provisions pertaining to the administration and enforcement of the order, shall continue in effect irrespective of whether the estimated season average price to producers for raisins is in excess of the parity level specified in section 2(1) of the act.

7 C.F.R. § 989.62 - Authorization for prohibition of trade practices

Whenever the Secretary finds, upon recommendation of the committee or other information, that continuance of certain practices in trade channels would tend to interfere with the achieving of the objectives of this part, he may prohibit handlers from using such practices, for any crop year or portion thereof, in selling raisins in containers exceeding four pounds net weight. The prohibited practices may include:

(a) Any provision within or added to a sales contract, or action or agreement outside such contract, whereby the handler is obligated to reflect declines in market prices of raisins by charging the buyer a subsequent market price in lieu of the sales price specified in the contract.

(b) Any agreement in an undertaking to hold raisins in reserve for possible future delivery to a buyer, or action or agreement outside such undertaking, whereby the handler is obligated to not reflect

increases in market prices by charging the buyer a price specified in the agreement.

Prior to any such practices being prohibited in any crop year, the committee shall recommend, for the approval of the Secretary, such rules and procedures and such record keeping requirements as are necessary to administer these prohibitions and obtain compliance therewith.

* * *

7 C.F.R. § 989.65 - Free and reserve tonnage

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Committee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

7 C.F.R. § 989.66 - Reserve tonnage generally

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b) (1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored,

part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in § 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relocate reserve tonnage raisins of the current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent

crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained as security therefor: *Provided*, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to defeat the objectives of this amended subpart. The net proceeds of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

7 C.F.R. § 989.67 - Disposal of reserve raisins

(a) At the time the committee meets to consider free and reserve percentages for a crop year, the committee shall consider the marketing of reserve tonnage raisins for the subsequent 12–month period. The committee shall dispose of all reserve tonnage in such manner as to achieve, as nearly as may be practicable, maximum disposal of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. Any reserve tonnage raisins held unsold by the committee on May 1 of the subsequent crop year shall be physically disposed of promptly in any available outlet not competitive with normal market channels for free tonnage raisins or sales of new crop reserve tonnage raisins in export: *Provided*, That, whenever the Secretary finds, based upon a recommendation of the committee, or on the basis of information otherwise available to him that because of national emergency, crop failure, an insufficient supply of reserve tonnage raisins for export, or other change of economic or marketing conditions, retention of reserve tonnage raisins carried over is warranted, the foregoing requirements as to disposal shall not apply and such raisins may be disposed of in any outlet recommended by the committee and approved by the Secretary.

(b) Reserve tonnage raisins shall be disposed of by the committee:

(1) By sale to handlers for sale in specified outlets or for resale to exporters for sale in export outlets;

(2) By direct sale to any agency of the U.S. Government for noncompetitive use;

(3) By direct sale to foreign government agencies or foreign importers in any country not listed pursuant to paragraph (c) of this section or where the procurement of raisins is so regulated as to preclude purchases from domestic handlers;

(4) By gift; and

(5) By any other means consistent with the provisions of this section, and in outlets noncompetitive with those for free tonnage raisins.

(c) The committee shall sell reserve raisins to handlers for export sale to countries on a list established by the Secretary, on the basis of the recommendation of the committee or from other available information. The list of countries shall be reviewed by the committee annually when it reviews matters relating to the free tonnage, and shall recommend any changes in the list to the Secretary for approval. No country may be removed from the list for the purpose of permitting direct sale by the committee unless a finding is made by the committee and approved by the Secretary, that such removal and subsequent direct sale by the committee shall not lead to disruption of sale of reserve tonnage raisins by handlers in other countries on the list, and that although handlers have been able to offer reserve tonnage raisins at competitive prices to the country to be so removed, there remains an unfilled demand in such country which has not been supplied by handlers and which could be supplied by the committee at the same prices by means of direct sale.

(d) (1) Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum

disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. The committee may pay the cost of transporting reserve tonnage from one handler to another and in the event a handler has more than one plant, the committee may pay the cost of transporting reserve tonnage to the handler's plant of its choice. In each offer or reoffer of reserve tonnage raisins for export, the committee may include a quantity of raisins not to exceed 2 percent of the total tonnage offered in such offer or reoffer, which it may sell to handlers whose regular allocation provides insufficient tonnage to fill a containerized freight shipping container: *Provided*, That such sale may be made only when the remaining portion of a handler's regular allocation will fill at least 50 percent of such container and shall be made to a handler only one time in each offer or reoffer of reserve tonnage raisins. No offer or reoffer shall be made until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, and price involved in such offer or reoffer, and the Secretary may disapprove the offer or reoffer or any term thereof: *Provided*, That at any time prior to the expiration of the 5–day period, the offer or reoffer may be made to handlers upon the committee receiving from the Secretary notice that he does not disapprove the making of the offer or reoffer. Subject to the same conditions as are set forth in the preceding sentence with respect to the making of such offer or reoffer, the committee may withdraw an offer or reoffer to sell reserve tonnage raisins to handlers or may extend the offer or reoffer period but

not when such extension would deprive one or more handlers of an opportunity to purchase raisins.

(2) Except for the final offer of the reserve tonnage from a crop year, an offer of reserve tonnage raisins for export shall provide for a specific tonnage. Each handler's share of the reserve tonnage offered prior to November 1 of any crop year shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by him during the preceding crop year is of the free tonnage raisins acquired by all handlers during the preceding crop year who remain handlers. If reserve tonnage raisins have been removed by the committee from a handler's premises pursuant to § 989.66(f), such handler's allocation of reserve pool offers subsequent to such removal and prior to November 1 of the following crop year shall be reduced by the percentage such removed reserve tonnage is of the total reserve tonnage acquired by such handler in the crop year. Subsequent to October 31, each handler's share shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by the handler during the then current crop year is of the total free tonnage raisins acquired by all handlers during the then current crop year. With respect to any offer other than the initial offer, each handler's share of the total quantity offered as of that date (the then current offer plus all prior offers of that crop year) shall first be determined by the appropriate formula. His share of the current offer shall then be determined by subtracting from his share of the total quantity offered, the total of his share of prior offers from the beginning of the crop year. If any handler did not acquire raisins during the preceding crop

year, the basis for his share of any quantity of reserve tonnage raisins offered prior to November 1 shall be his acquisitions of free tonnage raisins during the then current crop year. The current free tonnage acquisitions of all such new handler shall, for the purposes of determining the shares of all handlers prior to November 1, be added to the total acquisitions of free tonnage raisins during the preceding crop year of all handlers in business at the time the offer is made.

(3) With respect to any offer of reserve tonnage for sale to handlers for resale in export, the committee may provide that any such tonnage unpurchased at the end of the share reservation period will be reoffered to handlers without regard to shares and that approval for handlers' applications for purchase may be made in the same order in which the applications are received by the committee. Such reoffer may be made by the committee at the time it makes a regular offer of reserve tonnage, at any time during the period a regular offer is in effect, or within a reasonable time after a regular offer has expired.

(4) The final offer of the reserve tonnage from a crop year may be offered to handlers without regard to shares and approval of handlers' applications for purchase may be made in the same order in which the applications are received by the committee.

(5) Whenever a handler's share or allocation pursuant to this paragraph is less than or exceeds his holdings of reserve tonnage by a minor quantity, the committee may adjust the handler's share or allocation so as to avoid the cost of the physical transfer. The maximum quantity by which a

handler's share or allocation may be so allocated shall be prescribed in rules and procedures which the committee shall establish with the approval of the Secretary.

(e) The committee may sell reserve tonnage raisins as provided in paragraph (b)(3) of this section only when such country is not included in the list of specified countries established pursuant to paragraph (c) of this section and may sell reserve tonnage raisins to foreign government agencies of foreign importers in any country removed from such list. No agreement to sell reserve tonnage raisins shall be entered into by the committee until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, price and foreign country involved in any such proposed sale, and the Secretary may disapprove such sale or any term thereof: *Provided*, That, at any time prior to the expiration of the 5–day period, the sale may be made upon the committee receiving from the Secretary notice that he does not disapprove the making of the sale.

(f) Whenever the committee concludes that the orderly disposition of reserve tonnage would be promoted by the committee replacing any portion or all of handlers' export shipments of free tonnage raisins, to other than free tonnage outlets, made prior to the committee's first offer to sell reserve tonnage, it may do so and may specify such requirements and conditions as are necessary to carry out the replacement consistent with the objectives of this amended subpart. The committee may establish a price for such replacement tonnage

which is higher, the same as, or lower than that for reserve tonnage in the first offer of the crop year. Any such replacement offer by the committee shall be governed by those provisions of paragraph (d)(1) of this section which prescribe prior action by the Secretary on committee offers to sell tonnage to handlers.

(g) (1) The committee may, subject to review by the Secretary, refuse to sell reserve tonnage raisins for export:

(i) To any handler who is in default on any previous purchase of reserve tonnage raisins from the committee;

(ii) To any handler currently not in compliance with the provisions of a sales agreement covering reserve tonnage raisins, executed by such handler with the committee; or

(iii) To any handler who signifies an intention to sell reserve tonnage to or through any person who has previously failed to complete a sale of reserve tonnage raisins to a foreign buyer and such raisins remain to be exported and remain unsold to any foreign buyer in an eligible export market.

(2) Handlers who are in default of timely payment under any purchase agreement are subject to an interest and late payment charge(s) recommended by the committee and approved by the Secretary on the delinquent amount that is owed the committee. The interest charge shall be the current prime rate plus 2 percent established by the bank in which the committee has its administrative assessment funds deposited, on the day the amount owed becomes delinquent; and further, that such rate of interest be

added to the bill monthly until the handler's delinquent amount owed plus applicable interest has been paid: *Provided*, That the committee, with the approval of the Secretary, may recommend changes in the rate of interest to another rate of interest. When the committee determines to change the rate of interest or a late payment charge is needed, and such change is approved by the Secretary, the committee shall announce the change in the rate of interest or the rate of late payment charge through a mailing by the committee to handlers.

(3) Appeals. If a determination is made by the committee that a handler has not complied with the provisions of this section and any actions allowed under this section are taken against the handler, such handler may request a hearing before an appeals subcommittee established by the committee. If the handler disagrees with the subcommittee's decisions, the handler may request the committee to review the subcommittee's decision. The committee may, subject to the approval of the Secretary, establish additional procedures concerning appeals.

(h) Each packer's share of an offer of reserve tonnage raisins for contract packing shall be determined as the same proportion that the reserve tonnage raisins acquired by him is of the reserve tonnage raisins acquired by all packers. In the event that any packer fails to contract for packing any or all of his share of any offer, the remaining portion thereof shall be reoffered by the committee to all packers who contracted for packing all of their respective shares, in proportion to their respective acquisitions: Provided, That, if such amount which packers fail to contract for packing does not exceed 250 tons, or if it

is necessary to deviate from the foregoing in order to meet terms and conditions of shipment, the committee may, in its discretion, allocate such reserve tonnage raisins among packers as it deems appropriate, but the shares of packers in subsequent offers or reoffers shall be adjusted accordingly.

(i) In the event the committee determines that the applicable procedures as specified in paragraphs (d) and (h) of this section will not provide an allocation for handlers which is suitable for a particular situation, the committee, with the approval of the Secretary, may establish such modifications of procedures, consistent with § 989.66(e), as will facilitate the disposition of reserve tonnage through the handlers.

<Text of subsection (j) suspended in Part effective Sept. 29, 1997.>

(j) The committee shall not sell reserve tonnage raisins of any varietal type to handlers to provide them with raisins to sell as free tonnage, other than as provided in § 989.54, unless it files with the Secretary complete information and receives from the Secretary notice that he does not disapprove of such sale and that because of: National emergency, crop failure; change of economic or marketing conditions; free tonnage shipments during the then current crop year exceeding shipments of a comparable period of the prior crop year by more than 5 percent: *Provided*, That, such sale of reserve tonnage shall be limited to the quantity exceeding 105 percent of shipments for the first 10 months of the prior crop year; and/or an inadequate carryover, the free tonnage outlets cannot be reasonably well

supplied by the tonnage released to the industry as a whole by the committee's marketing policy for that varietal type. Any quantities of reserve raisins offered to handlers for free use, except as provided in § 989.54(g), may be offered to them on the basis of handler shipments or acquisitions in the same manner as in paragraph (d)(1) of this section. If offered on the basis of acquisitions, shares shall be determined pursuant to paragraph (d)(2) of this section. If offered on the basis of shipments, the same formula shall be used, except that shipments shall be used as the basis instead of acquisitions in computing handlers' shares. However, such raisins shall not be sold at a price below that which the committee concludes reflects the average price received by producers for free tonnage of the same varietal type purchased by handlers during the current crop year up to the time of any offer for sale of reserve tonnage by the committee, to which shall be added the costs to the equity holders incurred by the committee on account of receiving, inspecting, storing, fumigating, insuring, and holding of said raisins, and including costs of taxes and interest: *Provided*, That, where the outlook for the next crop year or other factors have caused a downward trend in the prices received by producers for free tonnage raisins or in the prices received by handlers for free tonnage packed raisins, reserve tonnage may be sold to handlers at the currently prevailing or the approximate computed field price for free tonnage raisins, as determined by the committee. The committee may sell reserve tonnage raisins of any varietal type to any handler to provide him with raisins to sell as free tonnage if such handler has lost all or part of his free tonnage because of fire or other

disaster beyond his control subject to the applicable provisions of this paragraph and in an amount equal to such tonnage so lost.

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7 C.F.R. § 989.70 - Storage or raisins held on memorandum receipt and of packer-owned tonnage

All raisins stored by a handler for another person on memorandum or warehouse receipt, or raisins produced and stored by a handler, shall be stored separate and apart from other raisins and shall be clearly marked or tagged as raisins stored on memorandum or warehouse receipt or as raisins produced by the handler but not acquired by him in his capacity as a handler.

7 C.F.R. § 989.71 - Disposition of unsold reserve tonnage in above parity situations

In the event that the Secretary should find, during a crop year when reserve tonnage percentages have been designated and are in effect pursuant to this part, that the estimated season average price for raisins for that crop year will be in excess of the price level contemplated by the provisions of section 2(1) of the act, he shall issue an order providing for the orderly disposition of the unsold reserve tonnage then on hand, in such outlets, at such times, and in accordance with such terms and conditions, as he may determine to be appropriate in the circumstances. In determining the liquidation procedures and terms, the Secretary shall give

consideration to the data and recommendations, if any, which may be submitted by the committee.

* * *

7 C.F.R. § 989.73 - Reports

(a) Inventory reports. Each handler shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any raisins which were held by him on a date designated by the committee, which information as specified may include, but not be limited to:

(1) The quantity of any raisins so held, segregated as to varietal type, natural condition, packed, standard quality or off-grade quality; and

(2) The locations of the raisins.

(b) Acquisition reports. Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report, which report shall include, but not be limited to: (1) The total quantity of standard raisins acquired; (2) the quantity of reserve tonnage referable to his acquisitions of standard raisins; (3) the locations of such reserve tonnages; (4) the total quantity of off-grade raisins acquired pursuant to § 989.58(e)(1)(i), and (5) cumulative totals of such acquisitions from the beginning of the then current crop year to and including the end of the period for

which the report is made. Upon written application made to the committee, a handler may be relieved of submitting such reports after completing his packing operations for the season. Upon request of the committee, each handler shall furnish to the committee, in such manner and at such times as it may require, the name and address of each person from whom he acquired raisins and the quantity of each varietal type of raisins acquired from each such person.

(c) Each handler shall file such reports of creditable promotion including paid advertising as recommended by the Committee and approved by the Secretary.

(d) Other reports. Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information as may be necessary to enable it to exercise its powers and perform its duties under this amended part.

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7 C.F.R. § 989.76 - Records

Each handler shall maintain such records of all raisins received, and of all raisins acquired, by him as prescribed by the committee. Such records shall include, but not be limited to, the quantity of raisins of each varietal type acquired from each person and the name and address of each such person, total acquisitions, total sales, and total other disposition of each varietal type which he handles, and each handler shall maintain such records for at least two

years after the termination of the crop year in which the transactions occurred. The Committee, with the approval of the Secretary, may prescribe rules and regulations to include under this section handler records that detail promotion and advertising activities which the Committee may need to perform its functions under § 989.53.

7 C.F.R. § 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. Each handler shall furnish all labor and equipment necessary to make such inspections. Each handler shall store raisins in a manner which will facilitate inspection, and shall maintain storage records which will permit accurate identification of raisins held by him or theretofore disposed of. Insofar as is practicable and consistent with the carrying out of the provisions of this amended subpart, all data and information obtained or received through checking and verification of reports and records shall be treated as confidential information.

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7 C.F.R. § 989.79 - Expenses

The committee is authorized to incur such expenses (other than those specified in § 989.82) as the Secretary finds are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the committee and for such purposes as he may, pursuant to this subpart, determine to be appropriate. The funds to cover such expenses shall be obtained levying assessments as provided in § 989.80. The committee shall file with the Secretary for each crop year a proposed budget of these expenses and a proposal as to the assessment rate to be fixed pursuant to § 989.80, together with a report thereon. Such filing shall be not later than October 5 of the crop year, but this date may be extended by the committee not more than 5 days if warranted by a late crop. Also it shall file at the same time a proposed budget of the expenses likely to be incurred during the crop year in connection with reserve raisins held for the account of the committee, exclusive of the receiving, storing, fumigating, and handling expenses which are covered by a schedule of payments to handlers effective pursuant to § 989.66(f) or any rules and procedures established by the committee, and exclusive of any expenses it may incur in connection with the disposition of such raisins and which are unknown at the time. The said report shall also cover this proposed budget.

7 C.F.R. § 989.80 - Assessments

(a) Each handler shall, with respect to free tonnage acquired by him, and any reserve tonnage released

or sold to him for use in free tonnage outlets, pay to the committee, upon demand, his pro rata share of the expenses (exclusive of expenses for receiving, fumigating, handling, holding or disposing of reserve pool tonnage) which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year less any amounts credited pursuant to § 989.53. Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler plus any reserve tonnage released or sold to him for use as free tonnage, during the applicable crop year and the total free tonnage acquired by all handlers plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year: *Provided*, That (1) in computing the total free tonnage acquired by a particular handler, there shall be excluded all standard raisins (recovered by the reconditioning of offgrade raisins) acquired by the handler and which comprise the assessable portion of another handler pursuant to paragraph (b) of this section, and (2) the computation of the total free tonnage acquired by all handlers shall not be similarly reduced.

(b) Each handler who reconditions offgrade raisins but does not acquire the standard raisins recovered therefrom shall, with respect to his assessable portion of all such standard raisins, pay to the committee, upon demand, his pro rata share of the expenses which the Secretary finds will be incurred by the committee each crop year. Such handler's pro rata share of such expenses shall be equal to the ratio between the handler's assessable portion (which shall be a quantity equal to the free tonnage portions of such handler's standard raisins which are

acquired by some other handler or handlers) during the applicable crop year and the total free tonnage acquired by all handlers, plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year.

(c) During any crop year or any portion of a crop year for which volume percentages are not effective for a varietal type, all standard raisins of that varietal type acquired by handlers during such period shall be free tonnage for purposes of levying assessments pursuant to this section. The Secretary shall fix the rate of assessment to be paid by all handlers on the basis of a specified rate per ton. At any time during or after a crop year, the Secretary may increase the rate of assessment to obtain sufficient funds to cover any later finding by the Secretary relative to the expenses of the committee. Each handler shall pay such additional assessment to the committee upon demand. In order to provide funds to carry out the functions of the committee, the committee may accept advance payments from any handler to be credited toward such assessments as may be levied pursuant to this section against such handler during the crop year. The payment of assessments for the maintenance and functioning of the committee, and for such purposes as the Secretary may pursuant to this subpart determine to be appropriate, may be required under this part throughout the period it is in effect, irrespective of whether particular provisions thereof are suspended or become inoperative.

(d) Each handler shall, with respect to administrative assessments not paid within 30 calendar days of the date of the Committee's invoice,

pay to the Committee interest on the unpaid assessment at the rate of the prime rate established by the bank in which the Committee has its administrative assessment funds deposited, on the day that the administrative assessment becomes delinquent plus 2 percent; and further, that such rate of interest be added to the bill monthly until the delinquent handler's assessment plus applicable interest has been paid: *Provided*, That the Committee may, with the approval of the Secretary, modify the interest rate applicable to delinquent handler's assessment through the establishment of applicable rules and regulations.

7 C.F.R. § 989.81 - Accounting

(a) If, at the end of the crop year, the assessments collected for such crop year exceed the expenses incurred with respect to such crop year, each handler's share of such excess shall be credited to him against, and may be used for, the operations of the following crop year, unless such handler demands payment thereof, in which case his share shall be paid to him.

(b) The committee may, with the approval of the Secretary, maintain in its own name or in the name of its members, a suit against any handler for the collection of such handler's pro rata share of the expenses.

7 C.F.R. § 989.82 - Expenses of reserve raisin operations

The committee is authorized to incur such expenses as are reasonable and are necessary in discharging its obligations, pursuant to this part, with respect to the receiving, fumigating, handling, holding, or disposing of any quantity of reserve pool raisins held for the account of the committee. The committee is authorized to pay any taxes assessed against raisins held by or for the account of the committee on March 1, or such assessment date as later changed and then in effect, in the reserve pool established pursuant to this subpart: *Provided*, That any equity holder may pay his taxes upon giving notice to the committee on or before May 1 of each year of his intention to do so. All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.

7 C.F.R. § 989.83 - Funds

All funds received by the committee pursuant to the provisions of this part, shall be used solely for the purposes authorized, and shall be accounted for in the manner provided, in this part. The Secretary may, at any time, require the committee and its members and alternate members to account for all receipts and disbursements.

7 C.F.R. § 989.84 - Disposition limitation

No handler shall dispose of free or reserve tonnage raisins, offgrade raisins, or other failing raisins, except in accordance with the provisions of this subpart or pursuant to regulations issued by the committee.

* * *

7 C.F.R. § 989.86 - Separability

If any provision of this amended subpart is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this amended subpart or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

* * *

7 C.F.R. § 989.89 - Agents

The Secretary may, by a designation in writing, name any person, including any officer or employee of the United States Government, or name any bureau or division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this amended subpart.

* * *

7 C.F.R. § 989.91 - Suspension or termination

(a) The Secretary may, at any time, terminate the provisions of this amended subpart by giving at least one day's notice by means of a press release or in any other manner which he may determine.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this amended subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this amended subpart at the end of any crop year 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 grapes used in the production of raisins in the State of California: *Provided*, That such majority have, during such representative period, produced for market more than 50 percent of the volume of such grapes produced for market within said State; but such termination shall be effective only if announced before July 31 of the then current crop year.

(d) The provisions of this amended subpart shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

7 C.F.R. § 989.92 - Proceedings after termination

(a) Upon the termination of the provisions of this amended subpart, the members of the committee then functioning shall continue as joint trustees for

the purpose of liquidating the affairs of the committee, of all funds and property then in the possession or under the control of the committee, including claims for any funds unpaid or property not delivered at the time of such termination. Action by said trusteeship shall require the concurrence of a majority of the said trustees.

(b) Said trustees shall continue in such capacity until discharged by the Secretary; shall, from time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and the joint trustees, to such person as the Secretary may direct; and shall, upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the committee or the joint trustees pursuant to this subpart.

(c) Any person to whom funds, property or claims have been transferred or delivered by the committee or its members, pursuant to this section, shall be subject to the same obligations imposed upon the members of the said committee and upon said joint trustees.

7 C.F.R. § 989.93 - Effect of termination or amendment

Unless otherwise expressly provided by the Secretary, the termination of this amended subpart or any regulation issued pursuant to this amended subpart, or the issuance of any amendment to either thereof, shall not (a) affect or waive any right, duty,

obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this amended subpart or any regulation issued under this amended subpart, (b) release or extinguish any violation of this amended subpart, or of any regulation issued under this amended subpart, or (c) affect or impair any rights or remedies of the Secretary or of any other person, with respect to any such violation.

7 C.F.R. § 989.94 - Amendments

Amendments to this amended subpart may be proposed from time to time, by any person or by the committee.

7 C.F.R. § 989.95 - Right of Secretary

The members of the committee (including alternates and successors) and any agent or employee appointed or employed by the committee, shall be subject to removal or suspension by the Secretary, in his discretion, at any time. Every decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void.

* * *

7 C.F.R. § 989.166 - Reserve tonnage generally

(a) Set-aside obligations--

(1) Natural (sun-dried) Seedless. Handlers who acquire any lot of natural condition Natural (sun-dried) Seedless raisins which have been dipped in or sprayed with water, with or without chemicals, prior to or during the drying process, for purposes other than to expedite drying, or that have been produced from seedless varieties of grapes other than Thompson Seedless (i.e., Fiesta, Emerald Seedless, Perlette, Delight, and other similar grape varieties), or that have been treated with Oleate or similar drying agents, or such other Natural (sun-dried) Seedless raisins that have been produced using other cultural practices as recommended by the Committee with the approval of the Secretary, may set aside such raisins to satisfy their reserve pool obligation: *Provided,* That such raisins shall be identified by the Inspection Service affixing to one container on each pallet or to each bin in each lot, a prenumbered RAC control card (to be furnished by the Committee) which shall remain affixed until raisins are processed or disposed of as natural condition raisins: *and Provided further*, That such raisins shall not be delivered to the Committee or transferred to another handler without approval of the Committee or the receiving handler.

(2) Mixed varietal types. A handler who acquired any lot of natural condition raisins of mixed varietal types (commingled within their containers) shall meet the reserve tonnage setaside obligation for each varietal type contained in the mixed lot by setting aside raisins of each such varietal type which

have not been mixed or commingled with raisins of any other varietal type. The obligation as to each varietal type shall be computed according to the reserve percentage established by the Secretary, and the percentage of the varietal type contained in the mixed lot as shown by the incoming inspection certificate applicable thereto.

(b) Storage of reserve tonnage raisins--

(1) Time limits for setting aside pool tonnage. Handlers shall be allowed 3 calendar days (exclusive of Saturdays, Sundays, and holidays), after the preliminary or interim percentages have been computed and announced by the Committee, and after the publication in the Federal Register of the applicable final reserve percentages established for the crop year, or after any reserve tonnage raisins are acquired subsequent to the percentages being announced or established, to segregate and properly stack each varietal type of reserve tonnage raisins.

(2) Conditions. Each handler shall store reserve tonnage raisins in storage and under conditions which protect them from rain and which reasonably can be expected to maintain the raisins free of any biological or other infestation or contamination. Each handler shall, pursuant to § 989.66(b)(2), store each varietal type of reserve tonnage raisins held by him for the account of the Committee, separate and apart from all other raisins. Storage of such raisins shall be deemed "separate and apart" if the containers are so marked and placed as to be capable of ready and clear identification as to the category in which are held. Reserve tonnage raisins shall be stored in sweat

boxes, picking boxes, or other portable containers not exceeding one ton capacity:

(3) Substitution of free tonnage. A handler may, pursuant to § 989.66(b)(3), after giving the Committee reasonable advance notice in writing and under its direction and supervision, substitute standard raisins for reserve tonnage raisins.

(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 (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) 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, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is requested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control,

shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

(d) Disposition of reserve tonnage raisins which become off-grade for causes beyond the handler's control. Any reserve tonnage raisins held by or for the account of the Committee which become off-grade for reasons beyond the handler's control shall, at the Committee's discretion, be reconditioned or disposed of by the Committee, or under the Committee's control, in eligible nonnormal outlets. Any monetary loss sustained in the reconditioning or disposition of such raisins, not covered by insurance carried by the Committee, shall be charged to the applicable reserve pool.

(e) Offers of reserve tonnage raisins to handlers for sale in export. Whenever the Committee offers reserve tonnage raisins to handlers for sale in export, it shall specify in addition to the normal contract terms and conditions, the total quantity, the price and period within which each handler will be permitted to purchase his share of the offer. Whenever a handler's share of an offer is less than,

or exceeds, his holding of reserve tonnage raisins by not more than 10 tons, the Committee may adjust his share so as to avoid the cost involved in the physical transfer of raisins. If, prior to the expiration of the offer period, a handler desires to obtain reserve tonnage in an amount greater than that represented by his share of the offer, he may negotiate with another handler for any unpurchased portion of the other handler's share of an outstanding offer. No such transaction shall be deemed to reduce the transferring handler's share or to increase the transferee handler's share so as to affect either handler's share privileges in subsequent offers. Transfers to implement such transactions between handlers shall be permitted by the Committee only upon receipt of written authorization, on a form furnished by the Committee, by the transferring handler. All limitations applicable to the transferred tonnage shall continue to apply. Such reserve tonnage raisins will be released by the Committee to the transferee handler upon submission of his completed application and full payment for such raisins, and such transferee handler shall be responsible to the Committee for all documentation required in connection with the transaction. All such transfers shall be made at the expense of the handlers concerned.

7 C.F.R. § 989.167 - Disposal of reserve raisins

(a) Offer of reserve tonnage raisins for use in noncompetitive outlets. Whenever the Committee proposes to offer to sell standard reserve tonnage raisins in noncompetitive outlets pursuant to § 989.67(a) and (b), it shall promptly file with the Secretary complete information with respect thereto and the basis therefor. The Secretary shall have the right to disapprove, within seven calendar days, the making of such an offer or sale or any term or conditions thereof.

(b) Determination of price of reserve tonnage sold for free tonnage use. Whenever, pursuant to § 989.67(j), the Committee concludes, with respect to any varietal type of raisins, that a downward trend in the price received by producers for free tonnage, or in the prices received by handlers for free tonnage packed raisins, makes it impracticable to sell reserve tonnage at the average price received by producers for free tonnage plus pooling costs, the Committee, subject to the requirements of § 99.67(j), may sell reserve tonnage raisins at the currently prevailing field price for free tonnage raisins of the same varietal type, unless such price is deemed to be unrepresentative of the current f.o.b. price of free tonnage packed raisins. In such an event, or if there is no current field price, the Committee shall make any offer of reserve tonnage at approximately the computed field price obtained by deducting from the current f.o.b. price for free tonnage packed raisins of the varietal type to be offered, the approximate recent packing and handling margin between such packed price and the field price for free tonnage

raisins. This paragraph (b) shall not be in effect from July 30, 1984, through July 31, 1986.

(c) Terms of reserve tonnage offers. Whenever the Committee offers reserve tonnage raisins to handlers for use in free tonnage outlets, the Committee shall, among other terms and conditions of the offer, specify (1) the period in which each handler shall be given the opportunity to purchase his share of the offer, and (2) the period in which each eligible handler shall be given an opportunity to purchase his respective share of any reoffer. In the event reserve pool raisins are transferred by the Committee, the purchasing handler shall promptly empty the raisins from the containers used in the transfer so that the Committee may return the containers and pallets used in the transfer to the handler from whom the raisins were transferred within 10 business days from the date of transfer. Any handler who refuses to permit the containers in which reserve pool raisins are stored to leave his premises, shall, at his expense, place such raisins in containers supplied by the Committee.

* * *

7 C.F.R. § 989.173 - Reports

(a) Inventory reports. Each handler shall submit to the Committee as of the close of business on July 31 of each crop year, and not later than the following August 6, an inventory report which shall show, with respect to each varietal type of raisins held by such handler: *Provided*, That, for the Other Seedless varietal type, handlers shall report the information

required in this paragraph separately for the different types of Other Seedless raisins:

(1) The quantity of free tonnage raisins, segregated as to locations where they are stored and whether they are natural condition or packed;

(2) The quantity of reserve tonnage raisins for the account of the Committee; and

(3) The quantity of off-grade raisins segregated as to those for reconditioning and those for disposition as such. Upon request by the Committee, each handler shall file at other times, and as of other dates, any of the said information which may reasonably be necessary for the determination or revision of marketing policy and which the Committee shall specify in its request.

(b) Reports of raisins received or acquired--

(1) General.

(i) Except as otherwise provided in paragraph (i) of this section, each handler shall submit to the Committee (on forms furnished by it) for each week (Sunday through Saturday or such other 7–day period for which the handler has submitted a proposal to and received approval from the Committee) and not later than the following Wednesday, the reports specified in paragraphs (b)(2), (3), (4), and (5) of this section.

(ii) For each report required to be submitted pursuant to this paragraph, the required information shall be shown separately for each varietal type: *Provided*, That, for the Other Seedless varietal type, the required information shall be shown separately for the different types of Other

Seedless raisins. With each report, other than that specified in paragraph (b)(4) of this section, the handler shall submit a copy of the door receipt, weight certificate or such other document approved by the Committee that accurately reflects the weight of each lot tendered, for each lot of raisins received or acquired by him during the reporting period and for each lot of raisins stored on memorandum or warehouse receipt which was returned to the tenderer during such period, which shall show the information to be contained on such receipts or weight certificates as specified in § 989.158(a)(3). At the time he submits the reports specified in paragraphs (b)(2) and (3) of this section to the Committee, each handler shall submit a copy of each such report to the Inspection Service.

(2) Acquisition of standard raisins. Each handler shall report:

(i) The total net weight of the standard raisins acquired during the reporting period, segregated when appropriate, as to free tonnage and reserve tonnage;

(ii) The location of the reserve tonnage raisins; and

(iii) The cumulative totals of such acquisitions (as so segregated) from the beginning of the then current crop year.

(3) Standard raisins received for memorandum storage. Each handler shall, with respect to all standard raisins held for memorandum receipt, storage, bailment, or warehousing (raisins received other than by acquisition or interhandler transfer), report:

(i) The net weight of such standard raisins held at the start of the reporting period;

(ii) The net weight of such standard raisins received during the reporting period;

(iii) The net weight of such standard raisins acquired during such period and included with the acquisitions required to be reported pursuant to paragraph (b)(2) of this section;

(iv) The net weight of such raisins returned during such period to the persons from whom they were received; and

(v) The net weight(s) and location(s) of such raisins held at the end of such period.

(4) Off-grade raisins returned to tenderers. Each handler shall report with respect to each lot of off-grade raisins which the handler returned during the reporting period to the tenderer pursuant to paragraph (1) of § 989.58(e):

(i) The inspection certificate number;

(ii) The net weight;

(iii) The name of the tenderer; and

(iv) The date the lot was returned to the tenderer.

(5) Off-grade raisins received for reconditioning or disposition in eligible nonfood channels. Each handler who is not a processor shall, with respect to all off-grade raisins received by the handler and retained by him for reconditioning or for disposition or use in eligible nonnormal outlets, report for each category received or reconditioned during the reporting period:

(i) The name of each tenderer;

(ii) The net weight of such raisins;

(iii) The locations where received;

(iv) The inspection certificate number covering each receipt;

(v) The name and address of each person to whom residual or off-grade lots were delivered for disposition, and the respective net weight delivered; and

(vi) The total net weight (according to location) of each category of off-grade raisins held by him at the end of the reporting period.

Each nonacquiring handler shall report also the weight of standard raisins recovered from reconditioning, their inspection certificate number(s) and the handler or other person to whom the standard raisins were delivered.

(6) Monthly report of raisins received or acquired by processors. Each processor who receives or acquires off-grade raisins, or who avail himself of the exemptions from the grade and inspection requirements provided in §§ 989.58, 989.59(f), and 989.160 and receives or acquires raisins or raisin residual material, shall submit to the Committee on or before the 7th day of each month a report of such raisins, raisin residual material, and off-grade raisins received or acquired during the preceding month. Each report shall show for each varietal type:

(i) The name and address of each handler, producer, or other person from whom such

raisins or raisin residual material was received or acquired; and

(ii) The net weight of such raisins and raisin residual material.

(7) Receipt of raisins produced from grapes grown outside the State of California. Each handler who receives raisins produced from grapes grown outside the State of California shall submit to the Committee, on an appropriate form provided by the Committee so that it is received by the Committee not later than the eighth day of each month, a report of the receipt of such raisins. This report shall include: The varietal type of raisins received; the net weight (pounds) of raisins received for the current month as well as a cumulative quantity from August 1; and the state or country where the raisins were produced. With each report, the handler shall submit a copy of the door receipt, weight certificate, or such other document as required by the Committee that includes, but is not limited to, the name of the tenderer (equity holder) from whom such raisins were received, the varietal type(s) of raisins, the net fruit weight, the number and type of containers in the lot, the date of delivery, and the address including State or country where such raisins were produced.

(c) Reports of disposition--

(1) Free tonnage raisins. Each month each handler who is not a processor shall furnish to the Committee, on an appropriate form provided by the Committee and so that it is received by the Committee not later than the seventh day of the month, a report showing the aggregate quantity of

each varietal type of free tonnage packed raisins and standard natural condition raisins which were shipped or otherwise disposed of by such handler during the preceding month (exclusive of transfers within the State of California between plants of any such handler and from such handler to other handlers): *Provided*, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins. Such required information shall be segregated as to:

(i) Domestic outlets (exclusive of Federal Government purchases) according to the quantity shipped in consumer cartons, the quantity shipped in bags having a net weight content of four pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than four pounds);

(ii) Federal Government purchases;

(iii) Export outlets according to the quantity shipped in consumer cartons, the quantity shipped in bags having a net weight content of four pounds or less, and the quantity shipped in bulk packs (including, but not limited to, those in bags having a net weight content of more than four pounds);

(iv) Export outlets, by countries of destination; and

(v) Each of any other outlets in which the handler has made disposition of such raisins other than by any transfer which is excluded by the preceding sentence.

(2) Disposition by handlers (other than processors) of off-grade raisins, other failing raisins, and raisin residual material. Each handler who is not a processor shall submit to the Committee on or before the seventh day of each month a report of all shipments and other dispositions made during the preceding month of off-grade raisins, other failing raisins, and raisin residual material. Such report shall be submitted on a form furnished by the Committee and shall include the following information:

(i) Date of each shipment and other disposition;

(ii) Name and address of each buyer and receiver; and

(iii) Description and net weight of the raisins and raisin residual material in each shipment or other disposition.

(3) Disposition by handlers of raisins produced from grapes grown outside the State of California. Each handler who receives raisins produced from grapes grown outside the State of California shall submit to the Committee, on or before the eighth day of each month, a report, on the appropriate form provided by the Committee, of all shipments of such raisins made during the preceding month. This report shall include:

(i) The varietal type(s) of raisins shipped;

(ii) The net weight (pounds) of raisins shipped;

(iii) The destination (domestic, export, and other disposition such as distilleries, livestock feeders, or concentrate) of such shipments; and

(iv) The area of origin (state or country) of the raisins shipped.

(4) Disposition reports by processors. Each processor shall submit to the Committee, upon its request, such of the following information and for such period as the Committee shall specify;

(i) The quantity of raisins and raisin material sold or otherwise disposed of by processing operations, segregated as to the processing outlets and the kinds of raisins or raisin material which the Committee shall specify; and

(ii) The quantity of raisins or raisin material sold or otherwise disposed of by the processor, segregated as to specified outlets and kinds of raisins or raisin material.

(d) Reports of interhandler transfers--

(1) Free-tonnage. Any handler who transfers free-tonnage raisins to another handler within the State of California shall submit to the Committee not later than five calendar days following such transfer a report showing:

(i) The date of transfer;

(ii) The name(s) and address(es) of the handler or handlers and the locations of the plants;

(iii) The varietal type of raisin, with organically produced raisins as specified in paragraph (g) of this section separated out, net weight, and condition of the raisins transferred:

Provided, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins;

(iv) If packed, the inspection certificate number in the event such raisins have been inspected prior to such transfer and a certificate issued. Two copies of such report shall be forwarded to the receiving handler at the time the report is submitted to the Committee, on one of which the receiving handler shall certify to the receipt of such raisins and submit it to the Committee within five calendar days after the raisins or the copies of such report have been received by him, whichever is later; and

(v) If packed, the transferring handler shall certify that such handler is transferring only acquired, free-tonnage raisins that meet all applicable marketing order requirements, including reporting, incoming inspection, assessments, and volume regulation.

(2) [Reserved by 73 FR 42259]

(e) Report of shipments of experimental or specialty packs under exemption. Each handler who obtains an exemption pursuant to § 989.59(g) for the shipment of experimental or specialty packs of raisins shall submit to the Committee on a copy of the approved application for exemption a report showing the quantity of raisins shipped or disposed of under such exemption. The handler shall submit the report promptly after the end of the crop year or after completion by him of all shipments of such exempted raisins, whichever is earlier.

(f) Reports pertaining to the release of reserve tonnage and marketing policy information. Upon request of the Committee, each handler shall submit to the Committee on forms furnished by it a report containing such of the following information for each specified varietal type of raisins as the Committee may request:

(1) The quantity of free tonnage raisins held by him in and outside California as of the date specified in the Committee's request, segregated by the portion sold and the portion not sold;

(2) The total quantity of raisins expected to be acquired by him subsequent to the date specified by the Committee, pursuant to purchase contracts with producers and dehydrators, which are in effect as of the date specified by the Committee;

(3) The weighted average price paid by him to producers and dehydrators for free tonnage raisins, natural condition basis, during the period specified by the Committee and the quantity of raisins for which such average was computed;

(4) The quantity of free tonnage raisins sold or sold and shipped (as to which category the Committee shall specify) by him during a period specified by the Committee, segregated to show the quantities sold or sold and shipped in:

(i) Domestic markets; and

(ii) Foreign markets, detailed by country; and

(5) The average weighted f.o.b. sales prices received from sales, during a period specified by the Committee, of raisins in 30 pound fibre cases in

domestic markets and the quantity of raisins for which such average prices were computed. Each such report shall be submitted not later than the end of the fifth calendar day following either the date of the request by the Committee or the ending date of the period to be covered by the report, whichever is later.

(g) Organically produced raisins. For purposes of this section, organically produced raisins means raisins that have been certified by an organic certification organization currently registered with the California Department of Food and Agriculture or such certifying organization accredited under the National Organic Program. Handlers of such raisins shall submit the following reports to the Committee by varietal type: *Provided*: That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins.

(1) Inventory report of organically-produced raisins. Each handler shall submit to the Committee by the close of business on July 31 of each crop year, and not later than the following August 6, on an appropriate form provided by the Committee, a report showing, with respect to the organically-produced raisins held by such handler:

(i) The quantity of free tonnage raisins, segregated as to locations where they are stored and whether they are natural condition or packed;

(ii) The quantity of reserve tonnage raisins held for the account of the Committee;

(iii) The quantity of off-grade raisins segregated as to those for reconditioning and those for disposition as such.

(2) Acquisition report of organically-produced standard raisins. Each handler shall submit to the Committee for each week (Sunday through Saturday or such other 7–day period for which the handler has submitted a proposal to and received approval from the Committee) and not later than the following Wednesday, on an appropriate form provided by the Committee, a report showing the following:

(i) The total net weight of the standard raisins acquired during the reporting period, segregated when appropriate, as to free tonnage and reserve tonnage;

(ii) The location of the reserve tonnage; and

(iii) The cumulative totals of such acquisitions (as so segregated) from the beginning of the current crop year.

(iv) Upon request of the Committee, each handler shall provide copies of the organic certificate(s) applicable to the quantity of raisins reported as acquired.

(3) Disposition report of organically-produced raisins. No later than the seventh day of each month, handlers who are not processors shall submit to the Committee, on an appropriate form provided by the Committee, a report showing the aggregate quantity of free tonnage packed raisins and standard natural condition raisins which were shipped or otherwise disposed of by such handler during the preceding month (exclusive of transfer within the

State of California between the plants of any such handler and from such handler to other handlers). Such information shall include:

(i) Domestic outlets (exclusive of Federal government purchases) according to the quantity shipped in consumer cartons, the quantity of bags having a net weight content of 4 pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than 4 pounds);

(ii) Federal government purchases;

(iii) Export outlets according to quantity shipped in consumer cartons, the quantity shipped in bags having a net weight of 4 pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than 4 pounds);

(iv) Export outlets, by countries of destination; and

(v) Each of any other outlets in which the handler disposed of such raisins other than by any transfer which is excluded by the preceding sentence.

(h) Certification of report. All reports submitted to the Committee pursuant to this part shall be dated, and certified to the United States Department of Agriculture and to the Raisin Administrative Committee as to the truthfulness, accuracy and completeness of the information shown thereon.

(i) Reporting by non-profit cooperative associations. Non-profit cooperative associations need not submit door tags, door receipts, weight

certificates or other similar documents with its report as to raisins received or acquired from its members.

(j) Exemption from filing report. A handler may be relieved by the Committee of submitting any of the reports required pursuant to paragraph (b) of this section which he shall specify in a written application therefor to the Committee stating that no transactions subject to such reports are contemplated for the balance of the crop year: *Provided*, That any such exemption shall remain in effect only so long as said handler has no such transactions subject to such reports.

From:	Incoming Lit
To:	Kiren Mathews; Suzanne M. MacDonald; Theresa A. Salazar
Subject:	FW: Horne
Date:	Friday, September 19, 2014 1:59:46 PM
Attachments:	No 14- Horne Cert Petition OK TO PRINT.pdf

From: Jennifer F. Thompson
Sent: Friday, 19 September 2014 13:59:40 (UTC-08:00) Pacific Time (US & Canada)
To: Incoming Lit
Subject: FW: Horne

4-1527

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Monday, September 08, 2014 1:19 PM
To: Jennifer F. Thompson
Subject: RE: Horne

Jennifer,

I've attached a copy of the final petition, as filed and served today. Let me know if you would like to discuss anything.

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.
(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: Jennifer F. Thompson [mailto:JFT@pacificlegal.org]
Sent: Tuesday, August 26, 2014 6:27 PM
To: Schwartz, Stephen S
Subject: RE: Horne

Hi Stephen,

We do not have any other groups signing onto the brief, and I probably will not invest very much time in looking for any.

Generally, we are very amenable to having other groups join us on amicus briefs. We simply like to know who the group is before committing, so we can make sure their values and interests align with ours---primarily for PR purposes. So if there are groups looking to sign onto a brief, I would be very happy to communicate with them directly; please feel free to pass along my contact information. In all likelihood, we would welcome their involvement as a signatory.

Best wishes,
Jennifer

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Tuesday, August 26, 2014 2:55 PM
To: Jennifer F. Thompson

Subject: RE: Horne

Jennifer -

One question occurred to me after our call. Are you planning on writing just for PLF, or are you thinking there will be other signers? Quite all right either way, but interested to know if you're actively looking for others or willing to let me send along interested groups who don't have the resources to write themselves.

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.
(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: Jennifer F. Thompson [mailto:JFT@pacificlegal.org]
Sent: Monday, August 25, 2014 2:50 PM
To: Schwartz, Stephen S
Subject: RE: Horne

Will do. Thank you very much.

Best wishes,
Jennifer

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Monday, August 25, 2014 11:45 AM
To: Jennifer F. Thompson
Subject: RE: Horne

As discussed, here is the current version of our petition. This is a rough draft, of course, subject to further revision, so please do not share it with outside parties. Let me know your thoughts, and keep me posted on your drafting.

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.
(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: Jennifer F. Thompson [mailto:JFT@pacificlegal.org]
Sent: Friday, August 22, 2014 4:41 PM
To: Schwartz, Stephen S
Subject: RE: Horne

Thank you -- same to you.

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Friday, August 22, 2014 1:41 PM
To: Jennifer F. Thompson
Subject: RE: Horne

That would be perfect. Have a good weekend, and talk then on Monday.

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.

(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: Jennifer F. Thompson [mailto:JFT@pacificlegal.org]
Sent: Friday, August 22, 2014 4:38 PM
To: Schwartz, Stephen S
Subject: RE: Horne

Great. I'm happy to call you then on your direct line, unless you prefer differently.

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Friday, August 22, 2014 1:35 PM
To: Jennifer F. Thompson
Subject: RE: Horne

Very good - how about 11:30 am Pacific/2:30 pm Eastern?

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.
(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: Jennifer F. Thompson [mailto:JFT@pacificlegal.org]
Sent: Friday, August 22, 2014 4:34 PM
To: Schwartz, Stephen S; J. David Breemer
Subject: RE: Horne

Yes, that would be very helpful. Any time after 11am West Coast Time would be best. I look forward to speaking with you.

Thanks,
Jennifer

-----Original Message-----
From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
Sent: Friday, August 22, 2014 1:29 PM
To: J. David Breemer
Cc: Jennifer F. Thompson
Subject: RE: Horne

Thank you, David. Jennifer, are you free for a short talk on Monday?

Stephen S. Schwartz
Kirkland & Ellis LLP
655 Fifteenth Street N.W. | Washington, D.C.
(202) 879-5153 Direct | (202) 879-5200 Fax stephen.schwartz@kirkland.com

-----Original Message-----
From: J. David Breemer [mailto:jdb@pacificlegal.org]
Sent: Friday, August 22, 2014 4:19 PM
To: Schwartz, Stephen S
Cc: Jennifer F. Thompson
Subject: Re: Horne

Jennifer Thompson is drafting our ac brief. Please talk to her about deadlines and consent to file.

Thanks

Sent from my iPhone

> On Aug 22, 2014, at 10:33 AM, "Schwartz, Stephen S" <stephen.schwartz@kirkland.com> wrote:
>
> David,
>
> If you still plan to participate as an amicus, I'm happy to send the current draft of our brief along for your thoughts and reference. Alternatively, if you would like to sign on to one of the other amicus briefs currently in progress, I can send you along to the other teams I'm working with.
>
> Stephen S. Schwartz
> Kirkland & Ellis LLP
> 655 Fifteenth Street N.W. | Washington, D.C.
> (202) 879-5153 Direct | (202) 879-5200 Fax
> stephen.schwartz@kirkland.com
>
>
> -----Original Message-----
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Wednesday, July 23, 2014 4:21 PM
> To: Schwartz, Stephen S
> Subject: Re: Horne
>
> Good. Thank you.
>
> Sent from my iPhone
>
> On Jul 23, 2014, at 1:19 PM, "Schwartz, Stephen S" <stephen.schwartz@kirkland.com<mailto:stephen.schwartz@kirkland.com>> wrote:
>
> David,
>
> I wanted to follow up on our correspondence from a few weeks ago. If you are still interested in participating as an amicus, we would be very interested in discussing with you. The Court recently granted our application for an extension - our petition is now due September 8, which pushes the deadline for amicus briefs to October.
>
> Stephen S. Schwartz
> Kirkland & Ellis LLP
> 655 Fifteenth Street N.W. | Washington, D.C.
> (202) 879-5153 Direct | (202) 879-5200 Fax
> stephen.schwartz@kirkland.com<mailto:stephen.schwartz@kirkland.com>
>
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Friday, June 27, 2014 1:05 PM
> To: Schwartz, Stephen S
> Subject: RE: Horne
>
> I'll check in with you after the 7th. Have a great holiday.
>
> Best,
>
>
> J. David Breemer
> Principal Attorney
> Pacific Legal Foundation

> 930 G St.
> Sacramento, CA. 95814
> 916-419-7111
> 209-966-6802
>
> From: Schwartz, Stephen S [mailto:stephen.schwartz@kirkland.com]
> Sent: Friday, June 27, 2014 10:02 AM
> To: Brian C Leighton; J. David Breemer
> Cc: 'Kimberly Barker'
> Subject: RE: Horne
>
> David,
>
> Thanks for checking in. Prof. McConnell is counsel of record on another cert petition that was conferenced yesterday and might be granted on Monday. We wanted to see what happens with that before we seek the extension. We anticipate knowing the timing within a couple of weeks.
>
> I'm happy to talk about topics with you. I'm on a holiday through July 7, but can take some time if you want to discuss. Otherwise, we can talk after I'm back in the office.
>
> Stephen S. Schwartz
> Kirkland & Ellis LLP
> 655 Fifteenth Street N.W. | Washington, D.C.
> (202) 879-5153 Direct | (202) 879-5200 Fax
> stephen.schwartz@kirkland.com<mailto:stephen.schwartz@kirkland.com>
>
> From: Brian C Leighton [mailto:bleighton@arrival.net]
> Sent: Friday, June 27, 2014 12:40 PM
> To: 'J. David Breemer'
> Cc: Schwartz, Stephen S; 'Kimberly Barker'
> Subject: RE: Horne
>
> Hi David-we are requesting a 30 extension to file Petition : If
> Justice Kennedy grants it our Petition will be due by September 7 .
> You may wish to coordinate with Stephen Schwartz at Kirkland Ellis
> about possible topics . thank you for your interest . Brian Leighton
>
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Friday, June 27, 2014 9:07 AM
> To: 'Brian C Leighton'
> Subject: RE: Horne
>
> Any further word on possible timing of a petition filing?
>
> J. David Breemer
> Principal Attorney
> Pacific Legal Foundation
> 930 G St.
> Sacramento, CA. 95814
> 916-419-7111
> 209-966-6802
>
> From: J. David Breemer
> Sent: Tuesday, May 20, 2014 10:17 AM
> To: 'Brian C Leighton'
> Subject: RE: Horne
>
> That makes total sense to me.
>
> Thanks

>
> _____
> From: Brian C Leighton [mailto:bleighton@arrival.net]
> Sent: Tuesday, May 20, 2014 10:16 AM
> To: J. David Breemer
> Cc: 'Kimberly Barker'
> Subject: RE: Horne
> David-a few minutes ago I received word that Professor McConnell is
> strongly leaning towards direct Cert . Petition is not due until
> August 7 ; Rule 13 of Supreme Court rules ; 9th circuit decision is
> not final until 45 days from date of opinion, May 9 (time frame in
> which to file petition for rehearing/en banc : ; if no such 9th
> circuit petition is filed then mandate is 7 days later) at which time
> the 90-day cert petition clock starts . Brian
>
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Tuesday, May 20, 2014 8:48 AM
> To: 'Brian C Leighton'
> Subject: RE: Horne
>
> Appreciate it. One of worst takings decision on merits I have seen in a long time. Butchered physical takings law and the Nollan/Dollan/Koontz standards.
>
> We are eager to file an ac brief telling SCOTUS the same thing. En banc amicus more difficult due to timing (I believe a petition would be due in four days or so).
>
> _____
> From: Brian C Leighton [mailto:bleighton@arrival.net]
> Sent: Tuesday, May 20, 2014 8:46 AM
> To: J. David Breemer
> Subject: RE: Horne
> David--I will certainly give you a timely heads up . It is up to
> Professor McConnell which route we are taking and as soon as I know
> that from him I will promptly advise you . What did you think of the
> decision ? Thank you . Brian
>
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Tuesday, May 20, 2014 8:39 AM
> To: 'Brian C Leighton'
> Subject: RE: Horne
>
> Yes, I understand that; that is why I was asking about timing (i.e.,,whether you will bypass en banc process).
>
> Dave
>
> _____
> From: Brian C Leighton [mailto:bleighton@arrival.net]
> Sent: Tuesday, May 20, 2014 8:37 AM
> To: J. David Breemer
> Subject: RE: Horne
> I will David . thank you . I am sure we will , but issue is whether we
> want to first request rehearing en banc . Brian
>
> From: J. David Breemer [mailto:jdb@pacificlegal.org]
> Sent: Tuesday, May 20, 2014 8:26 AM
> To: 'bleighton@arrival.net<mailto:bleighton@arrival.net>'
> Subject: Horne
>
> Mr. Leighton,

>
> Please let me know if and when you plan to file another certiorari petition in SCOTUS.
>
> Thank you,
>
> Dave Breemer
> Principal Attorney
> PLF
> 209-966-6802
>
>
> **********
> CONFIDENTIALITY NOTICE: This communication and any accompanying document(s) are confidential and privileged. They are intended for the sole use of the addressee. If you receive this transmission in error, you are advised that any disclosure, copying, distribution, or the taking of any action in reliance upon the communication is strictly prohibited. Moreover, any such inadvertent disclosure shall not compromise or be a waiver of any applicable privilege as to this communication or otherwise. If you have received this communication in error, please contact the sender at its Internet address above, or by telephone at (916) 419-7111. Thank you.
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