No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that a Just Compensation Clause challenge to the raisin marketing order, 7 C.F.R. Pt. 989, brought by a producer-handler in its capacity as a producer, must be brought in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. 1491(a)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals, as amended (J.A. 289-311), is reported at 673 F.3d 1071. The court of appeals' decision prior to amendment (J.A. 186-214) is unreported but is available at 2011 WL 2988902. The opinion of the district court (J.A. 119-184) is unreported, but is available at 2009 WL 4895362. The decision of the judicial officer of the United States Department of Agriculture (USDA) (J.A. 50-94) and his order granting reconsideration (J.A. 95-118) are reported respectively at 67 Agric. Dec. 18 and 67 Agric. Dec. 1244. The decision of the USDA administrative law judge (J.A. 24-49) is reported at 65 Agric. Dec. 805.

JURISDICTION

The original judgment of the court of appeals was entered on July 25, 2011. The court of appeals issued an amended judgment on March 12, 2012. On June 1, 2012,

Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 25, 2012, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 20, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation." Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted during the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." J.A. 291; see 7 U.S.C. 601.[1] The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture (Secretary), agricultural producers, and handlers, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-462 (1997).

To achieve these goals, the Secretary is authorized to promulgate marketing orders that regulate the "han-

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[1] The AMAA reenacted and amended the Agricultural Adjustment Act, ch. 25, Tit. I, 48 Stat. 31 (1933) (7 U.S.C. 601 *et seq.*). See *United States* v. *Rock Royal Coop., Inc.*, 307 U.S. 533, 542 & n.5 (1939).

dling of [certain] agricultural commodit[ies] or product[s] thereof," in interstate or foreign commerce. 7 U.S.C. 608c(1). The Secretary may choose among various market regulation tools, such as limiting the total quantity of a commodity or product that can be marketed or transported, 7 U.S.C. 608c(6)(A) and (C); allotting the amount that each handler may purchase from or handle on behalf of any or all producers, 7 U.S.C. 608c(6)(B); or (as directly relevant here) establishing "reserve pools of any such commodity or product" and "providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein," 7 U.S.C. 608c(6)(E).

Marketing orders do not directly regulate "producers" (*i.e.*, the farmers) who grow the agricultural commodities. Instead, marketing orders directly regulate only the "handlers" of agricultural commodities and products (*i.e.*, those who process the products for marketing). See 7 U.S.C. 608c(1) (marketing orders "shall regulate * * * *only such handling* of such agricultural commodity, or product thereof") (emphasis added).[2] The AMAA thus specifies 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). Accordingly, only a handler, and not a producer, is subject to

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[2] See also 7 C.F.R. 989.15 (defining "handler" to include, inter alia, "[a]ny processor or packer" or "any person who places, ships, or continues natural condition raisins in the current of commerce"); 7 C.F.R. 989.14 (defining "packer" to mean "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins").

civil penalties for violating a marketing order. 7 U.S.C. 608c(14).[3]

While marketing orders do not directly regulate producers, the AMAA does grant producers certain rights with respect to those orders. In general, a marketing order proposed by the Secretary does not become effective unless approved by two-thirds of producers (by number or by volume of production). 7 U.S.C. 608c(8) and (9).[4] Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of the producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the market for California raisins. See 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. J.A. 295 n.9. The grapes used for raisins can also be marketed as fresh grapes or crushed to produce wine or juice concentrate. See 71 Fed. Reg. 29,567, 29,569 (May 23, 2006). Price changes in all those markets, in addition to the impact of weather variability on the sun-drying process for raisins, can lead to wide swings in the supply of raisins, "result[ing] in producer price instability and disorderly market conditions." *Ibid.*

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[3] The raisin marketing order defines a producer as "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.

[4] The marketing orders must also be approved by at least 50% (by volume) of handlers, except that the Secretary can override a refusal by the handlers if that refusal tends to prevent the effectuation of the declared policy of the AMAA, the order is the only practical means of advancing the interests of producers, and the requisite number of producers approve the order. 7 U.S.C. 608c(9).

Following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton, USDA in 1949 issued the marketing order for California raisins "at the request of the raisin industry." J.A. 38, 294 & 295 n.9. After that steep decline in prices, "[t]he Raisin Marketing Order, like other fruit and vegetable orders established pursuant to 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 (Fed. Cir. 2005). The order maintains a stable market price by, under certain circumstances, controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65.

The raisin marketing order established the Raisin Administrative Committee (RAC), consisting of 47 members, with 35 representing producers, 10 representing handlers, one representing the cooperative bargaining associations, and one member of the public. See 7 C.F.R. 989.26, 989.29, 989.30. Producers and handlers nominate their representatives to the RAC and vote for their preferred candidates; the Secretary selects from those nominees or other eligible producers and handlers. See *ibid.*

Every year, the RAC reviews the crop yield, inventories, and shipments and determines whether to recommend that the Secretary establish a reserve pool. If the RAC recommends a reserve pool, it further recommends what portion of the year's production should be included in it (the "reserve percentage"), with the balance made available for sale on the open market (the "free percentage"). 7 C.F.R. 989.54(d), 989.55, 989.65. Based on the

percentages recommended by the RAC and set by the Secretary, the raisins that a handler receives from producers are divided into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65. The handler pays producers for the free tonnage at market prices and may resell those raisins without restriction. *Ibid.*; *Lion Raisins, Inc*, 416 F.3d at 1360; J.A. 296.

Producers do not receive immediate direct payment for the reserve tonnage. *Lion Raisins, Inc.*, 416 F.3d at 1360. The handler must hold those raisins "for the account of the [RAC]." 7 C.F.R. 989.66(a); *Lion Raisins, Inc.*, 416 F.3d at 1360; J.A. 296. The RAC can dispose of the reserve raisins in a variety of ways not expected to undermine domestic market prices for free-tonnage raisins, such as by export or sale in "secondary, noncommercial" markets like school-lunch programs. *Lion Raisins, Inc.*, 416 F.3d at 1359-1360; see 7 C.F.R. 989.67; J.A. 296. The RAC uses the proceeds from the sale of reserve raisins to pay the costs of administering the reserve pool and to promote the sale of raisins domestically and abroad, with surplus proceeds distributed to producers on a pro rata basis. J.A. 296; 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h). Thus, a producer's overall compensation for its raisin crop will be determined by the market price for free-tonnage raisins plus any additional surplus proceeds from reserve-tonnage raisins.

In some years, for example in the 1998-1999, 2004-2005, 2010-2011, and 2011-2012 crop years, there was no reserve raisin pool at all, so all raisins were free tonnage that could be sold at market prices. See RAC, *Marketing Policy & Industry Statistics: 2012-2013 Marketing*

Season 28.[5] In the 2002-2003 and 2003-2004 crop years at issue in this case, the Secretary required reserves of 47% and 30% respectively. *Ibid.*

In the 2002-2003 crop year, a producer received $27.45 per ton as its equitable share of the remaining proceeds after the RAC disposed of the raisin reserve pool. See RAC, *Minutes of the Meeting* 3 (Apr. 12, 2007). No payments were made for the 2003-2004 crop year because no surplus from the sale of reserve raisins remained after the RAC met its expenses and funded export-promotion activities. See RAC, *Memo to All 2003-2004 Natural (sun-dried) Seedless Growers regarding 2003-2004 Natural (sun-dried) Seedless Reserve Pool* 1 (June 23, 2008).

The raisin marketing order requires handlers to file certain reports with the RAC, such as reports concerning the quantity of raisins they hold or acquire. 7 C.F.R. 989.73. The order additionally requires handlers to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports. 7 C.F.R. 989.77. The order also requires handlers to obtain inspections of raisins acquired, 7 C.F.R. 989.58(d), and to pay certain assessments, 7 C.F.R. 989.80, which help pay the RAC's administrative costs, J.A. 122.

A handler that violates any provision of the marketing order or its implementing regulations is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii); see J.A. 106-107 & n.2. In addition, a handler that does not comply with the

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[5] See http://www.raisins.org/images/marketing_policy_2012.pdf (Oct. 3, 2012). When there is no reserve pool, the RAC funds its operations entirely through assessments on handlers. See 76 Fed. Reg. 18,003, 18,004 (Apr. 1, 2011).

reserve requirement "shall compensate the [RAC] for the amount of the loss resulting from his failure to so deliver" reserve raisins when requested by the RAC. 7 C.F.R. 989.166(c).

3. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. J.A. 297. For six years, petitioner Marvin D. Horne served as a member or alternate member of the RAC. J.A. 28. As raisin growers, petitioner Horne and his family do business under the name "Raisin Valley Farms," which is also a petitioner in this Court. J.A. 297.

For more than 30 years, petitioners operated only as raisin producers. But after petitioners informed USDA in 2001 that they planned to pack and market their own raisins, USDA informed petitioners that

> 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 RAC].

J.A. 58, 152. On April 23, 2002, petitioners notified the Secretary that they were, under protest, registering as a handler under the raisin marketing order, and they agreed to comply with the order's reserve provisions. J.A. 29.

In a May 20, 2002 letter, USDA repeated its admonition to petitioners, stating that "[y]ou 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." J.A. 152-153.

Petitioners purchased equipment to clean, stem, sort, and package raisins, and proceeded to operate their own packing and handling operation, doing business under the name "Lassen Vineyards." J.A. 124. (Lassen Vineyards is separately named as a petitioner in this Court.) Lassen Vineyards not only packed the raisins petitioners produced in their Raisin Valley Farms operation, but also packed, for a fee, raisins produced by more than 60 other farmers. J.A. 30, 298.[6] All told, petitioners' facilities processed more than three million pounds of raisins during the 2002-2003 and 2003-2004 crop years. J.A. 127, 298. During the 2002-2003 crop year, only 27.4% of those raisins were produced by petitioners; the remaining 72.6% belonged to other producers.[7] During the portion of the 2003-2004 crop year at issue here, petitioners produced only 12.3% of the raisins they handled; the remaining 87.7% were owned by other producers.[8]

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[6] Petitioners typically charged producers 12 cents per pound to pack their raisins and five dollars for the use of each pallet for stacking boxed raisins. J.A. 31, 56, 125.

[7] These figures were calculated by (1) adding the total weight of natural seedless raisins handled by petitioners and produced by Raisin Valley Farms (276,544 pounds); Don and Rena Durbahn, whose estates are petitioners in this Court (67,980 pounds); and Lassen Vineyards (3180), see A.R. 745-748, and then (2) dividing the resulting figure (347,704 pounds) into the total weight of natural seedless grapes handled by petitioners for all producers (1,266,924 pounds), see A.R. 748.

[8] To calculate this figure, the government used outgoing inspection certificates, A.R. 2186-2287, and reports, A.R. 2290-2304, to sum weight by lot number, and the charts at A.R. 2593-2595 to correlate lot numbers to specific producers. Of the 1,965,650 pounds of raisins

Although petitioners had "requested and received" advice from USDA about their status as handlers, they "expressly disregarded" it. J.A. 30. During the 2002-2003 and 2003-2004 crop years, petitioners repeatedly failed to pay any assessments to the RAC, to have inspection of incoming raisins performed, to allow USDA access to their records (despite being served by the agency with two subpoenas), and to hold raisins in reserve. J.A. 35-36. Petitioners also filed inaccurate reports incorrectly claiming that they had not acquired, shipped, or disposed of any raisins during the relevant time periods. J.A. 33-34. Petitioners' Lassen Vineyards handling operation not only failed to reserve petitioners' own raisins produced by their Raisin Valley Farms operation, but it also failed to reserve any of the raisins produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for handling services. J.A. 298.

During this period, USDA continued to inform petitioners that, as handlers, they were subject to the requirements of the raisin marketing order even with respect to the raisins they produced:

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handled by petitioners during the relevant portion of the 2003-2004 crop year (J.A. 85), lots representing 59,850 pounds were exclusively attributed to Marvin Horne on these inspection sheets. Lots with an additional 84,270 pounds were attributed simultaneously to Raisin Valley Farms or Lassen Vineyards and other (non-petitioner) producers. For purposes of this calculation, the government nonetheless attributed those raisins entirely to petitioners. There were additional raisins (totaling 98,015 pounds) without lot numbers noted or whose only lot numbers could not be correlated with a producer. The government attributed all those raisins to petitioners as well. Given these conservative assumptions, the resulting calculation—(59,850 + 84,270 + 98,015)/1,965,650)—likely overstates the proportion of raisins produced by petitioners.

> You are not the only handler who handles raisins of his own production. More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins. These handlers have raisins of their own production brought to their plant; they have them inspected; they acquire those raisins and report them to the RAC; they set aside a portion of raisins of their own production as reserve * * *. Those packers do this for their own produced raisins, just as they do for any other growers that deliver raisins to their packing facility.

A.R. 2444; see J.A. 153 ("You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate.").

4. In 2004, the Administrator of the Agricultural Marketing Service (a division of USDA) initiated a disciplinary proceeding against petitioners, alleging that they had violated various provisions of the raisin marketing order and implementing regulations during the 2002-2003 and 2003-2004 crop years. J.A. 127-128, 299. An administrative law judge (ALJ) held a three-day hearing. J.A. 128. In the administrative proceedings, petitioners admitted that during the 2002-2003 and 2003-2004 crop years, they did not pay assessments to the RAC; they did not have incoming inspections performed; they did not report acquisitions of raisins; and they did not hold raisins in reserve. J.A. 126-127.

The ALJ rejected petitioners' contention that they were not handlers of their own raisins because they did not "acquire" them within the meaning of the relevant regulation, pointing out that the term means, among other things, "to have or obtain physical possession." J.A. 41-45 (quoting 7 C.F.R. 989.17) (emphasis omitted).

The ALJ also rejected petitioners' "patently specious argument" that the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. 3001-3006, exempted them from their handler obligations. J.A. 45-46. He pointed out that the 1976 statute nowhere mentioned the AMAA and also explained that the statute sought to promote direct sales from farmers to consumers, while petitioners were in fact "marketing raisins to candy makers and food processors as ingredients." J.A. 46.

The ALJ found that petitioners committed 673 violations of the raisin marketing order:

> 20 violations for submitting inaccurate reports to the RAC, see 7 C.F.R. 989.73(a), (b), and (d);
>
> 58 violations for failure to obtain incoming inspections of raisins during the 2002-2003 and 2003-2004 crop years; see 7 C.F.R. 989.58(d);[9]
>
> two violations for failure to pay required assessments to the RAC, see 7 C.F.R. 989.80;
>
> one violation for failing to allow USDA access to their records, see 7 C.F.R. 989.77; and
>
> 592 violations (one per day) for failure to reserve required raisins for 294 days during the 2002-2003 crop year and failure to reserve required raisins for 298 days during the 2003-2004 crop year, see 7 C.F.R. 989.66, 989.166.

J.A. 36-38, 299.

The ALJ also found that petitioners "acted willfully and intentionally," J.A. 45; that "their violations were deliberate," J.A. 27; and that their violations "were

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[9] The ALJ appears to have originally found 53 inspection violations, which the judicial officer later corrected to 58 violations. Compare J.A. 37 with J.A. 91.

designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order," *ibid.* See J.A. 41, 80, 91, 169; see also J.A. 45 (Petitioners "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler.").

The ALJ's decision was affirmed in relevant part by a USDA judicial officer. See J.A. 50-94; see also J.A. 95-118 (judicial officer decision granting petition to reconsider).

Accordingly, petitioners were ordered to pay:

> $8,783.39 in assessments that petitioners had failed to pay to the RAC for the 2002-2003 and 2003-2004 crop years, see J.A. 299;
>
> $483,843.53 for the raisins petitioners had failed to reserve in the 2002-2003 and 2003-2004 crop years, see J.A. 299; and
>
> $202,600 in civil penalties, see J.A. 299.[10]

5. Petitioners sought judicial review of the agency's decision in the United States District Court for the Eastern District of California. J.A. 132, 300; see 7 U.S.C. 608c(14)(B). The district court granted summary judgment in favor of the government. J.A. 120. It concluded that petitioners met the regulatory definition of raisin handlers, 7 C.F.R. 989.15, because "substantial

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[10] The ALJ originally ordered petitioners to pay $1100 for each of the 592 days in which they failed to reserve raisins as required by the marketing order ($651,200), plus an additional $1100 for each of 73 violations in submitting inaccurate reports and failing to obtain inspections ($80,300), for total civil penalties of $731,500. J.A. 48. The judicial officer reduced the civil penalty to $300 per violation for a total of $202,600. J.A. 92.

evidence demonstrates that [petitioners] engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California," J.A. 137; see J.A. 74-79, 112-116 (same conclusion by judicial officer), 41-45 (ALJ). The court found that the various monetary orders imposed on petitioners did not violate the Eighth Amendment because they were either remedial provisions rather than fines, J.A. 160-163, or were not excessive, J.A. 163-170. The court further concluded that "the transfer of title to the reserve tonnage does not constitute a physical taking." J.A. 178 (emphasis omitted).

6. The court of appeals affirmed. J.A. 186-214. It agreed with the district court that petitioners were handlers under the relevant regulation, J.A. 198, and also rejected petitioners' Eighth Amendment challenge to the agency's order. J.A. 210-213.

In its initial opinion, the court of appeals likewise agreed with the district court that petitioners' takings claim lacked merit. J.A. 199-209. The court observed that petitioners' argument was limited to an allegation that the "'direct appropriation' of their reserve-tonnage raisins * * * is a classic *physical* taking," J.A. 202, and concluded that petitioners had "suffered no compensable *physical* taking of any portion of their crops." J.A. 209. The court explained that the reserve-pool requirement does not constitute a "direct appropriation" or "forced seizure" of petitioners' raisins, but instead merely "impose[s] a condition on [petitioners'] *use* of their crops by regulating their sale." J.A. 203-204. The requirement applies only to those who (like petitioners) "voluntarily choose to send their raisins into the stream of interstate commerce," and thereby benefit from the price support of the regulatory program. J.A. 203.

The court of appeals also explained that, while the Fifth Amendment "protects real and personal property alike," those different types of property require different analyses. J.A. 207 (citing *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-1030 (1992)). The court explained that "[w]hereas a regulation depriving a landowner of '*all* economically beneficial uses' of his land effects a categorical taking, the same may not necessarily be true of a regulation banning the sale of a commercial product." *Ibid.* (quoting *Lucas*, 505 U.S. at 1019). The reserve requirement applies to personal, not real, property, the court continued, and it limits only the "right to sell [petitioners'] raisins," which implicates at most "one 'strand' in [petitioners'] bundle" of property rights. J.A. 208.

The court of appeals also explained that petitioners' exclusive focus on reserve-tonnage raisins "ignore[d] [this] 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.'" J.A. 208 (quoting *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 & n.27 (1978)). In this case, the court explained, "the relevant parcel * * * is the entirety of [petitioner's] annual crop." J.A. 209. Reserve raisins are only a portion of that crop, and "the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for [petitioners'] free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market." *Ibid.*

7. The court of appeals denied rehearing en banc, but the panel issued an amended opinion. J.A. 289-311. Agreeing with an argument made by the government for

the first time in its opposition to petitioners' rehearing petition, see J.A. 240-242, the court in its amended opinion omitted any discussion of the merits of petitioners' takings claim, concluding instead that the court lacked jurisdiction to address that claim. J.A. 302-306.

The court of appeals explained that the constitutional requirement to provide just compensation for a taking is satisfied so long as the government "provide[s] an adequate process" for obtaining such compensation. J.A. 303 (citation and internal quotation mark omitted). The court explained that, with respect to the federal government, such process is provided by the Tucker Act, 28 U.S.C. 1491(a)(1), which permits a person to bring an action in the Court of Federal Claims seeking monetary compensation for government actions alleged to be takings under the Fifth Amendment. J.A. 304. Accordingly, the court reasoned, "a takings claim against the federal government must be brought" under the Tucker Act "in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Ibid.* (quoting *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)).

The court of appeals determined that the relevant statute here—the AMAA—did not withdraw Tucker Act jurisdiction over petitioners' takings claim. J.A. 304-305. The court explained that, if petitioners were bringing a Just Compensation Clause claim in their capacity as raisin *handlers*, then the AMAA would preclude a Tucker Act action, because the AMAA itself provides the exclusive mechanism for administrative and judicial review of a challenge by a handler to a marketing order. *Ibid.*; see 7 U.S.C. 608c(15)(A). But the court observed that petitioners had brought their Just Compensation Clause claim "not in their capacity as handlers but in

their capacity as producers," because they had "allege[d] that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers." J.A. 305. "Nothing in the AMAA," the court concluded, "precludes [petitioners] from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers," and petitioners were therefore required to seek just compensation in that forum. J.A. 306.

SUMMARY OF ARGUMENT

The court of appeals correctly held that it could not adjudicate petitioners' Just Compensation Clause claim in the context of this proceeding.

A. The Just Compensation Clause "does not proscribe the taking of property" generally, but only such a taking "without just compensation." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Thus, when the government offers a procedure for obtaining after-the-fact compensation, a property owner must utilize that procedure rather than seek an injunction on the ground that the government action constitutes a taking *without* just compensation. Congress has provided such a procedure in the Tucker Act, which authorizes the Court of Federal Claims to award compensation against the federal government when the court finds that a taking has occurred.

B. The AMAA regulates handlers, not producers, and subjects handlers, not producers, to penalties for not complying with its regulatory requirements. See 7 U.S.C. 608c(13)(B) and (14)(B). The statute then gives only handlers an avenue for judicial review of such penalties. See 7 U.S.C. 608c(14)(B). The government agrees that this dedicated judicial-review provision would supplant Tucker Act jurisdiction for a takings

claim asserted by a handler in its capacity as a handler. But this is not such a case.

Petitioners allege that the reserve requirement unlawfully takes raisins they produced without just compensation. They have standing to raise that claim only in their capacity as producers who own those raisins allegedly taken. Yet the payment order they challenge here was imposed on petitioners only as handlers. To be sure, petitioners acted as both producers and handlers, but they cannot manufacture standing or a right of action under 7 U.S.C. 608c(14) for themselves—and give themselves avenues for judicial review not available to other producers—by engaging in a producer-handler "shell game" (J.A. 45).

C. Petitioners offer several theories in support of their contention that the court of appeals should have resolved their Just Compensation Clause claim. None succeed.

1. Relying on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), petitioners posit that when the alleged taking is the compelled transfer of money, the challenge to it need not be asserted in the Court of Federal Claims. They further contend that this is such a case because the Department of Agriculture ordered them to pay money for their myriad regulatory violations. Petitioners, however, litigated this case below as one involving the alleged physical taking of raisins, not money—and for good reason. This Court has never held that a requirement to pay money from unidentified sources can be challenged as a physical taking.

To the extent petitioners seek to challenge the USDA payment order not in its own right but because of its connection to raisins they produced (and refused to reserve), that is a producer claim, and, as described

above, it may not properly be asserted in this handler action. In any event, petitioners' analogy to *Eastern Enterprises* does not hold. The payment obligations imposed on them by the USDA were not the dollar-for-dollar equivalent of the just compensation they would have received if, hypothetically, they had complied with the reserve requirement and then successfully contended in a Tucker Act suit that the requirement resulted in a taking of the raisins they produced. Most of the raisins petitioners failed to reserve were produced by others, and petitioners would have no takings claim based on those raisins (or on the remedial payment obligation imposed for failure to reserve them).

Moreover, a proper just compensation inquiry would involve complex valuation questions that would defeat any claim for "dollar-for-dollar" reimbursement. For example, any compensation due petitioners would be reduced by the benefits they received from the raisin marketing order and its reserve requirement, such as higher prices for the raisins they sold legally. Such offsets might overall reduce any compensation owed petitioners to zero.

2. Petitioners' contention that they may assert a takings claim as a "defense" to this enforcement action fails. Even assuming *arguendo* that such a defense might be available in other circumstances, it is not available here, where the takings claim may be asserted only by producers but the enforcement action is brought only against handlers.

In any event, petitioners are incorrect that the very same takings claim that could not support an injunction (because the property owner had failed to seek compensation under available procedures) could support a "defense" to an enforcement action. In both settings the

defect in the claim is the same: there has been no constitutional violation if the property owner has not sought just compensation for the alleged taking through available procedures.

3. This case provides no occasion for the Court to decide whether the Congress that enacted the AMAA would not have wanted to pay compensation if a taking were found, thus making an injunction available in place of monetary compensation under the Tucker Act. Petitioners did not make that argument below. Moreover, even if a takings-based injunction were available to a producer, that does not mean that petitioners could assert that claim as a defense to an enforcement action brought against them as handlers.

In any event, petitioners' characterization of congressional intent is incorrect. It is true that the AMAA was intended to order economic relations among private parties and to stabilize the agricultural markets without expenditure of federal funds. The structure of the statute as a whole, however, nonetheless suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act. Congress intended the AMAA to benefit producers by increasing overall prices for their products, and there is thus no firm basis to conclude that Congress would have expected any taking to be found, or to result in an order to pay compensation. Moreover, Congress built considerable administrative flexibility into the statute, and likely would have preferred use of that flexibility in response to any order to pay compensation for a taking over an injunction against operation of the statute or its implementing regulations.

ARGUMENT

PETITIONERS' JUST COMPENSATION CLAIM CANNOT BE BROUGHT IN THIS ACTION UNDER 7 U.S.C. 608C(14) FOR JUDICIAL REVIEW OF A USDA ORDER ENTERED AGAINST PETITIONERS AS HANDLERS

The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. As its plain language indicates, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking *without just compensation*." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (*Williamson County*) (emphasis added); see *Brown* v. *Legal Found. of Washington*, 538 U.S. 216, 235 (2003); *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 314-315 (1987). As a general matter, Congress has designated the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1), as the exclusive venue for seeking just compensation for an alleged taking. Petitioners have not pursued compensation under the Tucker Act for their claim as raisin producers, and the court of appeals correctly concluded that it could not consider that claim in the context of this proceeding seeking review of sanctions imposed on petitioners only as handlers.

A. Property Owners Have No Just Compensation Claim Against The Federal Government If Compensation May Be Obtained Under The Tucker Act

1. 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." *Williamson County*, 473 U.S. at 194 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (*Regional Rail*)). Accordingly, "the Just Compensation Clause has never been held to require pretaking process or compensation. Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." *Id.* at 196 n.14 (internal citation omitted).

When the government has provided such a procedure to pay compensation, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195; see *id.* at 194-195 (noting that if resort to adequate process yields just compensation "then the property owner has no claim against the Government") (citation and internal quotation marks omitted); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("[T]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."). For this reason, "an alleged taking is not unconstitutional unless just compensation is unavailable." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 & n.40 (1981).

2. With respect to the federal government, the Tucker Act, 28 U.S.C. 1491(a)(1), constitutes the requisite reasonable, certain, and adequate provision for obtaining just compensation that a property owner must pursue. The Tucker Act generally permits a plaintiff who believes that the government has taken his property without just compensation to bring an action against the United States for compensation in the Court of Federal

Claims. *Ibid.*; see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); see also 28 U.S.C. 1346(a)(2) (Supp. V 2011) (providing concurrent jurisdiction in the district courts for claims not exceeding $10,000). Thus, the Tucker Act generally stands as an "implied[] promise[] [by the federal government] to pay that compensation" due if its actions constitute the taking of property under the Fifth Amendment. *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); see *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990).[11]

This Court has therefore recognized that, as a general matter, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County*, 473 U.S. at 195; see, *e.g.*, *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) ("[T]he availability of a Tucker Act remedy renders premature any takings claim in federal district court."); *Preseault*, 494 U.S. at 17 ("[P]etitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature."); *Monsanto Co.*, 467 U.S. at 1019 ("Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of [the statute], we conclude that Monsanto's

[11] To the extent petitioners suggest (Br. 36-37) that the Tucker Act monetary remedy is available only where the government concedes that a taking of property has occurred, they are mistaken. *Regional Rail*, 419 U.S. at 149 n.36 ("[T]he fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy.").

challenges to the constitutionality of the * * * scheme are not ripe for our resolution.").[12]

Although these decisions have stated that a takings challenge is "premature" or "not ripe" if compensation for the alleged taking is available under the Tucker Act, that does not mean that proceedings would lie in district court at a later date if the person alleging a taking did not succeed on the merits in the Tucker Act suit. Thus, if the Court of Federal Claims holds that the federal action at issue did not constitute a taking, or awards less compensation for a taking than was sought, that judgment resolving the takings claim would be binding and subject to review only on appeal to the Federal Circuit followed by a certiorari petition in this Court. Compare *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U.S. 323, 346-347 (2005) (barring relitigation in federal court of takings claim resolved in state court). Only if the courts in the Tucker Act proceeding were to conclude that compensation is not available even if the particular federal action did constitute a taking, see, *e.g.*, pp. 25-28, 50, *infra*, would a suit then lie in district court.

The correct path for petitioners to challenge the raisin marketing order's reserve requirement as a physical taking of the raisins petitioners produced thus was clear and well marked. Petitioners should have complied with

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[12] This conclusion is consistent with the proposition that where a remedy at law is available—namely, monetary compensation under the Tucker Act—injunctive relief to prevent an alleged taking is unavailable. See *Monsanto Co.*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted).

the order's requirements, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, petitioners could have sought compensation as producers in the Court of Federal Claims for the alleged taking. See *Evans* v. *United States*, 74 Fed. Cl. 554, 562-565 (2006) (considering—and rejecting—such a claim), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007), cert. denied, 552 U.S. 1187 (2008); see also *Cal-Almond, Inc.* v. *United States*, 30 Fed. Cl. 244, 246-247 (1994) (rejecting claim for compensation based on reserve requirement under almond marketing order), aff'd, 73 F.3d 381 (Fed. Cir. 1995) (Table), cert. denied, 519 U.S. 963 (1996); see also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (observing that, in order to assert takings claim, party's "proper course is not to resist [agency's statutory interpretation in enforcement action], but to initiate a suit for compensation in the Claims Court"). Petitioners failed to pursue such an action. In any event, as explained below, the lower courts could not adjudicate petitioners' just compensation claim as producers in the context of an action for judicial review of an order imposing sanctions on them in their separate capacity as handlers.

B. Petitioners May Not Assert Producer Claims In An AMAA Handler Proceeding

Petitioners (Br. 47-55) and the United States both agree that the AMAA withdraws Tucker Act jurisdiction for claims brought by *handlers* as handlers. As the court of appeals recognized (J.A. 304-305), the AMAA contains its own exclusive provisions for administrative and judicial review of a legal challenge to a marketing order, or to an implementing regulation or requirement, by "[a]ny handler subject to" that order. 7 U.S.C. 608c(15)(A). The AMAA likewise contains the exclusive

review provisions for sanctions orders imposed on handlers, 7 U.S.C. 608c(14)(B). See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (noting that Congress's creation of a comprehensive statutory scheme for judicial review in a specific forum will ordinarily be understood to withdraw jurisdiction of the Court of Federal Claims under the Tucker Act); see also *United States* v. *Bormes*, 133 S. Ct. 12, 18 (2012).[13] Accordingly, a takings claim by a handler brought in its capacity as a handler can only be asserted through the judicial review procedures established by the AMAA. See *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1370-1373 (Fed. Cir. 2005).

But those review procedures are unavailable for claims asserted by *producers*. Compare 7 U.S.C. 608c(14)(B) ("Any *handler* subject to [a marketing] order, or any officer, director, agent, or employee of such *handler*," is subject to civil penalties, and an order for such penalties is judicially reviewable in any district "in which the *handler* subject to the order is an inhabitant, or has the *handler*'s principal place of business") with 7 U.S.C. 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capaci-

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[13] Congress has likewise provided for exclusive review of orders of the Federal Communications Commission in the courts of appeals, see 47 U.S.C. 402 (2006 & Supp. V 2011); *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984), thus displacing jurisdiction under the Tucker Act. See *Biltmore Forest Broad. FM, Inc.* v. *United States*, 555 F.3d 1375, 1380-1384 (Fed. Cir.), cert. denied, 558 U.S. 990 (2009); *Folden* v. *United States*, 379 F.3d 1344, 1355-1358 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005). It is therefore not surprising that the Court considered the takings claim on the merits in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), in which a party used the exclusive judicial review mechanism in 47 U.S.C. 402 to challenge an FCC order. Cf. Pet. Br. 25.

ty as a producer."). And here, petitioners' Just Compensation Clause claim is brought "in [their] capacity" (7 U.S.C. 608c(13)(B)) as producers, not as handlers.

Petitioners allege that the reserve requirement unlawfully took a portion of the raisins they produced without just compensation. They have standing to raise that claim only in their capacity as producers who own those particular raisins. A raisin handler who produces no raisins and simply handles the raisins that are property of another would have no standing and no right of action under 7 U.S.C. 608c(14)(B) to contend that the reserve requirements unlawfully takes a separate producer's property. So too with petitioners.

Plainly, petitioners do not have standing in any court to contend that the government has taken the raisins owned by the more than 60 other farmers with whom petitioners contracted to provide handling services. If petitioners have standing to assert a claim under the Just Compensation Clause, it is only because *some* of the raisins they handled are raisins that they themselves produced, grew, or owned. But that means that they have standing only in their capacity *as producers,* for raisins that they own, and thus their Just Compensation claim could be brought only in their capacity as producers. Such a claim cannot be brought in a suit for judicial review of a USDA decision under 7 U.S.C. 608c(14); that avenue for judicial relief is available only to *handlers*, because only handlers can be subject to penalties and other monetary assessments for violating a marketing order.

For this reason alone, the court of appeals properly concluded that petitioners' takings claim was not cognizable in this suit. This distinction is not "doubletalk," as petitioners contend (Br. 51), but simply recognition

that, under this particulars regulatory scheme, handlers have no property interest in (and never take title to) the reserve raisins they handle, and therefore have no standing or right of action to assert that those raisins have been taken from them without just compensation.

Petitioners seek to avoid that result by contending (Br. 52) that because they happen to be both producers and handlers, their claims fall within the AMAA's review provision for claims by "[a]ny handler." 7 U.S.C. 608c(15)(A). But the AMAA expressly recognizes that a single entity may function in several capacities, see 7 U.S.C. 608c(13)(B) (providing that no marketing order "shall be applicable to any producer in his capacity as a producer"); see also 7 U.S.C. 608c(13)(A) (recognizing similar exemption for one operating "in his capacity as a retailer"), and nowhere dictates that an entity must always be considered a producer or a handler for all purposes. Thus, other courts of appeals, like the court of appeals in this case, have held that an entity that is both a producer and a handler under the AMAA may bring claims in either capacity depending on the nature of the claim presented, and the review provisions under the AMAA may or may not apply depending on the capacity under which the claim is brought. See *Arkansas Dairy Coop. Ass'n* v. *USDA*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009), cert. denied, 558 U.S. 1133 (2010); *Hettinga* v. *United States*, 560 F.3d 498, 503-504 (D.C. Cir. 2009), cert. denied, No. 12-506 (Jan. 7, 2013); *Edaleen Dairy, LLC* v. *Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006); *Dairylea Coop., Inc.* v. *Butz*, 504 F.2d 80, 83 (2d Cir. 1974).[14]

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[14] Petitioners have contended that these decisions, which involve milk regulation, are inapposite because the "AMAA and its accompanying *milk* regulations expressly create a separate category for milk

C. Petitioners' Various Contentions For Establishing Jurisdiction Lack Merit

Petitioners advance several arguments for why the court of appeals nevertheless could adjudicate their just compensation claim in this action under 7 U.S.C. 608c(14) for judicial review of USDA's decision finding violations by petitioners in their capacity as handlers. All are incorrect.

1. Any exception to the Tucker Act for a "direct transfer of funds" has no application here

Petitioners observe that, under the reasoning of the plurality opinion in *Eastern Enterprises*, 524 U.S. at 521, if an alleged taking requires the direct transfer of funds, the appropriate recourse is an injunction in federal district court rather than monetary compensation in the Court of Federal Claims. Petitioners contend that their challenge to USDA's order that they pay monetary remedies and sanctions for their non-compliance with the raisin marketing order is such a case. See Pet. Br. 17-22. This contention fails for several reasons.

a. Petitioners are correct that a plurality of this Court in *Eastern Enterprises* concluded that the plaintiff in that case could obtain injunctive relief against an alleged taking based on a "direct transfer of funds mandated by the Government." 524 U.S. at 521. That case concerned the Coal Industry Retiree Health Benefits Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, in which

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'producer-handlers.'" Pet. 31 (quoting 7 U.S.C. 608c(5)). In fact, the AMAA generally contemplates that entities may operate as producer-handlers; that is why it specifies that no marketing order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c(13)(B); see *Lion Raisins, Inc.*, 416 F.3d at 1368-1373 (distinguishing between claims asserted by a single entity in its capacity as raisin producer and those asserted in its capacity as raisin handler).

Congress provided for the funding of medical expenses for retired miners and their dependents. The program was financed by premiums, assigned by the Commissioner of Social Security, to be paid by current and former coal operators according to a statutory formula. *Eastern Enterprises*, 524 U.S. at 514-515. Although Eastern Enterprises had left the coal industry in 1965, the government required the company to pay premiums totaling more than $5 million for a 12-month period. *Id.* at 516-517.

Eastern Enterprises brought suit in district court asserting, in part, that the Coal Act's requirement that it pay premiums constituted a taking of property within the meaning of the Fifth Amendment. *Eastern Enterprises*, 524 U.S. at 517. A four-Justice plurality, before addressing the merits of that claim, considered whether Eastern Enterprises' takings claim should have been brought in the Court of Federal Claims in a suit for compensation under the Tucker Act, rather than in federal district court in a suit for injunctive relief. *Id.* at 519.

The plurality recognized that ordinarily, "a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance." *Eastern Enterprises*, 524 U.S. at 520. But the plurality concluded that the Tucker Act was unavailable "in a case such as" that one, because "it cannot be said that monetary relief against the Government is an available remedy." *Id.* at 521. The plurality reasoned, *inter alia*, that "'where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds' mandated by the Government," a "claim for compensation 'would entail an utterly pointless set of activities.'" *Ibid.* (citation omitted). That is,

if assessment of the premiums on a coal operator constituted a taking, then the just compensation due the coal operator would require the government to "compensate coal operators" for the exact amount of the premiums, and thus "[e]very dollar paid pursuant to [the] statute would be presumed to generate a dollar of Tucker Act compensation." *Ibid.* (citation omitted). Rather than require that "pointless set of activities," the plurality concluded that "the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief." *Id.* at 522.

The other five Justices in *Eastern Enterprises* concluded that imposition of monetary liability, as distinguished from seizure of a specific fund of money, was not properly analyzed as a takings claim. 524 U.S. at 541-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-558 (Breyer, J., dissenting). Those Justices therefore did not address the plurality's conclusion that a suit for equitable relief was a proper procedure for pressing a takings claim.

b. Even under the plurality's approach in *Eastern Enterprises*, petitioners have no basis for seeking equitable relief rather than pursing a Tucker Act claim.

i. Before USDA and the lower courts, petitioners litigated this case as a challenge to the reserve requirement as a physical "taking" of petitioners' raisins. See Br. in Opp. 10-12. That focus is understandable because a takings claim based on the novel theory that USDA had "taken" petitioners' money by ordering them to pay remedial compensation and civil penalties for regulatory violations would fail. As an initial matter, this Court has never held that *any* requirement to pay money from

unidentified sources (as opposed to, for example, the seizure of a specific account) can be the basis of a takings claim, see p. 31, *supra*; and if such a claim were cognizable, it would be analyzed as a regulatory taking, not a physical one. See *Eastern Enterprises*, 524 U.S. at 522-524 (plurality opinion) (applying regulatory takings analysis); Gov't Amicus Br. 30-32, *Koontz* v. *St. John's River Water Mgmt. Dist.*, No. 11-1447 (argued Jan. 15, 2013). But here petitioners have disclaimed any regulatory takings claim. See J.A. 202, 209, 225.

Moreover, petitioners cite no authority for the proposition that the assessment of civil penalties or entry of a remedial payment order, imposed after administrative or judicial proceedings for violations of statutory or regulatory requirements, could constitute a taking of private property within the meaning of the Just Compensation Clause. Cf. *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) ("The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."). There are specific constitutional provisions that limit the government's authority to impose such exactions. See U.S. Const. Amend. V (Due Process Clause), Amend. VIII (Excessive Fines Clause); see also J.A. 306-310 (court of appeals' rejection of petitioners' excessive fine claim). Petitioners have not explained why the Just Compensation Clause should be interpreted to impose a separate set of limitations on such remedies and sanctions, or how that Clause's requirements (for example, that a taking of private property be "for public use") would apply in the context of remedial and punitive payment orders.

ii. Petitioners contend that, "were they to litigate successfully a claim for compensation in the Court of Federal Claims," they would be entitled to receive "the fair-market value" of the reserve raisins as just compensation. Pet. Br. 20. They further contend that this would be the "dollar-for-dollar" equivalent of the remedial payments and civil penalties they were ordered to pay in the proceedings before USDA, making resort to the Court of Federal Claims pointless. See *id.* at 20-21. But this argument necessarily rests on the premise that the alleged taking at issue involved the raisins themselves (even though petitioners failed to place them in reserve), rather than the monetary amounts they were ordered to pay, taking this case out of the narrow category of mandatory cash-payment statutes contemplated by the *Eastern Enterprises* plurality.

In addition, as described above, a takings claim based on petitioners' ownership of raisins would be a claim they could assert only in their capacity as raisin *producers*. That producer claim would not be cognizable in this action for judicial review of an order imposing sanctions on petitioners in their separate capacity as *handlers*. To be sure, petitioners "play[ed] a kind of shell game * * * to try to conceal their role as first handler," J.A. 45, and thus operated in both capacities. But that stratagem does not permit them to assert a claim limited to producers in a proceeding limited to handlers.

In any event, the payment obligations the USDA sanctions order imposed on petitioners are not the dollar-for-dollar equivalent of the just compensation that would have been awarded if, hypothetically, they had *complied* with the reserve requirement rather than violated it, and had then successfully invoked the Tucker Act. The plaintiff in *Eastern Enterprises* sought an

injunction to prevent application of the statute to it, contending that the statute would result in an unconstitutional taking of property *it* owned (money that would be used to pay the $5 million premium). Petitioners, by contrast, did not own the majority of the raisins they failed to hold aside. Petitioners failed to place into reserve not only a portion of their own raisins, but also the raisins produced and owned by the 60 other farmers with whom petitioners contracted to provide handling services. See p. 9, *supra*; see also A.R. 536 (petitioners' acknowledgement that other producers retained "right, title, [and] ownership" of their raisins). Even if petitioners could successfully assert a takings claim with respect to their own raisins (despite the fact that they never placed those raisins in reserve), they could not do so with respect to those belonging to other growers. Petitioners likewise would not be entitled to the return of that portion of the $483,843.53 remedial payment attributable to raisins owned by those other growers.

The same flaw is present in petitioners' insistence that they would be entitled in a Tucker Act suit to a dollar-for-dollar return of the civil penalty. Pet. Br. 21. The civil penalty was imposed for petitioners' failure, as a handler, to reserve the requisite percentage of raisins they held for 592 days. See J.A. 48, 91-92. For any one of those days in which petitioners failed to set aside raisins owned by someone else, petitioners could have no conceivable argument that that day's civil penalty was predicated exclusively on a potential uncompensated taking of *petitioners'* property. In addition, only a portion of the civil penalty was based on the failure to withhold reserve raisins. J.A. 92. The remainder was based on petitioners' violations of other requirements imposed on handlers: the filing of 20 inaccurate reports, 58 fail-

ures to obtain incoming inspections (which, among other things, are intended to assure that marketed raisins meet minimum quality standards, see 7 C.F.R. 989.58(d)), two failures to pay required assessments, and one failure to allow the Agricultural Marketing Service to have access to records. J.A. 91-92. Petitioners fail to explain why they would be entitled to a dollar-for-dollar just compensation payment for the portion of the civil penalty based on those independent regulatory violations.

Finally, petitioners would not be entitled to a simple dollar-for-dollar reimbursement even for the raisins they produced themselves. In *Eastern Enterprises*, the requirement to pay money was the very regulatory requirement challenged; it was not a sanction imposed as the consequence of the failure to yield another form of property. Because money has a fixed and easily ascertained value, any just compensation due for the taking of money could be readily ascertained. But when the property alleged to be taken is personal property, such as a portion of the raisins in this case, the value due as just compensation is not so readily calculated—even assuming a claim for just compensation for a physical taking would lie here at all, especially since no raisins were actually placed in reserve. That is why the *Eastern Enterprises* plurality recognized that the presumption of the availability of compensation under the Tucker Act is "reversed where the challenged statute * * * requires a direct transfer of funds," but is *not* reversed where the "challenged statute * * * burden[s] real or physical property." 524 U.S. at 521.

Any just compensation due petitioners for a taking would be measured not by the government's gain, but by the loss to petitioners. *Brown*, 538 U.S. at 236 (noting

that "the question is what has the owner lost, not what has the taker gained") (quoting *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.)). A proper calculation of petitioners' loss (if any) would necessarily take into account the entire marketing order and regulatory program, including the gains to petitioners in the price of their free-tonnage raisins, which were higher precisely because of the marketing order's reserve requirement. See *Regional Rail*, 419 U.S. at 151 ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation.") (footnote omitted); *United States* v. *Rands*, 389 U.S. 121, 126 (1967) (explaining that when government takes part of a property and its actions result in an increase in market value for the remainder, just compensation owed is reduced by that increase).

Some calculation of that gain—the difference between actual prices and what those prices would have been in the absence of the reserve requirement—would be needed in order to determine the amount of any just compensation due petitioners. See, *e.g.*, 71 Fed. Reg. 29,567, 29,570 (May 23, 2006) (econometric model for 2005-2006 crop year estimated that prices for free tonnage raisins were $63 per ton higher than they would be in an unregulated market). A proper just compensation analysis would also have to account for other benefits petitioners receive from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards, 7 C.F.R. 989.58, and promotional activities, 7 C.F.R. 989.53(a). Additionally, in a hypothetical case seeking compensation for reserve raisins, petitioners would not be entitled to the price

they would have received had they sold those raisins—that hypothetical price would be higher than the price they would have received in the absence of the raisin marketing order and its reserve requirement.

Indeed, it is entirely likely that when all benefits and alleged losses from the reserve requirement were calculated, petitioners would have a net *gain* rather than a net loss. After all, a central point of the marketing order is to benefit producers by limiting supply and thus raising prices for their commodities. J.A. 209; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). If so, then their just compensation would be zero. Cf. *Brown*, 538 U.S. at 240 & n.11 (noting that "just compensation for a net loss of zero is zero").

Furthermore, if petitioners had complied with the reserve requirement, they would have also received at least some of their equitable share of the net proceeds from the RAC's disposition of the reserve raisin pool. See p. 6, *supra*. Any amounts that petitioners received from the RAC would necessarily be deducted from any just compensation that might otherwise be due them because of the alleged taking. But petitioners, who violated the order by never holding aside any reserved raisins at all, never became entitled to receive any of the net proceeds from the RAC's disposition of the reserve pools.

Even putting all of those issues aside, just calculating the value of the raisins is not a straightforward exercise. During the administrative proceedings in this case, the judicial officer ultimately calculated the dollar equivalent of the unreserved raisins using the so-called "announced price" of raisins, rather than the "producer

price" he had previously used, J.A. 102-103.[15] While the Administrator argued that the "announced price" should be used to calculate the compensation to the RAC under the particular regulatory terms in 7 C.F.R. 989.166(c), J.A. 102, the government would remain free to argue, in a Tucker Act suit, that any just compensation due under the Fifth Amendment is not governed by the "announced price" relevant under the marketing order, but by some other methodology, such as the "producer price," which in this case would yield lower compensation. For these reasons as well, there is no reason to believe that any just compensation due petitioners (if they could somehow make out a valid takings claim) would match precisely, or even necessarily have any relation to, the amount of remedial compensation, assessments, and civil penalties petitioners were ordered to pay under the USDA order.

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[15] The "producer prices" for these crop years was based on retrospective RAC data published in the Federal Register in 2006. See J.A. 85 (citing 71 Fed. Reg. 29,565, 29,569). The "announced prices" were those agreed to in 2003 after negotiations between producers' and handlers' bargaining associations. J.A. 102 (citing *Lion Raisins, Inc.*, 416 F.3d at 1360, and A.R. 5533-5534). Petitioners waived any objection to using the "announced price" to calculate the dollar-equivalent compensation to the RAC under 7 C.F.R. 989.166(c). See J.A. 101.

2. Property owners may not assert the Just Compensation Clause as a "defense" to a government enforcement action where injunctive relief would be unavailable

Petitioners ultimately agree that "[w]here the Tucker Act does create a 'reasonable, certain, and adequate' remedy at law, a private party cannot obtain affirmative injunctive relief." Pet. Br. 46-47. Petitioners contend, however, that even where injunctive relief could not be obtained in an affirmative case, a property owner can nonetheless raise the Just Compensation Clause as a *defense* to a government action, such as the proceedings brought by USDA in this case based on petitioners' repeated violations of the raisin marketing order. *Id.* at 47; see *id.* at 43. Petitioners' contention is incorrect, both in the procedural context of this case and as a general matter.

a. No takings "defense" would be permissible in this case because, as noted above, it is one seeking review of penalties and payment obligations imposed on petitioners as handlers, for their numerous violations of regulatory obligations that apply only to handlers. A takings "defense" would belong to petitioners only in a proceeding brought against them in their capacity as producers. And such a proceeding would be impermissible under the AMAA. See 7 U.S.C. 608c(13)(B) and (14)(B).

b. In any event, petitioners' broad claim of entitlement to assert a takings "defense" lacks merit. As noted above, when the federal government, through the Tucker Act, provides a procedure for obtaining monetary compensation, the property owner cannot claim a violation of the Just Compensation Clause as a result of the imposition of a regulatory requirement. *Williamson County*, 473 U.S. at 195 (explaining that a "property

owner has not suffered a violation of the Just Compensation Clause" if he can obtain just compensation through available procedures); *Larson*, 337 U.S. at 697 n.18 (noting that availability of monetary compensation "will defeat a contention that the action is unconstitutional").

In other words, the answer to petitioners' asserted "defense" is that they have never invoked the Tucker Act procedure. Accordingly, they "cannot claim a violation of the Just Compensation Clause," *Williams County*, 473 U.S. at 195, and they thus have no claim that anything "unconstitutional" has been done to them. See *Riverside Bayview Homes, Inc.*, 474 U.S. at 129 n.6 (defense to enforcement action "is not the proper forum" for takings claim; party should instead "initiate a suit for compensation in the Claims Court").

As this Court has explained, it is "[t]he nature of the constitutional right [under the Just Compensation Clause that] requires * * * a property owner [to] utilize procedures for obtaining compensation" rather than suing to enjoin government action as unconstitutional. *Williamson County*, 473 U.S. at 194 n.13. The Court has never "recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." *Id.* at 196 n.14.[16] That does not make the Just Compensation Clause a "poor relation" to other constitutional provisions, Pet. Br. 46, but merely recognizes that the Clause itself is not violated

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[16] Petitioners at times suggest that the Constitution requires just compensation to be paid before the government may take property, Pet. Br. 28, 32, 35, but this Court has long since rejected that argument, *Hurley* v. *Kincaid*, 285 U.S. 95, 104-105 (1932) ("The Fifth Amendment does not entitle him to be paid in advance of the taking.") (collecting cases).

at all unless just compensation for any taking that may occur is unavailable through established procedures. Indeed, as this Court noted in *Williamson County*, the Just Compensation Clause is not the only Clause under which a violation may occur only at a discrete, later time. See 473 U.S. at 195 (noting that sometimes the government does not "caus[e] a constitutional injury" under the Due Process Clause unless it fails to provide "an adequate *post*deprivation remedy") (emphasis added).

Because a claim under the Just Compensation Clause includes as a necessary ingredient resort to available procedures for monetary compensation, such a claim fails—whether asserted affirmatively or defensively—where such a procedure is available. In fact, a takings "defense" is no different in substance from an action by a property owner seeking an injunction to restrain the government from carrying out acts that allegedly would effectuate a taking of property.

For example, in this case, petitioners' defense effectively asks the courts to prevent USDA from imposing on petitioners any civil penalty or monetary assessment for violating the raisin marketing order's reserve requirement, on the ground that the reserve requirement amounts to an unconstitutional taking. But that is no different from a suit seeking to "obtain affirmative injunctive relief" against USDA to preclude the agency from imposing any monetary sanctions under the raisin marketing order. Pet. Br. 46-47; cf. *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (noting that a "negative injunction [i]s nothing more than the pre-emptive assertion in equity of a defense").

The substantive identity between an injunction and a defense in this context is also illustrated through a hypothetical modification of the facts in *Williamson County*. The developer in that case sought an injunction ordering zoning officials to allow it to develop its land in accordance with a previous zoning ordinance, on the theory that application to the developer of a new, more restrictive ordinance effected a taking. See 473 U.S. at 182. This Court held that the takings claim was premature because the developer had not filed an inverse condemnation action under state law to seek just compensation for any alleged taking. See *id.* at 194-197. If, instead of seeking an injunction, the developer had begun to develop the land in open defiance of the new ordinance, and then faced an enforcement action, the logic of *Williamson County* would not permit the developer to assert a takings "defense"—*i.e.*, an assertion that it was entitled to violate the new ordinance because that ordinance resulted in an unconstitutional taking. The defect in the takings claim in that situation would be exactly the same as in the injunctive action; in both instances, the developer could not claim a violation of the Just Compensation Clause if procedures for seeking just compensation were available. See *id.* at 195.

c. Petitioners contend that this Court "has heard Takings Clause defenses to government-initiated actions on the merits on numerous occasions," Pet. Br. 24; see also *id.* at 43-44. But the cited cases do not hold that injunctive relief or a takings "defense" is available in all situations. Rather, the cited authorities generally involved situations in which the government *failed* to provide a reasonable, certain, and adequate procedure for monetary compensation, such as that in the Tucker Act, and several of them expressly recognized that the

government may take property so long as just compensation is provided. See *Miller* v. *Schoene*, 276 U.S. 272, 277 (1928) ("[T]he statute as interpreted allows [for no] compensation for the value of the standing cedars or the decrease in the market value of the realty."); *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 205 (1910) ("[T]here is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required."); *Union Bridge Co.* v. *United States*, 204 U.S. 364, 388 (1907) ("[The act] makes no provision, and the United States has not offered, to compensate [plaintiff] for the sum that will necessarily be expended in order to make the alterations or changes required by the order of the Secretary of War."); *Chicago, Burlington & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 564-567, 582 (1906) (noting that the state statute provided for costs to be paid by the State "*or by the railroad company*, as the case may be," and the State's notice to the property owner made clear that it would not offer compensation in that instance); *St. Louis & S.F. Ry.* v. *Gill*, 156 U.S. 649, 666 (1895) ("[T]he present [case] is one [in which] there is no opportunity to resort to a compendious remedy."); see also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (holding that government may not take the property at issue "without invoking its eminent domain power *and paying just compensation*") (emphasis added).[17]

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[17] In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), this Court based its decision on the concession that, if there were a taking, then "no compensation, just or otherwise, [was] paid to the appellants," *id.* at 82 n.5. Moreover, no state procedure for receiving monetary compensation for the alleged taking was apparent. The alleged taking in that case—allowing unwanted speech and petitioning inside the property owner's shopping mall—derived directly from the Cali-

The "early historical record" discussed by petitioners (Pet. Br. 29-32) is similarly unhelpful to them. As an initial matter, this Court did not hold that the Just Compensation Clause applies to the States until its decision in *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897), so cases involving challenges to state action prior to that decision are not instructive. See *Bonaparte* v. *Camden & A.R. Co.*, 3 F. Cas. 821, 828 & n.2, 831 (C.C.N.J. 1830) (noting that "it may well be doubted whether as a constitutional provision, [the Just Compensation Clause] applies to the state governments," and that "[s]ince [the] opinion [in *Bonaparte*] was prepared," the Supreme Court had held that it did not) (citing *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833)). Additionally, cases against federal defendants decided before 1887—when the Tucker Act was enacted and generally made monetary compensation available, see Act of Mar. 3, 1887, ch. 359, 24 Stat. 505—are likewise inapposite.

Even putting those defects aside, the decisions petitioners cite are inapposite. *Bonaparte* agreed that an alleged taking "is not obnoxious to Magna Charta, or its construction in England or this state," if the law "prescribes a mode of proceeding by which compensation shall be ascertained and made." 3 F. Cas. at 828. Similarly, *Baring* v. *Erdman*, 2 F. Cas. 784 (C.C.E.D. Pa. 1834), involved a state law under which "[n]o provision is made for compensation to the owner," and the court in fact denied an injunction. *Id.* at 789. The court observed that "a court of equity * * * would not interfere, if a just compensation was offered, or the state was

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fornia constitution as interpreted by the California Supreme Court, neither of which discussed any mechanism for recovering just compensation for any alleged taking that might thereby result. *Id.* at 78.

willing to make some equitable adjustment of the damages." *Id.* at 791. *Thacher* v. *Dartmouth Bridge Co.*, 35 Mass. 501, 501 (1836), also involved an act that "did not provide any mode of ascertaining or paying the damage," and the same is true for *Sinnickson* v. *Johnson*, 17 N.J.L. 129, 144 (1839) ("yet the statute which authorizes the act, has not provided compensation for the injury") (opinion of Dayton, J.); *Bloodgood* v. *Mohawk & Hudson R.R.*, 18 Wend. 9, 19 (N.Y. 1837) (chancellor's opinion) (statute enacted "without having made an adequate and certain provision for the recovery of the damages"); and *Perry* v. *Wilson*, 7 Mass. 393, 395 (1811) ("But in this statute, no compensation is provided, nor any means of ascertaining or securing the payment of it declared.").

Nor do the later nineteenth century cases cited by petitioners (Pet. Br. 32-33, 44-45) support their contention that a property owner may always raise a takings defense to a government action, even where injunctive relief would be unavailable. Instead, they confirm that a state law violates the Just Compensation Clause only where it "will not admit of the [property owner] earning such compensation as under all the circumstances is just to it," *Smyth* v. *Ames*, 169 U.S. 466, 526 (1898), overruled on other grounds, 315 U.S. 575 (1942), and that "[e]quitable jurisdiction may be invoked" only "in view of the inadequacy of the legal remedy," *Osborne* v. *Missouri Pac. Ry.*, 147 U.S. 248, 258 (1893) (construing state constitution). See *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 176 (1872) (observing that "it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands.") (decided under state constitution); *Sanborn* v. *Belden*, 51 Cal. 266, 269 (1876) (no "certain and adequate compensation" available)

(decided under state constitutional provision); *California Pac. R.R.* v. *Central Pac. R.R.*, 47 Cal. 528, 530 (1874) ("It seems clear that the defendant had no plain, speedy, and adequate remedy.") (decided under state constitution).

In sum, where the government has established a procedure to obtain monetary compensation (whether through the statute that causes the alleged taking, a general statute like the Tucker Act, or a combination of the two, see *Regional Rail*, 419 U.S. at 148), there can be no claim for injunctive relief, and hence no right to assert a takings "defense" to government action.

d. Petitioners argue that the requirement that a property owner seek just compensation through available procedures should not be considered a matter of "ripeness" that concerns the court's "jurisdiction" in the Article III sense of that term. Pet. Br. 38-42. Petitioners contend instead that the requirement to seek compensation under the Tucker Act should be understood as a "substantive ingredient[] of a claim" under the Just Compensation Clause, *id.* at 42.

This Court has often referred to the requirement as involving a question of "ripeness," stating that a claim under the Just Compensation Clause is "premature" if there is an avenue for monetary relief that the property owner has not yet pursued and that has not been shown to be unavailable. *Williamson County*, 473 U.S. at 194 ("the taking claim is not yet ripe"); *id.* at 195 ("[W]e have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act."); *Monsanto Co.*, 467 U.S. at 1013 ("any finding that there has been an actual taking would be premature"); *id.* at 1019 ("Because we hold that the Tucker Act is

available as a remedy for any uncompensated taking * * * , Monsanto's challenges * * * are not ripe for our resolution."); *First English Evangelical Lutheran Church*, 482 U.S. at 312 n.6 ("Our cases have also required that one seeking compensation must 'seek compensation through the procedures the State has provided for doing so' before the claim is ripe for review.").

On the other hand, the Court has sometimes stated that when a property owner fails to avail himself of a suit under the Tucker Act or similar procedures for obtaining compensation, his Just Compensation Clause claim will fail on the merits. See *Williamson County*, 473 U.S. at 195 ("[T]he property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); see *id.* at 194-195 (noting that if resort to adequate process yields just compensation, "then the property owner 'has no claim against the Government'"); *id.* at 195 ("[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the [available] procedures."); *Larson*, 337 U.S. at 697 n.18 ("[T]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."); *Hodel*, 452 U.S. at 297 n.40 ("[A]n alleged taking *is not unconstitutional* unless just compensation is unavailable.") (emphasis added).

Whether conceived of as a question of jurisdiction under the particular statutory regime governing here or as a question going to the merits, the outcome in this case is the same. As petitioners note, Br. 3, 13-14, the court of appeals affirmed the judgment of the district court denying relief on the merits, rather than ordering

the case dismissed for lack of jurisdiction; if (as petitioners urge) their failure to seek a Tucker Act remedy goes to the merits of their claims rather than the court's jurisdiction, then the court of appeals' judgment affirming the district court's judgment in its entirety was correct.

e. Petitioners assert that it "makes little sense to bifurcate proceedings," Br. 27, by requiring property owners to assert non-Just Compensation Clause claims or defenses against a government enforcement proceeding in one action (in district court), and bring a separate Just Compensation Clause claim in another (in the Court of Federal Claims). But there is nothing odd about that result. If a property owner has a Just Compensation Clause claim against the federal government, the owner must ordinarily seek monetary relief in the Court of Federal Claims. The fact that the property owner may also have *other* claims or grounds for relief against the federal government—even claims that arise out of the same set of facts—does not alter that requirement. See *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011) (rejecting contention that it would be unjust to "forc[e] plaintiffs to choose between partial remedies available in different courts"); see also *id.* at 1734 (Sotomayor, J., concurring in the judgment) ("The jurisdictional scheme governing actions against the United States often requires * * * plaintiffs to file two actions in different courts to obtain complete relief in connection with one set of facts. As just one example, an action seeking injunctive relief to set aside agency action must proceed in district court, but a claim that the same agency action constitutes a taking of property requiring just compensation must proceed in the [Court of Federal Claims]."). The Tucker Act fur-

nishes a reasonable, certain, and adequate procedure to obtain just compensation for an alleged taking; it does not cease to be so simply because a property owner might also have other constitutional or non-constitutional claims against the federal government.

3. The AMAA's language, context, and history do not reflect a congressional preference for an injunction over the payment of compensation in circumstances such as those present here

Petitioners contend that where Congress would not have intended for the United States to pay for the government's action if a taking were found, then a monetary remedy under the Tucker Act is unavailable. In such cases, petitioners continue, it follows that either an action for an injunction to restrain the alleged taking, or the assertion of a takings defense to a government enforcement action, is appropriate. Pet. Br. 37-38.

a. This contention is not properly before the Court. Petitioners did not make this argument in the court of appeals, nor did they advance it in their petition for a writ of certiorari. It was identified for the first time in the government's brief in opposition, which took the position that the Court should not grant certiorari to address it in the first instance. See Br. in Opp. 16 n.4. Nor is there any reason for the Court to address this question now that it has granted certiorari. Even assuming *arguendo* that Congress would have preferred an injunction against operation of the AMAA in the event it were found to impose a taking to an order for payment of compensation, that would not mean that a takings "defense" would be available here. As noted above (pp. 25-28, *supra*), this case involves judicial review of sanctions imposed on petitioners in their capaci-

ty as handlers, and no takings defense is available to them in that capacity.

b. Were the Court to address this issue, petitioners are correct in their general premise that there is a category of cases in which a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking. But, although the question is close, we do not believe that the AMAA falls within that category in the narrow circumstances presented here.

In determining whether a case falls into that category—meaning that an action would lie in district court for equitable relief to prevent the operation of a federal statute that allegedly results in a taking—the court should decide whether, in light of the specific statute's language, context, and history, Congress would have intended to pay compensation if the governmental action could be implemented only if accompanied by compensation, or whether Congress would have instead intended to have the legislation enjoined if it were found to constitute a taking. See *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion) (citing U.S. Br. at 38 n.30, *Eastern Enterprises*, *supra*, No. 97-42); see also U.S. Br. at 13 n.5, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), No. 95-1595; U.S. Br. at 25 n.16, *Hodel* v. *Irving*, 481 U.S. 704 (1987), No. 85-637.[18]

To be sure, there are some aspects of the AMAA that indicate that it falls in this category. Marketing orders

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[18] Cf. *Preseault*, 494 U.S. at 14-15 ("We have previously rejected the argument that a generalized desire to protect the public fisc is sufficient to withdraw relief under the Tucker Act.").

are designed to regulate private parties only. The orders stabilize the market, but without any direct expenditure of government funds. And the AMAA does not appear to contemplate any direct benefit to the government or the acquisition of any property for the government's direct use. The statutory scheme, in short, orders the affairs of private market actors without any direct burden on the public fisc. Those features of the scheme could lead to the conclusion that Congress would not have intended to pay funds from the federal Treasury to maintain the particular program here if it were found to result in a taking, and thus would instead have preferred it to be enjoined rather than give rise to the payment of compensation under the Tucker Act.

The broader structure of the statute, however, suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act. Congress designed the AMAA to increase prices for regulated commodities (by limiting supply) and thus assumed the scheme would *benefit* producers. See 7 U.S.C. 601 (absence of regulation had "impair[ed] the purchasing power of farmers and destroy[ed] the value of agricultural assets"); 7 U.S.C. 602(1); J.A. 209; *Block*, 467 U.S. at 346. Congress built that assumption into the statute by giving producers power over the creation and termination of marketing orders. Marketing orders are effective only if approved by two-thirds of the relevant producers (or producers who produce at least two-thirds of the commodity). See 7 U.S.C. 608c(8) and (9)(B). Moreover, the Secretary is required to terminate a marketing order if termination is favored by a majority of producers (assuming that majority also produces a majority of the commodity). 7 U.S.C. 608c(16)(B). And the RAC, which recommends

reserve requirements and administers the reserve pool, is controlled by producers. See p. 5, *supra*.

By design, therefore, a marketing order will not continue in operation unless it benefits producers. Not all marketing orders utilize a reserve pool mechanism. See p. 3, *supra*. But where, as here, such a mechanism is used, even if Congress thought there was a risk that a reserve requirement would constitute a taking of a producer's commodities, Congress might well have expected the just compensation for any such taking to be zero because the marketing order would result in net benefits for producers. See pp. 36-37, *supra*; cf. *Regional Rail*, 419 U.S. at 125-131, 148 (finding Tucker Act applicable where Congress did not intend legislation to require expenditure of funds beyond those provided by the statute, but Congress would have thought such additional expenditure highly unlikely). This suggests that Congress would not have preferred an injunction barring the application of the reserve pool provision to petitioners to an abstract judicial finding of a taking for which no compensation was due. And because Congress gave a majority of producers control over the regulatory scheme, there is reason to believe that Congress would not have intended for a single disgruntled producer to be able to obtain an injunction against application of the reserve requirement to him on a takings theory, while still reaping the benefit of the higher prices established by others' compliance with the marketing order.

Moreover, the AMAA vests the Executive Branch with significant administrative authority to modify or abandon commodity regulation under the statute as necessary. That authority could be used in response to a just compensation award from the Court of Federal Claims. In particular, Congress gave the Secretary

broad authority to choose which tools he would employ to regulate the market for any particular commodity. See 7 U.S.C. 608c(6). A reserve pool—the regulatory method currently in place for California raisins—is just one of the available options. See 7 U.S.C. 608c(6)(E). Instead of using a reserve pool, the Secretary may limit or allot the quantity of the commodity that handlers may sell in interstate or foreign commerce, see 7 U.S.C. 608c(6)(A) and (C); allot amounts of the commodity that each handler can purchase from each producer, 7 U.S.C. 608c(6)(B); or provide for disposition of all agricultural surpluses, 7 U.S.C. 608c(6)(D).

The Secretary has unilateral authority to "terminate or suspend the operation of [a marketing] order" or one of its provisions "whenever he finds that [the] order * * * obstructs or does not tend to effectuate the declared policy of" the AMAA. 7 U.S.C. 608c(16)(A)(i); see 7 C.F.R. 989.91 (same); see also 60 Fed. Reg. 33,679-33,681 (June 29, 1995) (using this authority to terminate marketing order for Tokay grapes grown in San Joaquin County, California); 50 Fed. Reg. 26,977 (July 1, 1985) (same for domestically produced hops). Among the declared policies of the AMAA is the stabilization of agricultural supplies and prices through use of the Secretary's *regulatory* powers, 7 U.S.C. 602, rather than through use of direct federal subsidies.

Accordingly, an award of monetary compensation from the United States under the Tucker Act arising out of the reserve requirement could prompt the Secretary to terminate the current marketing order on the ground that it was no longer consistent with the policies of the AMAA. 7 U.S.C. 608c(16)(A)(i). He could then adopt a different regulatory strategy. Or, short of termination, the Secretary (or the RAC) could respond to a just com-

pensation order by prospectively altering the percentages of reserve and free raisins, or increasing equitable payments to producers. Either step might serve to eliminate future takings or at least reduce just compensation owed to zero. These features suggest that Congress would not have preferred the inflexible tool of an injunction to a modulated administrative response.

Furthermore, the raisin marketing order has stood for decades, during which the reserve requirement has stabilized the market for producers and handlers alike and created reliance interests. It is thus unlikely that Congress would have intended that such a market be potentially thrown into immediate turmoil through an injunction, rather than elect to pay any necessary just compensation on an interim basis while the government worked to craft new stabilizing measures not requiring any compensation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 7 U.S.C. 601 provides:

Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

2. 7 U.S.C. 602 provides:

Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current

level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title[1] such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal

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[1] So in original. Probably should be followed by a comma.

marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

3. 7 U.S.C. 608c (2006 & Supp. V 2011) provides in part:

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, Mas-

sachusetts, 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[1] 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

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[1] So in original. Probably should be followed by a comma.

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[5] (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[6] 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);[7]

(I) establishing[6] or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or

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[5] So in original. Probably should be "clause".

[6] So in original. Probably should be capitalized.

[7] So in original. Probably should be a period.

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[8] 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

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[8] So in original. Probably should be "Florida-grown".

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 employ-

ee 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 time-

frames 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.

4. 7 U.S.C. 608d provides:

Books and records

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws.

Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section, as well as information for marketing order programs that is categorized as trade secrets and commercial or financial information exempt under section 552(b)(4) of title 5 from disclosure under section 552 of such title, shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United

States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Notwithstanding the preceding sentence, any such information relating to a marketing agreement or order applicable to milk may be released upon the authorization of any regulated milk handler to whom such information pertains. The Secretary shall notify the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 10 legislative days before the contemplated release under law, of the names and addresses of producers participating in such marketing agreements and orders, and shall include in such notice a statement of reasons relied upon by the Secretary in making the determination to release such names and addresses. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(3) COLLECTION OF CRANBERRY INVENTORY DATA.—

(A) IN GENERAL.—If an order is in effect with respect to cranberries, the Secretary of Agriculture may require persons engaged in the handling or importation of cranberries or cranberry products (including producer-handlers, second handlers, processors, brokers, and importers) to provide such information as the Secretary considers necessary to effectuate the declared policy of this chapter, including information on acquisitions, inventories, and dispositions of cranberries and cranberry products.

(B) DELEGATION TO COMMITTEE.—The Secretary may delegate the authority to carry out subparagraph (A) to any committee that is responsible for administering an order covering cranberries.

(C) CONFIDENTIALITY.—Paragraph (2) shall apply to information provided under this paragraph.

(D) VIOLATIONS.—Any person who violates this paragraph shall be subject to the penalties provided under section 608c(14) of this title.

5. 7 U.S.C. 610 provides:

Administration

(a) Appointment of officers and employees; impounding appropriations

The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of chapter 51 and subchapter III of chapter 53 of title 5,

and such experts, as are necessary to execute the functions vested in him by this chapter: *Provided*, That the Secretary shall establish the Agricultural Adjustment Administration in the Department of Agriculture for the administration of the functions vested in him by this chapter: And *provided further*, That the State Administrator appointed to administer this chapter in each State shall be appointed by the President, by and with the advice and consent of the Senate. Section 8 of Title II of the Act entitled "An Act to maintain the credit of the United States Government," approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this chapter.

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in

harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of milk or products thereof received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of milk or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers.

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by

such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(d) Regulations of Secretary of the Treasury

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this chapter.

(e) Review of official acts

The action of any officer, employee, or agent in determining the amount of and in making any payment authorized to be made under section 608 of this title shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury.

(f) Geographical application

The provisions of this chapter shall be applicable to the United States and its possessions, except the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this chapter, is authorized by proclamation to make the provisions of this chapter applicable to the Virgin Islands,

American Samoa, the Canal Zone, and/or the island of Guam.

(g) Officers; dealing or speculating in agricultural products; penalties

No person shall, while acting in any official capacity in the administration of this chapter, speculate, directly or indirectly, in any agricultural commodity or product thereof to which this chapter applies, or in contracts relating thereto, or in the stock or membership interest of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) Adoption of Federal Trade Commission Act; hearings; report of violations to Attorney General

For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. Hearings authorized or required under this chapter shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under this chapter, to the Attorney General of the United States, who shall cause appro-

priate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) Cooperation with State authorities; imparting information

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d(1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and

employees under the provisions of section 608d(2) of this title.

(j) Definitions

The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this chapter (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of said sections. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.

6. 7 U.S.C. 613 provides:

Termination date; investigations and reports

This chapter shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this chapter as he finds are not requisite to carrying out the declared policy with respect to such commodity. In the case of sugar beets and sugarcane, the taxes provided by this chapter shall cease to be in effect, and the powers vested in the President or in the Secretary of Agriculture shall terminate on December 31, 1937 unless this chapter ceases to be in effect at an earlier date, as hereinabove provided. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

7. 28 U.S.C. 1491 provides in part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liq-

uidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

8. 7 C.F.R. 989.1 through 989.56 provide:

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.

989.2 Act.

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

989.3 Person.

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

989.4 Area.

Area means the State of California.

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.

989.7 Golden Seedless raisins.

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

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.

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.

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.

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.

989.12 Dehydrator.

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

989.12a Cooperative bargaining association.

Cooperative bargaining association means a nonprofit cooperative association of raisin producers engaged within the area in bargaining with handlers as to price and otherwise arranging for the sale of natural condition raisin of its members.

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.

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.

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.

989.16 Blend.

Blend means to mix or commingle raisins.

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.

989.18 Committee.

Committee means the Raisin Administrative Committee established under § 989.26.

989.20 Ton.

Ton means a short ton of 2,000 pounds.

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.

989.22 District.

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

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.

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.

989.24a Non-normal outlets.

Non-normal outlets means outlets other than those customarily used for commercial disposition of raisins meeting the then applicable minimum standards for natural condition raisins or packed raisins.

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.

RAISIN ADMINISTRATIVE COMMITTEE

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.

989.27 Eligibility.

No person shall be selected or continue to serve as a member or alternate member of the Committee who is not actively engaged in the business of the group which he represents either in his own behalf, or as an officer, agent, or employee of a business unit engaged in such business: *Provided*, That only producers, as defined in § 989.11, engaged as such with respect to the most recent grape crop, are eligible to serve on the

Committee. Only handlers who packed or processed raisins during the then current crop year shall be eligible to represent handlers on the Committee. Any handler eligible to represent a particular group shall continue to represent handlers for the entire term for which he was selected.

989.28 Term of office.

The term of office of all representatives serving on the Committee shall be for two years and shall end on April 30 of even numbered calendar years, but each such member and alternate member shall continue to serve until their successor is selected and has qualified.

989.29 Initial members and nomination of successor members.

(a) *Initial members.* Members and alternate members of the Committee serving immediately prior to the effective date of this amended subpart shall, if thereafter they are eligible, serve on the Committee until April 30, 1984, and until their respective successors have been selected and qualified.

(b) *Nominations for successor members.* Nominations for successor members and alternate members of the Committee shall be made as follows:

(1) The Committee shall notify the cooperative marketing association(s) engaged in handling not less than 10 percent of the total raisin acquisitions during the preceding crop year, and cooperative bargaining association(s), of the date by which nominations to fill member and alternate member positions shall be

made. The Committee shall give reasonable publicity of a meeting or meetings of producers who are not members of cooperative bargaining association(s), or cooperative marketing association(s) which handled 10 percent or more of the total raisin acquisitions during the preceding crop year, and of independent handlers and cooperative marketing association(s) who handled less than 10 percent of the total raisin acquisitions during the preceding crop year, for the purpose of making nominations to fill the member and alternate member positions prescribed in § 989.26 (c) and (d): *Provided*, That member and alternate member nominations by independent handlers and cooperative marketing association(s) who acquired less than 10 percent of the total raisin acquisitions during the preceding crop year may be made to the Committee by mail in lieu of meetings.

(2)(i) Any producer representing independent producer and producers who are affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year must have produced grapes which were made into raisins in the particular district for which they are nominated to represent said district as a producer member or alternate producer member on the committee. In the event any such nominee is engaged as a producer in more than one district, such producer may be a nominee for only one district. One or more producers may be nominated for each such producer member or alternate member position.

(ii) Each such producer whose name is offered in nomination shall be given the opportunity to provide the committee a short statement outlining qualifications and desire to represent on the committee independent producers or producers who are affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year. These brief statements, together with a ballot and voting instructions, shall be mailed to all independent producers and producers who are affiliated with cooperative marketing associations handling less than 10 percent of the total raisin acquisitions during the preceding crop year of record with the committee in each district. The producer receiving the highest number of votes shall be designated as the first member nominee, the second highest shall be designated as the second member nominee or alternate member nominee, as the case may be, until nominees for all member and alternate member positions have been filled.

(iii) Each independent producers or producers affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year shall cast only one vote with respect to each position for which nominations are to be made. Write-in candidates shall be accepted. The person receiving the most votes with respect to each position to be filled, in accordance with paragraph (b)(2)(ii) of this section, shall be the person to be certified to the Secretary as the nominee. The committee may, subject to the approval of the Secre-

tary, establish rules and regulations to effectuate this section.

(3) One or more eligible handlers for each handler position to be filled may be proposed for nomination to represent independent handlers and cooperative marketing association(s) which acquired less than 10 percent of the total raisin acquisitions during the preceding crop year on the Committee. Nominations shall be made by and from handlers, or employees, representatives or agents of handlers falling within such groups. Each handler shall cast only one vote with respect to each position for which nomination is to be made. The person receiving the most votes with respect to each handler member of handler alternate member position shall be the person to be certified to the Secretary as the nominee for each such position.

(4) Each vote cast shall be on behalf of the person voting, the person's agent, subsidiaries, affiliates, and representatives. Voting at each handler meeting shall be in person. The results of each ballot at each handler meeting shall be announced at that meeting.

(5) Each nomination shall be certified by the Committee to the Secretary on or before April 5 immediately preceding the commencement of the term of office of the member or alternate member position for which the nomination is certified.

989.30 Selection.

The Secretary shall select producer, handler, cooperative bargaining association(s), and public members and alternate members in the number specified in

989.26, as applicable, and with the qualifications specified in § 989.27. Such selections may be made from nominations certified pursuant to § 989.29 or from other eligible producers, handlers, or cooperative bargaining association(s) officers or employees.

989.31 Failure to nominate.

In the event nomination for a member or alternate member position on the committee is not certified pursuant to and within the time specified in § 989.29, the Secretary may select an eligible person to fill such position without regard to nomination.

989.32 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the Committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

989.33 Alternate members.

The alternate for a member of the committee shall act in the place and stead of such member (a) during his absence, and (b) in the event of his removal, resignation, disqualification, or death, until a successor for such member's unexpired term has been selected and has qualified.

989.34 Vacancies.

To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the committee to qualify, or in the event of the removal, resignation, disqualification, or death of any

member or alternate member, a successor for such person's unexpired term shall be nominated and selected in the manner set forth in §§ 989.29 and 989.30, insofar as such provisions are applicable. If nomination to fill any vacancy is not filed within 40 calendar days after such vacancy occurs, the Secretary may select an eligible person to fill such vacancy without regard to nomination.

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.

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 transac-

tions, 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.

989.37 Obligation.

Upon the removal, resignation, disqualification, or expiration of the term of office of any member or alternate member, such member or alternate member shall account for all receipts and disbursements and deliver to his successor, to the committee, or to a designee of the Secretary all property (including, but not limited to, all books and records) in his possession or under his control as member or alternate member, and he shall execute such assignments and other instruments as may be necessary or appropriate to vest in such successor, committee, or designee full title to such property and funds, and all claims vested in such member or alternate member. Upon the death of any member or alternate member of the committee, full title to such property, funds, and claims vested in such

member or alternate member shall be vested in his successor or, until such successor has been selected and has qualified, in the committee.

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.

989.39 Compensation and expenses.

The members and alternate members of the committee shall serve without compensation, but shall be allowed their necessary expenses as approved by the committee.

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.

MARKETING POLICY

989.54 Marketing policy.

(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 esti-

mated 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.

(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.

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.

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 an-

nounce 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.

9. 7 C.F.R. 989.65 through 989.95 provide:

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.

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.

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 con-

tracted 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.

(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.

989.70 Storage of 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.

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.

989.72 Exemption of educational institutions.

The committee may exempt, wholly or in part, from the volume regulation provisions of this part, that volume of raisins received or acquired by public or private educational agencies or institutions incidental to or in connection with teaching, experimental, or research activities.

REPORTS AND RECORDS

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.

989.75 Confidential information.

All reports and records furnished or submitted by a handler to the committee shall be received by, and at

all times kept under the custody or control of, one or more employees of the committee, who shall disclose to no person, except the Secretary upon request therefor, data or information obtained or extracted therefrom which would constitute a trade secret or the disclosure of which might affect the trade position, financial condition, or business operations of the particular handler from whom received: *Providied*, That the committee may require such an employee to disclose to it, or to any person designated by it or by the Secretary, information and data of a general nature, compilations of data affecting handlers as a group, and any data affecting one or more handlers, so long as the identity of the individual handlers involved is not disclosed.

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.

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.

EXPENSES AND ASSESSMENTS

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.

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 ac-

quired 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 assess-

ment 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.

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.

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.

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.

MISCELLANEOUS PROVISIONS

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.

989.85 Personal liability.

No member or alternate member of the committee or any employee or agent thereof shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any handler or any person, for errors in judgment, mistakes, or other acts either of commission or omission, as such member,

alternate member, employee, or agent, except for acts of dishonesty.

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.

989.87 Derogation.

Nothing contained in this amended subpart is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

989.88 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this amended subpart shall cease upon the termination of this amended subpart, except with respect to acts done under and during the existence of this subpart.

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 Agricul-

ture, to act as his agent or representative in connection with any of the provisions of this amended subpart.

989.90 Effective time.

The provisions of this amended subpart, as well as any amendments to this amended subpart shall become effective at such time as the Secretary may declare, and shall continue in force until terminated, or during suspension, in one of the ways specified in § 989.91.

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.

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 sub-

ject to the same obligations imposed upon the members of the said committee and upon said joint trustees.

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.

989.94 Amendments.

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

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 disap-

proved action of the committee shall be deemed null and void.

10. 7 C.F.R. 989.166 provides:

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 re-

quested 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 re-

serve 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.