

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 930**

[Docket No. AO-370-A5; FV93-930-1]

**Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Recommended Decision and Opportunity To File Written Exceptions to the Proposed Marketing Agreement and Order****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This recommended decision proposes the issuance of a marketing agreement and order (order) for tart cherries grown in certain designated states. The proposed order and agreement would authorize volume regulation, grade, size, and maturity regulations, and mandatory inspection. The proposed order would also authorize production, processing, and marketing research and promotion projects, including paid advertising. The order would be administered by an 18 member administrative board consisting of 17 growers and handlers and one public member. The order would be financed through assessments on handlers of tart cherries grown in the production area. A primary objective of this program would be to improve grower returns by strengthening consumer demand through volume control and quality assurance mechanisms. Tart cherry producers and processors would vote in a referendum to determine if they favor issuance of the proposed marketing order.

**DATES:** Comments must be received by December 29, 1995.**ADDRESSES:** Four copies of all comments should be sent to the Hearing Clerk, United States Department of Agriculture, Room 1079, South Building, Washington, DC 20250-9200. All written comments will be made available for public inspection at the Office of the Hearing Clerk during regular business hours.**FOR FURTHER INFORMATION CONTACT:** (1) R. Charles Martin or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, Room 2523-S, AMS, USDA, PO Box 96456, Washington, DC 20090-6456; telephone number (202) 720-5053, FAX: (202) 720-5698.

(2) Robert Curry, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and

Vegetable Division, AMS, USDA, 1220 SW Third Avenue, Room 369, Portland, Oregon 97204; telephone: (503) 326-2725, FAX: (503) 326-7440.

**SUPPLEMENTARY INFORMATION:****Prior Documents in This Proceeding**

Notice of Hearing, issued on November 30, 1993, and published in the Federal Register on November 30, December 23, 1993, and January 31, 1994 (58 FR 63108, 58 FR 68065, and 59 FR 4259, respectively). The notice reopening the hearing was issued on December 5, 1994, and published in the Federal Register on December 8, 1994 (59 FR 63273).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

The marketing agreement and order proposed herein have been reviewed under Executive Order 12778, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed agreement and order would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

**Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to a proposed marketing agreement and order regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement

Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act, and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The proposed marketing agreement and order are based on the record of a public hearing held December 15-17, 1993, in Grand Rapids, Michigan; January 10-11, 1994, in Rochester, New York; January 13, 1994, in Provo, Utah; February 15-17, 1994, in Portland, Oregon; January 9-10, 1995, in Grand Rapids, Michigan; and January 12-13, 1995, in Portland, Oregon. These multiple hearing sessions were held to receive evidence on marketing order proposals from growers, handlers, processors and other interested parties located throughout the proposed production area.

At the conclusion of the February 1994 hearing in Oregon, the deadline for filing post-hearing briefs was set at April 29, 1994. The deadline for filing post-hearing briefs was subsequently extended to May 31, 1994. However, based on a review of the hearing evidence and post hearing briefs, the Department of Agriculture (USDA) determined that the hearing should be reopened to clarify some provisions. The USDA wanted to obtain additional information and clarification on the following: (1) The States that should be regulated under the order; (2) the economic impact of the proposed order on small and large businesses; (3) whether the expected program benefits would exceed costs, especially for growers, handlers and consumers; and (4) how certain provisions would be implemented under the proposed marketing order. The hearing was reopened and held January 9-10, 1995, in Grand Rapids, Michigan and January 12-13, 1995 in Portland, Oregon. At the conclusion of the Oregon hearing, the deadline for filing post-hearing briefs was set at March 17, 1995.

Ten briefs were filed following the first briefing period. These briefs were from the U.S. Department of Justice, Anti-Trust Division (DOJ), Ray Schultz of Schultz's Fruitland, Ridgecrest Fruit Corporation, Smeltzer Orchard Co., Northwest Food Processors Association, American Farm Bureau Federation, Laughlin Orchards, Inc., Oregon Tart Cherry Association, Fruithill Inc., and the Cherry Marketing Institute.

Seven briefs were filed following the second briefing period. These were filed by Knouse Foods Cooperative, Inc. (Knouse), Shoreline Fruit, Inc., Oregon Tart Cherry Association, DeRuijer Farms, Inc., Milne Fruit Products, Cherry Marketing Institute, and DOJ.

The briefs are discussed throughout the following document where relevant.

The tart cherry industry's previous Federal Marketing Order began in 1971. It covered the States of Michigan, New York, Wisconsin, Pennsylvania, Ohio, Virginia, West Virginia, and Maryland. In a continuance referendum conducted March 10-20, 1986, 64 percent of all cherry producers and 83 percent of all cherry handlers voted. Of those voting, 51 percent of the producers and 56 percent of the handlers favored terminating the cherry marketing order. Producers favoring termination represented 45 percent of the production volume represented in the referendum, while handlers favoring termination represented 40 percent of the processed volume represented.

Given the lack of producer and handler support for that tart cherry order, it was determined that it no longer fulfilled the Act's objective, and was terminated April 30, 1987.

#### Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Administrator of the Agricultural Marketing Service has considered the economic impact of this action on small entities. The record indicates that there are approximately 1,600 growers of tart cherries and 75 handlers who process cherries in the production area proposed to be regulated. Small agricultural service firms have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those whose annual receipts are less than \$5,000,000, and small agricultural producers as those having annual receipts of \$500,000. The majority of the tart cherry handlers and producers may be classified as small entities.

For practical purposes, there is no fresh market for tart cherries. Processors dry, freeze, can, juice, or puree pitted tart cherries. Market use averages are: 56 percent of the product becomes industrial grade frozen cherries; 16 percent goes into consumer-size cans of pie filling; 8 percent is used for commercial pie filling; 10 percent becomes juice concentrate; 2 percent is dried; and 8 percent goes into water packs.

Since 1971, there has been a marked transformation in the processing industry's structure. Currently, 75 percent of the crop is processed by farmer-owned cooperatives or grower-owned processing facilities; whereas in 1971, a substantial volume was processed by independent handlers. Processors, through their sales agents, market in all U.S. markets and export to Europe and Asia. There are no discrete

regional markets where cherries from a particular district could have a particular advantage, beyond nominal differences in transportation costs, which can often be overcome by price discounting.

The record evidence shows that economic adversity has caused more than 21 percent of Michigan's growers to withdraw from tart cherry farming. There were 1,183 Michigan commercial growers in 1986, compared to 933 in 1992. In 1992, Michigan growers had an average production of 238,000 pounds with 19 percent of those growers averaging 800,000 pounds, accounting for 66 percent of the total Michigan production. In states other than Michigan, there has also been a general decline in the number of commercial growers since 1986. There are fewer growers in other States besides Michigan, but the number of bearing acres has increased from 4.5 million in 1986, to more than 5 million in 1990.

Record evidence indicates that the demand for red tart cherries is inelastic at high and low levels of production, and relatively elastic in the middle range. At the extremes, during times of very low and very high production, different factors become operational. In very short crop years, such as 1991, there is limited but sufficient exclusive demand for cherries that can cause processor prices to double and grower prices to triple. In the event of large crops, there seems to be no price low enough to expand sales beyond about 275 million pounds of raw fruit in a single year.

Since 1982, annual sales have averaged 230 million pounds. Under the proposed order, total returns to growers could be increased by restricting supplies of red tart cherries available for sale by handlers during large crop years. Also, the alternate production characteristics of the tart cherry industry provide an opportunity to increase growers' total earnings by converting the excess production of large crop years into storable products that could constitute reserve pools. These pools would be liquidated in a year when the available supplies are short.

One of the main concerns of this recommended order is the short term annual variation in supply which is attributable to climatic factors that neither growers nor processors can control, and which leads to chaotic marketing conditions. Such climatic factors can result in highly unpredictable annual crop sizes, causing gluts and shortages of tart cherries. When gluts occur, large carryin inventories can decrease processor and

grower prices, regardless of the anticipated size of the oncoming year's crop. Many sales are consummated with large buyers well before the current crop year's supply and demand situation is clear (based on what can best be described as "Anticipated Supply", i.e., the sum of the carryin inventory and the United States Department of Agriculture crop forecast, available usually late in June, weeks before the actual crop harvest.)

These large, unrestricted carryin inventories and crop estimates can play a dominant role in setting the tone of the market in a given year. The proposed order is intended to lessen the impact of these inventories and estimates by establishing an "optimum supply," thereby reducing price swings to growers and buyers, and ultimately resulting in a stabilization and enhancement of the market.

The order would impose some reporting and record keeping requirements on handlers. Handler testimony indicated that the expected burden that would be imposed with respect to these requirements would be negligible. Most of the information that would be reported to the Board is already compiled by handlers for other uses and is readily available. Reporting and recordkeeping requirements issued under comparable marketing order programs impose an average annual burden on each regulated handler of about one hour. It is reasonable to expect that a comparable burden may be imposed under this proposed marketing order on the estimated 75 handlers of tart cherries. With respect to growers, they testified at the hearing that information required to be submitted to the Board for grower diversion is already collected and available from growers.

The Act requires that, prior to the issuance of a marketing order for tart cherries, a referendum be conducted among affected producers and processors to determine if they favor issuance of the order. The ballot material that would be used in conducting the referendum would be submitted to and approved by OMB before it is used. It is estimated that it would take an average of 10 minutes for each of the approximately 1,600 tart cherry growers and 75 tart cherry processors to complete the ballots. Additionally, it has been estimated that it would take approximately ten minutes for each handler to complete the marketing agreement.

Therefore, in compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction

Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements that may be imposed by this order would be submitted to OMB for approval. Those requirements would not become effective prior to OMB review. Any recordkeeping and reporting requirements imposed would be evaluated against the potential benefits to be derived and it is expected that any added burden resulting from increased reporting and recordkeeping would not be significant when compared to those anticipated benefits derived from administration of the order.

The purpose of the RFA is to fit regulatory and informational requirements to the size and scale of the business entities in a manner that is consistent with the objectives of the rule and applicable statutes. The proposed marketing order provisions have been carefully reviewed and every effort has been made to eliminate any unnecessary costs or requirements. As discussed in the RFA, Congress' intent, among other objectives, was to direct agencies to identify the need for any "special accommodation" (e.g., exemption or relaxation) on regulated small entities (i.e., handlers) because, in the past, some Federal regulatory and reporting requirements imposed unnecessary and disproportionately burdensome demands on small businesses. Thus, the AMS closely reviewed the record evidence and could not find any evidence to suggest that any direct or indirect costs imposed under the marketing order regulation would be proportionately greater on small handlers than on large handlers, or conversely, that any projected order benefits would be proportionately smaller for small handlers than for large handlers.

The record evidence indicated that the order may impose some additional costs and requirements on handlers, but those costs are insignificant and are directly proportional to the sizes of the regulated handlers. The record evidence also indicated that, given the severe economic conditions and unstable markets facing the majority of the industry, the benefits to small (as well as large) handlers are likely to be greater than would accrue under the alternatives to the order proposed herein, namely no marketing order, or an order without the proposed combination of volume controls and other order authorities.

The record evidence indicates that the proposed order would be instrumental in providing expanding markets and sales, and raising and stabilizing prices of tart cherries, primarily for the

primary benefit of producers, but the evidence also indicates that, since handlers (including cooperatives that market the crops of their producer members) market the producers' crops, they would benefit as well. While the level of such benefits to handlers is difficult to quantify, it is also clear the provisions of the proposed order are designed to benefit small entities. For example, the record evidence indicated that small handlers (and small producers) are more likely to be minimally capitalized than large entities, and are less likely to survive without the stability the proposed order would provide.

Accordingly, based on the information discussed above and in the following discussion, it is determined that the marketing order would not have a significant economic impact on a substantial number of small entities.

#### Material Issues

The material issues presented on the record of the hearing are as follows:

1. Whether the handling of tart cherries grown in the proposed production area is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects such commerce;
2. Whether the economic and marketing conditions are such that they justify a need for a Federal marketing agreement and order which would tend to effectuate the declared policy of the Act;
3. What the definition of the production area and the commodity to be covered by the order should be;
4. What the identity of the persons and the marketing transactions to be regulated should be; and
5. What the specific terms and provisions of the order should be, including:

(a) The definitions of terms used therein which are necessary and incidental to attain the declared objectives and policy of the Act and order;

(b) The establishment, composition, maintenance, procedures, powers and duties of a Cherry Industry Administrative Board (Board) that would be the local administrative agency for assisting the Secretary in the administration of the order;

(c) The authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses;

(d) The authority to establish or provide for the establishment of production, processing and marketing research and market development projects, including paid advertising;

(e) The authority to establish regulations that would require minimum quality and inspection requirements;

(f) The authority to establish regulations that would provide for a volume control program;

(g) The authority to establish other regulations and procedures necessary and incidental to the administration of the order;

(h) The establishment of requirements for handler reporting and recordkeeping;

(i) The requirement of compliance with all provisions of the order and with any regulations issued under it; and

(j) Additional terms and conditions as set forth in § 930.81 through § 930.91 of the Notice of Hearing published in the Federal Register of November 30, 1993, which are common to all marketing agreements and orders, and other terms and conditions published at § 930.92 through § 930.94 that are common to marketing agreements only.

#### Findings and Conclusions

The following proposed findings and conclusions on the material issues are based on the record of the hearing.

1. The record indicates that the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin is in the current of interstate or foreign commerce or directly burdens, obstructs or affects such commerce. The proposed production area is discussed in material issue no. 3.

Red tart cherries, also known as red sour cherries, are grown in commercially significant amounts in these seven states: Michigan, New York, Utah, Pennsylvania, Oregon, Washington, and Wisconsin. Between 1988 and 1992, Michigan, New York, and Utah accounted for 90 percent of the United States' production, with Michigan producing 71 percent of the total industry product. Pennsylvania, Oregon, Washington, and Wisconsin's current tart cherry production averages 9 percent of the total. One handler handles all of Pennsylvania's production, while a substantial portion of Oregon and Washington's production is marketed almost entirely in those states as cherry juice concentrate. Colorado, which is excluded from the proposed marketing order because of its consistently small production, has averaged only 1.3 million pounds of cherries annually since 1986.

Handlers, through their sales agents, market in all U.S. markets and in exports to Europe and Asia. For example, Michigan cherries are sold in

every State except Maine, Idaho, and Alaska, as well as in Asia, Australia, and Europe.

Record evidence shows that any handling of tart cherries in market channels, including intrastate shipments, exerts an influence on all other handling of such cherries and vice versa. Therefore, because such handling directly burden, obstruct, or affect such commerce, all handling of tart cherries grown in the proposed production area should be covered by the order, and an order for tart cherries is supported by evidence in the record of hearing.

2. The proponents have demonstrated that there is a need for a marketing order for tart cherries. The proponents testified that the following conditions currently exist in the industry: (1) Large variations in annual supplies of tart cherries; (2) significant fluctuations in prices to farmers with gross receipts being below the industry's costs in seven of the last eight years; (3) disruptive variations in the price of cherries to food manufacturers; and (4) concomitant difficulties in developing both domestic and export markets.

Large variations in annual supply tend to lead to disorderly marketing. The proponents testified that a recent study at Michigan State University of annual variation in production of major horticultural crops indicates that the average production of tart cherries fluctuated to a greater extent than any other crop, including almonds, hazelnuts, and raisins. These are other storable commodities that have Federal marketing order programs. The fluctuations in production are due mainly to climatic factors over which neither growers nor processors have any control. In recent history, tart cherry production increased by 63 percent from 1986 to 1987 and by 82 percent from 1991 to 1992. These surges in production are far beyond the capability of the market to absorb. The result is not only the production year impact of depressed grower prices during the production year, but large carryover inventories which can depress prices for the next three to five years. The proponents provided an example as follows: Production averaged about 242 million pounds in 1988 and 1989 following the 1987 surge in production of 359 million pounds, yet grower prices only averaged 16.7 cents per pound during the period, which is well below the estimated cost of production of 20 cents per pound. The inventory carryin did not reach tolerable levels until July 1, 1991. The mere presence of these large carryin inventories had a depressing effect on processor and grower prices.

As a result of these fluctuations in price, growers receive less income for their tart cherries. Several growers testified that they are, in most years, unable to recoup their production costs of tart cherries. Also, very few new growers have entered the tart cherry industry because the initial investment in an orchard is substantial and yields little or no income for the first five years. In addition, cherry trees have a commercially productive life of 15 to 20 years, which means they are treated as a long term investment. Thus, it is not economically sound to plant and/or uproot cherry trees in response to changing supply or demand conditions. Further, while some growers have diversified their holdings to include other crops, record evidence shows that most growers do not have other viable economic alternatives for their land, due to the unsuitability of the land for crops for which additional demand exists. This most often results in the continued maintenance of and/or replanting of tart cherry trees.

In the crop years 1986 through 1993, tart cherry production ranged from a high of 359 million pounds in 1987 to a low of 189.9 million pounds in 1991. The price per pound to tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuation in the tart cherry industry are national in scope and impact. Tart cherry growers testified about the hardships they have endured over the seven years since the demise of the prior Federal tart cherry marketing order. Growers testified that the average prices of 12 to 17 cents per pound which they received do not come close to covering the costs of production for the vast majority of tart cherry growers. There was testimony that production costs for most growers range between 20 to 22 cents per pound, which is well above average prices received.

Proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because such growers and handlers have been going out of business over most of the last eight years due to low tart cherry prices. They also testified that, since an order would help increase grower returns, this should increase the buffer between success and failure because small growers and handlers tend to be less capitalized than larger ones. One Michigan grower testified that his family operates a 184 acre fruit farm and about one-half of their annual farm production comes from tart cherries. While the value of the farm is \$450,000 (includes value of land, \$15 per fruit

tree, and \$55,000 for depreciated equipment), their tart cherry crop has returned a negative \$1,240 per year, on average, over the past seven years. There are no funds left for the grower's labor and no return on the grower's investment. This grower has only been able to stay in business because of the income from other crops such grower produces and off-farm income.

Another grower testified that some growers do not own harvesting equipment. In most years, all the money such growers earn from their cherries is spent on hiring someone else to harvest their cherries. To further demonstrate economic difficulties faced by the tart cherry industry, a representative from a cooperative testified that, in 1994, the cooperative was unable to make a monthly payment to growers because of the large crop and the necessary storage and interest costs that the cooperative incurred. One Michigan grower testified that in 1985, there were 2,000 tart cherry growers; today (1995), due to the economic hardships, there are 1,190 growers.

The prior order had a grower owned reserve pool that was controlled by the Board. The Board had the authority to establish prices for sales of reserve pool cherries to handlers. There were often disagreements on the Board as to what price should be established for reserve pool cherries. One reason for the demise of the order was that the price the Board established for reserve pool cherries was often higher than cherries being sold into the marketplace. Therefore, the reserve was not disposed of and continued to grow into a large, high priced surplus. Proponents testified that the proposed order should have a limit on the volume of cherries which could be stored in the inventory reserve. They also testified that handlers, and not the Board, should be responsible for pricing and selling the reserve once it is released. This would provide an incentive to handlers to place good quality cherries into the reserve, avoiding a previous problem of some handlers placing low quality cherries into the reserve—cherries which handlers did not have to repurchase when reserve cherries were offered for sale. Based on such considerations, the proponents believe that the proposed order would work significantly better than the previous order.

An economist for the proponents testified that tart cherry growers and handlers would benefit from the proposed order and that consumers would benefit from the order's stabilization of supplies and prices. When supplies and prices are stabilized, manufacturers should more readily

develop new tart cherry containing products, thereby increasing the availability of new products and permitting retailers to introduce new and increased numbers of tart cherry products as part of their regular year-round product lines. Consumers would not be expected to have to pay more for tart cherry products because much of the anticipated favorable impact on grower returns would be absorbed by tart cherry processors and others in the manufacturing and distribution channels.

The USDA's evaluation of the record shows that fluctuating tart cherry prices are inherently harmful to growers and consumers. If the peaks of grower prices were lowered and the production troughs reduced slightly through the operation of the order, consumer prices over a period of years could actually be slightly lower, and additional cherry supplies and products could be made available.

The proponents testified that tart cherry growers could anticipate an average return of ten cents more per pound under the proposed marketing order. An economist for the proponents testified that had the order been in effect for the years 1974 through 1991, grower prices would have increased by an average of ten cents per pound with the year-to-year price variation decreased by 33 cents. If handlers had passed on the cost of the proposed assessment for order operation (approximately .75 cents per pound) to growers, growers would still have received an increase of at least an additional nine cents per pound. Thus, the proponents testified that the beneficial effects of the proposed order would outweigh any related costs.

An economist for the proponents testified that the benefit/cost ratio for handlers and processors is also favorable, although less so than for tart cherry growers. The witness testified that their prices would increase, but less in percentage terms than grower prices. Also, volatility in prices and supplies would be significantly reduced. For the period analyzed by the proponent's witness (1974 through 1991), the handler/processor price would have been expected to have increased an average of four cents per pound and the price variation from year to year would have been reduced by approximately ten percent. It was argued that, if the price is increased, handlers/processors would have additional financial resources to develop and expand markets, thereby increasing the demand for tart cherries and tart cherry products.

The proponents testified that the benefit/cost ratio for consumers under

the proposed order would be slightly positive and, to the extent that market supplies and prices are more stable and product development occurs, consumers should benefit. This is because most increases in grower prices would not be likely to be passed on to the consumer, and consumers would benefit with more stable tart cherry prices and supplies. Even if handlers and processors were to pass on some percentage of increased grower prices, consumers would not be likely to notice major differences in the prices that they would have to pay for products that contain tart cherries compared to what they might have paid if an order had not been functional. As in most processed consumer food products, the cost of the primary food commodity ingredient represents a relatively small portion of the consumer price. The proponents estimated the cost of tart cherries in a cherry pie represented about nine percent of the total cost. Therefore, if the presence of an order increased grower prices by ten cents, this could result in a one cent increase in the cost of the ingredient at the retail level. The potential retail price impact of the order would represent a very minor change compared to the wide year to year fluctuations in grower and processor prices. It is, therefore, unlikely that the operation of an order would have much, if any, impact on the pricing strategies of retail operators or the average retail price. Furthermore, most of the evidence of how grocery stores and food service establishments price their products implies that they do not tie the retail price to the cost of the basic raw food ingredient. Two economists that testified at the hearing agreed with an analysis prepared by Mr. Bruce Marion (The Organization and Performance of the U.S. Food System) that states "consumer prices in grocery stores and particularly in food service markets largely do not reflect fluctuations in cherry supplies." Thus, just because there is a price increase to the grower, that increase would not necessarily be passed on to the consumer that buys the cherry pie.

The proponents testified that large swings in prices to food manufacturers inhibit the industry's ability to expand the usage of tart cherries. Manufacturers are reluctant to make product development or marketing investments in products whose supply and price are capricious. The record evidence shows that a major national fast food retailer discontinued making cherry pies for its fast food restaurants because it could not be guaranteed a consistent supply of and stable price for tart cherries.

In its brief, DOJ indicated that growers and handlers can hedge against

fluctuating prices by using the free market mechanisms available. For example, handlers may store low-priced tart cherries for sale in the future when prices are higher, diversify crops, enter into long-term contracts with buyers, or make more extensive use of frost control systems. The Department stated that the proponents ignored these options and never explained why they cannot thus protect themselves from fluctuating prices. However, the evidence showed that some handlers have already tried withholding product from the market. Persons at the hearing testified that this is a regular practice among some handlers, although it has not proven to be beneficial, since handlers acting alone or in small numbers cannot successfully ameliorate the current production variability problem. Growers testified that they have diversified somewhat, but tart cherries require specific growing conditions and substantial investment, so it is difficult for growers to further diversify. Land currently devoted to tart cherry production may be suitable for other tree crops such as apples and pears. However, there is little to no demand for additional supplies of these commodities and costs to convert to such crops are substantial. As there are often no profitable alternative uses for their land resources, Michigan, Utah, and Wisconsin growers' principal crop is often tart cherries. Some growers in other States have been able to diversify their crops and regard tart cherries as a minor crop, or have additional alternative uses for their land. However, the bulk of the production is not in these States.

DOJ took the position that the proposed marketing order should be rejected because the order would increase consumer prices, artificially limit supplies, and result in the destruction of substantial portions of the tart cherry crop. Instead, growers, processors, buyers, and consumers should continue to participate in a free market for tart cherries. Free markets best determine optimal production and price levels and are often the most efficient way to supply all types of goods and services. Regulation should be substituted for a free market only where exceptional circumstances exist. It was further argued by DOJ in its brief that the record established that the tart cherry industry is a competitive marketplace. Every year hundreds of growers sell their crop to numerous processors who sell processed cherry products to many buyers. The Department stated that entry to the industry is easy and market information

is readily available. It was the Department's position that the proponents did not offer any facts that there is market failure in the tart cherry industry that might be addressed through government regulation. Instead, they merely complained about fluctuating tart cherry prices while proposing that the order would stabilize tart cherry prices by restricting supply. With respect to the proponents' claim that fluctuations are inherently harmful to growers and consumers, DOJ argued that fluctuating prices provide growers and consumers with valuable signals which reflect changes in the market over time. Responses by growers and consumers to these signals assure resources are allocated efficiently in the tart cherry industry. The Department opined that volume control regulations would distort these signals and result in inefficient production and lost consumption opportunities of cherries for consumers.

It was DOJ's position that the proponents' economic model presented at the hearing ignores the basic laws of supply and demand and that the model fails to incorporate the effect of increased plantings induced by the higher prices which would be brought on by volume controls. According to DOJ, the proponents' model rendered simulated results that are unreliable because the methodology ignores the supply decisions of growers and the demand decisions of consumers that determine prices and price variability in the real world.

The market signals discussed by DOJ are available now to growers and handlers. However, they have been unable to effectively respond to them because of the large fluctuations in production. If prices received were to encourage additional production, record evidence shows that there is limited land available to effectuate such increases. Also, growers cannot immediately respond to increased prices. Record evidence shows that it takes approximately five years to receive a commercial cherry crop from newly planted trees. New trees are also a large financial investment for growers, an additional disincentive to increased plantings.

If volume control regulations were established, the regulations would set forth the quantity of cherries that could be marketed. Opportunities for reserve releases would allow the industry to deal with demand increases and ensure a stabilized supply to the marketplace. The order would not establish prices.

In years of excessive production, growers would have additional options to control their costs and income. There

would be less of an incentive to deliver poor quality cherries simply to obtain some return on their investment and, given reduced pressures to deliver cherries at all costs, decisions concerning retiring marginal producing acreage, replanting, or economic abandonment of poor quality production could be made on sounder economic terms. Keeping such poor quality cherries off the market should also improve returns for all growers.

If a marketing order were established, cultural practices currently available to growers would remain and growers would be expected to utilize them through market based decisions. For example, orchard planning, which includes removing old trees and replanting new trees, would need to continue to ensure continued viability of commercially significant acreage. However, if growers discover a substitutable crop, the order would not prevent them from converting tart cherry acreage to that crop.

With regard to forward contracting, as mentioned by DOJ, handlers testified that this type of mechanism could possibly decrease the wide swings in prices and has been utilized to some extent. Forward contracting would not be prohibited under the proposed marketing order. However, record evidence indicates that forward contracting, in and of itself, has been ineffective as a tool to manage supplies or significantly reduce the price variability experienced in the industry.

The proposed order is designed to bring supplies in line with demand, thereby increasing grower returns. It is a tool the industry could use to alleviate a widespread problem in the industry, one which has not been effectively dealt with by the economic mechanisms DOJ has identified. The "real world" has resulted in significant losses to tart cherry growers in seven of the last eight years.

In a brief submitted on behalf of the Oregon Tart Cherry Association, Mr. Lee Schrepel contended that the proponents failed to offer convincing evidence that the benefits derived from the proposed order would exceed the costs for participants in an equitable manner. Mr. Schrepel stated that the record shows that Oregon growers are likely to bear comparatively greater costs than other districts proposed to be regulated under the order. Any potential increase in grower prices would be tempered by inventory reserves which would tend to depress the market. There is no evidence to support Mr. Schrepel's contention that Oregon would bear greater costs than the other districts. Inventory reserves would be held off the

market and slowly released when needed. Order imposed mechanisms would prevent their release until they are needed in the market, preventing the exact type of market depression unregulated carryovers now cause. Mr. Schrepel's other concerns have been addressed under material issue number 5(c).

The preponderance of the evidence presented at the hearing supports a Federal marketing order for tart cherries. The proponents have demonstrated that there is need for regulation in order to bring supplies in line with demand. The use of a marketing order could increase demand for tart cherries through price stability, market research and new market development opportunities. Also, the proposed order could increase returns to growers which is one of the objectives of the Act.

In view of the foregoing, and based on the record of the proceeding, it is concluded that current economic and marketing conditions justify a need for a marketing order for tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The order would meet many needs of the industry and would tend to effectuate the declared policy of the Act.

3. A definition of the term "production area" should be included in the order to delineate the area proposed to be regulated. Such definition should include the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

The area defined in the proposed order comprises what is generally recognized as the major tart cherry producing States within the United States. The States included are not, to the most part, contiguous, and therefore do not generally share the same climatic conditions. However, the defined production area does generally share the same cultural, production, processing, and distribution characteristics with respect to tart cherries, although differences in technology and transportation costs are evident. The State of Michigan leads in volume produced with approximately 68 percent of the 48,454 bearing U.S. acres of tart cherries reported in 1993, as well as approximately 60 percent of all known producers. During the same year, Utah was reported as having the second highest production with approximately eight percent of the bearing acreage and 12 percent of the producers. New York had seven percent of the bearing acreage and 13 percent of the producers, Wisconsin had six percent of both the acreage and the producers, Oregon had four percent of the acreage and three

percent of the producers, Washington also had four percent of the nation's acreage but less than one percent of the producers, and Pennsylvania had three percent of both the bearing acreage and the producers.

During the hearing process, considerable testimony was received pertaining to the proposed scope of the production area under the order. Most of the testimony was centered around the question of whether the States of Washington and Oregon should be included in the definition of the production area. The subject of removing any or all of the States of Michigan, New York, Pennsylvania, Utah, and Wisconsin from the proposed order was not broached during the hearing process, other than in testimony made against issuance of any marketing order for tart cherries.

Hearing evidence indicates that the primary issues encompassing the question of whether Oregon and Washington should be included within the proposed marketing order pertain to prices received by producers, the geographic scope of markets as they relate to particular forms of processed tart cherries, and whether competition is international, national, or regional in scope. The issue of regional responsibility for the current surplus of bearing tart cherry acreage was also raised during the hearing.

Lee Schrepel, representing the Oregon Tart Cherry Growers Association, testified that there is no meaningful relationship between the small tart cherry crop in Oregon and nationwide producer prices. He also stated that the market for processed tart cherries in the States of Oregon and Washington is substantially different from the rest of the U.S. market. The different processed forms of tart cherries generally include frozen, canned, brined, dehydrated, pureed, and juice concentrated products. Mr. Schrepel, as well as other producers and processors from Oregon and Washington testified that, whereas the majority of U.S. tart cherries are processed into frozen and canned forms, a significant proportion of Pacific Northwest cherries are processed into what is generally termed as secondary market forms, such as brined, dehydrated, juice concentrate, and pureed cherries. Testimony was received that these secondary, and in some cases, specialized, forms are marketed to a large extent in "niche" markets that have little or no relation to the national market for frozen and canned cherries. Some examples of "niche" markets provided during the hearing included wine, dried specialty fruit, and specialty juices. Moreover,

opponents to inclusion of Oregon and Washington in the proposed order testified that a majority of their frozen and canned product is marketed on the West Coast or into export markets, specifically Japan, rather than to markets east of the Rocky Mountains. Further testimony indicated that Pacific Northwest tart cherries are often higher in color and Brix, or sugar content, than cherries from other producing States. While purportedly not of great importance in the freezing and canning of tart cherries, these characteristics are valued in the concentrate business. As a consequence of these differences, it was argued that competition between the Pacific Northwest and other tart cherry producing regions has not been, nor will be, significant.

While it is true that a notable portion of the Pacific Northwest crop is marketed in secondary forms, a viable argument was not presented that demonstrated that this isolates the majority of such crop from other markets, either nationally or internationally. To the contrary, evidence presented during the hearing by Dr. Olan Forker of Cornell University shows that, nationally, producer prices move in the same direction and in similar amounts. This analysis, based upon statistical information presented throughout the hearing process, shows a definite national correlation or link in the prices received by all tart cherry producers. This correlation further indicates that the markets available to producers for fresh tart cherries grown for processing are national in scope.

In partial response to testimony that the Pacific Northwest States largely produce tart cherries for markets other than the primary frozen packed market, such as the juice concentrate market, proponents of the proposed order testified that increasing supplies of juice concentrate from Michigan and from Eastern Europe would, in time, undermine that market. Proponents testified that the resulting price erosion in the juice concentrate market would force both Oregon and Washington to move increasingly into the primary freezing and canning market. Indeed, record testimony suggests that marketing trends in the State of Washington are already moving in this direction.

Hearing evidence further indicates that the end-use, or consumer market, is also national in scope. For example, consumers in any location are not likely to differentiate between a can of pie cherries grown and processed in the Pacific Northwest and one originating from the Midwest or East.

Pacific Northwest producers and processors advocating exclusion from the proposed order contended that their regions have not contributed to the tart cherry over-supply situation, and therefore should not be held responsible for alleviating the problem. This testimony indicated that the Oregon and Washington industries have managed to consistently market all tart cherries produced. Moreover, it was testified that statistical evidence shows that Oregon has experienced a reduction in tart cherry acreage in recent years, thus reflecting a form of independent supply control without the use of complex federal regulations. Opponents to the inclusion of Oregon and Washington specifically, and the proposed order generally, insisted that the national over-supply problem is largely caused by the Michigan industry and therefore should be borne by it alone. Opponents testified that both Oregon and Washington together annually contribute an amount equal to seven percent of the nation's tart cherry stocks and are thus too small to have a significant impact on national supply.

Nonetheless, evidence supports the position that the over-supply situation in the U.S. is a national problem. Since the tart cherry industry is national in scope, evidence indicates that the entire industry should work together to alleviate the problem, regardless of any current localized over-planting of tart cherry trees. Although it is acknowledged that the Pacific Northwest has not contributed significantly to the over-supply problem, this area has the potential in the future to expand its production, notwithstanding inclusion or exclusion from the proposed order. Regardless of the question of supply, any region capable of significantly increasing bearing acreage, such as Oregon and Washington, would benefit from the provisions of the proposed order and thus should be included in the program. Testimony supports the proponents' opinion that, if excluded, the Oregon and Washington tart cherry industries could be characterized as "free-rider" States and could thus contribute to inequities within the national tart cherry industry rather than to a national solution. The majority of testimony from individuals from States other than Oregon, including producers and processors representing approximately half of the production from the State of Washington, overwhelmingly supported inclusion of all seven states within the defined production area.

It was testified at the hearing that the proposed order ignores the fact that both Montana and Colorado produce tart

cherries. It was contended that if States such as Oregon and Washington must be included in the proposed order, then Montana and Colorado should be as well. Evidence presented at the hearing showed, however, that bearing acreage and production in Montana and Colorado is insignificant and will likely remain insignificant. Therefore, Montana and Colorado should be excluded from the production area at this time.

Opponents to the proposed inclusion of the Pacific Northwest in the order asserted that climatic and general production characteristic differences in the various tart cherry producing areas are significant enough to warrant exclusion of Oregon and Washington from the order. It is true that climatic differences in the various regions can be quite significant—they are even quite different between the producing regions in Oregon and Washington. However, there is insufficient evidence to show that climate, or cultural practices for that matter, have a significant effect on the various regions with respect to pricing or markets.

To create orderly marketing conditions through volume regulations with the goal of achieving parity prices should require that all significant tart cherry producing areas in the United States be included under the proposed order, since all would be competing in the same market. To exclude any portion of the proposed production area, as defined, would tend to defeat the purpose of the proposed order and could result in depressed prices of the regulated tart cherries. All territory included within the boundaries of the production area constitutes the smallest regional production area that is practicable, and thus consistent with carrying out the declared policy of the Act. The production area, therefore, should be defined as hereinafter set forth.

4. The term "handler" should be defined to identify the persons who would be subject to regulation under the order. Such term should apply to any person who handles cherries or causes cherries to be handled for his or her own account. The term is also used to identify those persons who are eligible to vote for, and serve as, handler members and alternate handler members on the Board. Such term should apply to any person who first performs any of the activities within the scope of the term "handle" as hereinafter defined. Record evidence indicates that the term should also include growers that deliver cherries to a handler but keep title of the cherries and pay to have them processed. This is

referred to in the industry as custom processing. Evidence supports the position that the grower would be performing a handler function by retaining the right to sell the product and should therefore be covered under the definition of handler. The definition of the term "Handler" identifies persons who would be responsible for meeting the requirements of the order, including paying assessments and submitting reports and maintaining inventory reserves.

The term "handle" should be defined in the order to establish the specific functions that would place tart cherries in the current of commerce within the production area or between the production area and any point outside thereof, and to provide a basis for determining which functions are subject to regulation under authority of the marketing order.

The record indicates that the term "handle" should include the acts of processing cherries by brining, canning, concentrating, freezing, dehydrating, pitting, pressing or pureeing cherries, or in any other way, converting cherries commercially into a processed product. The definition also includes diverting cherries at the handler's plant and acquiring grower diversion certificates under the marketing order. Diversion will be discussed in material issue 5(f). However, the term "handle" shall not include the brining, canning, concentrating, freezing, dehydrating, pitting, pressing or the converting, in any other way, of cherries into a processed product for home use and not for resale. The term also does not include: (1) The transportation within the production area of cherries from the orchard where grown to a processing facility located within such area for preparation for market; (2) the delivery of cherries to a processing facility for such preparation; (3) the sale or transportation of cherries by a producer to a handler of record within the production area; and (4) the sale of cherries in the fresh market in an unpitted condition. In the first three cases, the tart cherries have not been prepared for market nor are they in their existing condition being transported to market. The sale of fresh unpitted cherries should not be regulated because there are very few sales into this market.

Testimony presented at the hearing by Mr. Schrepel stated that the terms hot pack, pie filling and culls should be added to the definition of handle. The term "handle" as proposed includes these terms since hot pack and pie filling are canned products. Mr. Schrepel stated that he wanted these terms added to make the definition

more explicit. However, it would be redundant to include these terms in the definition.

5. (a) Certain terms should be defined for the purpose of specifically designating their applicability and limitations whenever they are used in the order. The definition of terms discussed below is necessary and incidental to attain the declared policy and objectives of the order and Act.

"Secretary" should be defined to mean the Secretary of Agriculture of the United States, or any officer, or employee of the United States Department of Agriculture who has been or who may be delegated the authority to act for the Secretary.

"Act" should be defined to mean the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This is the statute under which the proposed regulatory program would be operative, and this definition avoids the need to refer to the citation throughout the order.

"Board" should be defined to mean the administrative agency known as the Cherry Industry Administrative Board established under the provisions of the marketing order. Such a board is authorized by the Act, and this definition is merely to avoid the necessity of repeating the full name each time it is used. The Board is discussed in detail in material issue 5(b).

"Crop Year" should be defined to mean the annual period that tart cherries are harvested and marketed. Record evidence indicated that the harvesting and marketing cycle for tart cherries begins in July. Therefore, "Crop Year" should be defined as the 12-month period beginning on July 1 and ending on June 30 of each year. Volume control regulations are implemented based on upcoming crop year forecasts and reports of final crop delivered to handlers. With the approval of the Secretary, the Board also has the authority to change the crop year if another period is found to be more appropriate. The proponents testified that a change would be necessary if a new variety of tart cherry was developed that would have an earlier harvest cycle.

The term "Cherries" should be defined to specify the commodity covered by the proposed order and to which the terms and provisions of the marketing order would be applicable. The record indicates that "Cherries" means all tart/sour cherry varieties grown in the production area classified as *Prunus cerasus*, *Prunus cerasus* by *Prunus avium*, or *Prunus cerasus* by *Prunus fruticosa*. Record evidence

indicated that the definition should not include *Prunus avium*, which is the sweet cherry variety. The proponents testified that in order to embrace the activities that are taking place in plant breeding programs, the definition should include all the varieties as proposed under the "Cherries" definition. These varieties are grown throughout the proposed production area.

"Department" or "USDA" should be defined to mean the United States Department of Agriculture which is the governmental body responsible for oversight of Federal marketing orders and agreements.

"District" should be defined to mean each subdivision of the production area described in the marketing order. The district delineations defined would be important for the purposes of Board nominations and implementation of volume control provisions. Testimony indicated that authority should be provided to allow the Board to recommend to the Secretary the establishment of other districts or addition of other districts, as may be necessary, through informal rulemaking procedures. Therefore the definition of "district" contains such authority. This term is further discussed under material issue no. 3.

The term "Fiscal period" should be defined to mean the 12-month period for which the Board would plan the use of its funds. This period should be established to allow sufficient time prior to the time tart cherries are first marketed for the Board to organize and develop its budget for the ensuing season. However, it should also be set to minimize the incurring of expenses during a fiscal period prior to the time assessment income is available to defray such expense.

The Notice of Hearing proposed that "fiscal period" mean the 12-month period beginning on July 1 and ending on June 30 of the following year. Record evidence indicates that the harvesting and marketing cycle for tart cherries grown in the production area begins in July and ends in August. The fiscal period should coincide with the tart cherry crop year, because the industry typically plans its operation on this basis. Hearing testimony supported the fiscal period being established for a 12-month period beginning on July 1 and ending on June 30 of the following year.

However, based on future experience, it may be desirable to establish a fiscal period other than one ending on June 30. Thus, authority should be included in the order to provide for the establishment of a different fiscal period if recommended by the Board and

approved by the Secretary through informal rulemaking procedures. In any event, the beginning date of any new fiscal period should be sufficiently in advance of the harvesting season to permit the committee to formulate its marketing policy and perform other administrative functions. Also, it should be recognized that if at some future date there is a change in the fiscal period, such change would result in a transition period being more or less than 12 months. For example, the Board may decide to change the fiscal period from beginning on July 1 through June 30 to August 1 through July 31. If that occurred, the fiscal period would be longer in one year running from July 1 through July 31 of the following year, to incorporate the new fiscal period.

The term "Free market tonnage percentage cherries" should be defined to mean that portion of cherries handled in a crop year which are free to be marketed in commercial outlets under any volume regulation established under the order. Testimony indicated that the definition was taken from volume control formulas under other established marketing order programs.

The term "grower" should be synonymous with "producer" and should be defined to identify those persons who are eligible to vote for, and serve as, grower members and alternate grower members on the Board and those who may vote in any referendum. The term should mean any person engaged in a proprietary capacity in the production of tart cherries for market within the production area. The term "grower" should not include a person who produces cherries to be marketed exclusively for the fresh market in an unpitted condition. Each business unit (such as a corporation or partnership) should be considered a single grower and should have a single vote in nomination proceedings and referenda. The term "grower" should include any person who owns or shares in the ownership of tart cherries such as a landowner landlord, tenant, or sharecropper. A person who rents and produces tart cherries resulting in that person's ownership of all or part of the tart cherries produced in that land should also be considered a grower.

Also, any person who owns land which that person does not farm, but as rental for such land obtains ownership of a portion of the tart cherries produced thereon, should be regarded as a grower for that portion of the tart cherries received as rent. The tenant on such land should be regarded as a grower for the remaining portion produced on such land.

A joint venture is one whereby several persons contribute resources to a single endeavor to produce and market a tart cherry crop. In such venture, one party may be the farmer who contributes one or more factors such as labor, time, production facilities or cultural skills, and the other party may be a handler who contributes money and cultural, harvesting, and marketing supervision. Normally, a husband and wife operation would be considered a partnership. Any individual, partnership, family enterprise, organization, estate, or other business unit currently engaged in the production of tart cherries for market would be considered a grower under the marketing order, and would be entitled to vote in referenda and Board nominations. Each party would have to have title to at least part of the crop produced, electing its disposition, and receiving the proceeds therefrom. This control would come from owning and farming land producing tart cherries, payment for farming services performed, or a landlord's share of the crop for the use of the producing land. A landlord who only receives cash for the land would not be eligible to vote. A business unit would be able to cast only one vote regardless of the number and location of its farms, but each legal entity would be entitled to vote.

"Person" should be defined to mean an individual, partnership, corporation, association, or any other business unit. This definition is the same as that contained in the Act.

"Primary inventory reserve" should be defined to mean that portion of handled cherries that are placed into inventory in accordance with any restricted percentage established under the volume control provisions of the marketing order. Testimony indicated that handlers would be responsible for maintaining the reserve and selling the reserve once it is released by the Board into certain outlets. The Board would reimburse handlers for the inspection of the primary inventory reserve. The Board could also establish quality requirements that cherries may need to meet before they are placed in an inventory reserve. Testimony supported that handlers could place tart cherries in the primary inventory reserve in any processed form.

"Secondary inventory reserve" should be defined to mean any portion of handled cherries voluntarily placed into inventory by a handler under the volume control provisions of the order. This definition is used to define the additional option handlers may use in the event free and restricted percentages are announced by the Board. The secondary inventory reserve is a handler

selected option and all expenses of such reserve are borne by the handler.

The term "Restricted percentage cherries" should be defined to mean that proportion of cherries handled in a crop year which must be withheld from marketing in normal commercial outlets in that crop year under a volume regulation established under the marketing order. Such cherries would be either placed into a primary or secondary inventory reserve or diverted in accordance with the diversion provisions of the marketing order. Testimony indicated that the Board would be responsible for evaluating supply and demand conditions and recommending to the Secretary, if necessary, the implementation of volume control percentages.

The term "sales constituency" should be defined to mean a common marketing organization or brokerage firm or individual representing a group of handlers or growers. The record indicates, that in this case, the largest single sales constituency currently in the industry is Cherry Central, Inc.

(b) Pursuant to the Act, it is desirable to establish an agency to administer the order locally as an aid to the Secretary in carrying out the declared policy of the Act and to provide for effective and efficient operation of the order. The establishment and membership of a Board is addressed in § 930.20 of the proposed order. The record shows that the Board should consist of 18 members, including one public member. Seventeen members should be growers or handlers of tart cherries, or individuals involved in both the growing and handling of tart cherries. One member should be selected from the general public. Each member should have an alternate possessing the same qualifications as the member.

For the purpose of Board representation, the order should provide that the production area be divided into nine districts. The record indicates that the 17 industry members of the Board should be composed of growers and handlers from within each district as follows: (1) Two grower members and two handler members from District 1, which would consist of that portion of the State of Michigan that is North of a line drawn along the northern boundary of Mason County and extended east to Lake Huron; (2) Three grower and handler members from District 2, which would consist of that portion of the State of Michigan that is South of District 1 and North of a line drawn along the southern boundary of Allegan County and extended east to Lake St. Clair. The number of grower and handler representatives in District 2

would alternate each full term of the Board. For example, evidence indicated that during the initial three-year term of the proposed Board, District 2 would be represented by two handler members and one grower member. During the second three-year term, District 2 would be represented by two grower members and one handler member. This would thus alternate for each succeeding term of office; (3) One grower member and one handler member from District 3, which would consist of that portion of the State of Michigan not included in Districts 1 and 2; (4) One grower member and one handler member from each of Districts 4 and 7, which would consist of the states of New York and Utah, respectively; and (5) One grower member or handler member from each of Districts 5, 6, 8, and 9, which would consist of the states of Oregon, Pennsylvania, Washington, and Wisconsin, respectively. The districts were developed based on the actual cherry production in those areas.

The order should provide that the Board positions for Districts 5, 6, 8, and 9 could be filled by individuals who are either growers or handlers of tart cherries, or by individuals involved in both the growing and handling of tart cherries. Furthermore, should any one of Districts 5, 6, 8, and 9 become subject to volume regulation under § 930.52(a), the Board should be realigned by the Secretary to provide that such district be represented by at least one grower member and one handler member rather than just one or the other.

The order should provide that, within any district represented by multiple seats, not more than one Board member may be elected from a single sales constituency. As addressed earlier, sales constituency is defined in § 930.16 to mean "a common marketing organization or brokerage firm or individual representing a group of handlers or growers." However, there should be no prohibition on the number of Board representatives from differing districts that may be elected from a single sales constituency which may have operations in more than one district.

The proponents testified that a limit to the total number of Board members from a single sales constituency should not be warranted, with the condition that there is no more than one such member from each district. The proponents suggested that it would be desirable to have Board membership reflect any potential industry affiliation with a single sales constituency. The proponents also testified that the single largest sales constituency in the tart cherry industry, Cherry Central, Inc.,

could possibly gain up to five seats on the Board under current industry conditions, but was doubtful that Board domination by such sales constituency would ever occur.

Testimony was received that the order should prohibit any sales constituency from gaining a majority of the seats on the Board. The record indicates that the order, as currently proposed, would prevent any single sales constituency from gaining a majority of the Board positions. With nine districts, any single sales constituency would have the maximum potential of nine members on the Board.

The Board should elect a chairperson, vice-chairperson, and any other officers it may find appropriate from among its members at its first meeting and annually thereafter. Testimony supports the position that all such officers should be voting members of the Board.

Upon recommendation of the Board and approval of the Secretary, reestablishment of districts or subdivisions of districts, and the distribution of grower and handler representation within any district or subdivisions thereof, is provided for in proposed § 930.21. Any such recommended change is subject to the provisions of § 930.23, as well as to consideration by the Board of the relative levels of production of tart cherries within each district, and the relative importance of new concentrations of tart cherry production within the overall production area. Prior to any such recommendation, the Board should also consider how the efficiency of marketing order administration is effected by geographic location of areas of production, as well as whether shifts in cherry production within the production area have occurred. The Board should also take into consideration any changing of the roles, or functions, of growers and handlers as it pertains to the production and handling of tart cherries. Any changes in the proportion of growers to handlers that may occur, as well as any other relevant factors, should also be considered by the Board before making any recommendations for redistribution or reestablishment.

Proposed § 930.22 provides that the term of office of Board members and their respective alternates should be three fiscal years. Approximately one-third of the Board terms should end each year. As defined earlier, fiscal year should mean the period beginning on July 1 and ending on June 30, or such other period as the Board may recommend and the Secretary approve. The record indicates that the term of office should begin on July 1, the

beginning of the marketing year for the tart cherry crop.

The length of the terms of those initial industry Board members who represent districts with more than one seat would be staggered so that all of the members' terms would not expire at the same time. The initial term of offices for the nine members and their respective alternates from Districts 1, 2, and 3 should be established so that one-third of such initial members and alternates would serve for a one year term, one-third would serve for a two year term, and one-third would serve for a three year term. It is also provided that one-half of the initial four members and respective alternates from Districts 4 and 7 would serve for one year, and one-half would serve for two years. Under the terms of the proposed order, the initial four members and four alternates from Districts 5, 6, 8, and 9 would all serve their full three year terms. Determination of which of the initial members and alternate members from Districts 1, 2, 3, 4, and 7 would serve for one year, two years, or three years would be by lot.

It was proposed by the proponents that the term of office of the public member and alternate public member should be for one fiscal year only. The proponents testified that to limit the term of the public member and alternate public member to one fiscal year would provide the industry members of the Board with the ability to quickly and easily replace such public members should Board expectations not be met.

An alternative proposal received during testimony favored a two-year term of office for all Board members and alternate members, inclusive of the public member and alternate public member. The justification provided in support of a two-year term of office was that Board members would gain sufficient experience within a two year time period and that a third year would not add significant benefit to either the members or the Board.

The preponderance of evidence, however, supports a three-year term because it would give members sufficient time to become familiar with Board operations and enable them to make meaningful contributions at Board meetings. Furthermore, a three-year term would enable establishment of a rotation so that approximately one-third of the Board membership would terminate each year. Such staggered terms would lend continuity to the Board by insuring that some experienced members would be on the Board at all times.

Insufficient supporting evidence was provided for the proposition that, while

industry members and alternate members should serve three-year terms, the public member and alternate public member should be limited to a one-year term. To maintain the continuity that is afforded the Board by industry members serving for three years, it logically follows that the public member should also serve for three years. If the public member and alternate would only serve one-year terms that are dependent on the Board's annual review, and nomination to the Board requires a  $\frac{2}{3}$  majority vote, the public member and alternate could feel pressured to always vote with the majority of the Board members. Record evidence supports public representation on the Board, and just as three-year grower and handler member terms offer many advantages to the Board, the tart cherry industry, and the members themselves, so would three-year public member terms. Therefore, the order should provide that the terms for all members be three years in duration. Approximately one-third of the total Board membership should terminate each year. The public member and alternate public member would both serve their full three-year terms initially and thereafter.

To prevent unnecessary vacancies from occurring on the Board, the order should provide that members and alternates shall serve in such capacity for the term of office, or portion thereof, for which they are selected and have qualified, and until their respective successors are selected and have qualified. However, so that there is continual turnover in membership and infusion of new ideas, the order should provide that the grower and handler members, and their respective alternates, may not serve more than two consecutive three-year terms on the Board.

The proponents proposed that there should be no limit on the number of consecutive terms the public member and alternate public member could serve on the Board. Just as testimony offered by the proponents indicated that a one-year term of office for the public member and alternate public member would provide the Board with the flexibility to quickly replace such members should they prove inadequate, the proponents also argued that unlimited tenure would provide the Board with the flexibility of maintaining the public member and alternate public member indefinitely should such be desired.

However, there was insufficient evidence offered during the hearing process to support a Board membership with differing tenure requirements. A two-term tenure requirement for the

public member and alternate public member would offer the Board the same infusion of new ideas from the public perspective that is provided from the industry perspective by continual turnover in grower and handler membership. The order, therefore, should provide that all members of the Board be restricted to serving no more than two consecutive three-year terms. Any initial term lasting less than three years should not be counted towards this six-year tenure limitation.

After serving two consecutive terms, Board members should be eligible to serve as alternates, but should be ineligible to serve as members for a period of at least one year. Conversely, alternate members should be eligible to serve as Board members after serving two consecutive terms as alternate members, but should be ineligible to again serve as alternate members for a period of at least one year. The alternate member's term of office should coincide with that of the position's member.

The effective date of the order, if issued, may not coincide with the specified beginning date of the terms of office of Board members and alternates. Therefore, a provision is necessary to adjust the initial terms of office. To accomplish this, the order should provide that if the initial fiscal period is less than six months in duration, that is beginning after January 1, then the tolling of time for the initial term of office would not begin until the following July 1. Similarly, if the initial fiscal period is for a duration of between 6 and 12 months, then the tolling of time for the initial term of office would begin on the prior July 1.

As an example, if an order were promulgated in May of 1996, and in the event that the initial members are selected prior to July 1, 1996, the initial terms of office could be adjusted as follows: the initial one-year term would not end on June 30, 1996, but would continue until June 30, 1997. The two-year and three-year terms would end on June 30, 1998, and June 30, 1999, respectively. However, if the initial members should start their terms of office between July 1, 1995, and February 1, 1996, the initial one-year term would end on June 30, 1996. The two-year and three-year terms would end on June 30, 1997 and June 30, 1998, respectively.

For the proposed Board to function, a mechanism is required by which members and alternate members may be nominated, elected, and appointed by the Secretary. Section 930.23 of the proposed order provides for a nomination and election procedure using petition forms and election ballots

and utilizing the U.S. Postal Service, or such other means as the Secretary may determine.

Proposed §930.29 establishes the eligibility criteria for membership on the Board. Each of the grower members and alternate grower members of the Board should be tart cherry growers or officers or employees of tart cherry growers. Likewise, each of the handler members and alternate handler members of the Board should be tart cherry handlers or officers or employees of tart cherry handlers. The proposed order further maintains that, to be eligible to serve on the Board, each of these handlers, or officers or employees of handlers, must own or lease, and operate a tart cherry processing facility in the district for which nominated to serve. A person who is a grower and handler in the industry (grower/handler) could serve as either a grower or handler member or alternate grower or handler member on the Board.

To be eligible to participate in the nomination and election process, the order should provide that an individual be a grower or a handler of tart cherries or a duly authorized officer or employee of a tart cherry grower or handler. To discourage potential duplication, eligible growers and handlers would only participate in the nomination and election process in the district where they produce or handle tart cherries. Since it is possible for a tart cherry grower to have production in more than one district and a handler to have handling facilities in more than one district, the proposed order provides that such growers and handlers must choose which district they wish to participate in. The record indicates that neither growers nor handlers would be allowed to participate in the nomination and election process in more than one district during a single fiscal period.

Furthermore, the order should restrict growers and handlers from participating in the nomination process in one district and the election process in a second district during the same election cycle. However, if growers or handlers with operations in more than one district do not participate in the nomination process but do participate in the election process, they should be authorized to select the district in which they wish to vote. To help ensure that proper administration of the nomination and election process is maintained, it is reasonable for the order to require such growers and handlers to notify the Secretary or the Board of their choice of districts prior to participation in the process.

In order that a grower's name appear on an election ballot, the individual's

name must first be submitted to the Board on a nomination petition form. Such petition form would contain the signatures of at least five eligible growers other than the nominee in order to be accepted. The order should provide that petitions for Board membership by growers from District 8 (Washington State) must be signed by two eligible growers other than the nominee. This differs from the procedure used in other districts because there are relatively few tart cherry growers in Washington. It would be reasonable to conclude that should the number of tart cherry growers in Washington significantly increase in the future, this provision could be revised, through informal rulemaking, to more closely approximate requirements in the other districts.

Similarly, in order that a handler's name appear on an election ballot in any district, the nominee's name should be submitted on a petition form signed by at least one other eligible handler. In districts where either a grower or a handler may be elected to the single position (initially Districts 5, 6, 8, and 9), both growers and handlers may be nominated for the single seat.

Testimony supported the inclusion of an order provision that would restrict individuals who are growers, but who may be regulated as handlers while having some or all of their tart cherries custom packed, to participating in the nomination and election process as growers rather than as handlers. Hearing evidence supports the provision that, for purposes of nominations and elections, such grower-handlers not owning or leasing and operating their own packing facilities be identified as growers.

At the hearing, witnesses supported adding a public member to the Board. While the influence of consumers would be implicitly present in the deliberations of the grower and handler Board members, and all meetings would be public, the appointment of a public member would offer many advantages. One such advantage would afford the industry an opportunity to discuss its problems and concerns with someone without an economic interest in the tart cherry industry.

The public member and alternate public member should not be permitted to have a direct financial interest in the production, processing, financing, buying, packing, or marketing of tart cherries except as a consumer; nor be a director, officer, or employee of any firm so engaged. Such public members should be willing to devote sufficient time to regularly attend Board activities and to familiarize themselves with the background and economics of the

industry, as well as with the provisions of the proposed order. Testimony indicated that the public member and alternate public member could, for example, be individuals who are retired food industry executives or are associated with an academic institution. The Board, once formed, could decide what further qualifications, if any, the public member and alternate public member should possess.

During the nomination process, tart cherry growers and handlers in each district would have an opportunity to nominate eligible individuals for the public member and alternate public member positions on the Board. Record evidence indicates that this would be accomplished in the same manner that grower and handler members are nominated. All eligible growers and handlers in each district would have the opportunity to submit the name of a nominee for both the public member and the alternate public member on a petition form provided by the Board or the Secretary. At one of its first meetings following initial appointment and every three years thereafter, Board members would elect, by at least a two-thirds majority of the entire Board, the public member and alternate public member. The Board members would vote for the public member and alternate public member from the list of nominees received from tart cherry growers and handlers. If such nominations are not made, the Board should have the authority to nominate qualified individuals for subsequent election. The persons elected by the Board to fill the public member and alternate public member positions would then be subject to appointment by the Secretary.

A procedure should be in place that provides adequate time for the nomination and election process to be completed and appointments made by the Secretary prior to the beginning of the next term of office. Thus it is reasonable that the Board should announce and solicit nominations at least 180 days before the expiration of the current term of office. Furthermore, a requirement that the nomination petition form be returned to the Board not less than 120 days prior to the then current term's expiration would provide adequate time to complete the election of industry members. Such a procedure would help ensure that appointments by the Secretary are made in time to seat the new Board by the beginning of the next term.

Once the completed petition forms are returned, the Board would distribute ballots containing the names of all eligible grower and handler nominees by district via the U.S. Postal Service, or

such other means as the Board may recommend and the Secretary approve, to all eligible growers and handlers. Hearing evidence indicates that, in Districts 1, 2, 3, 4, and 7, growers would be permitted to vote only for grower members and alternate grower members, and handlers would be permitted to vote only for handler members and alternate handler members. In Districts 5, 6, 8, and 9, where the single seat on the Board may be either a handler or a grower, both growers and handlers may vote regardless of whether the nominees are producers or handlers of tart cherries. In this situation, the member could be a grower and the alternate member could be a handler or vice versa or both.

The Board should have the ability to modify these provisions of the proposed order, or to specify more detailed nomination and election procedures. Consequently, the order should contain provision for the Board, with the approval of the Secretary, to establish rules and regulations necessary and incidental to the administration of the nomination and election process. The order should further provide that the Secretary or the Board may administer the nomination and election process as outlined herein.

Once affirmed, the nomination and election results should be presented to the Secretary for appointment pursuant to § 930.24. Following the Board's submission of the nomination and election results to the Secretary, the Secretary would appoint the grower and handler members and alternate members on the basis of representation provided for in § 930.20. The order should also authorize the Secretary to appoint the public member and alternate public member once elected by the newly appointed Board.

In the case of the initial Board, the Secretary would conduct meetings to nominate initial Board members. All producers of record in the production area would receive notice of the meetings in sufficient time to enable them to attend. Nominations should be received and voted upon at these meetings. Handlers nominations would be accomplished in the same way.

The order should provide for appointment by the Secretary of members and alternates of the Board. The tart cherry growers and handlers should have the responsibility for recommending nominees to the Secretary for appointment. The nomination and election procedure outlined in the order would provide a means of making available to the Secretary the names of prospective members and alternates selected by the

industry under the order to serve on the Board. The Secretary should have the authority to appoint the industry and public members and alternate members to the Board, notwithstanding the list of nominees submitted.

In the event the nomination and election process has not been completed within the time and in the manner specified in the order, the Secretary should have the authority to appoint members and alternates without regard to nominations, in accordance with proposed § 930.25. Such appointment should be from qualified persons as provided in the order.

Each person to be appointed by the Secretary as a member or as an alternate member of the Board should, prior to appointment, qualify by advising the Secretary on a form provided by the Board or the Secretary that such person agrees to serve in the position for which nominated. The information requested on the form would be incidental to the qualifications of each position and would thus provide the Secretary with the information required to complete the appointment process.

Proposed § 930.27 states that the order should provide a method for promptly filling any vacancies on the Board for unexpired terms of office. There may be vacancies caused by the death, removal, resignation, or disqualification of a member or alternate. The order should provide that the Secretary shall be authorized to name a successor to fill an unexpired term from the most recent list of nominations for the Board, from a nomination and election process specifically held to fill the vacancy and made in the same manner as provided for in § 930.23, or from other qualified individuals. Qualification and appointment should be made on the basis of § 930.20 or any redistribution or reestablishment made pursuant to § 930.21.

Proposed § 930.28 states that an alternate member of the Board should act in the place and stead of the regular member during the absence of such member. It continues by adding that an alternate member would not be eligible to serve at a meeting of the Board if the member is in attendance. In the event of the death, removal, resignation, or disqualification of a member, an alternate member would act for the regular member until a successor of such member is appointed. This would ensure that all portions of the production area are adequately represented in the conduct of the Board's business and that the continuity of Board operation is not interrupted. In the event both a member and the respective alternate member are unable

to attend a meeting of the Board, no other member or alternate member would be eligible to serve in that position. Witnesses testified that a member and alternate member are nominated and elected to represent a specific constituency, and that an arrangement that allows another member, even if from the same district, to sit in such position would not best serve the industry. The order should also provide that alternate members have the same qualifications as their respective members.

The Board, under proposed § 930.30, should be given those specific powers that are set forth in section 608c(7)(C) of the Act. Such powers are necessary for an administrative agency, such as the Board, to carry out its proper functions. The Board would administer the order in accordance with its terms and provisions and would recommend rules and regulations necessary to effectuate the terms and provisions thereof. The Board should also have the power to investigate complaints of violations to the order and forward such information to the Secretary, and to recommend to the Secretary appropriate amendments to this part.

The Board's duties as set forth in § 930.31 of the proposed order are necessary for the discharge of its responsibilities. These duties are similar to those typically specified for administrative agencies under other programs of this nature. They pertain to specific activities authorized under the order, such as investigating and compiling information regarding tart cherry marketing conditions, and to the general operation of the order including hiring employees, appointing officers, and keeping records of all Board transactions. The order should delineate Board duties as follows:

(1) The Board should select any officers, including a chairperson and vice-chairperson, necessary for its proper function, and should define the duties of such officers. Other officers might include secretary, treasurer, parliamentarian, or such other officers deemed helpful to the efficient operation of the Board.

(2) The Board should employ or contract with such persons or agents as it finds necessary, and should determine the duties and compensation of such persons or agents. This provides the Board with the ability to organize for the purpose of conducting its day-to-day business. A typical staffing arrangement could include a general manager who reports directly to the Board, and field and office support staff deemed necessary for efficient operation. In some cases, additional staff dedicated to

order compliance would be useful to the Board.

(3) Whenever committees or subcommittees are deemed necessary or advisable, the Board should appoint members or other industry representatives to serve on such committees or subcommittees. These may be producers, handlers, consultants, or other persons who are not members of the Board but who possess some knowledge or could serve the Board in some unique way. Thus, the provisions authorizing the board to appoint subcommittees should include authority for the Board to appoint persons to serve on special subcommittees or as consultants to regular subcommittees, even though they are not members of the Board. Actions recommended by any subcommittee should be subject to the approval of the Board.

(4) The Board should adopt bylaws and establish other rules, including rules of conduct and administration, which are necessary to carry out its duties and responsibilities. These could include rules relating to parliamentary procedures for the conduct of meetings and rules governing Board member and staff compensation for expenses incurred while performing their normal duties.

(5) Prior to the beginning of each fiscal period, the Board should submit a budget of such fiscal period to the Secretary. Each such budget should be accompanied by a report explaining the items appearing therein, as well as a recommendation for an assessment rate for the forthcoming fiscal period.

(6) The Board should keep minutes, books, and records which clearly reflect all of its meetings, acts and transactions. These minutes, books, and records would be subject to examination at any time by the Secretary or an authorized agent or representative of the Secretary. Minutes of all Board meetings, as well as all subcommittee meetings, should be recorded in a minutes book, or similar record. Minutes would assist in answering questions at a later date, and avoid confusion as to what transpired at a given meeting. In order for the record to be complete, minutes should include motions, whether passing or failing, votes, important points of discussion, and all resolutions. Copies of the minutes should be furnished to the Secretary and to all members and alternate members as early as possible following each meeting.

(7) The Board should prepare periodic statements of its financial operations and ensure that copies of each financial statement are made available to growers and handlers for examination at the

office of the Board. Copies of such statements should also be provided to the Secretary.

(8) The Board should have its books audited by a certified public accountant at least once each fiscal period, and at such other times as the Board may find necessary or as the Secretary may request. This audit would normally follow the conclusion of each marketing year. The audit report should show the receipt and expenditures of funds collected pursuant to this part. A copy of this report should be made available to the Secretary, as well as at the principal office of the Board for inspection by handlers and growers. Confidential or proprietary information should be removed from the audit report before making it available to handlers and growers.

(9) Should it be necessary, the Board should act as an intermediary between the Secretary and any grower or handler. This provides that any problems arising at either level can be dealt with in an efficient and orderly manner.

(10) The Board should have the duty to investigate and assemble data on the growing, handling, and marketing of tart cherries. Such data would provide information necessary for the Board to make proper recommendations and to otherwise perform its duties. During the investigation and assembly of data, the Board should acquire information concerning producing acreage and the estimated production of tart cherries on an ongoing basis. Thorough knowledge of growing and harvesting conditions in each of the districts, including information on weather, problems with pests, and new and innovative cultural practices, would be helpful to the Board when making decisions pertaining to quality and volume regulations. Information should be obtained pertaining to the volume of fresh and processed tart cherries in the possession of producers and handlers. With such growing, harvesting, and supply information and knowledge of past, current and projected demand patterns, the Board would be better equipped to make regulatory recommendations to the Secretary.

(11) Whenever the Board provides notice of meetings to its members, the same notice should be provided to the Secretary. This would apply to all meetings of the Board and any of its designated subcommittees. The Secretary should have ample notice of these meetings in order to exercise the supervisory responsibilities provided by law. With the exception of certain meetings held for personnel or compliance purposes, all such meetings

are open to the public. Therefore, all meeting notices should receive widespread distribution. In order for the Secretary to properly exercise oversight authority over the order and its administration, all information relating to the marketing of cherries and the various activities of the Board must be made available.

(12) The Board should submit such available information as the Secretary may request.

(13) The Board should investigate compliance with the provisions of this part. This would include development of a comprehensive plan, to be reviewed and approved by the Board and the Secretary on an annual basis, that contains sound and effective methods for preventing and detecting violations of the order and assurances that responsible staff are following the prescribed procedures.

(14) The Board should be responsible for developing and submitting an annual marketing policy to the Secretary for approval. The marketing policy should contain the optimum supply of tart cherries for the crop year established pursuant to § 930.50 and recommend any such action necessary to achieve such optimum supply. The marketing policy should include an explanation of the marketing problems expected to exist during the season, as well as an explanation of how the regulations recommended by the Board, if any, would be used in an effort to correct or change marketing conditions.

(15) The Board should implement such quantity regulations as are called for by the marketing policy and approved by the Secretary, including the release of any inventory reserve.

(16) The Board should provide thorough communications to growers and handlers regarding its activities and respond to any industry inquiries about its activities.

(17) The Board should oversee the collection of assessments levied under this part.

(18) For the development and conduct of activities, including research and promotion activities, the Board should have the authority to enter into contracts or agreements. Such contracts or agreements would pertain to the rendering of services required by the order and for the payment of the cost of such services with funds collected under the authority of this part. Any contracts or agreements entered into pursuant to this paragraph should provide that contractors submit to the Board a plan and a budget, that the plan or project be submitted to the Secretary for approval, and that the contractor shall maintain accurate records of all

transactions. Such an agreement should also specify that the contractor make periodic reports to the Board of its activities and funds received and expended or any other reports required by the Board or the Secretary. It should also clearly indicate that the Board or the Secretary may periodically audit the records of the contracting party as they pertain to the agreement.

(19) Pending the expenditure of funds as set forth in the annual budget, the Board should have the authority to invest funds collected through assessments as well as income generated by such assessments. Any investments made should be in accordance with applicable Departmental policies. The Board should maximize income opportunities while not putting the funds at risk.

(20) The Board, with the Secretary's approval, may establish standards and grade requirements for cherries produced for frozen and canned cherry products. Prior to making such recommendations, the Board should poll all handlers that would be affected by such regulations to obtain a consensus as to if, when, and how standards and grade requirements might be implemented. The Board, with the Secretary's approval, could establish a requirement for mandatory inspection pursuant to § 930.44.

After review of the requirement for the Board to poll handlers on how the standards and grade requirements might be implemented, the USDA is deleting such requirement from the proposed order. The Board, which is comprised of grower and handler members, has the responsibility of representing the growers or handlers from the district in which such member was represented to serve. It is the Board's responsibility to develop recommendations and/or rules and regulations to implement the sections in the proposed marketing order. Therefore, it is not necessary for the Board to poll handlers on this issue since handlers are represented by members on the Board.

An opponent to this provision testified that this section should be deleted from the proposed order. It was the opponent's position that the market should be allowed to function on utilization of relationships between handlers and buyers and use of the current USDA standards and specifications. However, the preponderance of the testimony supports the authority to authorize the Board to recommend to the Secretary standards or grade requirements in order to provide a consistent quality cherries to be processed into cherry products.

(21) The Board should be able to borrow funds necessary to administer its responsibilities and obligations under this part. Any such transaction should be subject to the Secretary's approval and should not exceed one fiscal period's budget. The Board should normally be required to pay any borrowed funds back within the same fiscal period.

(22) With the Secretary's approval, the Board should establish rules and procedures relative to the administration of this order. Such rules and procedures should be consistent with the provisions of this subpart and necessary for efficient operation of the order and to accomplish the purposes of the Act.

The duties listed in proposed § 930.31 are reasonable and necessary if the Board is to function in the manner prescribed under the Act and the order. It should be recognized that the duties specified are not necessarily all-inclusive, and it may develop that there are other duties that the Board may need to perform which are incidental to, and not inconsistent with, these specified duties.

As set forth in proposed § 930.32, the order should specify a procedure for the Board to conduct its meetings. Conflicting testimony was received during the hearing process pertaining to the number of Board members that should constitute a quorum, as well as to the number of favorable votes required of Board members to pass any recommendations by the Board. The proponents proposed that 12 members, or their alternates acting in their stead, should constitute a quorum. Further, the proponents proposed that for any action of the Board to pass, a simple majority of those present should concur. For example, if the minimum number of 12 Board members, the proposed quorum, were present at a meeting, seven members could conceivably carry a recommendation for regulatory action. The proponent argued that a general voting procedure requiring a higher degree of support for regulatory and administrative Board actions would potentially allow minority district representatives to boycott meetings and thereby disrupt the Board's ability to recommend rules and regulations to the Secretary. This proposal excluded Board action taken to elect the public member and alternate public member, however, in which case affirmation by at least two-thirds of the entire Board was proposed.

During the hearing process, an amendment to § 930.32 was offered by Mr. Lee Schrepel proposing that (1) a quorum consist of at least 14 members,

(2) any action approved by the Board would not be effective upon any district affected by such action unless a simple majority of the Board members from such district also approved the action, and (3) actions involving enactment of volume control, implementation of assessments, inspection, grading, procedural considerations and district representation should require a two-thirds affirmative vote of the entire Board.

In support of his proposed amendments, Mr. Schrepel testified that a quorum requirement of less than 14 Board members could potentially allow a single sales constituency to dominate the Board. He also indicated that the rights and responsibilities of all participants should be protected and that any regulations recommended by the Board not be imposed on a segment of the industry that objects to such regulations.

As indicated earlier, a single sales constituency would have a maximum potential representation on the Board of nine members. Therefore no such sales constituency could dominate the Board if the quorum requirement is less than 14 members, because, as discussed hereinafter the voting requirement for an action to pass should be two-thirds of the entire board. The proponents testified that they anticipate that most of the members would be present for full Board meetings. The proposal that each district must ratify any action by the Board should also not be adopted. Such a proposal is synonymous with requiring Board unanimity on any action and could cripple the effectiveness of the order.

However, Mr. Schrepel's third recommendation is a sound one. Therefore, the order should provide that 12 members of the Board, including alternates acting for absent members, should constitute a quorum and any action by the Board should require that two-thirds of the entire Board support such action. A voting procedure requiring the consensus of at least a two-thirds majority of the entire Board is similar to many of the other fruit, vegetable and specialty crop marketing orders now in effect. Such a voting procedure helps ensure that the industry majority supports any action of the Board and that minority interests are addressed.

If Board membership is increased in the future due to Districts 5, 6, 8, or 9 becoming permanently regulated as proposed in § 930.20(e), the order should authorize a like increase of the quorum requirement through implementing regulations. For example, if District 5 picked up one seat on the

Board in the future, the Board would increase to 19 members. The quorum requirement, in this example, would subsequently be increased from 12 to 13. The quorum would be maintained at a level equal to two-thirds of the total Board membership.

Since the production area encompasses several states and spans the entire width of the country, it is reasonable that the Board be provided with the authority to recommend to the Secretary rules and regulations pertaining to the conduct of simultaneous meetings of groups of its members assembled at different locations. There may be times, due to inclement weather or similar situations, when the Board is unable to assemble at one location. Therefore, the proposed order should also provide for Board meetings conducted via telephone or some other means of communications. To eliminate potential confusion or misunderstanding that may arise when the Board meets at multiple locations, all such votes cast by the Board should be promptly confirmed in writing.

All meetings of the Board should be open to the public with the exception of special meetings held in executive session for consideration of personnel or certain compliance matters, or such other matters that the Secretary may approve. The Board should establish a means of providing advanced notice of meetings to tart cherry growers and handlers as well as other interested parties.

Board members and alternates will necessarily incur some expense while on Board business. Reasonable expenses, which may include those associated with travel, meals, and lodging, should be reimbursed to members while attending Board meetings or performing other duties under the order, in accordance with proposed § 930.33. It is also reasonable that the public member and alternate public member, in addition to reimbursement for incurred expenses, should receive compensation for time served at meetings and while performing other Board authorized duties. The public members and alternate members should be compensated while performing Board authorized duties because attending Board meetings may take them from their normal place of employment, one not associated with the tart cherry industry. Therefore, the order should provide that, except for the public member and alternate public member who shall receive such compensation as the Board may establish and the Secretary may approve, the members of the Board, and alternates when acting as

members, shall serve without compensation but shall be reimbursed for necessary and reasonable expenses as authorized by the Board. The Board at its discretion may request the attendance of one or more alternates at any or all meetings, notwithstanding the expected or actual presence of the respective member(s), and may pay their expenses as aforesaid. The Board may also request nonmembers to attend Board or subcommittee meetings to present an issue of interest to the Board or subcommittee. In this case, the Board should be authorized to pay such individuals' expenses for attending such meetings.

(c) As noted under § 930.31(e), the Board should be required to prepare a budget showing estimates of income and expenditures necessary for the administration of the marketing order during each fiscal year. The budget, including an analysis of its component parts, should be submitted to the Secretary sufficiently in advance of each fiscal period to provide for the Secretary's review and approval. The submitted budget should include a recommendation to the Secretary of a rate of assessment designed to secure all or part of the income required for such fiscal year.

The Board should be authorized under § 930.40 of the proposed order to incur such expenses as the Secretary finds are reasonable and likely to be incurred during each fiscal year. Such a provision is necessary to assure the maintenance and functioning of the Board, and to enable the Board to perform its duties in accordance with the provisions of the order. Necessary expenses would include, but would not be limited to, such administrative items as employee salaries and benefits; establishment of an office and equipping such office; telephone and mail services; and such business and travel related costs for the Board staff as transportation, lodging, and food. As discussed previously, expenses incurred by Board members in attending Board meetings should be a reimbursable expense as well. Other administrative expenses would include those related to inspection and marketing order compliance.

In addition, the order should authorize the Board to incur expenses related to production and processing research, market research and development, and promotional activities, including paid advertising, designed to assist, improve, or promote the efficient production, processing, marketing, distribution, and consumption of cherries.

The proponents testified it would be unlikely, in the foreseeable future, that any activity under § 930.48 would be initiated by the Board unless the current high level of research and promotion activity sponsored by the Cherry Marketing Institute and the New York Cherry Board tapers off. The proponents estimated that producers representing approximately 94 percent of tart cherry production on a national scale are currently financing various production research, development and promotional projects through assessments to these two organizations. The proponents thus testified that it would be unnecessary and redundant for the Board to finance similar activities while such a relatively high level of activity exists, but recommended including the authority for such future activity in the order.

The proposed order should state that expenses incurred due to any approved administrative costs and authorized research, development, and promotion projects could occur on an ongoing basis throughout the fiscal period.

With the Secretary's approval, the Board, under proposed § 930.41, should be authorized to levy annual assessments upon handlers to cover administrative costs and the costs of any research, development and promotion activities undertaken pursuant to § 930.48 that the Board recommends and the Secretary approves. However, as noted earlier, the proponents indicated that it would be highly unlikely that the Board would initiate recommendations for research, development, or promotion related assessments while a high percentage of tart cherry producers are financing such activities through other organizations. It would be reasonable to expect the Board to ensure that handlers in each district are well informed of the assessment rate and how such assessment rate would be allocated among the various approved expenses.

During each fiscal period, the Board would assess each handler on all cherries handled, unless subject to certain authorized exemptions, that handler's pro rata share of the administrative expenses, as well as any research, development and promotion expenses. Assessments should be calculated on the basis of pounds of cherries handled. However, the order should provide that the formula adopted by the Board and approved by the Secretary for determining the rate of assessment should compensate for differences in the number of pounds of cherries utilized for various cherry products. For example, the proponents testified that high value products such as frozen, canned or dried cherries would be assessed one amount and the

low value products such as juice concentrate and puree would be assessed one half of the assessed amount of the high value product.

Testimony supported exempting any handler from paying assessments on cherries diverted as provided in § 930.59. This exemption from assessment would also include cherries represented by grower diversion certificates issued pursuant to § 930.58(b)(2) and acquired by handlers, and those cherries devoted to exempt uses under § 930.62.

In addition to administrative, research, development and promotion expenses, the proponents proposed that assessments be collected from all handlers in all districts to cover the costs of storing the primary inventory reserve. The proponents recommended that all handlers, whether regulated or non-regulated, pay storage cost assessments. Alternative proposals were also received into evidence recommending that such storage cost assessments not be levied. Considerable testimony was received throughout the hearing process concerning this issue.

The proponents testified that the entire industry would benefit from increased cherry prices during periods when a volume regulation is in effect, and not just the handlers and growers in the regulated districts. The proponents emphasized that non-regulated districts would be able to market one hundred percent of their marketable crop while the regulated districts would be required to withhold a determined amount of their marketable cherries from the market. The proponents argued that to excuse the non-regulated districts from paying for a portion of the regulated district's storage expenses would burden regulated handlers not only with such tangible costs, but also with the intangible cost of withholding product from the market. Therefore, in order to thus distribute the costs associated with the potential increase in the grower price of cherries, the proponents proposed that all districts, regulated or not, be assessed for annual storage costs.

However, opponents to the establishment of a storage cost assessment noted that, while the non-regulated districts do indeed have the opportunity to market one hundred percent of their crop, they enjoy such benefit primarily because they are producing less than the amount that would trigger volume regulation in their district, are not contributing to the oversupply situation, and have demonstrated the ability to market all of their crop. Opponents to the proposed storage assessment argued that such a

proposal merely provides a subsidy for those districts responsible for the oversupply situation.

Testimony received during the hearing process indicated that the cost of storage varies with different processed cherry products. For example, the costs associated with the storage of frozen product would generally run higher than the costs associated with the storage of canned, pureed, concentrated and dried product. Testimony also indicated that the cost differential between freezer storage and dry storage is considerable, with the cost of storing frozen product approximately twice that of storing non-frozen product. However, to effectuate the proponent's provision, storage assessments would have to be levied on all handlers such that the full cost of storage would be covered. Thus, under a storage assessment as proposed, handlers putting product into the lower cost, non-frozen storage packs would, to some degree, also be subsidizing handlers packing for freezer storage.

The preponderance of testimony supports the levying of assessments for administrative, research, development and promotion purposes on all handlers, but does not adequately justify the additional burden of an assessment designed to distribute individually assumed costs of storage to the entire cherry industry. Each regulated handler utilizing storage because of an established primary reserve should be independently responsible for any costs associated with such storage. Such an arrangement should also have the effect of increasing the efficiency of storing product since each handler, responsible for carrying the entire cost associated with storing their own product, would seek the most cost-effective storage facilities, would pack the cherry product in a form, frozen or non-frozen, that best matches his or her own individual economic situation, or could choose to divert the cherries into an approved exempt channel.

The proponents did not adequately show why it would be equitable for all handlers to share the cost of storing product when only a portion of them would be utilizing storage, how each producer or handler would benefit economically or practically from such an arrangement, nor why it would be cost effective for the Board or the assessed handlers to be burdened with the costs of administering such an assessment.

Sufficient evidence was not received to indicate that handlers would not be unduly burdened with the increased costs of reporting and record keeping that are directly attributable to a storage assessment, nor that the Board should

sustain expenses associated with the administration of a storage assessment.

The marketing order should contain the authority for the Board to incur administrative expenses and such expenses related to approved research, development, and promotion activities, as well as the authority for the Board to levy assessments on all handlers to cover such expenses. The order should not, however, authorize the Board to incur expenses nor levy assessments for any costs associated with the storage of reserve cherries. The Board should be authorized to pay inspection costs for reserve cherries from assessments collected from all handlers for the administration of the order.

The rate of assessment should be established by the Secretary on the basis of the Board's recommendation and other available information. However, in the event that an assessment rate is established which does not generate sufficient income to pay for the approved expenses, the Board should be authorized to recommend to the Secretary an increase in the rate of assessment in order to secure sufficient funds. The Secretary may approve an assessment rate increase, and such increase should be applicable to all tart cherries handled during the fiscal year to which that assessment rate applies.

The Board should be authorized to accept advance payment of assessments so that it may pay expenses which become due before assessment income is normally received. This would give the Board more flexibility in paying obligated expenses, particularly in the first part of a fiscal year before assessment funds are received.

The Board should also be able to borrow money to meet administrative expenses that would be incurred before assessment income is sufficient to defray such expenses. However, the Board should not borrow money to pay obligations if sufficient funds already exist in the Board's reserve fund or in other Board accounts.

If a handler does not pay any assessment by the date it is due, the order should provide that the late assessment may be subject to a late payment charge or an interest charge, or both, at rates set by the Board with the Secretary's approval. Such charges should be set at rates established to cover additional costs that may be incurred by the Board in attempting to collect overdue assessments, and should encourage timely payments. The period in which payments would be considered late, and late payment or interest charges incurred, should be recommended by the Board and approved by the Secretary.

If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, such excess should be established as a reserve or refunded pro rata to the handlers, under proposed § 956.42. The Board should be authorized to carry over excess assessment income into the following fiscal period as a reserve. If such excess income is not carried over as a reserve, handlers should be entitled to a refund proportionate to the assessments each handler paid. The proposed order should indicate that the amount held in reserve for administrative, research, development and promotion expenses should be held at or below an amount equal to approximately one year's operational expenses.

One purpose of the reserve fund would be to provide stability in the administration of the order in the case of a short crop. Also, establishing a reserve should minimize the necessity of the Board borrowing money at the beginning of a fiscal year or raising an assessment rate during a season of less than anticipated production.

Reserve funds could also be used to cover necessary liquidation expenses in the event the order is terminated. Upon such termination, any funds not needed to defray liquidation expenses should be disposed of as determined by the Secretary. To the extent possible, however, these funds should be returned pro rata to the handlers from whom they were collected.

All funds collected by the Board through assessments or any other provision of the order should be used only for the purposes set forth in the order. The Secretary should at all times have authority to require the Board, its members and alternates, and its employees and agents to account for all receipts, disbursements, and property and records of the Board. Likewise, when any of the above individuals ceases to act in his or her official position, that person should account for all receipts, disbursements, property or records of the Board for which such person has been responsible. In the event the order is terminated or becomes inoperative, the Board should appoint, with the approval of the Secretary, one or more trustees for holding records, funds or other property of the Board.

(d) Under proposed § 930.48, the order should authorize the Board to establish and provide for the establishment of production research, marketing research and development, and marketing promotion projects, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption,

or efficient production and processing of tart cherries. Funding for these programs should come from any authorized receipts of the Board including assessment income, voluntary contributions and miscellaneous income such as interest.

The Board should have the authority to initiate new production and marketing research projects, as well as to contribute to research which may currently be taking place.

As discussed previously, marketing order proponents testified that this authority would not be used unless existing State programs for these purposes were terminated or their operations suspended. Currently, Michigan, Utah, Wisconsin, and New York have assessment programs of \$10 to \$15 per ton that are paid by growers to support the Cherry Marketing Institute (CMI) and the New York Cherry Board. The CMI represents growers in Michigan, Utah, and Wisconsin. Both the New York Cherry Board and CMI conduct substantial domestic generic promotion programs for tart cherries. At this time the tart cherry industry does not support any brand advertising. These activities are supported only by the various finished product manufacturers.

The States of Washington, Oregon, and Pennsylvania have no state programs at this time to authorize assessments for this purpose. The proponents testified that about 94 percent of the tart cherry industry is now supporting marketing and production research and development, and promotion under the various state organizations.

The record indicates that some of the primary responsibilities of the CMI are to fund projects relating to: short-term production research directed at improving current horticultural practices; long-term research directed at developing new varieties of cherries with increased market appeal and greater resistance to pests and climate factors; domestic promotion activities covering food service and consumer markets; export development in Japan, Korea, and Taiwan; new product applications; and nutritional evaluations. These are also examples of the types of programs that could be implemented under the marketing order. When this authority is utilized the assessments would be collected, pursuant to § 930.41(a).

The record does not indicate the amount of assessment funds that may be allotted for research and promotion programs. The Board should have the responsibility to determine the amount of funds spent on each program each

year. Such determination should be based on the needs of the industry each year. The amount of funds to be spent on research and promotion programs would be included in the annual budget required to be submitted to the Secretary for review and approval.

All research and promotion projects to be conducted under the order in a given fiscal period should be required to be submitted by the Board to the Secretary for approval prior to being undertaken. Further, the Board should be required to report at least annually on the progress of each project and at the conclusion of each project. Such reports should be made to the Secretary.

The proponents did not provide specific testimony on paid advertising authority. However, the record supports the proposition that such authority should be added to allow the Board to implement such a program in the future, if necessary. Therefore, the authority is proposed to be contained in the order.

(e) In accordance with proposed § 930.44, the Board should have the authority to recommend regulations to the Secretary regarding minimum quality and inspection requirements. Also, the Board should be authorized to recommend to the Secretary the amendment, modification, termination, or suspension of any regulation issued under this part, when deemed necessary.

Recent technological improvements in the industry have enabled processors to install sophisticated equipment to reduce pit counts and improve color sorting. As the technology improves further, the Board should have the authority to respond by adopting additional quality standards for cherries, especially as to pit count. The proponents testified that any regulation that could be implemented to cause a reduction of the pit counts in cherries consumed by the public would be beneficial to growers and consumers. The proponents further testified that the sale of poor quality cherries creates image and marketing problems for the entire tart cherry industry, both domestically and internationally. Therefore, the Board should have the authority to implement quality regulations so that the industry can provide a consistent, quality product to consumers.

Marketing order proponents proposed that when quality control regulations are implemented, no handler should be allowed to process cherries into manufactured products or sell manufactured products in the current of commerce unless the cherries used in such products meet the applicable requirements. The inspection and

certification of tart cherries would be carried out by USDA. The proponents testified that cherries should be required to be inspected again if they are regraded, resorted, repackaged or in any way further prepared for market. This would be done to cover those situations where a handler may need to repackage or resort a product that was already packaged and inspected for a client. This provision is a safety valve designed to prevent poor quality product from entering the channels of commerce.

The Board should also have the authority to recommend to the Secretary such standards of grade, quality or condition of cherries to be placed in the inventory reserve. This would insure the quality of the inventory reserve once it is released to the handlers and sold in the marketplace.

After obtaining inspection and certification of tart cherries, a handler would be required to submit a copy of the inspection certificate to the Board. The Board, with the approval of the Secretary, should have the authority to establish rules and regulations to implement the provisions of this section.

An opponent offered testimony concerning § 930.44 providing exemptions for very small handlers and specialty packs for which grading may be inappropriate. The Board should establish a fixed cost per pound that small handlers would pay for inspection. The opponent testified that handlers that handle less than one million pounds of cherries per year should be exempt from the proposed order regulations, if implemented. One million pounds was chosen because these handlers would be severely burdened with providing personnel to comply with reporting requirements under a marketing order.

The preponderance of the testimony supports providing authority for minimum quality and inspection regulations. Also, several witnesses testified that the burden for handlers would not be severe. The information required to be submitted to the Board under a marketing order would be similar to information already available to handlers. Therefore, this provision would remain as proposed.

(f) In accordance with proposed section 930.50, whenever the Board believes that regulations issued pursuant to section 930.51 regarding free and restricted percentages would be appropriate, it should have the authority to recommend such regulations to the Secretary. The proponents have testified that the proposed volume control regulations would result in a supply management program which would

compensate for the extremely erratic natural production cycles of tart cherries and which would provide the market with a more stable supply of tart cherries. Record evidence shows that a major flaw in the previous tart cherry order was that the process used to establish the marketing policy was prone to too much subjective decision-making by the Board which led to non-uniform policies and political skirmishes. The proponents therefore sought to develop a more objective system that is less subject to outside influences and is more market driven.

#### Marketing Policy

Record evidence indicates that a volume control program should entail several steps. Section 930.50 of the proposed marketing order states that the Board would meet on or before July 1 of each crop year. At this meeting, the Board would review sales data, inventory data, current crop forecasts and market conditions in order to establish an "optimum supply" level for the crop year. The proponents testified that the USDA forecast is the most accurate estimate available at that time to use in the marketing policy calculations. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year for both buyers and sellers. The optimum supply would be calculated as 100 percent of the average sales of the prior three years, plus a desirable carryout inventory that would not exceed 20 million pounds. In addition, there should be authority, through informal rulemaking, to adjust the 20 million pound desirable carryout figure upward, if necessary. Record evidence shows that the 20 million pound figure is based on a historical pattern of the amount needed in inventory for the industry to operate. Once the optimum supply is calculated, it would be announced to the industry by the Board. Testimony showed that this could be done as early as May or June but definitely by July 1.

After the calculation of the optimum supply, the Board would establish preliminary free and restricted percentages. This would be done on or about July 1 of each crop year. Subsequently, as discussed below, the Board may also establish interim percentages and recommend final percentages to the Secretary. Evidence indicates that when the Board computes preliminary and interim percentages, or when it determines final percentages for recommendation to the Secretary, it should also consider the following factors: (1) The estimated total production of tart cherries; (2) the

estimated size of the crop to be handled; (3) the expected general quality of such cherry production; (4) the expected carryover as of July 1 of canned and frozen cherries and other cherry products; (5) the expected demand conditions for cherries in different market segments; (6) supplies of competing commodities; (7) an analysis of economic factors having a bearing on the marketing of cherries; (8) the estimated tonnage held by handlers in primary or secondary inventory reserves; and (9) any estimated release of primary or secondary inventory reserve cherries during the crop year.

Record evidence indicates that preliminary free and restricted percentages should then be calculated in the following manner. The Board would deduct the carryin inventory from the optimum supply figure (adjusted to raw fruit equivalent) and divide that figure by the current year's USDA crop forecast. The carryin inventory figure reflects the amount of cherries that handlers actually have in inventory. If the resulting quotient is 100 percent or more, the Board should establish a preliminary free market tonnage percentage of 100 percent. If the quotient is less than 100 percent, the Board should establish a preliminary free market tonnage percentage equivalent to the quotient, rounded to the nearest whole percent, with the complement being the preliminary restricted percentage. The Board would be responsible for announcing these percentages to the industry in an expedited manner. If a restricted percentage is announced, each handler would be responsible for setting aside a portion of tart cherries which that particular handler handled.

If necessary, the Board should be able to modify the preliminary free and restricted percentages to adjust to the actual pack occurring in the industry. The Board may adjust the percentages between July 1 and September 15 of the crop year. However, the optimum supply could not be adjusted. Record evidence shows that the Board would review weekly production reports to determine if it is necessary to adjust the preliminary percentages. If interim percentages are established, the Board would be responsible for announcing them quickly to the industry. Timely announcement would be crucial since the proponents testified that these percentages could be adjusted as often as once per week.

Finally, no later than September 15 of each crop year, the Board would recommend the establishment of final free and restricted percentages to the Secretary. At this time, the Board would

have available actual production and delivery figures to review to make any needed adjustments to the percentages. The Secretary would establish the final free and restricted percentages through the informal rulemaking process. These percentages would release the tart cherries necessary to achieve the optimum supply figure calculated earlier. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent would be the final restricted percentage.

An example of the marketing policy calculations is discussed below. The USDA crop forecast for the example is 256 million pounds and the optimum supply is 263 million pounds. The total industry carryin is 40 million pounds. The total production in the regulated districts is 233 million pounds. For this example, the average sales of the prior three years is 243 million pounds, and added to it is a 20 million pound desirable carryout, which equals an optimum supply of 263 million pounds. The preliminary percentages would then be calculated by deducting the carryin from the optimum supply to equal a free tonnage of 223 million pounds. The free tonnage would then be deducted from the USDA crop forecast. This would result in a requirement for a 33 million pound inventory reserve. The free and restricted percentages would only apply to those handlers in the regulated districts. Therefore, the percentages would be calculated by dividing the restricted tonnage volume by the regulated district production (233 million pounds would be divided into 33 million pounds to obtain the restricted percentage). This would result in a preliminary free percentage of 86 percent and a restricted percentage of 14 percent for those districts that are being regulated.

#### Illustration

1. Average movement is based on a three year rolling average of sales and movement, plus a desirable carryout of up to 20 million pounds. For example, if tart cherry sales for 1992–1994 had been, respectively:

1992—243 million pounds  
1993—245 million pounds  
1994—241 million pounds

The average movement for the 1992–94 three year period would have been 243 million pounds. Adding a carryout of 20 million pounds produces an Optimum Supply Formula (OSF) of 263 million pounds.

2. Annually, deduct the free carryin inventory from the optimum supply. This would provide the tonnage

requirement from current year production to meet market needs. In this illustration, if OSF is 263 million pounds and the carryin inventory is 40 million pounds, the free tonnage requirement for this year's crop would be 223 million pounds (263 million – 40 million).

3. Thus, using an initial estimated production of 256 million pounds, with 223 million pounds required, processors in the regulated districts would have to set-aside or divert 33 million pounds. Assuming for this illustration that the regulated districts produced 233 million of the industry's total of 256 million pounds, handlers would have a restricted tonnage set-aside of 14 percent (33 million/233 million). This would result in a preliminary free percentage of 86 percent.

Once harvest begins in late August or early September, the Board would be able to obtain better information on the final volume of product being packaged and adjust the percentages using actual figures. The Board could calculate and announce interim free and restricted percentages between July 1 and September 15 based on this new information.

No later than September 15, the Board would compute the final free and restricted percentages. At that time, the Board would recommend the percentages to the Secretary to establish them through the informal rulemaking process. For this example, we would use the crop year free tonnage of 223 million pounds calculated from the previous example. If the final crop year estimate is 296 million pounds and the final production for the regulated States is 256 million pounds, the final percentages would be calculated by deducting the current crop year free tonnage from the 296 million pound final crop estimate to equal a 73 million pound inventory reserve. The 73 million pound inventory reserve would be divided by the Regulated districts final production of 256 million pounds. This would equate to a 33 percent restricted percentage and a 66 percent free tonnage. Since 73 million pounds is above the 50 million pound maximum allowable in the inventory reserve, handlers would have to divert 23 million pounds or establish a secondary reserve.

The proponents testified that the Board should be able to modify its marketing policy in the event of a national emergency, crop failure, or other major change in economic conditions. This would provide a type of "escape hatch" should market conditions change so drastically from what Board projections or from

historical patterns on which the marketing policy outlined in this order is based. The Department agrees with this recommendation. The Board would be required to hold a meeting, and file a report with the Secretary within 5 days which shall show such modification and the basis therefor. For example, the Board could file a report with the Secretary that would request that the Board be allowed to release more or all the cherries, from any established inventory reserve, than what was established under the marketing policy formula. This could be done if a weather disaster was experienced during the harvest season in one of the production districts under the marketing order. The Board could therefore recommend that the free and restricted percentages not apply for that current crop year, lower the restricted percentage, or release more reserve cherries to the industry.

The proponents testified that the Board should recognize growers that cooperatively form a national bargaining agency in order to enhance their chances for a higher price for their cherries. In recognition of such organization, the Board should be able to release less than 100 percent of the free market tonnage for sale if a grower price had not been set. However, it would be required to release at least 65 percent of the total free market tonnage by September 1. This would allow handlers to make marketing plans, sales, and contractual agreements in order to market the new crop in a timely fashion. If no grower price is established by September 1, the Board must thereafter release all of the free market tonnage. However, after further review of this issue, the USDA has determined that such a provision should not be contained in the marketing order. Record evidence does not adequately explain how such a provision would work or what the benefits to growers would be. Also, the record does not contain adequate information relating to the composition, function, or the limits and bounds of a bargaining agency. Therefore, this provision should not be adopted in the proposed marketing order.

#### Inventory Reserve

The proposed order provides that if restricted percentages are established, handlers would be required to set aside a portion of cherries handled. Testimony at the hearing indicated that a handler could fulfill such restricted percentage amount by either establishing an inventory reserve or by diversion of product. There would be two types of inventory reserve—a

primary and secondary inventory reserve. The inventory reserve would be the sole property of the handlers who place products into the reserve. The proponents testified that this represents a significant improvement over ownership of the reserve by growers under the previous order. It is the proponent's view that handler ownership should help market forces determine the sales of released reserve cherries. Record evidence shows that handlers should be able to place cherries in their inventory reserve in any processed form. This would include individually quick frozen (IQF), canned product, frozen 5 plus 1 (25 pounds of cherries to 5 pounds of sugar), concentrated juice, dried product, etc. It was explained at the hearing that handlers would make individual business decisions as to the processed form in which they would wish to store their inventory reserve. This would allow maximum flexibility for handlers in meeting their restricted percentage requirements and storing inventory reserve cherries.

The proponents testified that, at the end of the processing season during which there is volume control, a regulated handler would be required to have an established inventory reserve and/or have proof of diversion of that handler's total restricted percentage requirement. It would not matter whether that handler actually processed and packed such inventory reserve cherries, or whether the handler purchased the cherries from a different handler within the regulated area and stored them at that location, as long as proper documentation is provided to the Board.

The proponents also testified that authority should be added to the order to allow a grace period for handlers to set up their inventory reserves after the processing season. This would allow handlers to appropriately document cherries that are being placed in the inventory reserve and to compile any applicable diversion certificates. In the proponents brief, a grace period of 30 days was specified. The Board, with the approval of the Secretary, would be able to establish rules and regulations to provide guidelines for handlers in complying with any restricted tonnage requirements. In view of the foregoing, these proposals relative to the industry reserve should be adopted and are included in this decision as proposed.

In addition, the record supports order authority for a handler bonding requirement. This would be another mechanism by which handlers would be able to comply with the restricted tonnage percentage, if established. The

Board would establish a date by which the inventory reserve must be established by each regulated handler. A bonding requirement would allow that date to be deferred if the handler obtains a bond equivalent to the value of the cherries such handler would have placed in the inventory reserve. Testimony did not provide details as to how this particular provision would be applied. However, the USDA is including the provision in the proposed language. The bonding requirement is similar to authority under other marketing order programs. The Board, with the approval of the Secretary, could develop rules and regulations which provide guidelines to implement the bonding authority.

The proposed order should require that the maximum percentage of restricted cherries which may be established as a primary inventory reserve not exceed 50 million pounds. Handlers should also be authorized to establish individual inventory reserves in excess of the 50 million pounds that would be classified as a secondary reserve. The proponents testified that the 50 million pound cap would help prevent an exceedingly large reserve from having a dampening effect on the market for tart cherries. Also, a very large inventory reserve would cost more to store over an extended period of time. A larger reserve may not be sold in time to offset the high investment of storing the reserve.

A witness testified and offered an alternative of 75 million pounds as the inventory reserve cap instead of the proposed 50 million pound cap. The witness testified that 75 million pounds would work better. Because of lack of testimony to support this alternative, the 50 million pound cap would remain as proposed by the proponents.

#### Inventory Reserve—General

Once a restricted percentage is established, each handler could establish an inventory reserve to meet such handler's restricted percentage. As previously discussed, handlers would be able to place cherries in any form in the reserve. Each handler's reserve portion would be computed by taking the sum of the multiplication of the weights of cherries in each lot of cherries the handler handled during the fiscal period by the restricted percentage. Rules and regulations would establish the manner in which processed products would be converted to raw fruit equivalents for each type of storable product.

The record indicates that a handler's equity in the primary inventory reserve could be transferred to another person.

A handler could elect to do this if such handler has no storage area remaining to store a primary inventory reserve. A handler would have to notify the Board if this authority is to be utilized. In addition, handlers would be encouraged to have written agreements with growers who deliver cherries to them. Such agreements could include provisions describing how the restricted percentage cherries delivered to the handler would be handled and what share, if any, the grower would have in the eventual sale of any inventory reserve cherries. Such agreements could also cover grower reimbursement for the sale of primary inventory reserve cherries.

Testimony at the hearing indicated that the Board could require reserve cherries to meet certain standards of grade, quality, or condition. All unprocessed cherries would be inspected by the USDA prior to placing them in an inventory reserve. A certificate of such inspection would show the name and address of the handler, the number and type of containers in the lot, the grade of the product, the location where the lot is stored, identification marks, and a certification that the cherries meet the prescribed standard.

All inspection costs of inventory reserve cherries would be paid by the Board. The USDA considered modifying this provision to provide that inspection costs be paid by the individual handler placing cherries in the inventory reserve. This would then be similar to the modification to the proposed order regarding storage costs to be paid by the regulated handler rather than by a separate storage assessment on all handlers. However, after further examination of the record, the USDA has determined that the industry as a whole would benefit by providing quality standards for cherries to be placed in the inventory reserve and later released to be sold in the marketplace. The proponents offered testimony that setting quality standards for inventory reserve cherries would be a benefit to the entire industry. Therefore, it would be appropriate for the Board to pay for inspection. The inspection costs would be paid from the administrative assessment fund.

The record does not indicate any specific quality standard for the inventory reserve. Thus, it should be the Board's responsibility to establish, with the approval of the Secretary, such quality standards. Promptly after inspection and certification, each handler would submit a copy of the certificate of inspection to the Board.

A witness testified that inspection on the inventory reserve should not be

required. The witness stated that tentative industry committees made up of pie fill, juice and IQF processors could propose different regulations to ascertain the quality of the product in the inventory reserve without requiring inspection. The preponderance of the testimony supports inspection of cherries placed in the inventory reserve, if recommended by the Board and approved by the Secretary. Inspection of the inventory reserve would ensure good quality product is placed into the reserve and is still of good quality when released and sold from the reserve. Therefore, the witness's proposal is not included in the proposed order.

Record evidence indicates that it would be the individual handler's responsibility to rotate cherries placed in the inventory reserves by putting new cherries in and taking old cherries out. Rotating cherries in the inventory reserve is not a requirement under the order. However, it would benefit the industry if it is done. This would insure that good quality cherries are being released when inventory reserve cherries are sold. Handlers would be required to notify the Board of any changes in lot numbers, etc., when inventory is rotated and provide proof of inspection of cherries used to produce the storable product. Since rotation is voluntary by each handler, the type of storage chosen would impact on how frequently rotation is required. Generally, the cost of inspecting cherries to be rotated into reserve inventories should be borne by the Board. However, the Board should have the authority, subject to the approval of the Secretary, to limit the number of inspections of cherries to be rotated into inventory reserves for which the Board would be financially liable.

Handlers would be responsible for holding inventory reserve cherries until released by the Board. So that such release is equitably apportioned, the Board would set the quantity to be taken out of each particular handler's reserve. Handlers would not be required to market such cherries immediately upon release from the reserve. Once released, the cherries could be marketed at appropriate times depending on each handler's marketing plan. Handlers would not be allowed to forward contract or, in any other way, market reserve cherries before receiving an official release from the Board.

The proponents testified that if a secondary reserve is established, all costs of that reserve, including inspection costs, should be paid by the individual handler. The record indicates that a secondary reserve established by a handler would be an option for a

handler to consider when the reserve is above the 50 million pound cap. Therefore, the handler should assume all the responsibility of a secondary reserve since there are other options (redeeming grower diversion certificates, diverting at the handler's processing facility, etc.) handlers could use to meet their diversion requirement.

All other requirements established to operate the primary reserve should apply to a secondary reserve established by an individual handler. These could include quality standards for inventory reserve cherries and inventory reserve releases.

A witness testified by offering an alternative proposal to the proponent's proposal. That proposal would eliminate the secondary reserve. The witness testified that there are many market factors which dictate against putting up a large reserve. For example, handlers would have to consider the costs of storing a large reserve. This proposal is not included in the proposed order because a secondary reserve is an option the handler could choose. If a handler does not want to pay for storage costs of a secondary reserve, the handler could choose to divert at the plant or redeem grower diversion certificates.

#### Reserve Releases

Record evidence indicates that the volume control provisions should provide for opportunities for the primary inventory reserve to be released throughout the year to handlers that are in regulated districts. No cherries should be released from the secondary reserve until all cherries in any primary inventory reserve have been released.

A witness testified that single districts should be allowed to release inventory reserve cherries when they are needed to satisfy a specific market. If such a release occurs in one district, those cherries could be sold into that market. Other districts who have inventory reserve released could not sell their cherries into those markets. After review of this modification the USDA has determined that such a modification would not be equitable to all handlers. Also, there was no additional testimony as to how such a provision would operate in the industry. Therefore, such a modification is not included in the proposed order.

The proposed marketing order specifies four possible releases of primary inventory reserves under §§ 930.50 (g) and (j) and 930.55(a).

The first, under proposed § 930.50(g), would release up to an additional 10 percent (above the optimum supply level) of the average of the prior three

years sales if such inventory is available in the primary inventory reserve. The proponents proposed that this release would take place after all handlers had been polled and deemed it advisable to release additional cherries into the market for market expansion. The proponents testified that handlers would be polled as quickly as possible and the Board would make the final decision on the release based on the handler vote. The USDA would be informed of the outcome of the voting process. The proponents also testified that this release would be up to an additional 10 percent of the optimum supply and could take place a couple of times a year to reach the 10 percent total.

After review of this proposal, the USDA has revised this reserve release mechanism to more closely follow USDA policy guidelines. As proposed by the proponents, the polling of handlers to determine the release of up to 10 percent would be difficult to administer and inconsistent with the Secretary's Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders (Guidelines). The Guidelines state that, under volume control programs, primary markets should have available a quantity equal to 110 percent of recent years' sales in those outlets before the Secretary would approve secondary market allocation or pooling. This is to assure plentiful supplies for consumers and for market expansion while retaining the mechanism for dealing with burdensome supply situations.

The proponents' proposal is revised by requiring the additional 10 percent to be made available to handlers, without a polling mechanism. However, for this release only, individual handlers would be able to decide if they need the additional tonnage and inform the Board so that their reserve cherries may be released to them. Those handlers not desiring the additional inventory would not have it released to them. This revision would be consistent with the Guidelines, which were discussed at the hearing, since the tonnage would be required to be made available to the industry, but actual release of inventories would be based on individual handlers projected needs and situations.

The second release, under § 930.50(j), would occur in years when the expected availability from the current crop plus expected carryin inventory does not fulfill the targeted availability of 100 percent of the average annual sales in the prior three years plus the desirable carryout (optimum supply). The Board would release, not later than November

1 of the current crop year, such volume from the inventory reserve. This release would be made to all handlers holding primary inventory reserve and is a required release to be made by the Board if the above conditions are met and inventory reserve cherries are available. This provision would assure that inventory reserves would be utilized to stabilize supplies available on the market. In this case, handlers would be required to accept the released inventory reserve cherries, if available, for their own use. Under these circumstances, most handlers would want more cherries because the current supply is not available to fulfill demand. Testimony at the hearing indicated that reserve inventories released to handlers could be sold into any market as free tonnage cherries. In addition, any secondary inventory reserve cherries could be released if the release of the total primary inventory reserve does not bring total available supplies up to the optimum supply level.

The third release of the reserve is proposed under § 930.54(a) which would allow the Board to recommend to the Secretary a release of a portion or all of the primary (and secondary) inventory reserve. In order to make this release, the Board would need to determine that the total available supplies for use in normal commercial outlets do not equal the amount needed to meet the demand in such outlets. This could happen if there was a tart cherry crop loss in Europe or a significant U.S. blueberry or other competing crop loss. In these instances, more tart cherries could be made available to supply the unexpected demand caused by such crop losses.

The proponents also proposed the authority under § 930.54(b), for the Board to establish, through informal rulemaking, circumstances in which an individual handler may sell any or all of their inventory reserve cherries into the following markets: Charitable uses; state government, USDA or other non-military federal agency purchases, any experimental purposes, and any nonhuman use, including animal feed. This provision would allow the Board to specify when handlers can sell inventory reserve cherries into these outlets.

After review of this proposal the USDA is deleting this provision from the proposed order. The Board should not be placed in the position of deciding whether inventory reserve cherries should be released to individual handlers for specific sales. Handlers would be able to sell cherries into these outlets by using their free tonnage

cherries or cherries that are released to them from the inventory reserve. The Board could address this issue under the exempted use provision (§ 930.62). The Board is authorized to expand the list of exempted uses, therefore the Board could specify those outlets that handlers can sell reserve cherries into after notifying the Board. For the above reasons the USDA has deleted this portion of the proposal and modified § 930.62 as discussed above.

#### Diversion—General

Handlers would be allowed to choose to meet their restricted percentage obligation by placing cherries in the primary inventory reserve or diverting the cherries, or a combination of both. Record evidence shows that cherries could be diverted either by the grower at the orchard or by the handler at the processing plant. Handlers and growers choosing to divert would save production, cultural, processing, storing and inspection costs.

A grower could choose to divert if such grower's crop is of poor quality due to hail damage or some other climatic condition. By choosing to divert the poor quality crop, the grower could be provided income from redeemed diversion certificates. In addition, poor quality fruit would be kept off the market.

Handlers choosing to divert would save processing, storage and secondary reserve inspection costs if they divert cherries at the plant. The handler could choose the best cherries to process, and divert the less desirable cherries or contribute them to a Board approved food bank. The specifics of both proposed diversion programs are discussed below.

#### Grower Diversion

There are no order provisions which would require a grower to divert tart cherries. Grower diversion would be completely voluntary. Growers could choose to divert because they have an abundance of low value, poor quality cherries or they are unable to find a processor willing to process some or all of their cherries because of a large crop. Before choosing to divert, the grower would most likely evaluate the harvesting and other cultural costs that could be saved by diverting and locate a handler that would be willing to redeem such grower's diversion certificate. Record evidence indicated that a portion of the production of growers choosing to divert would be left unharvested until the cherries are too ripe to be of commercial use. Growers who elect to divert their cherries and who wish to obtain diversion

certificates (explained below) would have to file an application with the Board for such diversion to be approved. The proponents stated that rules and regulations would need to be promulgated to implement provisions for diverting cherries by growers. These regulations could include: (1) The form and content of applications and agreements including provisions for supervision and compensation for such supervision by the Board; and (2) provisions for mapping procedures to identify growers' production and acreage locations. The proponents testified that diversion certificates should only be valid for one crop year. This would allow the Board to account for all cherries produced in the crop year and, since diverted cherries count as delivered cherries for marketing policy calculations, would allow the Board to calculate accurate preliminary and final percentages. The proponents also testified that the diversion program would be easier to administer if the diversion certificates were redeemed in the same crop year in which they were issued. However, the proponents testified that the Board should be able, through informal rulemaking, to develop rules that would apply to possible circumstances in which diversion certificates might be able to be carried forward into the next crop year.

Growers wishing to divert all or a portion of their crop could be required to submit maps to the Board that specify the area(s) where cherries would be left unharvested. Several growers testified at the hearing that most growers have maps of their orchards and that it would not be an undue burden to submit that information to the Board. Once the Board approves a grower's application for diversion and verifies diversion of the cherries, the Board would issue a diversion certificate to the diverting grower. The diversion certificate would specify the amount of cherries that were diverted. The grower could then take the diversion certificate to a handler to be redeemed. A handler could redeem the certificate for cash, by paying higher prices for nondiverted cherries, or through other financial arrangements between the two parties. Any such arrangements between growers and handlers concerning diversion certificates would not be part of the marketing order. Such decisions could vary among individual growers and handlers and among growers and handlers in different regions of the regulated area.

As an example, if a handler normally receives 1,000 tons of cherries and a restricted percentage of 20 percent is established, that handler would expect

to have to place 200 tons of cherries into the primary reserve. If the handler receives grower diversion certificates (which are treated as though they are actual cherries delivered), the volume of cherries required to be placed into reserve could be reduced. Thus, if the handler received 1,000 tons of cherries, with 50 tons represented by diversion certificates, and a restricted percentage of 20 percent is established, the actual tonnage required to be stored in the primary reserve would be 150 tons (200 tons minus the 50 tons of diverted cherries). Handlers would value certificates to the extent they could reduce their operating costs through the selective use of the best quality cherries available for initial delivery and/or the avoidance of processing and storage costs for reserve cherries. Handlers could also receive higher prices for processed products made from the best quality cherries. This would create opportunities for individual growers and handlers to arrive at different financial arrangements depending on the quality of the cherries available for delivery, whether contractual obligations exist for all or a portion of the grower's crop, the processing capacity of the handler, the size of the crop which exceeds market demands, individual handler's financial situations, etc.

Handlers may want to limit the volume of the primary inventory reserve that they would be responsible for and therefore, could request their growers to divert cherries in the orchard rather than at the processing plant. Nonharvest of the cherries would be considerably cheaper than incurring the costs of picking, cooling and hauling cherries to the handler's facility. A handler might also consider redeeming grower diversion certificates if they could receive and handle a larger volume of better quality cherries from other growers.

The proponents also testified that diversion certificates should be issued to growers in the event an act of nature damaged or destroyed what would otherwise have been a deliverable crop. In the event of a disaster, growers are faced with the very tough decision of whether to harvest a heavily damaged, and usually poor quality, crop, and deliver it to a handler for processing, or to leave the crop unharvested. By leaving the crop unharvested, the grower would have no income from the crop. However, harvesting the crop could result in a considerable quantity of poor quality fruit making its way into marketing channels and could add needlessly to the grower's costs. In addition, poor quality cherries in the

marketplace could depress market prices for all cherries. The proponents testified that issuing a grower diversion certificate to growers with damaged cherries could increase grower income, which is one of the purposes of the Act and the order. Record evidence supported that this should be limited solely to otherwise harvestable fruit that was damaged by acts of nature. For example, in the event of an early frost, preventing the initial setting of the cherries and resulting in no crop to harvest, this provision would not apply. Special precautions are expected to be taken by the Board to ensure that harvestable cherries were in fact not harvested, and were subsequently shaken on the ground or otherwise permanently removed from the market. The proponents testified that the Board may want to supervise some types of grower diversion. Additionally, the proponents testified that such unharvested fruit would be calculated in computing the final free and restricted percentages. Unharvested fruit for which diversion certificates are issued should also be used in the calculations in the marketing policy because such fruit would have been harvested if not diverted.

There was considerable discussion on the record concerning equity of this provision and the effect on the marketing policy. Also, one of the parties stated in his brief that the practice allowed under the proponents proposal grants a document of potential economic value in exchange for something of no value—cherries which are unmarketable because of damage of some kind. It was therefore, argued that, in no case should diversion certificates be granted for other than mature, harvestable cherries.

The Board would be required to ensure that diversion credit is not given to growers whose fruit was destroyed before it set and/or matured on the tree. Diversion credit would only be given to growers whose harvestable fruit was damaged or destroyed due to tornadic winds, floods, etc.

The proponents also testified that diversion credit could be given for fruit damaged or destroyed prior to full maturity that is not likely to enter the stream of commerce as defined under the proposed marketing order. However, counting this "destroyed, but to be diverted" cherries as though they were actually produced would result in a more restrictive inventory reserve percentage, applicable to all handlers. This would occur because the destroyed but diverted fruit would be counted in the final delivery figures used in computing the final and restricted

percentages. If the final crop figure is increased, it would result in a more restrictive percentage. This provision would create a form of crop insurance for growers which is inconsistent with these types of programs. Therefore, the proponent's proposal to grant diversion credit to growers for such unharvestable fruit is not included in the language of this recommended decision.

The USDA is including amendatory language that would recommend growers notify the Board if they are unable to redeem their diversion certificates. The Board could act as a clearinghouse and inform handlers that diversion certificates are available for redemption. The Board could recommend rules and regulations to specify the details of this provision. One such provision may be to include a date by which all growers must inform the Board that they have certificates remaining to redeem. The Board would then be able to assist growers in locating handlers willing to redeem their diversion certificates. However, the Board has no authority to require handlers to redeem certificates or establish prices or pricing guidelines for diversion certificates.

#### Handler Diversion

The other form of diversion would be by handlers at their processing facilities. Handlers in a regulated district could fulfill any restricted percentage requirement by voluntarily diverting cherries in an approved program rather than placing cherries in an inventory reserve. If the primary inventory reserve has reached its maximum volume limitation, handlers would either have to establish a secondary inventory reserve, divert the restricted percentage cherries, or utilize a combination of the two.

The uses eligible for diversion could take any of the following forms, if recommended by the Board and approved by the Secretary. These would be uses exempt under the order, contribution to a Board approved food bank or other approved charitable organization, acquisition of grower diversion certificates, or other uses, including diversion of the cherries at the handler's facility. Record evidence shows that handlers could choose which, and whose, cherries to divert. Those decisions would likely be made on quality considerations, but could also be impacted by prior contractual arrangements with their growers. A handler electing to divert cherries would first need to notify the Board. The notification would describe in detail the manner in which the handler proposes to divert the cherries,

including, if the diversion is to be by means of destruction of the cherries, a detailed description of the means of destruction and the disposition of such cherries. This type of description would be necessary to ensure that the cherries were not marketed in any form. Any notification of diversion would contain an agreement that the proposed diversion is to be supervised by the Board and that the costs of diversion will be paid by the handler. The proponents testified that uniform fees for supervision should be established by regulation.

#### Exempt Use Diversion

The diversion of cherries for exempt uses would first need to be approved by the Board. Tart cherries could be exempted from certain order provisions if they are diverted in accordance with the order; used for new product and/or new market development; or used for experimental purposes or for other uses designated by the Board, including processing into products for markets utilizing less than 5 percent of the preceding 5 year average production of cherries. The list of exemptions could be expanded, with the approval of the Secretary, through the informal rulemaking process. The Board may also want to provide that handlers can sell reserve cherries in existing inventory reserves into specific outlets if handlers first notify the Board. This would allow handlers to dispose of inventory reserve cherries if their individual economic situations make continued storage unfeasible, but would prevent such cherries from interfering with normal commercial markets for free market tonnage cherries. The application for exempt usage would show the uses to which the diverted cherries would be put and contain an agreement that the diversion would be carried out under the supervision of the Board, with the cost of diversion to be paid by the applicant. The applicant would be notified of the Board's approval or disapproval.

Upon receiving verification of an approved diversion, the Board would issue to the diverting handler a handler diversion certificate. The diversion certificate would show the quantity of cherries diverted by such handler. Such a certificate would satisfy any restricted percentage or diversion requirement up to the inspected weight of the cherries involved. Such diversion would reduce that handler's processing, storage, and inspection costs. For example, if a handler receives and processes 1,000 tons of cherries and a restricted percentage of 20 percent is established, the handler would have to place 200

tons of processed cherries into the primary inventory reserve. If the handler diverts 100 tons of cherries before processing, the required volume of restricted inventory reserve would be reduced to 100 tons.

The proponents took no position on what other exempt uses the Board may establish. However, handlers from Oregon and Washington expressed concern that juice concentrate could be established by the Board as a use eligible for diversion credit. Some handlers in Washington and Oregon process all or the majority of their cherries into juice concentrate. There is a wide selection of concentrators available in that area and there was testimony that cherries produced in Washington and Oregon have a high brix (sugar content) level desirable for juice concentrate. Testimony showed that small businesses in that area could be unduly burdened if the Board decided to allow diversion credit for juice concentrate as this could cause an artificially induced increase in the volume of juice concentrate in the marketplace, lowering prices for all such products. Therefore, the evidence presented on this issue has persuaded the USDA to modify the proposed provision to prohibit the use of juice concentrate for diversion credit.

#### Determination of Districts Subject to Volume Regulation

The order should provide for the establishment of districts for the purposes of volume regulations. The proponents testified in support of their proposal, that upon adoption of this order, districts subject to volume regulation would be those districts in which the average annual production of cherries over the prior three years exceeded 15 million pounds. Record evidence shows that Michigan, Utah and New York would be regulated States at this time. Using the proposed 15 million pound minimum production figure, Oregon, Pennsylvania, Washington and Wisconsin would not be regulated at this time. Handlers in districts not subject to volume regulation would not be subject to annual restricted percentages, except to the extent they might handle cherries grown in a regulated district. In such case, the handler would treat a portion of the cherries from the regulated district as restricted percentage cherries, just as if the handler were in a regulated district.

The proponents further testified in support of their proposal that districts not currently meeting the production requirement of 15 million pounds should automatically be subject to

regulation in the marketing year in which the production of cherries in the district is projected to exceed 150 percent of the average production experienced in 1989 through 1992. This period reflects a normal production cycle for tart cherries. This period could be changed with approval of the Secretary through the informal rulemaking process. This provision is designed to catch surges in production that occasionally occur in order to more equitably distribute the burden of controlling burdensome supplies. Proponents testified that, while a district may not historically be a large producer and thus not warrant permanent volume regulation, producing over 50 percent more than its historical average warrants a district's becoming subject to volume regulation, albeit on a temporary basis.

It was also the proponents' position that if a district's production exceeds 150 percent of the base period as a result of increased capacity to produce (i.e., increased bearing acreage), then beginning with the next crop year such district should be permanently subject to volume regulation. However, if a district, over a rolling three-year period following the year of subjectation to regulation, drops below the 150 percent trigger, such district would become unregulated again.

After review of the proponent's proposal concerning the trigger for regulation and the testimony and other record evidence concerning this issue, the Department has determined it would be overly complicated for the Board to administer and possibly inequitable to handlers and growers. Proponents testified that it is not the intent to regulate States with smaller production volumes (e.g., Pennsylvania, Oregon) because when one State's production is up the other State's production is likely to be down. The smaller States' aggregate volume is not a critical amount when compared to the total volume of tart cherries produced. Proponents stated that a purpose of the proposed order was to make sure that when smaller producing States (e.g., Washington, Oregon, Wisconsin) expand production, they do not take advantage of the system and become free riders. The proponents also testified that some districts could be regulated even though they have less than 15 million pounds annual production if they exceed the 150 percent trigger mechanism. For example, if Wisconsin's production for the 1989 through 1992 period is 7 million, 5 million, 8 million and 9 million pounds, respectively, the average for those four years would be 7.25 million pounds. Then 7.25 would

be multiplied by 150 percent to equal about 11 million pounds. If Wisconsin produced 11.5 million pounds in a specific year, Wisconsin would be regulated under the order, even though Wisconsin did not exceed the 15 million pound level.

The USDA crop estimate is not released until late June. Thus, the Board may not be able to provide adequate notice to handlers in districts that were not regulated from the initial promulgation of the order that they would be subject to volume control regulations that could be announced on July 1. The record indicated that some districts have been experiencing earlier harvesting dates than other districts and therefore, handlers and growers would not know in time that they were to become a regulated district. In addition, there could also be confusion and concern in the industry if districts can meet one of the criteria and not the other criteria and still be regulated.

Since the larger producing districts are the major concern for volume regulation purposes, the USDA is revising this provision by deleting the 150 per centum trigger mechanism for determining districts subject to volume regulation. Therefore, the criteria that a district would have to meet to become regulated under the volume control provisions of the order would be to exceed an average annual production of cherries over the prior three years of 15 million pounds. This provision would be much easier to administer and cause less confusion. It is also desirable for the district not to be subject to volume regulations until the crop year after the three year average production exceeds the 15 million pound level. This would allow adequate notice to be given to handlers that they would subsequently be subject to volume regulations. For example, if a previously unregulated district's average annual production of cherries over the prior three years was 18 million pounds at the conclusion of the 1997 crop year, that district would be subject to volume regulations during the 1998 crop year.

The USDA is also modifying the proposal for determining when regulated districts would not be subject to volume regulation. The USDA has revised this provision to provide that when a district drops below the 15 million pound three year average production figure, that district would not be regulated. It is desirable for a provision to be included in the order to discontinue regulation in a district when production capacity has decreased or actual production has suffered due to some type of hardship that has significantly affected

production in that district. This determination should be made after the close of the crop year and would apply to the next year's crop. These modifications were supported by record testimony.

The proponents testified that a disaster relief clause should be included to exempt a regulated district from regulation in a year in which production in that district drops to less than one-half of its maximum annual processed production for the previous five years. This provision is included in the proposed marketing order to help relieve such district from the burdens of the order in a year in which its processors and growers were already suffering from a severely short crop. Thus, if the central Michigan district's maximum production during the previous five year period was 80 million pounds, and in the next year only 30 million pounds were produced and supplies from other districts exceeded the optimum supply, the central Michigan district would not be regulated. The above modifications have been made to the proposed order.

A witness provided an alternative to the 15 million pound production level for determining when a district would become regulated. The witness testified that 20 million pounds should be used because it provides a cushion before regulation would occur. However, the preponderance of the testimony supported a 15 million pound production level. Therefore, the 20 million level is not adopted. In addition, the proponents proposed under § 930.63 that the Board should have the authority to recommend to the Secretary expansion of the production area if such new area's average annual production of cherries reaches at least five million pounds over a three-year period. The provision also provides for nomination, election, appointment, acceptance, and other matters concerning Board membership. After review of this proposal, the USDA is deleting this provision from the proposed order. The Board has the power under § 930.30(d) to recommend to the Secretary amendments to the marketing order dealing with any issue. During a formal rulemaking process to expand the production area, the issues dealing with Board representation, quorum, voting requirements and etc. would be addressed. Also, the proposed provision requires that the Board cannot consider expansion of the production area until such new area's average annual production of cherries reaches at least five million pounds over a three-year period. The Board may want to expand the production area even though such

new area has not reached the above level. Therefore, § 930.63 is deleted from the proposed order.

(g) The Board should have the authority, under proposed § 930.70, with the approval of the Secretary, to require that first handlers submit to the Board such reports and information as the Board may need to perform its functions and fulfill its responsibilities under the order. In the normal course of business, tart cherry handlers collect and record information that may be needed by the Board. Witnesses expressed the belief that the reporting requirements that may be imposed under the proposed order would not constitute an undue burden on handler businesses.

Reports would be needed by the Board for such purposes as collecting assessments; compiling statistical data for use in evaluating marketing research and development projects; promotional activities; making recommendations for production research; making recommendations for volume control regulations; and determining whether handlers are complying with order requirements. The record evidence indicates that, to the extent necessary for the Board to perform its functions, handlers would probably need to provide information showing weekly production data, monthly sales and inventory data, and other such information, including the volume of any cherries placed in or released from a primary or secondary inventory reserve or diverted. This should not be construed as a complete list of information the Board might require, nor should it be assumed that all of the above would be necessary for the proper conduct of its operations under the order. Therefore, the Board should have the authority, with the approval of the Secretary, to require each handler to furnish such information as it finds necessary to perform its duties under the order.

Each handler should be required to maintain such records of tart cherries acquired, handled, diverted or sold, or otherwise disposed of as may be necessary to verify the reports that the handler submits to the Board. All such records should be maintained for at least two years after the termination of the fiscal year in which the transaction occurred. The order should provide the authority for the Secretary and authorized employees of the Board to have access to handlers' premises to examine those records pertaining to matters within the purview of the order. This provision would enable verification of compliance with requirements of the order.

All reports and records submitted for Board use by handlers would be required to remain confidential and be disclosed only as authorized by the Secretary, except as required by law. Such reports should become part of the committee and Secretary's records. However, the Board should be authorized to release composite information from any or all reports. Such composite information could be helpful to the Board and to the industry in planning operations under the order and in promoting the order. Any release of composite information should not disclose the identity of the persons furnishing the information or any person's individual operation.

(h) No handler should be permitted to handle tart cherries except in conformity with the provisions of this part, as set forth in proposed section 930.80. If the program is to be effective, compliance with its requirements is essential.

In accordance with proposed section 930.83, the order should provide that the Secretary conduct a periodic referendum every six years with the initial referendum conducted within six years of the effective date of the marketing order.

The Secretary of Agriculture has determined that continuance referenda are an effective means for ascertaining whether producers favor continuance of marketing order programs. The Act provides that the Secretary shall terminate a marketing order whenever, through the conduct of a referendum, it is indicated that a majority of all producers favor termination and such majority produced more than 50 percent of the commodity for market during a representative period.

Since less than 50 percent of all producers usually participate in a referendum, it is difficult to determine overall producer support or opposition to termination of an order. Thus, to provide a basis for determining whether producers favor continuance of the order, a provision for continuance referenda should be included. Continuance should be based upon the affirmative vote of either two-thirds of the producers voting or an affirmative vote of the producers of two-thirds of the volume of tart cherries represented in the referendum.

The Act requires that in the promulgation of a marketing order, at least two-thirds of the producers voting, by number or volume represented in the referendum, must favor the issuance of the order. Continuance referenda should be based on the same standard of industry support. This requirement is considered adequate to measure

producers' support to continue the marketing order. The Secretary would consider termination of the order if less than two-thirds of the producers voting in the referendum or producers of less than two-thirds of the volume of tart cherries represented in the referendum favor continuance. In evaluating the merits of continuance versus termination, the Secretary should not only consider the results of the referendum but also should consider all other relevant information concerning the operation of the order and the relative benefits and disadvantages to producers, handlers, and consumers in order to determine whether continued operation of the order would tend to effectuate the declared policy of the Act.

The Secretary's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" provide for periodic referenda to allow producers the opportunity to indicate their support for or rejection of a marketing order. It is the position of the Department that periodic referenda ensure that marketing order programs continue to be accountable to producers and processors, obligate producers and processors to evaluate their programs periodically, and involve them more closely in their operation. The record evidence supports these goals.

In any event, section 608(C)(16)(B) of the Act requires the Secretary to terminate the order whenever the Secretary finds that the majority of all producers favor termination, and that such majority produced more than 50 percent of the commodity for market.

In addition to producer approval for the promulgation of an order, the Act provides that no order shall be effective for cherries for canning or freezing unless the Secretary determines that the issuance of such order is approved or favored by processors who, during a representative period, have frozen or canned more than 50 percentum of the total volume of cherries. Processors should also vote in continuance referenda. The same criteria for promulgation would apply to continuance referenda for processors.

(i) The provisions of proposed §§ 930.84 through 930.94 of the order as contained in the Notice of Hearing and hereinafter set forth, are common to marketing agreements and orders now operating. All such provisions are necessary to effectuate the other provisions of the marketing order and marketing agreement and to effectuate the declared policy of the Act. The record evidence supports inclusion of each such provision as proposed in the Notice of Hearing. These provisions, which are applicable to both the

marketing agreement and the marketing order, are identified by section number and heading as follows: § 930.84 Proceedings after termination; § 930.85 Effect of termination or amendment; § 930.86 Duration of immunities; § 930.87 Agents; § 930.88 Derogation; § 930.89 Personal liability; § 930.90 Separability; and § 930.91 Amendments. Those provisions applicable to the marketing agreement only are: § 930.92 Counterparts; § 930.93 Additional parties; and § 930.94 Order with marketing agreement.

Miscellaneous conforming and clarifying changes have also been made.

#### Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

#### General Findings

(1) The marketing agreement and order, as hereby proposed, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as hereby proposed, regulate the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as hereby proposed, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivision of the production area would not effectively carry out the declared policy of the Act; and

(4) All handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin as defined in the proposed marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

1. Title 7, chapter IX is proposed to be amended by adding part 930 to read as follows:

**PART 930—TART CHERRIES GROWN IN MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON AND WISCONSIN**

**Subpart—Order Regulating Handling**

Definitions

Sec.

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- 930.2 Board.
- 930.3 Cherries.
- 930.4 Crop year.
- 930.5 Department or USDA.
- 930.6 District.
- 930.7 Fiscal period.
- 930.8 Free market tonnage percentage cherries.
- 930.9 Grower.
- 930.10 Handle.
- 930.11 Handler.
- 930.12 Person.
- 930.13 Primary inventory reserve.
- 930.14 Production area.
- 930.15 Restricted percentage cherries.
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Administrative Body

- 930.20 Establishment and membership.
- 930.21 Reestablishment.
- 930.22 Term of office.
- 930.23 Nomination and election.
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- 930.25 Failure to nominate.
- 930.26 Acceptance.
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- 930.28 Alternate members.
- 930.29 Eligibility for membership on Cherry Industry Administrative Board.
- 930.30 Powers.
- 930.31 Duties.
- 930.32 Procedure.
- 930.33 Expenses and compensation.

Expenses and Assessments

- 930.40 Expenses.
- 930.41 Assessments.
- 930.42 Accounting.

Quality Control

- 930.44 Quality Control.

Research, Market Development and Promotion

- 930.48 Research, Market Development and Promotion.

Regulations

- 930.50 Marketing policy.
- 930.51 Issuance of volume regulations.
- 930.52 Establishment of districts subject to volume regulations.
- 930.53 Modification, suspension, or termination of regulations.
- 930.54 Prohibition on the use or disposition of inventory reserve cherries.
- 930.55 Primary inventory reserves.
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- 930.57 Secondary inventory reserve.

- 930.58 Grower diversion privilege.
- 930.59 Handler diversion privilege.
- 930.60 Equity holders.
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- 930.62 Exemptions.
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Reports and Records

- 930.70 Reports.
- 930.71 Records.
- 930.72 Verification of reports and records.
- 930.73 Confidential information.

Miscellaneous Provisions

- 930.80 Compliance.
- 930.81 Right of the Secretary.
- 930.82 Effective time.
- 930.83 Termination.
- 930.84 Proceedings after termination.
- 930.85 Effect of termination or amendment.
- 930.86 Duration of immunities.
- 930.87 Agents.
- 930.88 Derogation.
- 930.89 Personal liability.
- 930.90 Separability.
- 930.91 Amendments.
- 930.92 Counterparts.
- 930.93 Additional parties.
- 930.94 Order with marketing agreement.

Authority: 7 U.S.C. 601–674.

**Subpart—Order Regulating Handling**

Definitions

**§ 930.1 Act.**

*Act* means Public Act No. 10, 73d Congress (May 12, 1933), as amended, and as reenacted and amended by the Agriculture Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended, 68 Stat. 906, 1047; 7 U.S.C. 601, *et seq.*).

**§ 930.2 Board.**

*Board* means the Cherry Industry Administrative Board established pursuant to § 930.20.

**§ 930.3 Cherries.**

*Cherries* means all tart/sour cherry varieties grown in the production area classified botanically as *Prunus cerasus*, *Prunus cerasas* by *Prunus avium*, or *Prunus cerasas* by *Prunus fruticosa*.

**§ 930.4 Crop year.**

*Crop year* means the 12-month period beginning on July 1 of any year and ending on June 30 of the following year, or such other period as the Board, with the approval of the Secretary, may establish.

**§ 930.5 Department or USDA.**

*Department* or *USDA* means the United States Department of Agriculture.

**§ 930.6 District.**

*District* means one of the subdivisions of the production area described in § 930.20(c), or such other subdivisions

as may be established pursuant to § 930.21, or any subdivision added pursuant to § 930.63.

**§ 930.7 Fiscal period.**

*Fiscal period* is synonymous with fiscal year and means the 12-month period beginning on July 1 of any year and ending on June 30 of the following year, or such other period as the Board, with the approval of the Secretary, may establish: Provided, that the initial fiscal period shall begin on the effective date of this part.

**§ 930.8 Free market tonnage percentage cherries.**

*Free market tonnage percentage cherries* means that proportion of cherries handled in a crop year which are free to be marketed in normal commercial outlets in that crop year under any volume regulation established pursuant to § 930.50 or § 930.51 and, in the absence of a restricted percentage being established for a crop year pursuant to § 930.50 or § 930.51, means all cherries received by handlers in that crop year.

**§ 930.9 Grower.**

*Grower* is synonymous with “producer” and means any person who produces cherries to be marketed in canned, frozen, or other processed form and who has a proprietary interest therein: Provided that, the term “grower” shall not include a person who produces cherries to be marketed exclusively for the fresh market in an unpitted condition.

**§ 930.10 Handle.**

*Handle* means the process to brine, can, concentrate, freeze, dehydrate, pit, press or puree cherries, or in any other way convert cherries commercially into a processed product, or divert cherries pursuant to § 930.59 or obtain grower diversion certificates issued pursuant to § 930.58, or otherwise place cherries into the current of commerce within the production area or from the area to points outside thereof: Provided, that the term “handle” shall not include:

(a) The brining, canning, concentrating, freezing, dehydration, pitting, pressing or the converting, in any other way, of cherries into a processed product for home use and not for resale; or

(b) The transportation within the production area of cherries from the orchard where grown to a processing facility located within such area for preparation for market; or

(c) The delivery of such cherries to such processing facility for such preparation; or

(d) The sale or transportation of cherries by a grower to a handler of record within the production area; and  
 (e) The sale of cherries in the fresh market in an unpitted condition.

**§ 930.11 Handler.**

*Handler* means any person who first handles cherries or causes cherries to be handled.

**§ 930.12 Person.**

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

**§ 930.13 Primary inventory reserve.**

*Primary inventory reserve* means that portion of handled cherries that are placed into handlers' inventories in accordance with any restricted percentage established pursuant to § 930.50 or § 930.51.

**§ 930.14 Production area.**

*Production area* means the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin.

**§ 930.15 Restricted percentage cherries.**

*Restricted percentage cherries* means that proportion of cherries handled in a crop year which must be either placed into handlers' inventories in accordance with § 930.56 or § 930.58 or otherwise diverted in accordance with § 930.60 and thereby withheld from marketing in normal commercial outlets under any volume regulation established pursuant to § 930.50 or § 930.51.

**§ 930.16 Sales constituency.**

*Sales constituency* means a common marketing organization or brokerage firm or individual representing a group of handlers or growers.

**§ 930.17 Secondary inventory reserve.**

*Secondary inventory reserve* means any portion of handled cherries voluntarily placed into inventory by a handler under § 930.58.

**§ 930.18 Secretary.**

*Secretary* means the Secretary of Agriculture of the United States, or any officer or employee of the U.S. Department of Agriculture to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.  
 Administrative Body

**§ 930.20 Establishment and membership.**

(a) There is hereby established a Cherry Industry Administrative Board (Board) consisting of 18 members. Seventeen of these members shall be qualified growers and handlers selected

pursuant to this part, each of whom shall have an alternate having the same qualifications as the member for whom the person is an alternate. The remaining member of the Board shall be a public member who, along with his or her alternate, shall be elected by the Board from the general public.

(b) District representation on the Board shall be as follows:

District	Grower members	Handler members
1 .....	2	2
2 .....	1	2
3 .....	1	1
4 .....	1	1
5 .....	1	or 1
6 .....	1	or 1
7 .....	1	1
8 .....	1	or 1
9 .....	1	or 1

(c) Upon the adoption of this part, the production area shall be divided into the following described subdivisions for purposes of this section:

District 1—Northern Michigan: that portion of the State of Michigan which is north of a line drawn along the northern boundary of Mason County and extended east to Lake Huron.

District 2—Central Michigan: that portion of the State of Michigan which is south of District 1 and north of a line drawn along the southern boundary of Allegan County and extended east to Lake St. Clair.

District 3—Southern Michigan: That portion of the State of Michigan not included in Districts 1 and 2.

District 4—The State of New York.

District 5—The State of Oregon.

District 6—The State of Pennsylvania.

District 7—The State of Utah.

District 8—The State of Washington.

District 9—The State of Wisconsin.

(d) The ratio of grower to handler representation in District 2 shall alternate each time the term of a Board member from the representative group having two seats expires. During the initial period of the order, the ratio shall be as designated in paragraph (b) of this section.

(e) Board members from Districts 5, 6, 8 and 9 may be either grower or handler members and will be nominated and elected as outlined in § 930.23. If District 5, 6, 8, and/or 9 becomes subject to volume regulation under § 930.52(a), then the Board shall be reestablished by the Secretary to provide such District(s) with at least one grower and one handler seat on the Board and such seats shall be filled according to the provisions of § 930.23.

(f) In those districts having more than one seat on the Board, not more than one Board member from that district may be elected from a single sales

constituency. There is, however, no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler may only nominate Board members and vote in one district.

(g) Subject to the approval of the Secretary, the Board shall at its first meeting and annually thereafter elect from among any of its members a chairperson and a vice-chairperson and may elect other appropriate officers.

**§ 930.21 Reestablishment.**

Districts, subdivisions of districts, and the distribution of representation among growers and handlers within a respective district or subdivision thereof, or among the subdivision of districts, may be reestablished by the Secretary, subject to the provisions of § 930.23, based upon recommendations by the Board. In recommending any such changes, the Board shall consider:

- (a) The relative importance of producing areas,
- (b) Relative production,
- (c) The geographic locations of producing areas as they would affect the efficiency of administration of this part,
- (d) Shifts in cherry production within the districts and the production area,
- (e) Changes in the proportion and role of growers and handlers within the districts, and
- (f) Other relevant factors.

**§ 930.22 Term of office.**

The term of office of each member and alternate member of the Board shall be for three fiscal years: Provided that, of the nine initial members and alternates from the combination of Districts 1, 2 and 3, one-third of such initial members and alternates shall serve only one fiscal year, one-third of such members and alternates shall serve only two fiscal years, one-third of such members and alternates shall serve only two fiscal years; and one-half of the initial members and alternates from Districts 4 and 7 shall serve only one fiscal year, and one-half of such initial members and alternates shall serve two fiscal years (determination of which of the initial members and their alternates shall serve for 1 fiscal year, 2 fiscal years, and 3 fiscal years shall be by lot). Members and alternate members shall serve in such capacity for the portion of the term of office for which they are selected and have qualified until their respective successors are selected, have qualified and are appointed. The consecutive terms of office of grower, handler and public members and

alternate members shall be limited to two 3-year terms, excluding any initial term lasting less than 3 years. The term of office of a member and alternate member for the same seat shall be the same. If this part becomes effective on a date such that the initial fiscal period is less than six months in duration, then the tolling of time for purposes of this subsection shall not begin until the beginning of the first 12-month fiscal period.

**§ 930.23 Nomination and election.**

(a) Nomination and election of initial and successor members and alternate members of the Board shall be conducted through petition forms and election ballots distributed to all eligible growers and handlers via the U.S. Postal Service or other means, as determined by the Secretary. Similar petition forms and election ballots shall be used for both members and alternate members and any requirements for election of a member shall apply to the election of an alternate.

(b) Nomination:

(1) In order for the name of a grower nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which, except in District 8, contains at least five signatures of growers, other than the nominee, from the nominee's district who are eligible to vote in the referendum. Grower petition forms in District 8 must be signed by only two growers, other than the nominee, from the nominee's district.

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of at least one handler, other than the nominee, from the nominee's district who is eligible to vote in the referendum.

(3) Only growers, including duly authorized officers or employees of growers, who are eligible to serve as grower members of the Board shall participate in the nomination of grower members and alternate grower members of the Board. No grower shall participate in the submission of nominees in more than one district during any fiscal period. If a grower produces cherries in more than one district, that grower may select in which district he or she wishes to participate in the nominations and election process and shall notify the Secretary or the Board of such selection. A grower may not participate in the nomination process in one district and the election process in a second district in the same election cycle.

(4) Only handlers, including duly authorized officers or employees of handlers, who are eligible to serve as handler members of the Board shall participate in the nomination of handler members and alternate handler members of the Board. No handler shall participate in the selection of nominees in more than one district during any fiscal period. If a handler handles cherries in more than one district, that handler may select in which district he or she wishes to participate in the nominations and election process and shall notify the Secretary or the Board of such selection. A handler may not participate in the nominations process in one district and the elections process in a second district in the same election cycle. If a person is a grower and a grower-handler only because some or all of his or her cherries were custom packed, but he or she does not own or lease and operate a processing facility, such person may vote only as a grower.

(5) In Districts 5, 6, 8 and 9, both growers and handlers may be nominated for the district's Board seat. Grower and handler nominations must follow the petition procedures outlined in paragraphs (b)(1) and (b)(2) of this section.

(6) All eligible growers and handlers in all districts may submit the names of the nominees for the public member and alternate public member of the Board.

(7) After the appointment of the initial Board, the Secretary or the Board shall announce at least 180 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in this section. Nominations for such position should be submitted to the Secretary or the Board not less than 120 days prior to the expiration of such term.

(c) Election:

(1) After receiving nominations, the Secretary or the Board shall distribute ballots via the U.S. Postal Service or other means, as determined by the Secretary, to all eligible growers and handlers containing the names of the nominees by district for the respective seats on the Board, excluding the public voting member seat. The ballots will clearly indicate that growers and handlers may only rank or otherwise vote for nominees in their own district.

(2) Except as provided in paragraph (c)(4) of this section, only growers, including duly authorized officers or employees of growers, who are eligible to serve as grower members of the Board shall participate in the election of grower members and alternate grower members of the Board. No grower shall participate in the election of Board members in more than one district

during any fiscal period. If a grower produces cherries in more than one district, the grower must vote in the same district in which he or she chose to participate in the nominations process under paragraph (b)(3) of this section. However, if the grower did not participate in the nominations process, he or she may select in which district he or she wishes to vote and shall notify the Secretary or the Board of such selection.

(3) Except as provided in paragraph (c)(4) of this section, only handlers, including duly authorized officers or employees of handlers, who are eligible to serve as handler members of the Board shall participate in the election of handler members and alternate handler members of the Board. No handler shall participate in the election of Board members in more than one district during any fiscal period. If a handler does handle cherries in more than one district, he or she must vote in the same district in which the handler elected to participate in the nominations process under paragraph (b)(4) of this section. However, if a handler did not participate in the nominations process, that handler may select in which district he or she chooses to vote and shall notify the Secretary or the Board of such selection. If a person is a grower and a grower-handler only because some or all of his or her cherries were custom packed, but he or she does not own or lease and operate a processing facility, such person may vote only as a grower.

(4) In Districts 5, 6, 8 and 9, growers and handlers may vote for either the grower or handler nominee(s) for the single seat allocated to those districts.

(d) The members of the Board appointed by the Secretary pursuant to § 930.24 shall, at the first meeting and whenever necessary thereafter, by at least a two-thirds vote of the entire Board, select individuals to serve as the public member and alternate public member of the Board from the list of nominees received from growers and handlers pursuant to paragraph (b) of this section or from other persons nominated by the Board. The persons selected shall be subject to appointment by the Secretary under § 930.24.

(e) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

**§ 930.24 Appointment.**

The selection of nominees made pursuant to elections conducted under § 930.23(c) shall be submitted to the Secretary in a format which indicates the nominees by district, with the nominee receiving the highest number

of votes at the top and the number of votes received being clearly indicated. The Secretary shall appoint from those nominees or from other qualified individuals, the grower and handler members of the Board and an alternate for each such member on the basis of the representation provided for in § 930.20 or as provided for in any reapportionment or reestablishment undertaken pursuant to § 930.21. The Secretary shall also appoint the public member and the alternate public member elected by the Board pursuant to § 930.23(d).

**§ 930.25 Failure to nominate.**

If nominations are not made within the time and in the manner prescribed in § 930.23, the Secretary may, without regard to nominations, select the members and alternate members of the Board on the basis of the representation provided for in § 930.20 or as provided for in any reestablishment undertaken pursuant to § 930.21.

**§ 930.26 Acceptance.**

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

**§ 930.27 Vacancies.**

To fill any vacancy occasioned by the failure of any person appointed as a member or as an alternate member of the Board to qualify, or in the event of the death, removal, resignation, or disqualification of any member or alternate member of the Board, a successor for the unexpired term of such member or alternate member of the Board shall be appointed by the Secretary from the most recent list of nominations for the Board made by growers and handlers, from nominations made by the Board, or from other qualified individuals. Any nominations made by the Board to fill a vacancy must be received by the Secretary within 90 days of the effective date of the vacancy. Board members wishing to resign from the Board must do so in writing to the Secretary.

**§ 930.28 Alternate members.**

An alternate member of the Board, during the absence of the member for whom that member serves as an alternate, shall act in the place and stead of such member and perform such other duties as assigned. However, if a member is in attendance at a meeting of the Board, an alternate member may not act in the place and stead of such

member. In the event of the death, removal, resignation, or disqualification of a member, the alternate shall act for the member until a successor for such member is appointed and has qualified.

**§ 930.29 Eligibility for membership on Cherry Industry Administrative Board.**

(a) Each grower member and each grower alternate member of the Board shall be a grower, or an officer or employee of a grower, in the district for which nominated or appointed.

(b) Each handler member and each handler alternate member of the Board shall be a handler, or an officer or employee of a handler, who owns, or leases, and operates a cherry processing facility in the district for which nominated or appointed.

(c) The public member and alternate public member of the Board shall be prohibited from having any financial interest in the cherry industry and shall possess such additional qualifications as may be established by regulation.

**§ 930.30 Powers.**

The Board shall have the following powers:

(a) To administer this part in accordance with its terms and provisions;

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

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

(d) To recommend to the Secretary amendments to this part.

**§ 930.31 Duties.**

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

(a) To select such officers, including a chairperson and vice-chairperson, as may be necessary, and to define the duties of such officers and the duties of the chairperson and the vice-chairperson;

(b) To employ or contract with such persons or agents as the Board deems necessary and to determine the duties and compensation of such persons or agents;

(c) To select such committees and subcommittees as may be necessary;

(d) To adopt bylaws and to adopt such rules for the conduct of its business as it may deem advisable;

(e) To submit to the Secretary a budget for each fiscal period, prior to the beginning of such period, including a report explaining the items appearing therein and a recommendation as to the rates of assessments for such period;

(f) To keep minutes, books, and records which will reflect all of the acts

and transactions of the Board and which shall be subject to examination by the Secretary;

(g) To prepare periodic statements of the financial operations of the Board and to make copies of each statement available to growers and handlers for examination at the office of the Board;

(h) To cause its books to be audited by a certified public accountant at least once each fiscal year and at such times as the Secretary may request. Such audit shall include an examination of the receipt of assessments and the disbursement of all funds, including the payment of storage or other costs to handlers. The Board shall provide the Secretary with a copy of all audits and shall make copies of such audits, after the removal of any confidential individual grower or handler information that may be contained in them, available to growers and handlers for examination at the offices of the Board.

(i) To act as intermediary between the Secretary and any grower or handler with respect to the operations of this part;

(j) To investigate and assemble data on the growing, handling, and marketing conditions with respect to cherries;

(k) To apprise the Secretary of all Board meetings in a timely manner;

(l) To submit to the Secretary such available information as the Secretary may request;

(m) To investigate compliance with the provisions of this part;

(n) To develop and submit an annual marketing policy for approval by the Secretary containing the optimum supply of cherries for the crop year established pursuant to § 930.50 and recommending such action(s) necessary to achieve such optimum supply;

(o) To implement volume regulations established under § 930.50 and issued by the Secretary under § 930.51, including the release of any inventory reserves;

(p) To provide thorough communication to growers and handlers regarding the activities of the Board and to respond to industry inquiries about Board activities;

(q) To oversee the collection of assessments levied under this part;

(r) To enter into contracts or agreements with such persons and organizations as the Board may approve for the development and conduct of activities, including research and promotion activities, authorized under this part or for the provision of services required by this part and for the payment of the cost thereof with funds collected through assessments pursuant

to § 930.41 and income from such assessments. Contracts or agreements for any plan or project shall provide that:

(1) The contractors shall develop and submit to the Board a plan or project together with a budget(s) which shall show the estimated cost to be incurred for such plan or project;

(2) Any contract or agreement for a plan or project and any plan or project adopted by the Board shall only become effective upon approval by the Secretary; and

(3) Every such contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party.

(s) Pending disbursement consistent with its budget, to invest, with the approval of the Secretary, and in accordance with applicable Departmental policies, funds collected through assessments authorized under § 930.41 and income from such assessments;

(t) To establish standards or grade requirements for cherries for frozen and canned cherry products, subject to the approval of the Secretary;

(u) To borrow such funds, subject to the approval of the Secretary and not to exceed the expected expenses of one fiscal year, as are necessary for administering its responsibilities and obligations under this part; and

(v) 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.

#### **§ 930.32 Procedure.**

(a) Twelve members of the Board, including alternates acting for absent members, shall constitute a quorum. For any action of the Board to pass, at least two-thirds of the entire Board must vote in support of such action.

(b) The Board may provide through its own rules and regulations, subject to approval by the Secretary, for simultaneous meetings of groups of its members assembled at different locations and for votes to be conducted by telephone or other means of communication. Votes so cast shall be promptly confirmed in writing.

(c) All meetings of the Board are open to the public, although the Board may hold portions of meetings in executive

session for the consideration of certain business. The Board will establish, with the approval of the Secretary, a means of advanced notification of growers and handlers of Board meetings.

#### **§ 930.33 Expenses and compensation.**

Except for the public member and alternate public member who shall receive such compensation as the Board may establish and the Secretary may approve, the members of the Board, and alternates when acting as members, shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, as approved by the Board, incurred by them in the performance of their duties under this part. The Board at its discretion may request the attendance of one or more alternates at any or all meetings, notwithstanding the expected or actual presence of the respective member(s), and may pay the expenses of such alternates.

#### **Expenses and Assessments**

#### **§ 930.40 Expenses.**

The Board is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 930.41.

#### **§ 930.41 Assessments.**

(a) An assessment may be levied upon handlers annually under this part to cover the administrative costs of the Board, costs of inspection, and any research, development and promotion activities initiated by the Board under § 930.48.

(b) Each part of an assessment intended to cover the costs of each activity in paragraph (a) of this section, must be identified and approved by the Board and the Secretary, and any notification or other statement regarding assessments provided to handlers must contain such information.

(c) As a pro rata share of the administrative, inspection, research, development, and promotion expenses which the Secretary finds reasonable and likely to be incurred by the Board during a fiscal period, each handler shall pay to the Board assessments on all cherries handled, as the handler thereof, during such period: Provided, a handler shall be exempt from any assessment on the tonnage of handled cherries that are diverted according to § 930.59 which includes cherries represented by grower diversion

certificates issued pursuant to § 930.58(b)(2) and acquired by handlers and those cherries devoted to exempt uses under § 930.62.

(d) The Secretary, after consideration of the recommendation of the Board, shall fix the rate of assessment to be paid by each handler during the fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be approved and incurred during such period or subsequent period as provided in paragraph (c) of this section. At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all cherries handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments, the Board may accept the payment of assessments in advance, and may borrow money for such purposes.

(e) Assessments not paid within a time prescribed by the Board may be made subject to interest or late payment charges, or both. The period of time, rate of interest, and late payment charge will be as recommended by the Board and approved by the Secretary: Provided, that when interest or late payment charges are in effect, they shall be applied to all assessments not paid within the prescribed period of time.

(f) Assessments will be calculated on the basis of pounds of cherries handled: Provided, that the formula adopted by the Board and approved by the Secretary for determining the rate of assessment will compensate for differences in the number of pounds of cherries utilized for various cherry products and the relative market values of such cherry products.

(g) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

#### **§ 930.42 Accounting.**

(a) If, at the end of a fiscal period, the assessments collected are in excess of expenses incurred, the Board, with the approval of the Secretary, may carry over all or any portion of such excess into subsequent fiscal periods as a reserve. Such reserve funds may be used to cover any expenses authorized by this part; and to cover necessary expenses of liquidation in the event of termination of this part. If any such excess is not retained in a reserve, it shall be refunded proportionately to the

handlers from whom the excess was collected. Without an additional reserve level approved by the Secretary, the amount held in reserve may not exceed approximately one year's operational expenses. Upon termination of this part, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such a manner as the Secretary may determine to be appropriate: Provided, that to the extent practicable, such funds shall be returned pro rata to the persons from whom such funds were collected.

(b) All funds received by the Board pursuant to the provisions of this part shall be used solely for the purpose specified in this part and shall be accounted for in the manner provided in this part. The Secretary may at any time require the Board and its members to account for all receipts and disbursements.

#### Quality Control

##### § 930.44 Quality control.

(a) *Quality standards.* The Board may establish, with the approval of the Secretary, such minimum quality and inspection requirements applicable to cherries as will contribute to orderly marketing or be in the public interest. If such requirements are adopted, no handler shall process cherries into manufactured products or sell manufactured products in the current of commerce unless such cherries and/or such cherries used in the manufacture of products meet the applicable requirements as evidenced by certification acceptable to the Board. The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

(b) *Inspection and certification.* Whenever the handling of any cherries requires inspection pursuant to this part, each handler who handles cherries shall cause such cherries to be inspected by the appropriate division of the Department, and certified by it as meeting the applicable requirements of such regulation: Provided, that inspection and certification shall be required for cherries which previously have been so inspected and certified only if such cherries have been regraded, resorted, repackaged, or in any other way further prepared for market. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the Board a copy of the certificate of inspection issued with respect to such cherries.

Research, Market Development and Promotion

##### § 930.48 Research, market development and promotion.

The Board, with the approval of the Secretary, may establish or provide for the establishment of production and processing research, market research and development, and/or promotional activities, including paid advertising, designed to assist, improve or promote the efficient production and processing, marketing, distribution, and consumption of cherries subject to this part. The expense of such projects shall be paid from funds collected pursuant to this part and the income from such funds.

#### Regulations

##### § 930.50 Marketing policy.

(a) *Optimum supply.* On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

(b) *Preliminary percentages.* On or about July 1 of each crop year, the Board shall establish a preliminary free market tonnage percentage which shall be calculated as follows: from the optimum supply computed in subsection (a), the Board shall deduct the carryin inventory to determine the tonnage requirements (adjusted to a raw fruit equivalent) for the current crop year which will be divided by the current year USDA crop forecast. If the resulting number is positive, this would represent the estimated over-production which would need to be the restricted percentage tonnage. This restricted percentage tonnage would then be divided by the sum of the USDA crop forecast for the regulated districts to obtain the percentages for the regulated districts. The Board shall establish a preliminary restricted percentage equal to the quotient, rounded to the nearest whole number, with the compliment being the preliminary free tonnage percentage. If subtracting the current crop year requirement, computed in the first sentence from the current USDA crop forecast, results in a negative number, the Board shall establish a preliminary

free tonnage of 100 percent with a preliminary restricted percentage of zero. The Board shall announce these preliminary percentages in accordance with paragraph (h) of this section.

(c) *Interim percentages.* Between July 1 and September 15 of each crop year, the Board may modify the preliminary free market tonnage and restricted percentages to adjust to the actual pack occurring in the industry. The Board shall announce any interim percentages in accordance with paragraph (h) of this section.

(d) *Final percentages.* No later than September 15 of each crop year, the Board shall review actual production during the current crop year and make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board 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 Board shall give consideration to the following factors:

- (1) The estimated total production of cherries;
- (2) The estimated size of the crop to be handled;
- (3) The expected general quality of such cherry production;
- (4) The expected carryover as of July 1 of canned and frozen cherries and other cherry products;
- (5) The expected demand conditions for cherries in different market segments;
- (6) Supplies of competing commodities;
- (7) An analysis of economic factors having a bearing on the marketing of cherries;
- (8) The estimated tonnage held by handlers in primary or secondary inventory reserves;
- (9) Any estimated release of primary or secondary inventory reserve cherries during the crop year.

(f) *Modification.* In the event the Board subsequently deems it advisable to modify its marketing policy, 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 the Board's recommended modification and the basis therefor.

(g) *Reserve tonnage to sell as free tonnage.* In addition, the Board shall make available tonnage equivalent to an additional 10 percent, if available, of the average sales of the prior 3 years for market expansion. Handlers can determine if they need the additional tonnage and inform the Board so that reserve cherries may be released to them. Handlers not desiring the additional tonnage would not have it released to them.

(h) *Publicity.* The Board shall promptly give reasonable publicity to growers and handlers of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them and to the public. Similar publicity shall be given to growers and handlers 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 Board, where they shall be made available for examination. The Board shall notify handlers, and give reasonable publicity to growers, of its computation of the optimum supply, preliminary percentages, and interim percentages and shall notify handlers of the Secretary's action on final percentages by registered or certified mail.

(i) *Restricted percentages.* Restricted percentage requirements established under paragraphs (b), (c) or (d) of this section may be fulfilled by handlers by either establishing an inventory reserve in accordance with § 930.55 or § 930.57 or by diversion of product in accordance with § 930.59. In years where required, the Board shall establish a maximum percentage of the restricted quantity which may be established as a primary inventory reserve such that the total primary inventory reserve does not exceed 50 million pounds. Handlers will be permitted to divert (at plant or with grower-diversion certificates) as much of the restricted percentage requirement as they deem appropriate, but may not establish a primary inventory reserve in excess of the percentage established by the Board for restricted cherries. In the event handlers wish to establish inventory reserve in excess of this amount, they may do so, in which case it will be classified as a secondary inventory reserve and will be regulated accordingly.

(j) *Inventory reserve release.* In years when inventory reserve cherries are

available and when the expected availability of cherries from the current crop plus expected carryin inventory does not fulfill the optimum supply, the Board shall release not later than November 1st of the current crop year such volume from the inventory reserve as will satisfy the optimum supply.

(k) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

**§ 930.51 Issuance of volume regulations.**

(a) Whenever the Secretary finds, from the recommendation and supporting information supplied by the Board, that to designate final free market tonnage and restricted percentages for any cherries acquired by handlers during the crop year will tend to effectuate the declared policy of the Act, the Secretary shall designate such percentages. Such regulation designating such percentage shall fix the free market tonnage and restricted percentages, totaling 100 percent, which shall be applied in accordance with section § 930.55, § 930.57 and § 930.59 to cherries grown in regulated districts, as determined under § 930.52, and handled during such fiscal period.

(b) The Board shall be informed immediately of any such regulation issued by the Secretary, and the Board shall promptly give notice thereof to handlers.

(c) That portion of a handler's cherries that are restricted percentage cherries is the product of the restricted percentage imposed under paragraph (a) of this section multiplied by the tonnage of cherries, originating in a regulated district, handled, including those diverted according to § 930.59, by that handler in that fiscal year. Therefore, while diverted cherries, including those represented by grower diversion certificates, may be exempt from assessment under § 930.41, they must be counted when computing restricted percentage requirements.

(d) The Board, with the approval of the Secretary, shall develop rules and regulations which shall provide guidelines for handlers in complying with any restricted tonnage requirements, including, but not limited to, a grace period of at least 30 days to segregate and appropriately document any tonnage they wish to place in the inventory reserve and to assemble any applicable diversion certificates.

**§ 930.52 Establishment of districts subject to volume regulations.**

(a) Upon adoption of this part, the districts subject to any volume regulations implemented in accordance

with this part shall be those districts in which the average annual production of cherries over the prior three years has exceeded 15 million pounds. Districts not meeting the 15 million pound test at the time of order promulgation which subsequently become subject to volume regulation shall not be regulated until the next crop year after exceeding the 15 million pound average production requirement.

(b) Handlers in districts which are not subject to volume regulation would only be so regulated to the extent that they handled cherries which were grown in a district subject to regulation as specified in paragraph (a) of this section. In such a case, the handler must place in inventory reserve pursuant to § 930.55 or § 930.57 or divert pursuant to § 930.59 the required restricted percentage of the crop originating in the regulated district.

(c) Handlers in districts not meeting the production requirement in a given year would not be subject to volume regulation in the next crop year.

(d) Any district producing a crop which is less than 50 percent of the maximum average annual processed production in that district in the previous five years would be exempt from any volume regulation if, in that year, a restricted percentage is established.

(e) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

**§ 930.53 Modification, suspension, or termination of regulations.**

(a) In the event the Board at any time finds that, by reason of changed conditions, any volume regulations issued pursuant to § 930.51 should be modified, suspended, or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds, from the recommendations and information submitted by the Board or from other available information, that a volume regulation issued pursuant to § 930.51 should be modified, suspended or terminated with respect to any or all shipments of cherries in order to effectuate the declared policy of the Act, the Secretary shall modify, suspend, or terminate such regulation.

**§ 930.54 Prohibition on the use or disposition of inventory reserve cherries.**

(a) *Release of primary and secondary inventory reserve cherries.* Except as provided in § 930.50 and paragraph (b) of this section, cherries that are placed in inventory reserve pursuant to the requirements of § 930.50, § 930.51, § 930.55, or § 930.57 shall not be used

or disposed of by any handler or any other person: Provided, that if the Board determines that the total available supplies for use in normal commercial outlets do not at least equal the amount, as estimated by the Board, needed to meet the demand in such outlets, the Board shall recommend to the Secretary and provide such justification that, during such period as may be recommended by the Board and approved by the Secretary, a portion or all of the primary and/or secondary inventory reserve cherries shall be released for such use.

**§ 930.55 Primary inventory reserves.**

(a) Whenever the Secretary has fixed the free market tonnage and restricted percentages for any fiscal period, as provided for in § 930.51(a), each handler in a regulated district shall place in his or her primary inventory reserve for such period, at such time, and in such manner, as the Board may prescribe, or otherwise divert, according to § 930.60, a portion of the cherries acquired during such period.

(b) The form of the cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. Except as may be limited by § 930.50(i) or as may be permitted pursuant to § 930.59 and § 930.62, such inventory reserve portion shall be equal to the sum of the products obtained by multiplying the weight or volume of the cherries in each lot of cherries acquired during the fiscal period by the then effective restricted percentage fixed by the Secretary: Provided, that in converting cherries in each lot to the form prescribed by the Board, the inventory reserve obligations shall be adjusted in accordance with uniform rules adopted by the Board in terms of raw fruit equivalent.

(c) Inventory reserve cherries shall meet such standards of grade, quality, or condition as the Board, with the approval of the Secretary, may establish. All such cherries shall be inspected by the Department. A certificate of such inspection shall be issued which shall show, among other things, the name and address of the handler, the number and type of containers in the lot, the grade of the product, the location where the lot is stored, identification marks (can codes or lot stamp), and a certification that the cherries meet the prescribed standards. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the Board, at the place designated by the Board, a copy of the certificate of inspection issued with respect to such cherries.

(d) Handlers shall be compensated for inspection costs incurred on cherries placed in the primary inventory reserve. All reporting of cherries placed in, rotated in and out, or released from an inventory reserve shall be in accordance with rules and procedures established by the Board, with the approval of the Secretary. The Board could, with the approval of the Secretary, also limit the number of inspections of reserve cherries being rotated into inventory reserves for which the Board would be financially liable.

(e) Except as provided in § 930.54, handlers may not sell inventory reserve cherries prior to their official release by the Board. Handlers may rotate cherries in their inventory reserves with prior notification to the Board. All cherries rotated into the inventory reserve must meet the applicable inspection requirements.

**§ 930.56 Off-premise inventory reserve.**

Any handler may, upon notification to the Board, arrange to hold inventory reserve, of his or her own production or which was purchased, on the premises of another handler or in an approved commercial storage facility in the same manner as though the inventory reserve were on the handler's own premises.

**§ 930.57 Secondary inventory reserve.**

(a) In the event the inventory reserve established under § 930.55 of this part is at its maximum volume, and the Board has announced, in accordance with § 930.50, that volume regulation will be necessary to maintain an orderly supply of quality cherries for the market, handlers in a regulated district may elect to place in a secondary inventory reserve all or a portion of the cherries the volume regulation would otherwise require them to divert in accordance with § 930.60.

(b) Should any handler in a regulated district exercise his or her right to establish a secondary inventory reserve under paragraph (a) of this section, all costs of maintaining that reserve, as well as inspection costs, will be the responsibility of the individual handler.

(c) The secondary inventory reserve shall be established in accordance with §§ 930.55 (b) and (c) and such other rules and regulations which the Board, with the approval of the Secretary, may establish.

(d) The Board shall retain control over the release of any cherries from the secondary inventory reserve. No cherries may be released from the secondary reserve until all cherries in any primary inventory reserve established under § 930.55 have been released. Any release of the secondary

inventory reserve shall be in accordance with the annual marketing policy and with § 930.54.

**§ 930.58 Grower diversion privilege.**

(a) *In general.* Any grower may voluntarily elect to divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler, as though there were actual harvested cherries.

(b) *Eligible diversion.* Grower diversion certificates shall be issued to growers only if the cherries are diverted in accordance with the following terms and conditions or such other terms and conditions that the Board, with the approval of the Secretary, may establish. Diversion may take such of the following forms which the Board, with the approval of the Secretary, may designate: Uses exempt under § 930.63; nonhuman food uses; or other uses, including diversion by leaving such cherries unharvested.

(1) *Application/mapping.* The Board, with the approval of the Secretary, shall develop rules and regulations providing for the diversion of cherries by growers. Such regulations may include, among other things:

(i) The form and content of applications and agreements relating to the diversion, including provisions for supervision and compensation;

(ii) provisions for mapping areas in which cherries will be left unharvested.

(2) *Diversion certificate.* If the Board approves the application it shall so notify the applicant and conduct such supervision of the applicant's diversion of cherries as may be necessary to assure that the cherries have been diverted. After the diversion has been accomplished, the Board shall issue to the diverting grower a diversion certificate stating the weight of cherries diverted. Where diversion is carried out by leaving the cherries unharvested, the Board shall estimate the weight of cherries diverted on the basis of such uniform rule prescribed in rules and regulations as the Board, with the approval of the Secretary, may recommend to implement this section.

**§ 930.59 Handler diversion privilege.**

(a) *In general.* Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement in full or in part by voluntarily diverting cherries or cherry

products in a program approved by the Board, rather than placing cherries in an inventory reserve. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting handler a handler diversion certificate which shall satisfy any restricted percentage or diversion requirement to the extent of the Board or Department inspected weight of the cherries diverted.

(b) *Eligible diversion.* Handler diversion certificates shall be issued to handlers only if the cherries are diverted in accordance with the following terms and conditions or such other terms and conditions that the Board, with the approval of the Secretary, may establish. Such diversion may take place in any of the following forms which the Board, with the approval of the Secretary, may designate: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities: Provided, that diversion may not be accomplished by converting cherries into juice or juice concentrate.

(1) *Notification.* The handler electing to divert cherries through means specified in this section or other approved means (not including uses exempt under § 930.62), shall first notify the Board of such election. Such notification shall describe in detail the manner in which the handler proposes to divert cherries including, if the diversion is to be by means of destruction of the cherries, a detailed description of the means of destruction and ultimate disposition of the cherries. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the handler. Uniform fees for such supervision shall be established by the Board, pursuant to rules and regulations approved by the Secretary.

(2) *Application.* The handler electing to divert cherries by utilizing an exemption under § 930.62 shall first apply to the Board for approval of such diversion; no diversion should take place prior to such approval. Such application shall describe in detail the uses to which the diverted cherries will be put. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the applicant. The Board shall notify the

applicant of the Board's approval or disapproval of the submitted application.

(3) *Diversion certificate.* The Board shall conduct such supervision of the handler's diversion of cherries under paragraph (b)(1) or under paragraph (b)(2) of this section as may be necessary to assure that the cherries are diverted. After the diversion has been accomplished, the Board shall issue to the diverting handler a handler diversion certificate indicating the weight of cherries which may be used to offset any restricted percentage requirement.

#### § 930.60 Equity holders.

(a) *Inventory reserve ownership.* The inventory reserve shall be the sole property of the handlers who place products into the inventory reserve. A handler's equity in the primary inventory reserve may be transferred to another person upon notification to the Board.

(b) *Agreements with growers.* Individual handlers are encouraged to have written agreements with growers who deliver their cherries to the handler as to how any restricted percentage cherries delivered to the handler will be handled and what share, if any, the grower will have in the eventual sale of any inventory reserve cherries.

(c) *Rulemaking authority.* The Board, with the approval of the Secretary, may adopt rules and regulations necessary and incidental to the administration of this section.

#### § 930.61 Handler compensation.

Each handler handling cherries from a regulated district that is subject to volume regulations shall be compensated by the Board for inspection relating to the primary inventory reserve as the Board may deem to be appropriate. The Board, with the approval of the Secretary, may establish such rules and regulations as are necessary and incidental to the administration of this section.

#### § 930.62 Exemptions.

The Board, with the approval of the Secretary, may exempt from the provisions of § 930.41, § 930.51, § 930.53, and § 930.55 through § 930.57 cherries: Diverted in accordance with § 930.59; used for new product and new market development; used for experimental purposes or for any other use designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized. The Board, with the approval of the Secretary, shall

prescribe such rules, regulations, and safeguards as it may deem necessary to ensure that cherries handled under the provisions of this section are handled only as authorized.

#### § 930.63 Deferment of restricted obligation.

(a) *Bonding.* The Board, with the approval of the Secretary, may require handlers to secure bonds on deferred inventory reserve tonnage. Handlers may, in order to comply with the requirements of §§ 930.50 and 930.51 and regulations issued thereunder, secure bonds on restricted percentage cherries to temporarily defer the date that inventory reserve cherries must be held to any date requested by the handler. This date shall be not later than 60 days prior to the end of that crop year. Such deferment shall be conditioned upon the voluntary execution and delivery by the handler to the Board of a written undertaking within thirty (30) days after the Secretary announces the final restricted percentage under § 930.51. Such written undertaking shall be secured by a bond or bonds with a surety or sureties acceptable to the Board that on or prior to the acceptable deferred date the handler will have fully satisfied the restricted percentage amount required by § 930.51.

(b) *Rulemaking authority.* The Board, with the approval of the Secretary, may adopt rules and regulations necessary and incidental to the administration of this section.

#### Reports and Records

#### § 930.70 Reports.

(a) *Weekly production, monthly sales, and inventory data.* Each handler shall, upon request of the Board, file promptly with the Board, reports showing weekly production data; monthly sales and inventory data; and such other information, including the volume of any cherries placed in or released from a primary or secondary inventory reserve or diverted, as the Board shall specify with respect to any cherries handled by the handler. Such information may be provided to the Board members in summary or aggregated form only without any reference to the individual sources of the information.

(b) *Other reports.* Upon the request of the Board, with the approval of the Secretary, each handler shall furnish to the Board such other information with respect to the cherries acquired, handled, stored and disposed of by such handler as may be necessary to enable the Board to exercise its powers and perform its duties under this part.

(c) *Protection of proprietary information.* Under no circumstances shall any information or reports be made available to the Board members or others which will reveal the proprietary information of an individual handler.

**§ 930.71 Records.**

Each handler shall maintain such records of all cherries acquired, handled, stored or sold, or otherwise disposed of as will substantiate the required reports and as may be prescribed by the Board. All such records shall be maintained for not less than two years after the termination of the fiscal year in which the transactions occurred or for such lesser period as the Board may direct with the approval of the Secretary.

**§ 930.72 Verification of reports and records.**

For the purpose of assuring compliance and checking and verifying the reports filed by handlers, the Secretary and the Board, through its duly authorized agents, shall have access to any premises where applicable records are maintained, where cherries are received, stored, or handled, and, at any time during reasonable business hours, shall be permitted to inspect such handlers premises and any and all records of such handlers with respect to matters within the purview of this part.

**§ 930.73 Confidential information.**

All reports and records furnished or submitted by handlers to the Board and its authorized agents which include data or information constituting a trade secret or disclosing trade position, financial condition, or business operations of the particular handler from whom received, shall be received by and at all times kept in the custody and under the control of one or more employees of the Board or its agent, who shall disclose such information to no person other than the Secretary.

**Miscellaneous Provisions**

**§ 930.80 Compliance.**

Except as provided in this part, no person may handle cherries, the handling of which has been prohibited by the Secretary under this part, and no person shall handle cherries except in conformity with the provisions of this part and the regulations issued hereunder. No person may handle any cherries for which a diversion certificate has been issued other than as provided in § 930.58(b) and § 930.59(b).

**§ 930.81 Right of the Secretary.**

Members of the Board (including successors and alternates), and any

agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each regulation, decision, determination, or other act of the Board shall be subject to the Secretary's disapproval at any time. Upon such disapproval, the disapproved action of the Board shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

**§ 930.82 Effective time.**

The provisions of this part, and of any amendment thereto, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated, or suspended.

**§ 930.83 Termination.**

(a) The Secretary may, at any time, terminate any or all of the provisions of this part by giving at least 1 day's notice by means of a press notice or in any other manner in which the Secretary may determine.

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

(c) The Secretary shall terminate the provisions of this part whenever the Secretary finds by referendum or otherwise that such termination is favored by a majority of the growers and processors: Provided, that such majority has, during the current fiscal year, produced or canned and frozen more than 50 percent of the volume of the cherries which were produced or processed within the production area. Such termination shall become effective on the last day of June subsequent to the announcement thereof by the Secretary.

(d) The Secretary shall conduct a referendum within the month of March of every sixth year after the effective date of this part to ascertain whether continuation of this part is favored by the growers and processors. The Secretary may terminate the provisions of this part at the end of any fiscal period in which the Secretary has found that continuance is not favored by a majority of growers and processors who, during a representative period determined by the Secretary, have been engaged in the production or processing of tart cherries in the production area. Such termination shall be announced on or before the end of the fiscal period.

(e) The provisions of this part shall, in any event, terminate whenever the provisions of the Act authorizing them cease to be in effect.

**§ 930.84 Proceedings after termination.**

(a) Upon the termination of the provisions of this part, the then functioning members of the Board shall, for the purpose of liquidating the affairs of the Board, continue as trustees of all the funds and property then in its possession, or under its control, including claims for any funds unpaid or property not delivered at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such person as the Secretary may direct; and

(3) 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 Board or in the trustees pursuant to this part.

(c) Any person to whom funds, property, and claims have been transferred or delivered, pursuant to this section, shall be subject to the same obligations imposed upon the Board and upon the trustees.

**§ 930.85 Effect of termination or amendment.**

Unless otherwise expressly provided by the Secretary, the termination of this part or of any regulation issued pursuant to this part, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have risen or which may thereafter arise in connection with any provision of this part or any regulation issued thereunder; or

(b) Release or extinguish any violation of this part or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the Secretary or any other person with respect to any such violation.

**§ 930.86 Duration of immunities.**

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

**§ 930.87 Agents.**

The Secretary may, by designation in writing, name any officer or employee of the United States, or name any agency or division in the U.S. Department of

Agriculture, to act as the Secretary's agent or representative in connection with any provisions of this part.

**§ 930.88 Derogation.**

Nothing contained in this part is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States :

(a) To exercise any powers granted by the Act or otherwise; or

(b) In accordance with such powers, to act in the premises whenever such action is deemed advisable.

**§ 930.89 Personal liability.**

No member or alternate member of the Board and no employee or agent of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to 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, willful misconduct, or gross negligence.

**§ 930.90 Separability.**

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

**§ 930.91 Amendments.**

Amendments to this subpart may be proposed, from time to time, by the Board or by the Secretary.

**Marketing Agreement**

**§ 930.92 Counterparts.**

This agreement may be executed in multiple counterparts and when one counterpart is signed by the Secretary, all such counterparts shall constitute, when taken together, one and the same instrument as if all signatures were contained in one original.

**§ 930.93 Additional parties.**

After the effective date thereof, any handler may become a party to this agreement if a counterpart is executed by such handler and delivered to the Secretary. This agreement shall take effect as to such new contracting part at the time such counterpart is delivered to the Secretary, and the benefits, privileges, and immunities conferred by this agreement shall then be effective as to such new contracting party.

**§ 930.94 Order with marketing agreement.**

Each signatory hereby requests the Secretary to issue, pursuant to the Act, an order providing for regulating the handling of tart cherries in the same manner as is provided for in this agreement.

Dated: November 20, 1995.

Lon Hatamiya,

*Administrator.*

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